IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A, And MAIGE, J.A.)

CRIMINAL APPEAL NO. 54 OF 2020

ABRAHAM WILSON KAAYA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mkapa, J.)

dated the 16th day of November, 2019

in

DC. Criminal Appeal No. 58 of 2018

.....

JUDGMENT OF THE COURT

22nd & 26th September, 2023

MUGASHA, J.A.:

The appellant was charged and convicted before the District Court of Siha at Siha on two counts. On the first count, laid under sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2022, it was alleged that on 11/4/2017 at the Karansi village within Siha District in Kilimanjaro Region, the appellant unlawfully had carnal knowledge of a girl aged 15 years old a student of Karansi Secondary School.

On the second count, the appellant was charged with impregnating a school girl contrary to section 60A of the Education Act, Cap. 353 R.E. 2002 ("the Education Act") as amended by section 22 of the Written Laws (Miscellaneous Amendments) (No.2) Act, No. 4 of 2016. In that count, it was alleged that on the same date and place, the appellant impregnated the stated victim who was a school girl. In order to conceal her identity, the girl shall be referred to as the victim in this decision.

From a total of four witnesses, the prosecution account was as follows: The victim who testified as PW2 recalled that, on 11/4/2017, while going to school, she met the appellant who seduced her and forcefully held her hand and took her to his home. Then, he undressed the victim and himself and forcefully had sexual intercourse with her. According to the victim, the appellant told her not to reveal the incident to her parents. She obliged until on 21/7/2017 when she was examined by the school teacher cum matron, Esfana Magwaza (PW1) and she was found to be pregnant. Upon probing the victim as to who was responsible for the pregnancy, she mentioned the appellant and further intimated that besides the appellant, she never had sexual intercourse with any other person. This evidence was flanked by PW1 who also confirmed before the trial court that the victim

was a student at Karansi Secondary school. Another prosecution witness was the victim's mother, Magreth Msafiri (PW3) who recalled that upon being informed by the head master of said school on the pregnancy of her daughter, she interrogated the victim who mentioned the appellant to be the culprit. The matter was reported to the police station and, on 21/7/2017, the victim was taken to the hospital. Upon being medically examined by Doctor Mussa Lepukate (PW4), it was established that she was pregnant and had bruises on her vagina. However, the duration of the pregnancy was not stated.

On the other hand, the appellant who testified as DW1, denied the accusations by the prosecution. After a full trial, the trial magistrate believed the prosecution account and as earlier stated, convicted the appellant as charged and sentenced him to serve 30 years' imprisonment on each count. His appeal to the High Court was unsuccessful, hence the present appeal on the following seven points of grievance:

1. *That, both courts below erred in law and fact in failing to note and hold that the trial honorary magistrate failed to comply with mandatory requirement of section 231 of the CPA. Hence after finding that a*

prima facie case has been established by the prosecution the trial court failed to address the appellant accordingly, under the above provision of the law.

2. *That, both courts below erred in law and fact in failing to note and hold that the trial Honorary magistrate failed to comply with mandatory requirement of section 214 of the CPA before proceeding with the hearing of a case which was partly heard by another magistrate (i.e.) during PH.*

3. *That, both courts below erred both in law and fact in failing to note and hold that the appellant was plainly prejudiced when the trial magistrate ordered the prosecution to substitute the charge immediately after his defence testimony, hence the whole prosecution evidence and defence testimony was based on a defective charge and the witness could not be recalled at that stage as stipulated by the law.*

4. *That, both courts below erred in law and fact in failing to note and hold that unexplained delay by the victim (PW2) to disclose to any person especially her teachers or parents the information of sexual occurrence at the earliest opportunity could not attract*

her credibility nor her confidence to any prudent court.

5. *That both courts below erred in law and fact in failing to note and hold that the contents of PF3 was not read aloud before the court after its admission in evidence hence the appellant's attention was not drawn to the contents of exhibit.*
6. *That, both courts below erred both in law and fact in failing to consider at all the appellant's defence testimony and make reference of it in their judgement, which is contrary to natural justice and unsettle both courts' judgment.*
7. *That, both courts below erred in law and fact in finding and holding that the charge was proved to the required standard of law by the prosecution.*

At the hearing, the appellant appeared in person, unrepresented. He adopted the grounds of appeal without more and reserved a right to rejoin if need arises. The respondent Republic had the services of Ms. Revina Tibilengwa, learned Principal State Attorney who co appeared with Ms. Eliainenyi Njiro, learned Senior State Attorney. From the outset, Ms. Tibilengwa opposed the appeal.

She began her address by submitting on the alleged procedural irregularities at the trial which cover grounds 1,2,3 and 6 in which the appellant faults the first appellate court to have glossed over them which vitiated the trial and caused a failure of justice. It was contended by Ms. Tibilengwa that, besides minor omissions which did not go to the root of the matter, the appellant was fairly tried and he was not prejudiced at all and neither was there any miscarriage of justice. However, she conceded that the PF3 was not read out after its admission and as such, implored on us to discard it.

We indeed agree with the learned Principal State Attorney having considered that: **one,** having intimated on the manner of giving his defence, that tells he was addressed in that regard and exercised the right to make his defence in terms of section 231(1) of the Criminal Procedure Act Cap 20 RE. 2022 (the CPA). See: **MADUHU SAYO NIGHO VS REPUBLIC,** Criminal Appeal No. 560 of 2016 (unreported). **Two;** the trial was conducted by Jasmin, RM; who took the evidence of all witnesses and wrote a judgment. Kirekiano, RM; (as he then was), conducted a preliminary hearing which is not a trial as envisaged under section 214(1) of the CPA which stipulates:

"214 (1) ***Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial*** *or conducted in whole or part any committal proceedings* ***is for any reason unable to complete the triai*** *or the committal proceedings* ***within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial*** *or committal proceedings, as the case may be,* ***and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial*** *or the committal proceedings".*

[Emphasis supplied]

Thus, section 214 (1) of the CPA was not in any case contravened in any manner.

We have gathered that the charge which was substituted on 3/10/2020, was read out to the appellant as reflected at page 23 of the record of appeal. Besides, the absence of the punishment provision did not prejudice the appellant because he understood the nature of the charge he

faced and made an informed defence and he was thus not denied a fair trial.

As regards the PF3 which was admitted as exhibit P1, the same was not read out to the appellant which is fatal. It is settled law that once a document is admitted in the evidence it must be read out to the accused person. Since the contents of the PF3 were not read out at the trial, a miscarriage of justice ensued because the appellant was convicted on the basis of the documentary evidence he was not made aware of. We thus expunge the PF3 from the record. However, the oral account of the doctor remains because it is settled law that, the oral account shall not fail the test merely because the corresponding documentary evidence has not been admitted in the evidence. Therefore, save for ground 5, given that the trial was not flawed by the alleged procedural irregularities, grounds 1, 2, 3 and 6 are not merited and are hereby dismissed.

Next is the complaint that the charge was not proved beyond reasonable doubt which covers grounds 4 and 7. The appellant is faulting the two courts below in grounding conviction relying on the incredible account of the victim who delayed to mention him. On the other hand, it

was Ms. Tibilengwa's submission that, the victim's account was credible as she gave a narration on how she was raped by the appellant on the fateful day. She argued that, the delayed mentioning of the appellant was justified because it was unveiled by the victim after she was examined by the matron and found to be pregnant. That apart, it was contended that the victim adhered to the appellant's advice that she should not disclose the awful act to her parents. It was also contended that, the victim's account is corroborated by the evidence of the matron/teacher who examined and found the victim to be pregnant; and secondly, the Doctor's account who found bruises on the victim's vagina and gathered that she was not virgin. Ultimately, Ms. Tibilengwa argued that, the charge was proved against the appellant given that penetration was proved and the victim was found to be pregnant. She thus urged us to sustain the conviction and the sentence and proceed to dismiss the appeal.

Having considered the complaint in respect of grounds 4 and 7, the submission of parties and the record before us, the issue for our determination is whether the charge was proved beyond reasonable doubt proved against the appellant.

It is glaring that the conviction of the appellant was based on the credibility of prosecution witnesses as to whether it is him who was responsible with the rape incident. This being a second appeal, we are alive to the principle that, the Court should rarely disturb concurrent findings of facts by the lower courts based on credibility because we did not have the advantage of seeing, hearing and assessing the demeanour of the witnesses. However, the Court will interfere with any such findings, if there has been a misapprehension of the nature, quality of the evidence resulting in unfair conviction or violation of some principle of law, occasioning a failure of justice. The second principle is that, it is not sufficient for the trial court to merely state that it believes in the credibility of a witness, or that it has examined and is satisfied with the demeanour of a witness. The reason as to why the court reached such conclusion or finding must be recorded as that would assist the appellate Court to determine as to whether credibility of a witness has been considered by the courts below. See: **DPP VS JAFFAR MFAUME KAWAWA** [1981] T.L.R. 149, **SALUM MHANDO VS REPUBLIC** [1993] TLR 170, **SEIF MOHAMED E.L ABADAN VS REPUBLIC,** Criminal Appeal No. 320 of 2009, **ISAYA MOHAMED ISACK VS REPUBLIC** Criminal Appeal No. 38 of 2008 (both unreported).

Apart from demeanour, the credibility of a witness can also be determined even by a second appellate court when examining the findings of the first appellate court by **one,** when assessing the coherence and consistency of such witness; and **two**, when the testimony of that witness is considered in relation with that of the other witnesses including the accused. See: **SHABAN DAUDI VS REPUBLIC**, Criminal Appeal No. 28 of 2001 and **ABDALLA MUSSA MOLLEL @ BANJOR VS REPUBLIC**, Criminal Appeal No. 31 of 2008. (Unreported).

As earlier stated, since the conviction of the appellant was based mainly on the evidence of the victim, PW2, PW3 and PW4 as corroborating witnesses, we think the basis of the trial court's evaluation was not based on demeanour but rather inferences. In this regard, the question to be answered is whether the findings of the two courts below were beyond question.

In the first place we agree with the learned Principal State Attorney that, for the offence of statutory rape to be proved two things must be established that is, penetration and age of the victim in terms of section 130 (1) (2) (a) of Penal Code. In **SELEMANI MAKUMBA VS. REPUBLIC**,

(2006) T.L.R. 379 the Court stated that the true evidence of rape has to come from the victim if an adult, it is proved that there and in case of any other woman where consent is irrelevant, there was penetration. Also, the victim must be a credible and reliable witness. See: **PASCAL YOYA @ MAGANGA VS THE REPUBLIC**, Criminal Appeal no. 248 of 2017 (unreported).

A lingering question is whether the victim gave a credible account on the rape incident. It is glaring on the record as per the evidence of the victim that she was allegedly raped on 11/4/2017 by the appellant. However, the doctor examined the victim on 21/7/2017; three months after the incident as evident at page 19 of the record of appeal: -

> *"We examined her and found bruises but she had no "bikira" which shows that she had sex before. We found her pregnant."*

The findings of the doctor contradict the victim's account given that she testified that besides the appellant, she never had sex with another man. Apparently, the doctor was not led by the prosecutor on the presence of bruises on the vagina of the victim who was raped three months earlier.

In the premises, it is highly probable that the victim might have engaged in sexual relations with other men as evidenced by the presence of bruises.

That apart, the evidence of the doctor is silent on the duration of pregnancy and neither the clinic card nor certificate of birth of the born child was tendered to establish the age of the pregnancy given that the appellant was also charged with impregnating a school child. With this state of evidence, the doctor's account contradicted that of the victim whose account is rendered incredible. We are alive to the although it is settled law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness, However, in this case the victim's account on the rape incident was improbable having been materially contradicted by the evidence of the doctor which connotes that, the victim had sexual intercourse with other men or man close to the date she was examined. Such state of evidence poked holes in the prosecution case clouding it with a heavy shadow of doubt.

With these findings, as earlier stated the re-evaluation of the evidence by the two courts below is indeed wanting. The trial court

believed the victim's account as credible merely because her evidence was not doubted. As for the first appellate court, instead of re-evaluating the entire evidence on record by reading it together and subjecting it to a critical scrutiny in particular the evidence of the doctor and the victim, instead, it concluded and wrongly so that, the early reporting of the sexual act to the victim's parents is not an essential ingredient of rape. Moreover, the first appellate court did not resolve the vivid contradictions in the evidence of the victim and that of the doctor, given that the incredible account of the victim, such evidence does not qualify to be corroborated by other prosecution witnesses.

After re-evaluating the evidence on the record, it is glaring that since the lower courts did not properly assess the credibility of the victim's account resolve the apparent contradictions, a misapprehension of evidence was bound to occur resulting to wrong conclusion which led to unfair conviction of the appellant based on the charge which was not proved beyond reasonable doubt.

All said and done we are satisfied that the charge was not proved beyond reasonable doubt against the appellant. We thus find grounds 4 and 7 merited and hereby allowed. Since the determination of the 6th

ground is inconsequential, we shall not determine it. Consequently, we quash the conviction and set aside the sentence meted on the appellant who shall be released forthwith unless if held for other lawful cause.

DATED at **MOSHI** this 25th day of September, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 26th day of September, 2023 in the presence of the Appellant in person and Ms. Revina Tibilengwa, learned Principal State Attorney and Ms. Eliainenyi Njiro, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL