IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 85 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS .... APPELLANT

VERSUS

JUMA CHUWA ABDALLAH .... 1ST RESPONDENT
SEIF MUSSA MZEE BABU NDEVU .... 2ND RESPONDENT

(Appeal from the Judgment of the High Court of Zanzibar, at Vuga)

(Sepetu, J.)

dated the 07th day of June, 2018

in

Criminal Appeal No. 24 of 2017

JUDGMENT OF THE COURT

8th June, 2022 & 2nd November, 2023

MASHAKA, J.A.:

Before the Regional Court of Zanzibar at Vuga, the respondents, Juma Chuwa Abdallah and Seif Mussa Mzee Babu Ndevu were jointly charged with four counts of rape contrary to sections 125 (1) (2) (e) and 126 (1) and two counts of child abduction contrary to section 130 (a) of the Penal Act No. 6 of 2004 of the Laws of Zanzibar. It was alleged that between the months of

June, 2016 and February, 2017 between 3.30 pm and 4.30 pm at Jang'ombe Matarumbeta within the Urban District in the Urban West Region, Unguja, the respondents had carnal knowledge of the two victims (names withheld) aged nine and eight years respectively. We shall hereinafter conceal their identities and refer to them as PW1 and PW2.

The respondents pleaded not guilty to all counts. After full trial they were found guilty of four counts of rape and acquitted on the two counts of abduction. Subsequently, the respondents were convicted and sentenced to seven years imprisonment on each count which were ordered to run consecutively. Aggrieved, they successfully appealed to the High Court of Zanzibar which led to their convictions being quashed and the sentences set aside. Dissatisfied, the Director of Public Prosecutions, the appellant, has preferred this appeal.

The facts of the prosecution case as unfolded from the evidence which led to the appeal are that; In 2016, PW1 and PW2 were standard two students at Kidongo Chekundu Primary School when the alleged incidences occurred. It was revealed that, on 20th February, 2017 Mwamgeni Mohamed (PW4), a teacher at Kidongo Chekundu Primary School noted that PW1 and

PW2 had not returned to the class after the 4.00 pm recess. An inquiry made by PW4 (and PW1) revealed that they used to visit PW2's aunt. On 22nd February, 2017 PW1 led some of the teachers at the school and her father one Salum Hemed Khamis (PW3) to the respondents' residence where they found PW2. It was the testimony of PW1 and PW2 that from the year 2016 to February, 2017, on diverse unknown days during school recess time they often visited the house of the respondents who raped them.

Upon that disclosure by PW1 and PW2, Police Forms (PF3) were issued by the police. The victims were taken to Mnazi Mmoja Hospital where Dr. Jasmin Maokola Majogo (PW6) examined them and discovered that both had old tears in their female private parts suggesting penetration. This led to the arrest of the respondents who were arraigned before the trial court to answer the charges alluded to earlier.

In their defence, the respondents denied to have raped the victims. They denied having seen the victims before 22/02/2017 when the first respondent saw one of the victims at his house asking for her aunt Asia and upon further enquiry, he came to know that it was his sister whom they lived together and was not at home that day. He testified further that one of the

victims returned later with her teachers and he was arrested and taken to a Police post for investigations. The second respondent was not instantly arrested. He was arrested the next day when he went to visit his uncle, the first respondent, at Ng'ambo police station where he was held.

Upon analysis of the evidence adduced by the prosecution, the trial court found it credible and reliable. It found the respondents' guilty, convicted and sentenced them on the four counts of rape as alluded to earlier.

In this appeal, the appellant has raised four grounds which can conveniently be paraphrased into the following complaints; **one,** that the first appellate judge erred in acquitting the respondents on the ground that the trial magistrate failed to consider and evaluate the defence evidence; **two**, error in holding that the PF3 of PW1 was not admitted in evidence; **three**, that, the prosecution evidence had discrepancies; and **four**, erroneous holding that the prosecution case was not proved beyond reasonable doubt.

During hearing of the appeal, the appellant was represented by Messrs. Mohamed Kassim Hassan who teamed up with Khamis Othman

Abdalla and Anuar Khamis Saadun, Principal State Attorney and Senior State Attorneys respectively. The respondents were represented by Mr. Rajab Abdalla Rajab, learned counsel.

Mr. Hassan onslaught in ground one was that, the judgment failed to contain an analysis of the defence evidence, although the first appellate judge was right in holding that there was no analysis of evidence in the trial court's judgment, he contended that the first appellate judge ought to have stepped into the shoes of the trial court and make an evaluation of the defence evidence and come to his own findings and conclusion which would not have resulted into the respondents' acquittal. He prayed to the Court to step into the shoes of the first appellate court and do what ought to have been done.

In opposing the appeal, Mr. Rajab submitted that even though the first appellate judge failed to consider the defence case, he beseeched the Court to analyse it as the evidence of DW2 was not challenged by the prosecution who had failed to cross examine the defence witnesses.

Having revisited the record of appeal and as rightly found by the High Court, the trial court summarized the evidence adduced by the respondents

without subjecting it to a proper scrutiny with a view to assessing its strength against the prosecution case.

However, we do not agree with the appellant that the first appellate court acquitted the respondents merely for failure to consider the defence evidence. It is glaring from the judgment of the first appellate court that the learned judge embarked on a discussion of the prosecution evidence which revealed some contradictions from which he concluded that such prosecution witnesses were unreliable. Besides, the learned judge faulted the trial court for relying on a PF3 of PW2 whilst PW6 tendered the PF3 of PW1 and concluded that the prosecution had proved penetration for both of the victims. Furthermore, the learned judge entertained doubt in the prosecution case for its failure to call the third girl; Salha who was mentioned by PW1 and PW2 as a witness to the acts complained of to testify during the trial. He impressed similar misgivings in respect of an aunt mentioned by PW1 and PW2 in their testimonies and conceded that despite all that, the trial court grounded conviction without considering the defence evidence which, according to him contravened the provisions of the Criminal Procedure Act,

No. 7 of 2004. Later in his judgment at page 23 of the record of appeal, the learned judge stated that:

> *"Moreover, a conviction cannot, however, be based on a discussion of evidence of one side only. At the same time if the evidence is shaky and such that [both] appellants cannot be convicted with a clear conscience or there are circumstances indicating the [appellants] may have committed the offence or may not have, always and must be necessarily given [a] benefit of doubt...."*

Unlike the appellants' counsel, we do not agree with them that from the excerpted part of the impugned judgment the respondents were acquitted by failure to consider defence evidence by the trial court. On the contrary, the respondents' acquittal was a result of unsatisfactory evidence by the prosecution first and foremost coupled with exclusion of the defence evidence whether the learned judge's treatment of the prosecution evidence was sound is a different matter altogether. In the upshot, we find no merit in ground one and dismiss it.

The above notwithstanding, as the first appellate court did not do its job, the Court step into its shoes to consider and evaluate the respondents' evidence guided by the Court's previous decisions in **Director of Public**

Prosecutions v. Jaffari Mfaume Kawawa [1981] TLR 149; **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387 and **Omary Lugiko Ndaki v. Republic**, Criminal Appeal No. 544 of 10 2015 (unreported).

Upon our evaluation of the defence evidence, we have found that the prosecution failed to offer any meaningful cross examination against the evidence of the first respondent who denied to have ever seen PW1 and PW2 prior to the 22/02/2017 the day the three teachers visited his residence. The second respondent testified that he was arrested on 23/02/2017 when he went to Ng'ambo police station to deliver food to the first respondent. Both respondents vehemently denied to have committed the offence.

Coming to ground two, the appellant's complaint is that the learned appellate judge erred to hold that PF3 of PW1 was not admitted in court. Mr. Hassan argued in support of ground two that PF3 for PW1 was admitted in evidence as exhibit P1 and that for PW2 was admitted in evidence as exhibit P2. However, he conceded that both exhibits were not read out before the trial court, cannot be relied on by the Court and were liable to be expunged. Mr. Rajab for the respondents had same views and prayed to the Court that exhibits P1 and P2 be expunged from the record.

The complaint concerns the observations made by the first appellate court at page 229 of the record of appeal that the trial court relied on PF3 of PW1 which was not tendered and admitted in evidence as an exhibit. We hold that the first appellate court misconstrued the facts on record. As we gleaned at page 31 of the record of appeal that PW6 tendered PF3 of PW1 on 23/05/2017 and was admitted in evidence without any objection from the respondents as exhibit P2 which formed part of the prosecution evidence during trial. It was therefore a misconception by the first appellate court to find that exhibit P2 did not form part of the evidence on the record.

Nevertheless, it is clear that the two exhibits were wrongly relied upon by the trial court as, after admission, their contents were not read out. Failure to read out the contents of a document after its admission in evidence is an incurable irregularity on the authority of **Robinson Mwanjisi and Three Others v. Republic** [2003] T.L.R 218, in which the Court underscored the conditions which must be observed during the admission of documentary evidence:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted before it can be read out otherwise it is*

> *difficult for the court to be seen not to have been influenced by the same."*

The effect of failure to read out a document after its admission in evidence was discussed in **Ally Said @ Tox v. Republic**, Criminal Appeal No. 308 of 2018 (unreported) as follows:

> *"Mindful of our previous decisions stressing on the duty to read the contents of documentary exhibits after being cleared for admission, we are satisfied that the omission to have the contents of exhibit PI read out by the witness who tendered after it was cleared for admission was fatal."*

Having so observed, the Court proceeded to expunge the exhibit from the record. Based on that incurable irregularity, P1 and P2 must suffer the same fate and we accordingly expunge them from the record which means that had the first appellate court considered this anomaly he would have come to the same conclusion. Next, we turn our attention to grounds three and four.

The complaint in ground three is on discrepancies in the prosecution evidence, as found by the High Court, that the evidence of PW1 and PW2 were contradictory. Gound four is whether the first appellate court erred in

acquitting the respondents while the prosecution proved its case beyond reasonable doubt.

Mr. Saadun addressed the Court on grounds three and four jointly. It was his contention that the prosecution had the obligation to prove the ingredients of rape offence against the respondents, which are; the age of the victims, penetration and identification of the perpetrators. He argued that, the age of PW1 was proved by PW3 her father and PW5 her grandfather, while PW2 stated in court that she was 8 years old. He argued further that the evidence proving penetration from PW1 and PW2 who stated that they were raped by the respondents. He bolstered his argument with **Mohamed Juma @ Kodi v. Republic**, Criminal Appeal No. 18 of 2007 (unreported) that, the best evidence comes from the victims. On the identification of the perpetrators, Mr. Saadun submitted that, by the evidence PW1 and PW2 proved that the respondents were the culprits. Thus, it was his contention that the prosecution proved the offence beyond reasonable doubt.

In his reply, Mr. Rajab submitted that the prosecution evidence failed to prove the offences against the respondents beyond reasonable doubt. He

argued that the evidence of the victims adduced by the prosecution shows that when PW1 was cross examined by the 2nd respondent at page 15 of the record of appeal whether she cried during the act, she stated that people heard them crying and went to the room in which they were being raped by the respondents. However, PW2 presented another version of the same fact during cross examination by the 2nd respondent. She stated that she felt pain when the penis was inserted in her vagina but did not shout. She failed to name the people who heard them crying and entered the room where they were being raped. The prosecution did not call any of the individuals who were said to have heard the victims crying and had entered the room as stated by PW1. He argued further that the defence evidence by the second respondent was not challenged by the appellant. He contended that no report was immediately made to the responsible authorities within the local vicinity where this atrocious act of the victims being raped by the respondents allegedly occurred. In conclusion, he prayed to the Court to uphold the acquittal of the respondents.

Rejoining, Mr. Khamis Othman Abdalla, the learned Senior State Attorney implored the Court to consider the contradictions raised by the

respondents as immaterial because the prosecution evidence is supposed to be taken in totality and not pick one sentence that the victims were crying for help and not shouting. It was his contention that the alleged contradictions did not go to the root of the case citing the case of **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018 (unreported), despite the fact that both PW1 and PW2 did not report immediately the rape when done at the first time. Mr. Abdalla contended that although the victims delayed to report the criminal act, that did not affect their credibility because there was evidence that the respondents used to give them money.

Having carefully examined the entire evidence on record, there is no doubt that the prosecution case was laden with some contradictions and inconsistencies. Although the appellant' s attorneys implored us to hold otherwise, we are satisfied that the contradiction went to the root of the prosecution case. We shall now demonstrate why we are saying so.

The law on contradictions and inconsistences is well-established that in evaluating discrepancies, contradictions and omissions, the court should not pick pieces of sentences and consider them in isolation from the rest of other pieces of evidence. It is settled law that a contradiction can only be

considered as material if they go to the root of the case. See **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 (unreported).

On the other hand, we are mindful of the settled law that the best evidence in sexual offences comes from the victim as stated in **Selemani Makumba v. Republic** [2006] T.L.R. 379 and several other decisions of this Court. However, we hasten to emphasize that, the said position equally depends on the credibility of the respective witness on the facts of the incident and the connection of the accused to the offence. It is glaring from that it took nine months to report the fateful incident and arraign the respondents. The prosecution did not provide evidence explaining the cause of delay to report to either the victims' parents or elders or any member of the community or school. It is settled that delayed reporting dents the credibility of the evidence of the victims. In **Marwa Wangiti Mwita and Another v. Republic,** [2002] T.L.R. 39, the Court underscored that, the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry The

victims' delay in reporting the incidents in this appeal until they were quizzed by the school administration dented their credibility and reliability of their evidence to prove the charged offences..

The incredible account of the victims is further cemented by the contradictory versions of the victims on the occurrence of the alleged rape by the respondents in the same room. While being cross examined by 1st respondent, PW1 stated:

> "When *we are in your house other people stayed in the room, they are all men and they are three, I can identify them. I felt pain when you inserted your chululu (penis) to my vagina. I cried and people came but stayed outside."*

During cross examination by the 2nd respondent, PW1 said:

> "... *I cried for help when you were inserting your penis to my vagina as I was feeling pain. We were all in your room PW2 was crying too, people heard us crying and came to your room."*

PW2 who claimed to have been raped in the same room with PW1 was cross examined by 1st respondent and said the following:

" ..... I felt pain when you inserted your penis to my vagina but I did not yell."

During cross examination by the 2nd respondent, PW2 stated:

"I felt pain when you inserted your penis to my vagina, I did not yell, after (sic) did that to us I went home. ...... Even PW1 and another victim (name withheld) did not yell when you inserted your penis to their vagina."

In the circumstances of the instant appeal, we wish to reiterate what was stated in **Mathias Bundala v. Republic**, Criminal Appeal No.62 of 2004 (unreported):

"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."

To this end, we are settled that the above observation applies in the circumstances of this case as, apart from the victims giving improbable evidence on the incident and the involvement of the respondents in the commission of the offence, they materially contradicted each other during trial. The inconsistencies cast doubts in the prosecution case given that the

victims' claim to have been raped on the same day, time and place by the respondents.

Additionally, the prosecution presented no reasons for not parading all material witnesses to prove their case. Furthermore, the prosecution offered no explanations for not calling witnesses who were allegedly peeping from outside when the victims were being raped. The said witnesses were, in our view material who could have clarified to the trial court on the incidence of rape on specific dates. These contradictions in the prosecution case coupled with the failure to call the said witnesses weakened the prosecution case.

In view of our findings in ground three, we need not be detained with the issue whether the first appellate court was correct in holding as it did that the case for the prosecution was not proved beyond reasonable doubt. We agree with Mr. Rajab that the contradictions in the evidence by the two witnesses; PW1 and PW2 were material to the prosecution case on the commission of the offences on the alleged dates and if so whether the respondents were the actual culprits. Like the first appellate court, we are satisfied that the contradictions dented the credibility of the two witnesses

raising doubts in the prosecution case which should, as a matter of principle been resolved in the favour of the respondents by the trial court.

In the event, we find no merit in the appeal and dismiss it.

DATED at **DAR ES SALAAM** this 26th day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of November, 2023 in the presence of Mr. Ali Yusuph Ali learned Principal State Attorney assisted by Mr. Anuar Khamis Saadun, learned Senior State Attorney for the appellant and Ms. Mwanaidi Abdala Mohamed, learned counsel for the respondents, all the parties appeared remotely via video conference facilities linked from the High Court of Zanzibar at Tunguu, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL