IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KWARIKO, J.A., SEHEL, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 418 OF 2020

NOEL SAMWEL ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Robert, J.)

dated the 5th day of June, 2020

in

(DC) Criminal Appeal No. 132 of 2017

JUDGMENT OF THE COURT

14th & 23rd August, 2023

KWARIKO, J.A.:

The appellant, Noel Samwel is appealing against the decision of the High Court of Tanzania at Arusha (the first appellate court) which upheld his conviction and sentence meted out by the District Court of Babati (the trial court). He was formerly arraigned before the trial court with the offence of rape contrary to sections 130 (1) (2) (a) and 131 (1) of the Penal Code [CAP 16 R.E. 2002; now R.E. 2022].

The prosecution alleged that, on the 2nd day of May, 2018 at Bashnet Village within Babati District in Manyara Region, the appellant had sexual intercourse with 'ET' (name withheld to disguise her identity), without her consent. He denied the charge but at the end of the trial, he was convicted and sentenced to imprisonment for thirty years with corporal punishment of four strokes of a cane and a compensation of TZS. 4,000,000.00 to the victim of the offence. Aggrieved by that decision, the appellant unsuccessfully appealed before the first appellate court.

At this juncture, we find it apposite to revisit the facts of the case as they unfolded at the trial as follows. The prosecution case which comprised of a total of six witnesses and one documentary exhibit shows that on 2nd May, 2018, 'ET' (PW1) was at home together with her brother 'TT' (PW2) (name withheld to disguise his identity), when the appellant who was known to them visited and upon request, he was given an axe. Later, in the evening hours when he returned the axe, the appellant took PW1 to her mother's bedroom, undressed her and forcefully had sexual intercourse with her. It was PW1's testimony during cross-examination that, in the course of intercourse, although her brother was at home, he could not hear her when she raised an alarm.

On his part, PW2 evidenced that he was at home when the appellant took the axe. Thereafter, he left to find grasses and when he returned, he found the appellant inside the house and upon inquiry of his mission there, he kept quiet and went away and shortly thereafter, PW1 informed him about the rape. However, upon cross-examination, he said that he met the appellant outside the house when he returned home from his errand.

Later on, the victim's mother "EL" (PW3) (name withheld to disguise her identity) came home and was informed of the incident. Upon examination, she found PW1's private parts with blood and wet. PW3 reported the matter to the ten-cell leader, Martin Makwai (PW4) who in turn effected the arrest of the appellant. According to PW4, the appellant admitted the allegations and accordingly sent him to the police station where No. G 24 DC Josephat (PW6) was assigned to investigate the case. Subsequently, PW1 was issued with a PF3 to go to hospital for medical examination. At the hospital she was attended by Dr. Clare Laidar (PW5). According to the doctor's testimony, PW1 had bruises and blood in her vagina and her clothes had blood. She concluded that the victim's vagina had been assaulted with a blunt object. PW5's findings were filled in the PF3 which was admitted in evidence as exhibit P1.

On the other hand, in his defence, the appellant testified on his behalf and called one witness. He denied the charge and said that on the material day, together with his uncle, they had gone to the Bashnet auction and went back to the home of his uncle at 20:00 hours before he was arrested at 22:00 hours for the present allegations. The appellant's account was supported by his uncle, Tehema Sima (DW2).

Having considered the evidence from both sides, the trial court was satisfied that the offence of rape had been proved beyond reasonable doubt against the appellant. He was convicted and sentenced as shown earlier.

Before this Court, the appellant raised five grounds of complaint which we have paraphrased as follows:

1. *That, the first appellate court erred in law and in fact for failure to consider that the age of the victim was not properly proved or ascertained as the mother of the victim testified that her daughter was 11 years old contrary to other witnesses.*

2. *That, the first appellate court erred in law and in fact for its failure to note that although the doctor (PW5) testified that the victim's clothes had blood stains, they were not produced as evidence.*

3. *That, the first appellate court erred in law and in fact for its failure to note that the prosecution evidence was inconsistent, unreliable and contradictory, as PW2 testified that he met the appellant inside the house while in cross-examination he testified that he met the appellant outside the house.*

4. *That, the first appellate court erred in law and in fact to note that the date of the incident and the date of arrest of the appellant differed between the facts of the case adduced during preliminary and the prosecution evidence.*

5. *That, the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, while the respondent Republic had the services of Ms. Janeth Sekule, learned Senior State Attorney who was assisted by Mses. Lilian Kowero, Neema Mbwana and Tusaje Samwel, all learned State Attorneys.

We wish to state at the outset that, in the determination of this appeal we shall be guided by a principle of law that, this being a second appeal, the Court can only interfere with the concurrent findings of facts

by the lower courts where there has been misapprehension of the nature and quality of evidence. See for instance; **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387; **Raymond Mwinuka v. Republic,** Criminal Appeal No. 366 of 2017; and **Jacob Mayani v. Republic,** Criminal Appeal No. 558 of 2016 (both unreported).

When we invited the appellant to argue his appeal, he did not have much to say. He adopted his grounds and paved the way for the respondent to reply, reserving his right of rejoinder in case it became necessary. Ms. Samwel argued the appeal on behalf of the respondent whereby she supported the conviction and sentence against the appellant. As regards the first ground, she argued that the age of the victim was twenty-one years during the material time as it was found by the first appellate court. That, where PW3, the mother of the victim was recorded to have said she was aged eleven years, it was only a typing error since the original record showed that, she had said that the victim was aged twenty- one years.

We have considered this ground and we are in agreement with the learned State Attorney that, it was a typing error where the record showed that in her evidence PW3 said that the age of the victim was eleven years. In fact, upon our perusal of the original hand written record, we have

found that PW3 like other witnesses said that the victim was aged twenty-one years at the material time. This matter was also sufficiently dealt with by the first appellate court. In the circumstances, this ground fails.

In the second ground where the appellant complained about failure to tender the alleged victim's blood-stained clothes, the learned State Attorney argued that, even without such evidence, the prosecution case was not affected. We share the same view with Ms. Samwel because from the beginning, the issue for determination was whether PW1 was raped by the appellant and clothes, if any, could only be corroborative evidence but not central to prove the offence. After all, the clothes were not listed among the intended prosecution exhibits during preliminary hearing. This ground too, fails.

The appellant's complaint in respect of the third ground is that the prosecution evidence was inconsistent, unreliable and contradictory. He specifically argued that in his examination- in- chief, PW2 said he found the appellant inside the house when he returned home from his errands while during cross-examination, he said that he met him outside the house. Countering this complaint, the learned State Attorney contended that the contradictions were resolved by the first appellate court and correctly found to be minor not going to the root of the case. She argued

further that the contradictions showed that witnesses were not couched to implicate the appellant and thus they testified on what they had witnessed. Ms. Samwel fortified her contention with the decision of the Court in the case of **Ex- G. 2434 PC George v. Republic,** Criminal Appeal No. 8 of 2018 (unreported). It was Ms. Samwel's further argument that in evidence, contradictions cannot be avoided so long as they do not prejudice the prosecution case. She supported her argument with an unreported decision of the Court in **Jonas Boniphas Massawe v. Republic,** Criminal Appeal No. 52 of 2020.

We have gone through the record and found that, apart from self-contradiction by PW2, there is the evidence by the victim (PW1) who testified during cross-examination that, when she was being raped, PW2 was at home and although she raised an alarm, she could not be heard. Now, if PW2 was at home when PW1 was raped, definitely he could have intervened. It is therefore evident that there is self-contradiction by PW2 and also between him and PW1.

It is trite law that, where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the discrepancies and try to resolve them and where possible decide whether the inconsistencies and contradictions are minor or whether they go to

the root of the matter. See **Mohamed Said Matula v. Republic** [1995] T.L.R. 3. In the case at hand, the said contradictions and inconsistencies were not addressed and resolved by the trial court. However, the first appellate court addressed them and resolved that they were minor which did not affect the root of the case.

On our part, we have considered and weighed these contradictions and inconsistencies by the two key witnesses. We do not share the view taken by the first appellate court and the argument fronted by the learned State Attorney. This sharp contradictions and inconsistencies by the two key witnesses go to the root of the case as it shows that the alleged incident might not have happened in the way explained by these witnesses. It is our considered view that the contradictions by these witnesses affected their credibility. We are alive to the principle of law that, the credibility of witnesses is the province of the trial court. However, credibility of a witness, where necessary, can also be assessed by an appellate court. In the previous decision of the Court when faced with an akin situation in the case of **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported), it was observed thus:

> *"The credibility of a witness can also be determined in two other ways: one, when assessing the coherence of the testimony of that*

witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."

See also **Robert Sanganya v. Republic,** Criminal Appeal No. 363 of 2019 and **Chacha Matiko @ Magige v. Republic,** Criminal Appeal No. 295 of 2020 (both unreported).

Guided by these decisions, being a second appellate court, we have assessed the said contradictions and inconsistencies and we are satisfied that they do raise doubts on the credibility and reliability in the evidence of PW1 and PW2. It follows therefore that, the doubts ought to be resolved in favour of the appellant and accordingly the charge of rape was not proved beyond reasonable doubt against him which is the gist of complaint in the fifth ground. Thus, the third and fifth grounds of appeal have merit.

Having resolved the third and fifth grounds of appeal in the affirmative, we find no need to determine the fourth ground. In the result, we find the appeal meritorious and accordingly allow it, quash the

conviction and set aside the sentence meted out against the appellant. Finally, we order the immediate release of the appellant from custody unless he is continually held for other lawful cause.

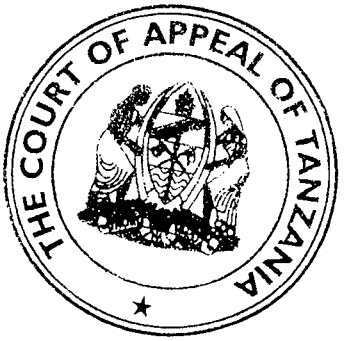
DATED at **ARUSHA** this 21st day of August, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The judgment delivered this 23rd day of August, 2023 in the presence of appellant in person and in the absence of respondent Republic is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL