IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: KOROSSO, J.A., KIHWELO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 40 OF 2020

TUMAINI FRANK ABRAHAM .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Mkapa, J.)

dated 10th December, 2019

in

Criminal Appeal No. 39 of 2018)

.....

JUDGMENT OF THE COURT

12th July & 1st August, 2023

RUMANYIKA, J.A.:

On 1st January, 2017, Tumaini Frank Abraham (the appellant) was arraigned before Siha District Court (the trial court) in Criminal Case No. 1 of 2017 and charged for two counts: rape contrary to section 130(1) (2) (e) and 131 of the Penal Code Cap 16 (the Penal Code) and Impregnating a School Girl contrary to section 60A of the Education Act. Cap 353 (the Education Act). After a full trial, he was convicted and sentenced to thirty years imprisonment for each count both to run

concurrently. Being aggrieved with the conviction and sentence, he appealed to the High Court at Moshi unsuccessfully, since his appeal was dismissed for want of merit. Dissatisfied with the decision of the first appellate court, he has preferred the instant appeal.

It was alleged that on 13th November, 2016, at Kilingi village within Siha District in Kilimanjaro region, a sixteen years old girl to be referred to as "the victim" in order to conceal her identity, was on her way back home from the church. At that time she was a pupil of Kilingi Secondary School. However, she met the appellant who seduced and raped her. Upon the appellant fulfilling his sexual desire, they parted ways. Consequently, on being suspected and after being medically examined and tested positive for pregnancy, she named the appellant who is her neighbor to be the responsible person for the pregnancy. The matter was reported to the police station and later, the appellant arraigned in the court to answer the charges before the trial court. As the days went on, the victim gave birth to her child on 14th August, 2017.

The appellant admitted to having had sexual intercourse with the victim, allegedly his girlfriend. The appellant was thereafter arraigned to answer the charge before the trial court.

During the trial, the prosecution paraded five witnesses to prove its case. PW1 is the alleged victim of the offences charged. PW2 is the victim's mother who testified that the victim was born on 1st January, 2000 and was found to be pregnant on 24th December, 2016 while a pupil of Kilingi Secondary School and she named the appellant to be responsible for the pregnancy. Denis Mathias Kabusha, (PW3) was a teacher of Kilingi Secondary School who identified the victim to be a pupil thereof with Registration Number 1227. G.2509 DC Abilali, (PW4) was the policeman who investigated the case and recorded the appellant's cautioned statement (Exhibit P1). Onesmo Jackson, (PW5) was the medical practitioner who conducted the pregnancy test on the victim and proved her to be positive.

The appellant on his part stood as the sole defence witness without anyone else. He denied the charges disowning the victim and the pregnancy alleging that he had never ever slept with her.

In her conclusion, the trial magistrate was convinced beyond reasonable doubt and convicted the appellant as charged. Then she sentenced him to the term of thirty years imprisonment for each count as highlighted above. Aggrieved by that decision, the appellant preferred

an appeal to the High Court (the first appellate court). However, that appeal was not a success. It was dismissed for being arid of merit. Still protesting his innocence, the appellant has preferred the present appeal, armed with six grounds which may be paraphrased as follows:

1. *That, the two courts beiow grossly erred in law and fact failing to appreciate that, by conduct, the victim exhibited her maturity, sexual desire and consent, leave alone the assurance echoed from her physical appearance.*
2. *That, the two courts below erred in law and fact in failing to hold that upon the closure of the prosecutlon case and prima facie case established, the trial magistrate failed to address him as per the dictates of section 231(1) of the CPA thus denying him a fair hearing.*
3. *That, the two courts below erred in law and fact in failing to notice and hold that the appellant was prejudiced by late substitution of the charge which was made after the closure of the prosecution case and without recalling the prosecution's witnesses;*
4. *That, the two courts below erred in law and fact when they relied on an incredible, contradictory, concocted and inconsistent prosecution evidence let alone the unsworn evidence of PW3.*
5. *That the two courts beiow erred in law and fact in totally failing to consider the appellant's defence evidence which violated the principles of natural justice; and*

6. *That, the two courts below erred in law and fact in finding that, the prosecution case was proved beyond reasonable doubts.*

At the hearing of the appeal on 12th July, 2023, the appellant appeared in person without legal representation whereas, in appearance for the respondent Republic there were Messrs. Paul Kimweri and Geofrey Mlagala both learned Senior State Attorneys.

At the outset, the appellant dropped the first ground in his substantive memorandum of appeal filed on 15th July, 2020. Then he adopted the remaining grounds, along with a supplementary memorandum of appeal and written submission both filled in Court on 21st June, 2023. He also had another written submission of the even date which was certified on 12th July, 2023 by an officer on behalf of the Officer In charge Karanga Central Prison.

To start with, he challenged the victim's evidence on account of the delay in reporting the alleged ordeal and naming the appellant as the perpetrator of the alleged offences. The unexplained delay, he argued, rendered the victim's evidence to be questionable and should be disregarded. To bolster his proposition, he cited to us our decision in **Wangiti Mansa Mwita And Others v. R**, Criminal Appeal No. 1995

cited in **Ahmed Said v. R**, Criminal Appeal No.291 of 2015 (both unreported) to fortify his point.

He also attacked the cautioned statement (Exhibit P1) for being improperly recorded by a Police Constable instead of an officer of the rank of Corporal, as defined by section 3 of the Tanzania Evidence Act. He thus, on that account, urged us to expunge that statement from the record.

Additionally, the appellant faulted the trial court on its order dated 15th August, 2018 for admitting a belatedly substituted charge, appearing at page 4 of the record of appeal. There, the words *carnal knowledge* were substituted for the words *sexual intercourse* after the prosecution had closed its case. And, he argued that, the said substitution was done contrary to section 234(2) (b) of the Criminal Procedure Act Cap 20 (the CPA). Since the trial court did not recall the witnesses to testify following that substitution of the charge. With the said omission, he further argued that, his conviction for the offence under section 60A of the Education Act therefore cannot stand.

With regard to the alleged defective charge, the appellant argued, while citing to us our decision in **Godfrey Simon and Another**,

Criminal Appeal No. 296 of 2018 and **Meshack Malongo @ Kitachangwa v. R**, Criminal Appeal No. 302 of 2016 (both unreported) that section 131 of the Code which provides for punishment is not a standalone provision. He contended that, in the circumstance, he was prejudiced by being denied an opportunity to know the gravity of the impending sentence, thus, unable to defend himself much as on that account he was convicted on a defective charge.

Moreover, he argued that, PW3 gave unsworn evidence contravening the mandatory provisions of section 198(1) of the CPA, thus her evidence is liable to be expunged for being inconsequential. He cited to us the Court's decision in **Amos Seleman v. R**, Criminal Appeal No. 267 of 2015 (unreported) to cement his proposition.

Lastly, relying on the decision of the Court in **Dickson Hatibu Milonge v. R**, Criminal Appeal No. 400 of 2009 (unreported), he faulted the two courts below for having relied on a conviction which was founded on contradictory evidence affecting credibility of the witness who adduced it. He contended that, it is not clear whether PW1 met the appellant on 13th November, 2016 or on 19th November, 2016 for the first time and had sexual intercourse.

To reinforce the above, he urged us to discount the victim's evidence citing to us the Court's decision in **Balole Simba. v R**, Criminal Appeal No. 525 of 2017 where it restated the said legal principle citing **Ezekiel Hotel v. R,** Criminal Appeal No. 300 of 2016 (both unreported) and some other decisions.

The appellant wound up beseeching us to find his appeal merited, allow it and set him free from custody.

Replying, Mr. Kimweri readily supported the appeal generally for the following reasons; **one**, that the victim who is the key witness in her evidence had two versions contradicting each other, about when she had the alleged sexual intercourse with the appellant. She said it was on 13th November, 2016 and thereafter, but in the same breath that it was 19th November, 2016 much as she said that she did it only once. On that account, the learned Senior State Attorney implored us to disbelieve her for being incredible and unreliable. Stressing on the criteria to be considered when disbelieving a witness, he cited to us the Court's unreported decision in **Toyidoto Kosima v. R**, Criminal Appeal No. 525 of 2021.

Two, that, another piece of evidence which he thought to be too weak to build the prosecution case is the alleged appellant's cautioned statement (Exhibit P1) which appears at page 27 of the record of appeal. He faulted it for lacking certification by PW4, the recording officer to show the appellant's acknowledgment that the statement has been read to him. Consequently, on that account Mr. Kimweri beseeched us to expunge the said statement from the record, since the omission contravened section 57(3) (a) (4) (a) of the CPA. He added that should the cautioned statement be expunged, then the prosecution will not make it as the remaining evidence is not enough for it.

Three, that, the charge was defective, since the particulars of the offence were about events of unknown dates while, in the contrary, the prosecution's witnesses refer to specific dates when narrating on that story at the trial. Relying on the Court's decision in the case of **Mwalimu Jumanne v. R**, Criminal Appeal No. 18 of 2019 (unreported), Mr. Kimweri implored us to disregard the witnesses' evidence for being inconsistent with the charge thus, unreliable.

Four, the learned Senior State Attorney contended that, in her evidence, and considering the victim's conduct, it is not clear if at all the

appellant was the only man with whom she had sexual intercourse ever. In the absence of such viable evidence to connect him with the victim's pregnancy, he argued, the offence of impregnating a school girl was not proved.

Five, Mr. Kimweri further faulted the High Court Judge for not holding that the trial court's judgment did not contain points for determination and the reasons given by the trial magistrate in arriving at the decision. Thus, the Court was urged to find that it fell short of the threshold and features to qualify it as judgment. He asserted that the said omission contravened section 312 of the CPA and urged us to find merits in the appeal, allow it and order the release of the appellant.

Upon hearing of the appellant's written and Mr. Kimweri's oral concessional submissions and the authorities cited, the central issue for our consideration lies on the 6th ground of appeal. It is whether, the prosecution case was proved beyond reasonable doubts.

We wish to point out from the outset that, upon perusal of the record, it is plain to us that contrary to section 57(3) (a) and 4(a) of the CPA, plainly, the cautioned statement (exhibit P1) appearing at page 27 of the record of appeal does not bear certification by the recording

officer. The effect of the omission thus, could be that the said statement was not read to the appellant (accused then) to let him acknowledge its correctness or otherwise. The effects of an accused's cautioned statement which lacks certification cannot be overemphasized than what the Court did in a plethora of its previous decisions including in **Zabron Joseph v. R**, Criminal Appeal No. 447 of 2018 and **Ibrahim Issa And 2 Others v. R,** Criminal Appeal No. 159 of 2006 (both unreported). In the absence of the said certification, it cannot therefore certainly said that the cautioned statement was of the appellant. It is expunged from the record as proposed by Mr. Kimweri.

We have taken a serious note of the victim's evidence which appears at pages 15 and 16 of the record of appeal which Mr. Kimweri faults for being inconsistent and doubtful. We agree with the learned Senior State Attorney that the victim and the appellant had sexual intercourse. However, it is not clear to us when exactly did it happen. What we gather from the charge and the victim's oral testimony leaves a million questions unanswered. As is the Court, the two courts below were left at a cross road. It sounds to us that the victim was not sure when she and the appellant had sexual intercourse. For more clarity, the

relevant part of her evidence appearing at pages 15-16 of the record of appeal reads thus:

> *"...I recall on 13/11/2016 I met the accused Tumaini,...he did seduce me by words, later I went to accused residence on 13/11/2016. He did ask me to have sex, I agreed we had sex...**On 19/11/2016 I also met the accused...on this date I did not sex with the accused...**". [Emphasis added].*

However, upon the trial court putting questions on her, at page 16 of the record of appeal, on a second thought she changed the story and stated that:

> *"...**I had sex with the accused only once. It was on 19/11/2016** I do not recall the date...". [Emphasis added].*

While, we are mindful of the legal principle that to error or to forget is human, we nevertheless, in this case wish to observe that the above quoted part of the victim's testimony may not be a mere error of forgetfulness. We thus, find her evidence to be improbable and inconceivable because, on that aspect her oral evidence is materially inconsistent with the particulars of the offence narrated in the charge evidence. We find the above contradiction in the victim's evidence to be

fundamental thus a good reason for the Court to disbelieve her. Saying so, we are fortified with the Court's previous decisions including one in the case of **Mathias Bundala v. R**, Criminal Appeal No. 62 of 2004 (unreported) which we quoted in **Toyidoto Kosima** (supra) observing as follows:

> " ***Good reasons for not believing a witness include the fact that the witness has given improbable evidence***, *or the evidence has been materially contradicted by another witness or witnesses". [Emphasis added].*

Equally, we are aware of the settled principle of law that, in any judicial criminal proceedings, where oral testimonies by the prosecution's witnesses become inconsistent and incompatible with the particulars of the offence charged as indicated above thereby going to the root of the case, that inconsistence renders the prosecution case to be shaky and bound to fail for being deficient of proof beyond reasonable doubt. See- for instance the Court's decisions in the cases of **Noel Gurth @ Bainth & Another v. R**, Criminal Appeal No. 339 of 2013, **Issa Mwanjiku @ White v. R,** Criminal Appeal No. 175 of 2018 which was cited in

Michael Gabriel v. R, Criminal Appeal No. 240 of 2017 (all unreported).

As alluded to above, the victim's evidence that, she and the appellant had sexual intercourse on 13th or 19th November, 2016 as the case may be, is inconsistent with the particulars of the offence. Since the said particulars are silent about the dates of the alleged two incidents.

Now that, for the above reasons, the evidence of the victim and the alleged cautioned statement of the appellant are gone for being disregarded and expunged respectively, there will be no evidence left, to ground the conviction.

Having considered, as observed above the downfall of the victim's evidence to be fatal, we are constrained to restate yet another legal principle that generally, in cases of sexual offences as is one before us, the victim is the one whose evidence counts most and best against all in proving the prosecution's case. In this case, it is rape and impregnating a school girl for that matter. See- our unreported decisions in **Imani Charles Chimango v. R**, Criminal Appeal No.382 of 2016 and **George Mwanyingili v. R**, Criminal Appeal No. 335 of 2016.

We are satisfied that with the above observations only, the appeal will be sufficiently disposed on the 4th and 6th grounds of appeal.

However, without prejudice to the foregoing we wish, in passing to deliberate shortly on the 2nd, 3rd and 5th grounds of appeal generally:

One, it is about the substitution of the charge under section 234 of the CPA which, in the appellant's opinion was improper. We take note that the said substitution replaced the words *carnal knowledge* for *sexual intercourse* in the particulars of the offences and this was done after the closure of the prosecution case. We are mindful of both the law and logic that once a party to case has closed the case, from there his hands are tied and his mouth is closed. Except, as regards entering *nolle prosequi* in terms of section 91(1) of the CPA where the Director of Public Prosecutions is at liberty to withdraw its case at any stage before judgment.

Nonetheless, important to be noted in the instant case is whether the appellant was prejudiced by the said substitution of the charge at that stage. We find that, it is not always the case that every substitution of the charge will call for a recalling of the witnesses. It depends on the

substance of the charge affected by the substitution/amendment of the charge.

We have noted in the instant case that, the said substitution of the charge had the effect of the two phrases; *carnal knowledge* and *sexual intercourse* being replaced for each other and, not more. We are therefore satisfied that, for all intents and purposes, the newly introduced words "sexual intercourse" to the charge bore no material impact preventing the appellant from further appreciating the charge. Therefore, with respect we find that, the non-recalling of the witnesses was justified in the circumstance and not prejudicial to the appellant. In this appeal therefore, the scenario is different from one in the case of **Balole Simba** (supra) where similarly, the charge was belatedly substituted by adding a second count of indecent assault of the victim after the prosecution had closed its case.

For the above stated reasons therefore, unlike in the present case, in the **Balole case** (supra) the recalling of the witnesses to testify on the newly introduced count was inevitable for the prosecution to enable the accused understand the substance of the said substituting charge,

with respect to the added count. These cases therefore, are distinguishable.

The 2nd ground of appeal is about the alleged noncompliance by the two courts bellow with section 231(1) of the CPA. We are aware of the requirements of section 231 of the CPA that, in any trial, upon the prosecution closing its case the court shall explain to the appellant the substance of the case he faces and inform him of his various rights. Those are the accused to choose giving sworn or unsworn evidence as the case may be. It is also required of the trial court, at the same stage to require the accused to bring witnesses in court if any and if he wishes to.

It is clear to us, that in the instant case the above referred requirement of the law was not complied with. It did not bother the first appellate court at all. However, upon the prosecution closing its case and a prima facie case being recorded to be established as appears at page 23 of the record of appeal, it appears having been invited by the trial court, the appellant (accused then) stated that: "I will defend on oath and will have one witness". The record goes on telling that he

fended himself on 15th August, 2018 and closed his case on the same day, as is borne out at page 26 of the record of appeal.

The above considered, it is in our view sufficient to satisfy the requirement of section 231(1) of the CPA. The alleged omission to record this by the trial court and later maintained by the High Court is thus curable under section 388 of the CPA as it did not prejudice the appellant in any way. The Court reiterated that proposition in a number of its decisions including in **Charles Yona v. R**, Criminal Appeal No. 79 of 2019 (unreported). The second ground of appeal thus fails.

Now that as observed above the prosecution case was not proved beyond reasonable doubt, the 5th ground of appeal which concerns the alleged failures of the two courts below to consider the appellant's defence therefore will not take much of our time. We shall lay that issue there to rest. We find any discussion on it will be an academic exercise in the circumstances. From the above endeavor, the more so with the key PW1's evidence out of consideration as stated above, we find merit in the 6th ground of appeal that the two offences charged were not proved beyond reasonable doubt.

For the above reasons, we hereby allow the appeal, quash the conviction and set aside the sentence. We thus order the appellant's unconditional immediate release, if he is not held in prison for some other lawful cause.

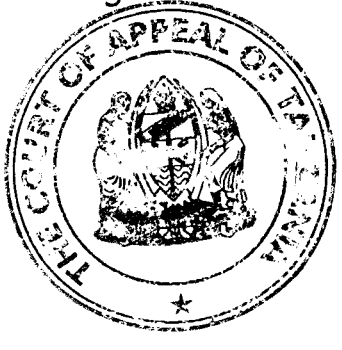
DATED at **DAR ES SALAAM** this 25th July, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 1st day of August, 2023 via video link to Moshi Registry in presence of the appellant in person – unpresented and Mr. Innocent Ng'assi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL