IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J. A., LEVIRA, J.A And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 244 OF 2019

PAULO MACHANDI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Galeba, J.)

dated the 17th day of June, 2019

in

(DC) Criminal Appeal No. 298 of 2018

.....

JUDGMENT OF THE COURT

8th & 15th July 2022

LEVIRA, J.A.:

Paulo Machandi, the appellant was arraigned before the District Court of Bunda at Bunda (the trial court) for the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). It was alleged by the prosecution that on 12th June, 2017 at about 00:15 hours at Hunyari Village within Bunda District in Mara Region, the appellant did rape one NM (name withheld) a girl of eight (8) years old (the victim or PW2). After a full trial, he was convicted and sentenced to life imprisonment. The appellant was aggrieved by the

decision of the trial court. Therefore, he appealed to the High Court of Tanzania at Mwanza (the first appellate court) where his appeal was partly successful to the extent that, the sentence of life imprisonment was reduced to thirty (30) years imprisonment. Undaunted, the appellant has preferred the present appeal.

The background of this case is crucial for the appreciation of the gist of the apprehension, arraignment and conviction of the appellant. The prosecution case was to the effect that: The appellant is a step father of the victim and they lived together with the mother of the victim (the appellant's wife) and other two children. On the fateful night of 12th June, 2017 at about 00:15 hours, the family members were at home sleeping. The appellant and his wife, Misana Mashauri (PW1) were sleeping in the bedroom and their three children in the sitting room (lounge). The appellant allegedly left PW1 in the bedroom, went to the sitting room, undressed the victim and raped her. The victim felt pain, she cried out and her voice awakened PW1 who realized that the appellant was not in bed. She rushed to the sitting room to respond to the victim's cry only to find the appellant with the victim who was bleeding from her vagina and had sperms.

The appellant went outside the house, PW1 called and asked him what he was doing. He responded *"ujinga siutaki"* meaning *"I do not want stupidity."* The victim testified that the appellant raped her by inserting his penis in her vagina. PW1 reported the incident to the Kasuguti Ward Chairman, Matawere Village Chairman and then to Bunda Police Station. The appellant accompanied PW1 when she went to the police station to report the incident. At the police they were issued with a PF3 (exhibit P1) and took the victim to DDH hospital where she was examined by Suleman German (PW3), a clinical officer who discovered that the victim had bruises on her vagina, the hymen was open and she had some sperms in her vagina. The appellant was arrested on the same day and taken to Bunda Police Station where he was interrogated by No. WP 8207 DC Maisala (PW4) and admitted to have committed the offence with which he was charged.

To the contrary, the appellant stated in his defence that on 11th June, 2019 he had a fight with PW1. After having their dinner, they went to sleep together. At about 23:00 hours, he heard a child crying, he woke up but could not find his wife in bed and thus he decided to carry the baby. Shortly thereafter, his wife came back in a company of her mother (the appellant's mother-in-law) who asked the appellant why he had

raped his daughter. The incident was reported to the village authority and later to the police. Upon arraignment, he denied the charge levelled against him as intimated above.

Before us the appellant has presented eight grounds of appeal which for convenience purposes, we shall paraphrase them as hereunder:

1. *That, it was wrong for him to be charged with rape instead of incest by male.*
2. *That, PW2 testified without promising to tell the truth.*
3. *That, the source of light in the fateful night was not disclosed for proper identification of a person suspected to commit the offence.*
4. *That, the evidence of PW1 and PW2 was contradictory on how PW1 discovered the incident.*
5. *That, exhibits P1 and P2 were tendered by the prosecutor contrary to the law.*
6. *That, there was unexplained delay to arraign the appellant from 13th June, 2017 when he was arrested to 13th March, 2018 when arraigned before the trial court.*

7. *That, the first appellant court failed to draw an inference adverse against the trial court for failure to consider defence case.*
8. *That, the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Republic had the services of Mr. Ofmedy Mtenga, learned Senior State Attorney assisted by Ms. Ghati Mathayo, learned State Attorney. When invited to address the Court on the grounds of appeal, the appellant adopted them and preferred the learned counsel for the respondent to reply first as he reserved his right to make a rejoinder.

In reply, Ms. Mathayo argued the grounds presented in the memorandum of appeal seriatim. Her response to the first ground was that the appellant was properly charged with rape under sections 130 (1) of the Penal Code as the said provision is in respect of a "man" who commits such offence rather than relationships. She went on arguing that there is no doubt that the appellant is a step father to the victim but the law does not restrict him being charged with rape. Besides, she argued that the appellant is not a biological father of the victim so he could not

be charged with incest. Therefore, she urged us to find that this ground of appeal is baseless.

The appellant had nothing useful to say regarding his complaint in this ground of appeal while making his rejoinder.

We need not consume much energy in the circumstances of this case to determine whether the appellant was properly charged with rape. The law is settled that it is an offence for a male person to rape a girl or a woman - section 130 (1) of the Penal Code. We agree with Ms. Mathayo that the law only makes reference to a 'male person' and it does not talk about relationships.

In the present case, there is no dispute that the appellant is a male person. Therefore, being a step father of the victim does not disqualify him as a male person, to be charged with rape. After all, the prosecution witnesses testified in respect of the offence with which he was charged. The intention in cases of incest by male is to prohibit sexual relationships between people of the same blood even if they consent. In the case at hand, as intimated earlier on, the appellant is victim's step father, which means the two are not blood related to justify the appellant's claim. In **Chora Samson @ Kiberiti v. Republic,** Criminal Appeal No. 516 of

2019 (unreported), when the Court was dealing with the case in which the appellant who raped his own mother was charged with rape, got an opportunity to distinguish between rape and an incest by male. It stated as follows:

> *"With respect, we agree with the learned State Attorney that whereas consent is an element in cases of rape involving adult victims, as in this case, it is irrelevant in cases of incest by male where the intention, as rightly submitted by Mr. Nchanila,* ***is to prohibit sexual relationships between people of the same blood even if they consent.*** *Obviously, it means that some cases of* ***incest by male may qualify to be rape where sexual intercourse with a prohibited partner*** *is obtained without consent of the female.* ***The two offences also carry different sentences.*** *" [Emphasis added].*

In the light of the above stated position, since the present case does not fall on prohibited relationships, we agree with Ms. Mathayo and find that this ground of appeal is baseless. It is hereby dismissed.

The second ground of appeal raises an issue as to whether the evidence of PW2 was valueless for being recorded without a promise to tell the truth. This ground also need not detain us much.

Section 127 (2) of the Evidence Act cap 6 R.E. 2022 provides that:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

It is in the record of appeal that the victim in the current case was a child of tender age. However, we do not think that it will serve any useful purpose for us to examine and determine how her evidence was recorded. We say so because, just as stated by Ms. Mathayo, the evidence of the victim (PW2) is no longer part of the record of appeal after being expunged by the first appellate court on the same basis. This ground of appeal is therefore unfounded and we dismiss it.

Regarding the third ground which challenges the identification of the appellant, the issue for our determination is whether the appellant was properly identified at the scene of crime to be the man who raped the victim. In her reply to this ground of appeal, Ms. Mathayo conceded that the source of light on the fateful night was not disclosed by prosecution witnesses as they were not directed to do so. However, it was her argument that this fact alone does not exonerate the appellant

from liability as circumstantial evidence on the record proved that the appellant raped the victim.

According to her, although the evidence of PW2 was discarded, the available evidence on record shows that the appellant was the only man who was in the house in the fateful night. She referred us to page 6 of the record of appeal where PW1 testified to the effect that when she woke up, she did not find her husband in the bed room. She went to the sitting room to respond to the child's cry and found her husband with the child who was bleeding and had sperms. Ms. Mathayo went on to state that the appellant did not dispute the fact that he was in the house. On top of that she said, PW1 and the appellant are the people who knew each other and the appellant did not cross-examine PW1 when she testified that she found the appellant and the victim in the sitting room while the victim was bleeding and had sperms in her vagina. She urged us to consider circumstances of this case cumulatively to find that the appellant was identified at the scene. To buttress her argument, she cited the case of **Mark Kasimiri v. Republic**, Criminal Appeal, No. 39 of 2017 (unreported).

In his rejoinder, the appellant insisted that he did not rape the victim and the case against him was framed (fabricated) by his wife due to the conflict they had, as his wife and mother-in-law wanted to sell his cotton.

We had an opportunity to peruse the record of appeal thoroughly, we agree with both parties that there was no any source of light disclosed by the prosecution witnesses; particularly PW1. However, Ms. Mathayo invited us to consider circumstantial evidence on record to determine the issue we have earlier on raised.

It should be noted that for a conviction to be based on circumstantial evidence, the circumstances must be fully proved. All facts must be consistent with the hypothesis of the guilty of the accused person. Circumstances should exclude every reasonable hypothesis except the one sought to be proved; they must be conclusive in nature. Circumstantial evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence – see **Shabani Mpunzu @ Elisha Mpunzu v. Republic,** Criminal Appeal No. 12 of 2022; **Mathias Bundala v. Republic,** Criminal Appeal No. 62 of 2004 and **Juma Salum Singano v. Republic,** Criminal Appeal No. 172 of 2008 (all unreported).

In the present case, the circumstances show that the victim was raped. PW1 testified that when she came out of her bedroom, she found the victim bleeding and had sperms in her vagina. Upon being medically examined by PW3, it was discovered that she had bruises and sperms in her vagina. According to PW1, the appellant was with the victim by the time she came to the victim's rescue. PW1 was cross-examined by the appellant in respect of his presence at the scene of crime, the following was her response:

"...I saw you at the lounge you were with NM."

In his defence, the appellant gave almost a similar account of what transpired but with a different version that when he heard the child crying, he woke up and his wife was not in the bedroom, he then decided to carry the baby. Later, PW1 and her mother arrived and he was asked by his mother-in-law why he had raped his daughter. The appellant was not cross-examined in this piece of evidence.

In the circumstances of this case, the question as to whether the victim was raped is settled; the evidence of PW1 and PW3 leave no shadow of doubt that, indeed she was raped. The only part which is not forthcoming clearly is whether it was the appellant who raped her. The

circumstantial evidence which Ms. Mathayo urged us to rely upon is with ambiguities. We say so because the record of appeal is silent as to whether the door to the house of PW1 was completely locked. In her evidence, PW1 only stated that she was sleeping with her husband in the bed room and the children in the sitting room. Ordinarily, it is expected that doors are locked when a family goes to sleep. However, mistake do happen sometimes in which we think, in a case attracting serious punishment like the one at hand, cannot just be ignored. We take note that PW1 stated in her evidence that when she found the appellant and the victim, the appellant went outside, she called him and asked him what he was doing with no more to that effect. It was not stated whether he opened the door or the same was open. Let the relevant part of PW1's evidence speaks for itself:

> *"I heard the voice of NM. I went to see why she was crying. I found the accused with NM. The accused person then went outside I called him and asked him what he was doing he said "ujinga siutaki" I then* ***escaped and went to my mother Mbalu it is nearby."*** *[Emphasis added].*

In the above piece of evidence where it is not certain whether the door was locked and that there was no possibility of any other person

getting into that house coupled with the fact that no any source of light was disclosed and in the absence of the victim's evidence, we think circumstances did not exclude every reasonable hypothesis except the one sought to be proved. The appellant stated in his defence that the allegation concerning rape was preceded by the conflict between him and his wife during the day. He was not cross-examined on that fact but we see that upon being told by the appellant that *"ujinga siutaki"* PW1 decide to escape to her mother leaving everything behind at least for a moment. The act of PW1 escaping just because of what she was told by the appellant may support the appellant's version of story that they had a conflict, which in our considered view would result into anything including the appellant's claim that the case against him was framed. In its decision the first appellate court relied on PW1's assertion that there was no other man who raped the victim as her husband was the only man in the house. The learned Judge concluded as follows:

> *"The allegation of identification would be valid may be if DW1 denied to have been found live with PW2 at the same time when the latter was bleeding and also with sperms in her private parts. DW1 did not say that there were other people with whom his wife could mistake him with, or there was another person who could have raped PW2."*

Based on the quotation above, we think, it was incumbent upon the prosecution to prove its case but not the appellant bringing evidence to justify his innocence. We do not find circumstances of the present case to exclude every reasonable hypothesis as far as the guilty of the appellant is concerned. The third ground of appeal is thus meritorious.

Regarding the fourth ground of appeal where the appellant is complaining about contradiction between the evidence of PW1 and PW2, we agree with Ms. Mathayo that since the evidence of PW2 was expunged from the record, the issue of contradiction does not arise. We therefore disregard this ground.

The complaint in the fifth ground of appeal is that exhibits P1 and P2, the PF3 and the appellant's cautioned statement, respectively, were un-procedurally tendered by a prosecutor instead of a witness. Ms. Mathayo conceded to this complaint forthwith and urged us to expunge them from the record. However, she said, even after expunging them the oral account of PW3 and PW4 who tendered them respectively shall remain intact. She cited the case of **Wambura Kiginga v. Republic,** Criminal Appeal No. 244 of 2019 (unreported) to buttress her argument.

Having perused the record of appeal; particularly, pages 10 and 11, we agree with both parties that those exhibits were tendered by the prosecutor. We as well agree with Ms. Mathayo on the stated position of the law with regard to the oral evidence of those witnesses who were supposed to tender the said exhibits. Before we wind up, we find it apposite to point out that the appellant's cautioned statement was recorded by PW4. In her oral evidence, PW4 did not state anything regarding as to whether or not the appellant confessed to have committed the alleged offence. She was only led to state the procedure she followed before recording the appellant's statement. Unlike Ms. Mathayo, we find nothing incriminating the appellant in PW4's oral evidence. Having so commented, we expunge exhibits P1 and P2 from the record of appeal. This ground of appeal succeeds.

In the sixth ground of appeal the appellant's complaint is that he was arrested on 13th June, 2017 but without any explanation or justification, he was arraigned on 13th March, 2018 after lapse of almost nine (9 months). The issue that calls for our determination is whether there was unexplained delay in arraigning the appellant, if so, what should be the consequences.

In reply to this ground, Ms. Mathayo conceded that the appellant was arraigned after lapse of about nine months reckoning from the date of his arrest. However, she added that there is no justification in the record of appeal as to why his arraignment was delayed. As for her, such delay did not prejudice the appellant because after having been arraigned, witnesses were called and he had an opportunity to cross-examine them. Therefore, she said, it is not true that the case was fabricated or framed against him.

Section 32 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (the CPA) governs detention of arrested persons. It requires an arrested person to be arraigned before appropriate court within twenty-four (24) hours after he was so taken into custody or as soon as practicable; and or be released on bail depending on the nature of the offence committed and circumstances of the case. But where he is retained in custody he shall be brought in court as soon as practicable.

In the current case, both parties are at one that the appellant was taken to court after lapse of almost nine (9) months. The law we have referred which governs detention of arrested persons envisaged the situation where a person may be released on bail with or without sureties,

and where he or she is retained in custody with a condition that he is brought before the court as soon as practicable. There is nothing on the record of appeal indicating as to where the appellant was, from the time of his arrest up to when he was arraigned before the trial court. In the circumstances, we do not think it will be appropriate to speculate what transpired.

While making his rejoinder in this ground of appeal, the appellant insisted that he was in police custody for that whole period of time. Without prejudice, we do not know how was that possible and if indeed that was the case, the law requires a person retained in custody to be brought before the court as soon as practicable. The question as to how soon is soon depends on the circumstances of each case and in our considered view, it cannot be answered with certainty in the current case where delay in arraigning the appellant was neither raised during preliminary hearing nor at the trial. We agree with Ms. Mathayo that the appellant's complaint in this ground did not vitiate trial proceedings because the trial was conducted accordingly from the moment he was arraigned. We are guided in this stance by our previous decisions in **Jafari Salum @ Kikoti v. Republic,** Criminal Appeal No. 370 of 2017 and **Gabriel Lucas v. Republic,** Criminal Appeal No 557 of 2017 (both

unreported). Therefore, we find the sixth ground of appeal without merits and we dismiss it.

In the seventh ground of appeal, the appellant complains that the first appellate court erred for failure to draw inference adverse upon the trial court after having concluded that the appellant's defence was not considered. Much as she agreed with the appellant that his defence was not considered by the trial court, Ms. Mathayo argued that the first appellate court considered but did not agree with it from page 70 to 73 of the record of appeal. Therefore, the appellant should not have raised it as a ground of appeal and urged us to find it baseless.

We have carefully gone through the record of appeal and we agree with Ms. Mathayo that the first appellate court considered the appellant's defence and the following was the conclusion:

> *"Having considered the evidence of DW1, I still cannot fault the trial court based on its omission to analyze his evidence and that consideration disposes of ground 6 which stands dismissed."*

Suffices here to state that, the first appellate court did what it ought to do having found that the appellant's defence was not considered by the trial court. In the circumstances therefore, we cannot fault the first

appellate court by failure to draw inference adverse upon the trial court as the appellant would wish us to do. Consequently, we find this ground without merits and dismiss it.

The eighth ground of appeal is general, that the prosecution failed to prove its case against the appellant beyond reasonable doubt. Following our determination of other grounds of appeal herein above, we think the issue as to whether the prosecution proved its case beyond reasonable doubt can be answered straight forward. It is trite law that, the burden of proof in criminal cases lies with the prosecution and the standard required is beyond reasonable doubt. This burden never shifts.

Basically, the prosecution case is built upon the evidence of three witnesses; these are, PW1, PW3 and PW4 as the victim's evidence was expunged from the record by the first appellate court and exhibits P1 and P2 by the Court. The respondent relied on circumstantial evidence urging us to find that the case against the appellant was proved beyond reasonable doubt. We have discussed in extenso circumstances in the current case while determining the third ground of appeal. We have shown that the available evidence on the record of appeal does not sufficiently provide for circumstances consistent with the appellant's

guilty. This finding interprets that the case against the appellant was not proved beyond reasonable doubt.

Consequently, we allow the appeal, quash the conviction and set aside the sentence. We order for immediate release of the appellant from prison unless he is otherwise lawfully held.

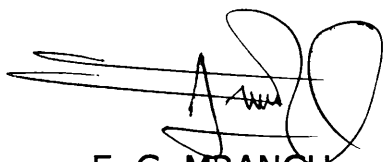
DATED at **MWANZA** this 14th day of July, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 15th day of July, 2022 in the presence of Appellant in person and Mr. Morice Mtoi, the learned State Attorney for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL