IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 76 OF 2022

SAID NASSORO FARIJALA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Ilala at Samora Avenue before F. MUJAYA, RM in Criminal Case No. 580 of 2018)

JUDGMENT

Date of Last order 03/10/2022
Date of Judgment 28/10/2022

A. Z. BADE, J

In the District Court of Ilala at Samora avenue, the appellant, Nassoro Said Farijala was charged with rape contrary to sections 130 (1), (2) (e) and 131(1) of the Penal Code Cap 16 RE 2002. Upon trial he was convicted and sentenced to serve 30 years imprisonment. He is now challenging the conviction and sentencing as he is aggrieved and thus lodged the present appeal before this Court whereby he has raised five (5) grounds of appeal.

When the matter was called up for hearing, the appellant prayed to argue the appeal by way of written submission for which the respondents as represented by the learned State Attorney Laura Kimario did not object. These submissions are thus a result of the scheduling order as abided the parties.

1. That the learned trial magistrate, erred in law and fact by convicting the appellant in a case where the trial court defective Judgment leered points of determination and the defence case was not considered before arriving at its decision contrary to procedure of law.

2. That the learned trial magistrate erred in law and fact by convicting the appellant relying on the unprocedurally procured oral evidence of PW as it was received contrary to section 127 (2) of the evidence Act (Cap 6 R.E 2002) as amended by Act No. 2 of 2016.

3. That, the learned trial magistrate erred in law and fact by convicting the appellant in case where PW3 failed to establish how he preserved the DNA samples he collected for examination to ensure there was no tampering with the same and their safety and integrity remained intact.

4. That the learned trial magistrate erred in law and fact by convicting the appellant in a case where the oral evidence of the prosecution witnesses was contradictory, incredible and implausible.

5. That the learned trial magistrate erred in law and fact by convicting the appellant in a case that the prosecution failed to prove beyond reasonable doubt.

Before we look at the issues surrounding this appeal, it is only fair to describe the facts that were captured giving rise to the original case. The appellant Said Nassoro Farijala is a step-father to the victim of the offence, who is herein referred to as PW1, 13-year-old girl at the time of commissioning of the offence; and they used to stay in the same place of abode, together with

the victim's mother Mwanne Musa who is the PW2, her grandmother and her uncle, where they have lived together for a year from 2017 to 2018. On the fateful day, PW1 is said to have gone inside her room to fetch her school bag, where her step-father followed her inside, pushed her onto the bed, unwrap her out of the kitenge she was wearing, took his penis and inserted it onto her vagina, while covering her mouth so that she would not make any noises. He also instructed her to dance to his sexual moves ('katika nyonga'), she did not oblige as she was feeling pains. When he was done, he took out his penis and instructed the child to wipe him clean. The child was oozing blood as well as 'white things'. He instructed her further that she should not say a word to anyone lest he kills her. So she quietly went to school and never said anything to anyone, but the blood kept flowing so she had to wear a pad, and that she knew she had attained her menstruation.

Three months later she realized her stomach is growing bigger, afterwhich her mother started probing on her, finding out who she had sex with, where she mentioned the accused appellant herein. At this point the mother decided to call the appellant who promised to come to them the next day so he can explain, for which her mother did not buy, and she went to arrest the accused appellant at his house.

The appellant propose to argue grounds two and three, and pray that the court consider also grounds of appeal number one, four and five even though he will not be making any submission on these three grounds.

On ground 2, that the learned trial magistrate erred in law and facts to convict the appellant basing on oral evidence of PW1 a girl of tender age

who gave affirmed evidence without being tested whether or not she understood the meaning and nature of an oath or affirmation in terms of section 127(2) of the Evidence Act (cap 6 RE 2022). At P 9 of the record of proceedings, PW1, Masele Saimon Joseph, 14 years, Muslim was affirmed before reception of her evidence. The record is completely silent whether before taking the evidence of PW1, examination was conducted by the trial court to test her competence and whether she knew the meaning and nature of an oath.

The appellant argue that this failure by the trial court to conduct an exercise of examining and testing not only the competence of PW1 but also if she knew the meaning of an oath, fatally contravened section 127(2) of the Evidence Act rendering the evidence by PW1 valueless. See for instance the decisions of the Court of Appeal in **Godfrey Wilson V.R Criminal Appeal No. 168 of 2018; Faraji Said vs Republic Criminal Appeal No. 172 of 2018 and John Mkorongo James vs Republic, Criminal Appeal No. 498 of 2020** (both unreported).

In the case of **Hassan Yusuph Ally vs Republic, Criminal Appeal No. 462 of 2019** (unreported) where the trial court record was silent as to how the trial court reached at a conclusion that PW1, possessed sufficient intelligence to justify the reception of her evidence upon affirmation the court observed as follows:

> "since the records is silent, we find that the recording of PW1's evidence was in contravention of the provisions of section 127(2) of the Evidence Act. In that regard, we entirely agree with the

submissions of the learned State Attorney that the affirmed evidence of PW1 was invalid with no evidential value. Consequently, we disregard it."

The appellant further argue that not only that the evidence of PW1, was recorded in gross violation of section 127(2) of the Evidence Act, but also the trial court took the evidence of PW1, as a gospel truth without testing the credibility and truthfulness of her evidence. The judgement of the trial court is lacking assessment of credibility of the evidence of PW1, because nowhere in the judgement, the trial magistrate was satisfied upon assessment of credibility of the evidence of PW1, that she was telling nothing but the truth. In the case of **Rehani Said Nyamila vs Republic, Criminal Appeal No. 222 of 2019** (unreported) at page 16 the court of Appeal of Tanzania held:

> "*For the court to rely solely on the testimony of a child of tender age or the victim of the crime to sustain conviction in respect to sexual offences, it must satisfy itself, upon assessment of credibility of such evidence, that, the witness in question is telling nothing but the truth"*

On the basis of these arguments the appellant pray the court to be guided by the above cited judicial precedents and find that the evidence of PW1, was invalid with no evidential value, and be discounted from the record.

In response to this ground, the respondents joined issue with the appellant that while Section 127(2) of the Evidence Act Cap 6 R.E 2002 provides that a court must test the credibility of a child of a tender age in order to ascertain whether a child understands the nature of an oath, again

section 127(5) of the same Act, provides for more definition of the child of the tender age to mean a child whose apparent age is not more than fourteen (14) years.

In the instance case, the case was initiated in 2018 when the victim, Masele Saimon Joseph was 13 years and during the hearing of the prosecution case the victim had already attained the age of 14 years old, which is excluded from the meaning of the definition of child of tender age. This is proved by the court proceedings at p 9 of the proceedings dated 20/02/2019 of which the victim was born in 28/01/2005. From the stated dates, it makes the victim to have attained 14 years old. She sees no issue on this one.

The respondent is of the further view that, the appellant does not know what he wants because at page two of the submission on the last paragraph he stated that the court did not test the credibility of the child witness while at page 3 of the same submission on the first paragraph the appellant cited the case which established a requirement of the child to promise to tell the truth. She urges that it is clearly understood that the law does not operate retrospective and he has also cited laws, that is, the evidence Act [cap 6 RE 2002] and the case of **Rehani Said Nyamila vs Republic, Criminal Appeal No. 222 of 2019** (unreported), where these are two laws stating two different positions of the law.

I have checked the records of the proceedings on ascertaining this issue and I must admit that the trial court went ahead and affirmed the child witness without following the guidance explained in **Godson Wilson vs R** (supra), but it is obvious the victim of the offence had already attained the apparent

age of 14. This was also corroborated by PW2 who is her biological mother, and tendered the birth certificate of PW1, and in that regard, the trial court is well cushioned under sub section 5 of section 127 of the Evidence Act Cap 6, RE 2019.

In the case of **Twalaha Ally Hassan vs Republic, Criminal Appeal No. 127 Of 2019,** the Court of Appeal made observation in an analogous situation and remarked:

> It is clear that PW1 narrated about her painful ordeal at the hands of the appellant, so graphically, consistently and in a truthful manner. Both courts took the view that her evidence was clear, spontaneous and reliable. It occurs to us that in examining the evidence both courts had in mind the primordial consideration that the best evidence of a sexual offence must come from the victim in consonance with the dictates of section 127 (6) of the EA - see also **Selemani Makumba v. Republic [2006] T.L.R. 379.** Moreover, to her further credit, according to both PW2 and PW8, she named the appellant as the perpetrator of the crime at the earliest opportunity after she met PW8, at first, and PW2, afterward.

A further fortification is on the case of **Wambura Kiginga vs Republic, Criminal Appeal No 301 of 2018** (unreported) where it was reasoned by the Court of Appeal:

> This Court has interpreted the section (127 (2) of Evidence Act) to mean that, a child of tender age, which means a child of an apparent age of not more than fourteen (14) years as provided under section

127(4) of the Evidence Act, may legally give evidence if one of the two conditions is fulfilled.

One, if before testifying the child swears or affirms; and **two,** if he or she promises to tell the truth and not lies in the course of giving evidence.

In this instant case the child was affirmed and the court proceeded to take her evidence. Even if it is reasoned that this evidence was unprocedurally taken and so faultily relied by the trial court, I think the same can be saved by subsection 127(6) of the Evidence Act which provides

> *"(6) Notwithstanding the preceding provisions of this section where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, **the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.**"* [emphasis mine]

We must confess at the outset that we construed the opening phrase, "***Notwithstanding the preceding provisions of this section/'*** to mean that, a conviction can be based on only subsection (6) of section 127 without complying with any other sub section of 127 including sub section (2).

Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed. In any case, I firmly believe as the court below me did, that this child evidence was nothing but the truth. The witness was consistent, coherent and firm. In that regard I have no reason to fault the finding of the trial court and thus I find this ground of appeal unmeritorious.

Arguing ground three, the appellant thinks that the evidence of DNA which was tendered by PW3, was invalid in many aspects and enumerates thus; One PW3, who conducted DNA test simply stated that he is a chemist with 8 years of experience. He did not explain where he got that profession, knowledge or skill, as required by section 47 of the Tanzania Evidence Act, (cap 6 RE 2022)

Two, PW3, did not establish how he took and preserve the DNA samples he collected for examination to ensure that there was no tampering with the same and their safety and integrity remain intact. Three, apart from stating that he is a chemist, PW3 did not explain he is a chemist whether from Government chemist or private chemist. Four, despite that the alleged DNA report was who tendered and admitted in court as exhibit page 5 it was not read out by PW3, who tendered it in court to enable the Appellant to know its contents.

The appellant argues that the law is well settled that, whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out, and cited the cases of **Robinson Mwanjisi and 3 Others vs Republic [1994] TLR**

203 and Rashid Amir Jaba and Another vs Republic, Criminal Appeal No. 204 of 2008 (unreported).

Responding to this ground, the learned state attorney expounds that Section 28 of the Human DNA Regulation Act no. 8 of 2009, generally provides for the notice of rights and assurance to the DNA source. Section 28(2) provides the rights and assurances of the sample source shall include the following information, viz

A. Sample for human DNA shall only be used as authorized in the written authorization

B. Sample for human DNA is the property of the source owner.

C. Unless specifically prohibited by sample source or sample source's

representative, researchers may be granted access to sample for human DNA that cannot be linked to individual authority.

In the light of the above stated section, it is very clear that there is an Act known as the Human DNA Regulation Act no. 8 of 2009 establishing the Human DNA Laboratory under section 15 of the Act. The said laboratory is managed by the Government, and by law, only the authorized personnel can access the laboratory, hence we do not have private DNA chemists in the country. Further she reasoned, since the said laboratory has some procedures in conducting their activities, it is not easy to tamper the DNA sample as it is alleged by the appellant.

On another note, she conceded that since the exhibit-DNA report was not read to the court, then the resulting consequence is to have the same be

expunged from record, even if the same is expunged, the witness Government chemist proved that indeed the child belonged to appellant thus, no doubt as to parentage of the child.

On determining this point, I am of the view that while this court accepts the invitation to expunge the DNA report exhibit P5, which is hereby expunged off the record, I do rely on the credible oral evidence of the government chemist PW3 who conducted the DNA sampling. I must add that the government chemist is a credible witness, I find no reason to disturb the finding of the trial court in accepting such evidence and accord weight to its testimony. Furthermore, the appellant herein had a chance to cross examine PW3 and record show that he wanted to know how PW3 recognized him, and he responded that he not only had a letter from the Ukonga Police introducing him, but also had test marks on the samples. He also ascertained on his doubts that the result took longer, assuring the accused that the same could last upto 3 months p 24 of the typed proceedings. The issues that are being raised now never came during trial, and they sound more like afterthoughts.

For the sake of clarifying the reliability of the DNA sampling, I think it prudent to dig further on what sort of evidence we are dealing with. DNA stands for deoxyribonucleic acid. Almost all living organisms contain DNA material. It is a self-replicating element of our body's chromosomes and carries our unique genetic information. Every person in the world has different DNA, except identical twins.

Further, there are two kinds of DNA. The first is found in bodily fluids, such as semen, saliva, and blood. The sample collected in the instance case where

from the saliva, as per P 22 of the record of the proceedings. The second type, epithelial DNA, comes from skin cells. DNA is highly useful in *identifying and confirming the presence of a person in a specific location or interaction with another person.* (emphasis mine) DNA material is gathered at the scene of a crime where bodily fluids are present. It is also gathered on the body and clothing of the victim.

In our instant case, DNA samples were gathered from three persons, the victim of the of the offence, the appellant herein and the child who is born of the rape incidence, to establish what is known as the (Random Occurrence Ratio) ROR of the cells of these persons, and it was established that it was highly probably that the accused appellant was the father of the child of the rape incidence, PW1 being the mother.

I have no doubt in my mind that the prosecution through the DNA testing, were able to prove the offence of rape against PW1, as well as the perpetrator of the offence being the accused person who is now the appellant. In that case I am not inclined to disturb this finding by the trial court. I hereby uphold the findings of the trial court and dismiss this ground of appeal.

Despite the appellant not submitting on the remaining grounds of appeal, the respondents took time to respond to them. On the first ground of appeal, she argues that it is not true that the trial court issued a defective judgment and failed to consider the defense case before arriving at its decision contrary to the procedure of law. At page 4 of the judgment and page 29-32 of the proceedings, the accused gave his sole testimony to defend the case against

him. He stated on his defense, the same was recorded by the court and were analyzed to arrive at a finding.

I disagree with the learned state attorney on this ground, particularly on the assertion that the trial court did evaluate the sole testimony of the accused person and arrived at a finding.

So admittedly, the judgment of the trial court was defective for failure to analyze and evaluate the defense case, the case of **Leonard Mwanashoka vs Republic, Criminal Appeal No. 226 of 2014** (unreported) where the court stated that

> "it is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from grain, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all the evaluation of analysis"

It is my considered opinion that this is a fit situation for this court to take the bait and evaluate the evidence so as to arrive at a finding and avoid a miscarriage of justice. The Court of Appeal was categorical in this invitation as explained in the case of **Yusuph Amani vs Republic, Criminal Appeal No 255 of 2014** (unreported) where it stated:

> "Thus, the omission was not remedied by the first appellate court which was duty bound to reevaluate the entire evidence and an opportunity to have defence evidence considered. It is universally

established jurisprudence that, failure to consider defence case is fatal and usually vitiates the conviction"

The defense case is recorded from pp 29 to 32 of the typed proceedings. In essence, the appellant defense is that this case is framed against him to pin him down because he refuses to leave his previous family for good, so as to join his new family. That his wife / fiancé PW2 is motivated by malice and jealous to get him off his previous family. He is complaining that PW2 has been extorting him or making demands on his time when he wants to be with his other family.

I am of the considered view that the appellant defence is trying to show that the case is framed up against him, and that there were other relevant circumstances that motivated the framing him up, but he failed to adduce any evidence to prove if this was a fact in issue. Neither were any of these allegations subject of the cross examination of the appellant to PW2 who was supposedly the wife or fiancé, who had the motive to frame him up. There were no questions as to animosity or jealous apart from checking whether or not she demanded any money from him and how much the pregnancy test kit costed P 14 of the typed proceedings. In any case, the defence case does not refute in any way the prosecution's case that the victim of the offence was raped, and the person commissioning the rape was the appellant as aptly corroborated by the DNA evidence of the baby who is a living testimony of the crime.

It is the finding of this court that this ground of appeal is without any merit and is thus dismissed.

The fourth ground is that the oral evidence of the prosecution witnesses was contradictory, incredible, and implausible.

The appellant failed to state where in the proceedings the evidence of the prosecution was contradictory. Although the evidence was contradictory because, PW1 was the victim while PW2 was the mother of the victim. Again, PW3 the Government chemist and PW4 was the doctor of Amana who tested the child and found her pregnant.

I must agree with the learned state attorney that my gleaning of the record does not pick any material contradictions. As per the case of **Mzee Ally Mwinyimkuu @ Babu Seya vs Republic, Criminal Appeal No. 499 Of 2017** (unreported), the Court has pronounced itself that minor contradictions which do not affect prosecution's case cannot stand. The prosecution case was not shaken by any contradictions, if any, and I find this ground to be baseless and it stand dismissed.

The fifth ground of appeal is that the prosecution failed to prove the case beyond reasonable doubt. Looking at the evidence by the prosecution witnesses, they had managed to create a plausible case against the appellant. The learned state attorney made a remark on all the documents that were tendered in evidence having material irregularity for not being read over in court against the requirements of law, and thus they deserve to be expunged off the record of the court as a consequence.

Granted that the omission to read the documentary exhibits after admission is an irregularity which may not be cured. The case of **Robison Mwanjisi v. Republic [2003] TLR 218** and a score of other decisions have long

settled the position on this area. For that reason I accept the invitation to do so. The said documents which are PF3, Birth Certificate and DNA report, are so expunged.

It is my finding that despite not having the advantage of many of the exhibits that were tendered for the explained procedural irregularity and thus being expunged off the record, the documents which are PF3, Birth Certificate and DNA report, still the evidence as adduced in court by the prosecution through its various witnesses have higher probative value, and it does stand on record as oral evidence. The evidence on birth certificate is held to be of value because PW2 who is the mother of the victim was able to state the date which her child was born; the evidence on PF3 were recorded from the child victim of the offence PW1, who also stated the facts which establish that it is the accused who raped her coherently and consistently. The evidence of the Government chemist PW3 proved that the appellant is the father of the victim's child, who is this appellant, logically meaning it must be the one who had sexual intercourse with the victim. Part of the evidence in PF3 has been also adduced from who is the Doctor at Amana hospital PW4, who filled the contents of the PF3.

In the case **Magendo Paul & Another vs Republic (1993) TLR 2019** the Court of Appeal held that a case to be taken to have proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favor which can easily be dismissed.

That is not to say, however, that we are not mindful of the principle of law and practice that no conviction in a criminal case should be based on

weaknesses of the defence as per the Court of Appeal's decisions in **DPP v. Ngusa Keleja @ Mtangi and Another, Criminal Appeal No. 276 of 2017**, **Mohamed Haruna @ Mtupeni and Another v. Republic, Criminal Appeal No. 259 of 2007** (both unreported) and many others, thus find this ground of appeal is without any merit and it too stands dismissed.

I firmly hold that the oral evidence that remains has not only proved the case against the appellant beyond reasonable doubt, but also sufficient to sustain conviction of the appellant for the charged offence.

The appeal is dismissed.

It is so ordered.

Dated at Arusha this 27th day of October, 2022.

A. Z. Bade
Judge
27/10/22

COURT: Judgment is delivered by Hon. Nyembele, DR in the presence of Appellant in person, and Ms. Laura Kimario, Senior State Attorney for the Respondent this 27th day of October 2022.

Right of appeal is explained.

Signed