IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 241 OF 2020

DAVID ZABRON @ LUSUMO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Khamis J.)

Dated the 8th day of May, 2020

in

Criminal Appeal No. 65 of 2018

JUDGMENT OF THE COURT

20th & 29th September, 2023

MGEYEKWA, J.A.

The appellant, David Zabron @ Lusumo stood trial at the District Court of Tabora at Tabora for rape contrary to sections 130 (1) (2) (e) of the Penal Code Cap.16 [R.E 2019] (the Penal Code). It was alleged that on 8th November, 2017 during morning hours at Malolo area, Ng'ambo Ward within

the Municipality and Region of Tabora the appellant had carnal knowledge of a girl aged 13 years. The appellant's conviction of rape subjected him to imprisonment for 30 years under section 131 (1) of the Penal Code. To conceal the victim's identity, we shall henceforth refer to her as 'Z' or simply 'PW1' as she so testified before the trial court.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshaled a total of six witnesses. The appellant relied on his own evidence as he did not summon any witness. The victim testified that on the fateful date, around 09:00 AM, she was at Mwinyi Sikanda area selling bans, when she met the accused person who told her that, there was a woman who wanted to buy bans and he offered to take her to the said woman. Unfortunately, the accused person took her to Malolo area near a big tree.

The victim gave a detailed explanation of how she was raped. She stated that the appellant stood up and tightened her neck, then he threw her down, undressed her by removing her underpants, then undressed himself and penetrated her four times. She could not raise an alarm because he tightened her neck. After the incident, the accused person asked her if

he could take her back home but she refused. On her way home, she disclosed the whole incident to PW2 who was cultivating his farm. He directed her to narrate that incident to Mama Babu (PW2) and she headed to Mama Babu's home and revealed the ordeal to her and gave the description of the accused person who was wearing a red T-shirt, black trouser and a cap. Thereafter, she went home and told her mother (PW4) what had befallen her.

To support the victim's evidence, the Republic led the evidence of PW2, PW3, PW4, PW5 and PW6. To corroborate the victim's story, PW2 testified that on 8th November, 2017, when he was cultivating in his farm, he saw the appellant carrying PW1 on his bicycle holding a container of bans. After half an hour, he saw PW1 with her container crying and she asked for help. PW1 informed PW2 that the guy who had earlier carried her on the bicycle did rape her. PW2 told PW1 to go to Mama Babu's home.

PW3, who was the ten-cell leader testified to the effect that on the fateful date, PW1 approached her looking very dirty, crying and had injuries on her neck. PW3 asked PW1 what had befallen her and PW1 told her that she was raped by a guy who had given her a ride on his bicycle. After a few

minutes the appellant passed by PW3's house, she called him and put him under arrest.

As such, PW3 decided to call the police officers who interrogated the accused person, he confessed and urged them to end the matter but the police officer took him to the police station. PW4, the victim's mother testified that when she returned home, PW1 told her that she was raped by the appellant. This prompted PW4 to rush to the street chairman to alert her on what had befallen PW1. Thereafter, they proceeded to the police station and later to Kitete Hospital for medical examination. PW5, a police officer testified that he met the victim and she told him what transpired. Around 16:00 hours, he interrogated the appellant who according to him, confessed to have committed the offence. Doctor Aziza Ally Hamisi (PW6) examined the victim's body and noted blood clots in the victim's vagina and he confirmed that the victim had been raped.

In his defence, the appellant denied involvement in the commission of the offence. It is the appellant's version that he was arrested and brought before the police station and later he was released. On the following day, he was arrested and brought to the police station and he was locked in the

police station for two days. On 20th November, 2017 he was arraigned before the court and on 23rd August, 2018, he was acquitted and received a release certificate. He further testified that after several days, he went to collect his belongings at the prison, but surprisingly, the police arrested him and after four days he was arraigned again before the court for the same offence against the same victim.

At the end of it all, the trial court found the charge proved against the appellant to the hilt. Hence, the appellant was found guilty, convicted and sentenced as indicated above. The appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were confirmed.

Still aggrieved, he has come to this Court, on appeal. In the Memorandum of Appeal, the appellant raised four (4) grounds of appeal. The grounds of appeal can be conveniently paraphrased as follows:

1. *That, the case for the prosecution case was not proved beyond reasonable doubt.*
2. *That, the two Courts below did not at all analyse, evaluate and consider the defence evidence.*

3. *That, PW4 did not testify regarding the age of her daughter (PW1).*
4. *That, there was misdirection in the analysis of the evidence by the two Courts below in two regards; on the identity of the appellant and the PF3 was wrongly admitted by the trial court.*

At the hearing of the appeal, the appellant appeared in person, unrepresented. When allowed to amplify on his grounds of appeal, he valiantly argued that he had faced the same charge of rape but he was acquitted. Surprisingly, when he went to collect his belongings at the prison, he was arrested and charged with the same offence. He was flabbergasted since there was no explanation as to why his defence was not considered by the lower courts. He adopted all the grounds of appeal and urged us to allow the appeal and set him free.

In response, Ms. Grace Lwila, learned State Attorney appearing for the respondent/Republic, opted to submit first on ground two of appeal. She initially opposed this ground of appeal. However, on probing by the Court, she conceded that the trial court and the first appellate court did not give any reason for rejecting the appellant's defence. She elucidated that the

appellant alleged that he was charged and acquitted on the same offence. Revisiting the charge sheet, Ms. Lwila conceded that there is a correlation between the charge sheet and evidence. She added that the offence was committed on 8th November, 2017, but he was charged on 27th August, 2018 after a lapse of nine months. Therefore, in her view, unexplained delay in taking steps against a suspect raised doubt and rendered the appellant's conviction unsafe. To support her proposition, the learned State Attorney cited the case of **Ally Patrick Sanga v. The Republic**, Criminal Appeal No. 341 of 2017 [2019] TZCA 254 (20 August 2019).

The third ground complains of lack of prosecution evidence establishing the age of the alleged victim. While conceding that the victim's mother did not mention her daughter's age, the learned State Attorney was certain that the said omission is not fatal because the evidence as to proof of age of the victim can be given by the victim, relative, parent or guardian and on page 8 of the record of appeal, PW1 mentioned her age. Relying on the case of **Samwel Nyerere v. The Republic**, Criminal Appeal No. 216 of 2016 (unreported), she urged us to find that the victim's evidence sufficed to prove her age.

Moving to ground four of appeal, the learned State Attorney prefaced her submission by expressing the stance of the respondent that they concede that the evidence of visual identification of the appellant was weak. She elaborated that PW1's description of the appellant was based on the colors of clothes which he was wearing, thus, it was unsafe for the trial court to convict the appellant. She further clarified that the appellant was a stranger to PW1 and PW2, therefore the trial court was required to conduct an identification parade to identify the potential suspect instead of relying on dock identification. Expounding on the issue of PF3, the learned State Attorney held the view that, PW6's explanation was clear as to why the victim's bruises were not fresh because he filled in the PF3 on 10th November, 2017 whilst the offence was committed on 8th November, 2017.

In respect of ground one, the contention is that the prosecution failed to prove the case beyond reasonable doubt because of weak identification evidence and failure of the trial court to consider the defence case. Ms. Lwila conceded and thus implored the Court to step into the shoes of the High Court to do what it omitted to do.

On the strength of her submission, the learned State Attorney beckoned upon us to re-evaluate the defence case and allow the appeal.

In his rejoinder, the appellant nodded in approval of the position taken by the learned State Attorney. He prayed to be released.

Having heard and considered the submissions from either side, we have chosen to disregard all other grounds of appeal and confine our decision to grounds one and two which will be determined jointly because they are intertwined. Basically, the second ground is a new ground which was not featured before the first appellate court and determined as such, however, we will consider it since it is a matter of law. In the circumstances of this matter these grounds are sufficient to dispose of this appeal for reasons which will unfold in the course of this judgment.

Basically, two interconnected issues arise in the two grounds: **One**, failure to consider the accused's defence and consequences thereof. **Two**, whether the prosecution proved the case to the hilt. Our starting point will be on whether the appellant's defence was considered. This is the gist of the complaint in the second ground of appeal. It is plain from the record of appeal that the trial court and the first appellate court did not consider and

evaluate the appellant's defence adequately. The Court has already dealt with the state of the law relative to the caution that a court must exercise when evaluating the evidence of both parties. The trial court was enjoined to satisfy itself whether the guilt of the appellant has been proven beyond reasonable doubt. The proper approach was to look at the evidence holistically, upon an appraisal of all the evidence not just the evidence of the respondent. As observed by the Supreme Court of Appeal of South Africa in **S v van der Meyden** 1991 (1) SACR 447 (W):-

> *"[A]* ***court does not base its conclusion, whether it be to convict or acquit, on only part of the evidence. The conclusion which is arrived at must account for all the evidence.*** *Although the dictum of Van der Spuy AJ was cited without comment in S v Jaffer* ***1988 (2) SA 84*** *(C),* ***it is apparent from the reasoning in that case that the Court did not weigh the "defence case" in isolation.*** *It was only by accepting that the prosecution witness might have been mistaken (see especially at 89J-90B) that the Court was able to conclude that the accused's evidence might be true...* ***The process of reasoning which is appropriate***

to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored." [Emphasis added]

Guided by the above holding, we agree that the trier of fact must weigh all the essentials of the evidence that point to the guilt of the accused person against all those which are suggestive of his innocence, taking proper account of intrinsic strengths and weaknesses, probabilities and improbabilities on both sides. Thereafter, the trial court must decide whether the balance weighs so heavily in favour of the Republic to exclude any reasonable doubt about the accused's guilt. (See **S v Chabalala** 2003 (1) SACR 134 (SCA) para 15.

Based on the above reasons, the next issue for our consideration and determination is the consequences arising from the error. The learned State Attorney implored us to step into the shoes of the trial court and evaluate the

defence case. It is a well settled position, that the realm for the interference by a second appellate court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court or where the recorded evidence shows that the finding is clearly wrong. Adverting to our decision in the case of **Abdallah Seif v. The Republic**, Criminal Appeal No. 122 of 2020 [2022] TZCA 196 (14 April 2022) TanzLII, it can be said that in case the trial court did not consider the appellant's defence and neither the first appellate court played its role as a first appellate court by evaluating the evidence on record afresh and arriving at its own conclusions, we shall step into the shoes of the first appellate court and do what it omitted to do.

Applying the above tests in **Abdallah Seif's** case (supra) in the instant case, we think the defence evidence calls for special scrutiny. In doing so, we will proceed to find out what transpired before the trial court whereby, having summarized the prosecution and defence case, the trial court considered the evidence of the respondent in isolation and concluded that it was to be believed. In his defence, the appellant had narrated at length what had befallen him. He testified that he was arrested by the police officer but there

was no any case of rape which was lodged in court, thus, he was released. According to the appellant, on the following day, he was arrested by two unknown people and was brought to the police station and was informed that he was arrested for committing an offence of rape. Thereafter he was locked up at the police station and on 20th November, 2017 he was arraigned before the court. On 23rd August, 2018, he was acquitted and they issued him a released certificate. Surprisingly, on 28th August, 2018 when he went to prison to collect his belongings, he was re-arrested, charged, convicted, and sentenced on the same offence of rape. Going by the appellant's evidence, we think there is a need to scrutinize the charge sheet. For easy reference, we undertake to reproduce the charge sheet hereunder. It reads:

> "STATEMENT OF OFFENCE
>
> RAPE Contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code Cap. 16 [R.E 2002].
>
> PARTICULARS OF OFFENCE
>
> *David S/O ZABRON @ LUSUMO on 8th November, 2017 during morning hours at Malolo area, Ng'ambo Ward within the Municipality and Region of Tabora, did have carnal knowledge of one Z a woman of 13 years of age.*

Signed at Tabora this 21st day of August, 2018."

Deducing from the above excerpt, there is no dispute that there was nexus between the charge and the appellant's defence evidence. The trial court was required to analyse the appellant's evidence in deciding his guilt. When we read the charge sheet, the first thing that came to our mind was the unexplained delay to arraign the appellant immediately after the commission of the offence. The unexplainable delay which is featured in the charge sheet has some connection with the appellant's defence story that he was once charged and acquitted on the same offence.

As alluded above, the charge sheet shows that the appellant was charged after a lapse of approximately nine (9) months from the date when the alleged offence was committed. There is no justifiable explanation of the said delay on record considering the fact that he was arrested on the fateful date. It was echoed in the case of **Ramson Peter Ondile v. The Republic**, Criminal Appeal No. 84 of 2021 [2022] TZCA 608 (6 October 2022) TanzLII that: -

> *"It is therefore our considered view that the unexplained delay to arraign the appellant in court*

creates doubt in the prosecution case as to whether the incident occurred as alleged".

For the aforesaid reasons, we have seen no reason to discredit the defence evidence of the appellant. It is clear that there was a fundamental misdirection that emerged from the judgment of the trial court as it failed to evaluate and critically analyse the appellant's evidence in its entirety and not even a fleeting reference was made to the counteracting evidence of the appellant. It did not embark on this exercise. That is plainly a wrong approach. Had the trial magistrate considered the defence case, it would have realized that the appellant's complaints were supported by the facts stated in the charge sheet, hence, it could decide in favour of the appellant.

Accordingly, all said and done, we are in all fours with Ms. Lwila that, the prosecution did not prove the case beyond reasonable doubt. Consequently, it is our view that in the light of the evidence led at the trial, viewed in its totality, we are satisfied that the appellant's defence is highly plausible, hence entitled him to a finding of not guilty.

In the result, we allow the appeal, quash the conviction and set aside the sentence. We order the immediate release of the appellant from prison custody unless otherwise lawfully detained.

Order accordingly.

DATED at **TABORA** this 27th day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P.KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 29th day of September, 2023 in the presence of Mr. David Zabron @ Lusumo the Appellant in person and Ms. Alice Thomas, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL