IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MKUYE, J.A., KIHWELO, J.A. And NGWEMBE, J.A.)

CRIMINAL APPEAL NO. 263 OF 2021

HEZRON NDONE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Matogolo, J.)

dated the 7th day of December, 2020
in
Criminal Appeal No. 14 of 2020

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JUDGMENT OF THE COURT

11th December, 2023 & 6th February, 2024

KIHWELO, J.A.:

Hezron Ndone, the appellant herein was arraigned and convicted by the Court of Resident Magistrates of Njombe at Njombe. In the charge that was eventually laid at his door, the appellant was formally arraigned for four counts. The first count is incest by male contrary to Section 158 (1) (a) of the Penal Code, Cap 16 (the Code). The second count is unnatural offence contrary to Section 154 (1) (a) and (2) of the Code, read together with section 185 of the Law of the Child Act, No. 21 of 2009, the third count is incest by male contrary to 158 (1) (a) of the Code and the fourth count is unnatural offence contrary to Section 154 (1) (a) and

(2) of the Code, read together with section 185 of the Law of the Child Act, No. 21 of 2009.

At the height of the trial the appellant was convicted in all four counts, and was sentenced to imprisonment for a term of 30 years for the first and third counts as well as life imprisonment for the second and fourth counts. Furthermore, the appellant was ordered to compensate the victim the sum of TZS. 10 million. His appeal to the High Court was dismissed in its entirety (Matogolo, J.), hence this second appeal. The factual setting as unveiled by the prosecution during the trial may briefly be recapitulated as follows:

From a total of six witnesses and one documentary exhibit, the prosecution allegation was that, on unknown date and month in 2019 at Mpechi area within the District and Region of Njombe, the appellant had carnal knowledge of a girl aged eleven years, who, we shall henceforth identify her as the victim, for purposes of concealing her identity, and who happened to be the appellant's daughter. It was further alleged by the prosecution that, on unknown date and month in 2019 at Mpechi area within the District and Region of Njombe, the appellant had carnal knowledge of a girl aged eleven years, against the order of nature, who,

we shall henceforth identify her as the victim, for purposes of concealing her identity.

At the opening of the trial, Valestina Mkorongo (PW1), the wife of the appellant and mother of PW2 (the victim), testified that, the couple are blessed with five issues of marriage and that the victim was the elder, aged 10 years at the time when the alleged offence was committed. Her evidence was to the effect that, the duo were married and their matrimonial affairs deteriorated hence they experienced twists and turns over the past couple of years since there was constant acrimonious bickering. She further testified that, during their matrimonial quarrels the appellant chased her from their bedroom and instead she started sleeping in the kitchen with the little baby while the appellant and her other children including the victim were sleeping in their bedroom.

PW1, testified further that, one morning she observed the victim walking awkwardly and suspected that something was not right, but upon inquiring the victim, she replied that she accidentally fell from the coach while asleep the night before. On further inquiring, Ayubu Hezron Ndone (PW6), a nine-year old boy at that time and younger brother of the victim, she was informed that the appellant and the victim were sleeping together in the floor on the mattress while the other three kids were sleeping in

the bed. PW1 reported this unusual behavior, initially to her in-laws, the ten-cell leader and finally to the church leaders but all these efforts were barren of results as their plea for the appellant to stop his conduct and allow PW1 sleep in their matrimonial bedroom fell on deaf ears. In the contrary, the appellant reported PW1 to Njombe Police Station Gender Desk alleging that, PW1 hit the victim which resulted in her arrest but fortunately PW1 was bailed out.

There was some further prosecution evidence from the victim, PW2 who graphically described in minute detail how the appellant who was sleeping with her on a mattress on the floor raped her and had sexual intercourse with her against the order of nature. She further, testified how the appellant pleaded with her on several occasions not to make any noise and promised to buy her present. She further testified that, the appellant repeatedly raped and sodomized her more than seven times, on different occasions, and that, at all material times the appellant would commit the heinous act while the other three children were asleep on the bed in that same bedroom where the appellant and kids were sleeping while the mother, PW1 was sleeping in the kitchen with the younger child. In her testimony the victim told the trial court that the appellant was so overprotective of her, such that PW1 could not get space with her and

often the appellant would buy her present like biscuits, chips, buns and soft drinks. She further testified, on how she was summoned by the headteacher at her school and explained the ordeal she endured and how she was taken to hospital for medical examination and later to the police.

Henry Lema (PW3), a medical practitioner testified how he medically examined the victim's vagina and anus and found out that both of them were penetrated by a blunt object but did not indicate any sign of bruises at the time of examination. His further evidence was to the effect that, the victim's anus was large and discharging mucus that had a foul smell. PW3 then duly filled the PF3 which was later admitted in evidence as exhibit P1.

WP 7898B Detective Corporal, Fatuma (PW5) testified how she was informed of the child sexual abuse incident and started investigation by approaching the school teacher and interrogating the victim who implicated the appellant which led to his arrest. On the other hand, Edward Hilari Saleh (PW4) a Street Executive Officer, briefly testified how he unsuccessfully attempted to resolve the matrimonial strife between the appellant and PW1.

PW6's evidence was to the effect that, he was sleeping on the bed with his younger sister and a brother while the appellant and the victim

were sleeping on the mattress on the floor in the same bedroom while their mother, PW1 usually slept in the kitchen with their youngest sister. He further testified that, their house has three rooms namely, the bedroom, kitchen and the sitting room. He recounted on an earlier event in which the victim who hurt herself lied to the appellant that it was PW1 who beat her. In his further testimony, PW6 denied that he wasn't aware of any wrong doing by the appellant.

The appellant was formally arraigned in court on 28th January, 2020 and, that concludes the prosecution version which was unfolded during the trial.

In his sworn evidence, the appellant disassociated himself from any wrong doing and claimed that he was the husband of PW1 and father of the victim and other four children. His account was that, PW1 was not a faithful wife as she had an affair with another man and that, at one point the victim found her mother making love with another man. According to the appellant, he reported the extramarital affairs to his in laws and his parents. In his view, the entire case was fabricated against him so as to conceal PW1's extramarital affairs since she had already turned back the wedding ring to the appellant. He completely refuted having committed the offences in question.

On the whole of the evidence, the two courts below were concurrent in the finding that, PW1, PW2 and PW6 told a credible tale as to what transpired. The two courts, thus, found as an established fact that the appellant ravished the victim. Against this backdrop, the trial court and the first appellate court, respectively, convicted and upheld the conviction of the appellant to the extent as already indicated. As hinted upon, the appellant is aggrieved of both conviction and sentence upon seven grounds of grievance which may conveniently be reproduced as follows:

1. *That, the learned first appellate court erred to dismiss the appeal while the case totally based on the evidence of PW2 without considering the fact that the same was fabricated.*
2. *That the first appellate court erred to dismiss the appeal while the conviction of the appellant based on the contradictory evidence of PW1, PW2 and PW6.*
3. *That, the learned first appellate court erred to dismiss the appeal without considering that the trial court did not consider the defence case.*
4. *That, the learned first appellate court erred to dismiss the appeal while the trial court relied on the evidence of PW3 and exhibit P1 which were irregularly taken and admitted.*
5. *That the prosecution totally failed to prove the case beyond reasonable doubts.*

At the hearing, before us, the appellant was fending for himself, unrepresented, whereas Mr. Tito Ambangile Mwakalinga, learned State

Attorney, stood for the respondent Republic. The appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage after the submissions of the learned State Attorney.

For his part, Mr. Mwakalinga opposed the appeal and supported both the conviction and sentence. The learned State Attorney prefaced by arguing the first ground in support of the appeal and contended that the prosecution ably proved the case relying on the evidence of PW2, the victim. To support his proposition, he referred us to pages 16 to 20 of the record of appeal. Illustrating, the learned State Attorney argued that, the evidence of PW2 was credible and reliable as she testified that she was close to the appellant than PW1. In further elaboration, the learned State Attorney argued that, to prove that the appellant raped and sodomized the victim, the prosecution produced exhibit P1 and the testimony of PW3 which to him had nothing to do with family quarrels.

On the basis of the foregoing evidence, the learned State Attorney argued that, under the circumstances, it can safely be said that the prosecution ably proved the case and therefore, the first appellate court rightly found that the appellant was properly convicted and sentenced by the trial court. He then, rounded off his submission in support of this ground by arguing that, the first ground has no merit.

In relation to the second ground of appeal which is also similar to the fifth ground of appeal, the learned State Attorney in his brief and focused oral argument contended that, there was no contradiction between the evidence of PW6, PW2 and PW1. Illustrating, he referred us to page 12 of the record of appeal where PW6 testified about the appellant sleeping with the victim and what transpired on 1st January, 2020 when the victim hurt herself while running.

The learned State Attorney, further referred us to the testimony of PW2 who graphically described how she was brutally raped and sodomized by the appellant, and that, the last day to be raped was on 1st January, 2020. He took the view that, there was no contradiction at all, in the testimony of PW6, PW2 and PW1. He further argued that, even if we assume, for the sake of argument that, there was any contradiction in the testimony of PW1, PW2 and PW6, the same is minor and does not go to the root of the case. The learned State Attorney, paid homage to the case of **Lusungu Duwe v. Republic**, Criminal Appeal No. 76 of 2014 (unreported) in which the Court citing our earlier decision in **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported) expressed the general view that, contradictions by any particular witness or among witnesses cannot be escaped or avoided in

any particular case and that, minor contradictions, inconsistences, or discrepancies which do not affect the case of the prosecution, should not be made a ground on which the evidence can be rejected in its entirety. In his view, this ground has no merit too.

Arguing in response to the third ground of appeal which is also similar to the sixth ground of appeal, the learned State Attorney was fairly brief, he faulted the appellant for unfairly challenging the High Court for not considering the defence case. For, in his view, this argument was baseless since both the High Court and the trial court adequately considered the appellant's defence and found it barren of results. The learned State Attorney referred us to pages 53 and 87 of the record of appeal where both the two courts below considered the appellant's defence in which the appellant alleged that the case against him was fabricated and found out that the defence was a mere afterthought since PW1 was not the prime mover of the prosecution's case. The learned State Attorney urged the Court to dismiss this ground of appeal.

In relation to the fourth ground of appeal, the learned State Attorney was fairly very brief and to the point. He faulted the appellant's argument that the High Court erred in relying on the evidence of PW3 and exhibit P1 which evidence was irregularly taken and was not binding upon

the trial court, it being an expert opinion. The thrust of the learned State Attorney's submission is that, PW3 described in minute detail during his testimony what he observed upon medically examining the victim and this is evident at page 21 of the record of appeal. He took the view that, the trial court and the High Court rightly relied on the evidence of PW3 and exhibit P1 and therefore, this ground too has no merit.

Submitting in response to the seventh ground of appeal, the learned State Attorney contended that, the prosecution proved the case beyond reasonable doubt. Elaborating, he submitted that, the prosecution ably proved that, **one**, the victim was a biological daughter of the appellant, **two**, the victim was raped and sodomized and this was proved by PW2, the victim herself as well as PW3 and **three**, the victim testified that she was raped and sodomized by the appellant more than seven times. For him, the evidence was overwhelming against the appellant's guilty. In all, the learned State Attorney urged the Court to disallow the appeal in its entirety.

Rejoining, the appellant insistently submitted that, the case against him was fabricated by PW1, owing to their constant acrimonious bickering and that, both the police gender desk and the social welfare officer were behind his arrest which ultimately culminated to his arraignment in court

and subsequently, conviction and sentence. He implored the Court to allow the appeal and set him free.

We have anxiously considered the oral arguments of the learned State Attorney in line with the grounds of grievance which were lodged and adopted by the appellant and we have come to the conclusions that, the vexing issue in this appeal is whether the prosecution proved the case beyond reasonable doubt.

It is momentous to state that, in our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution. This is a universal standard in all criminal trials and the burden never shifts to the accused. As such, it is incumbent on the trial court to direct its mind to the evidence produced by the prosecution in order to establish if the case is made out against an accused person. This principle equally applies to an appellate court which sits to determine a criminal appeal in that regard. In our earlier decision in **Phinias Alexander and Others v. Republic,** Criminal Appeal No. 276 of 2019 (unreported), we cited with approval the decision in **Jonas Nkize v. Republic** [1992] T.L.R. 214 in which the High Court stated that:

> *"the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our*

law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking."

The term beyond reasonable doubt is not statutorily defined but case laws have defined it, in the case of **Magendo Paul & Another v. Republic** (1993) T.L.R. 219 the Court held that:

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."

We equally wish to state the time honoured principle of law that, a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. There is, in this regard, a long and unbroken chain of decisions of the Court which underscore this principle. See, for instance, **Jafari Mohamed v. Republic,** Criminal Appeal No. 112 of 2006 (unreported), in which we stated as following:

"An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it unreasonable or perverse" leading to a miscarriage of justice, or there have been a misapprehension of evidence or a violation of some principle of law: see, for instance, ***Peters v Sunday Post Ltd*** *[1958] E.A. 424:* ***Daniel Nguru and Four***

Others v. Republic, *Criminal Appeal No. 178 of 2004 (unreported)"*

Similarly, in the case of **Neli Manase Foya v. Damian Mlinga** [2005] T.L.R. 167 we had the following to say:

> *"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So, did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact."*

Now, turning to the appeal before us, we hasten to state at this point that, in seeking to answer the question on whether the prosecution in the instant appeal proved the case beyond reasonable doubt, we find it convenient first of all, to begin with the appellant's argument that the case against him was fabricated owing to their constant acrimonious bickering, and that the two courts below in reaching to their decisions they made did not consider this defence.

We are quite clear in our mind, even without resort to any stretch of imagination, that, the argument by the appellant that the case against

him was fabricated is to say the least, far-fetched and untenable. If at all, the appellant was trying to make such an enduring impression in the urge to save his skin as he was at the knife-edge, but all this effort was merely trying to swim against the tide.

The trial court and the first appellate court found out, and properly so in our view, that, the appellant's argument was a mere afterthought and this is because the matter was reported to the police and social welfare by the school teachers and not PW1, who is said to have had constant acrimonious bickering with the appellant, PW2 and PW6 the appellant's own children testified against him and to make matter worse for the appellant, PW3 and PW5 testified against him and these witnesses had no grudges against the appellant. We therefore, find considerable merit in the learned State Attorney's submission that, the trial and the first appellate courts adequately considered the appellant's defence at pages 53 and 87 of the record of appeal respectively and came to the conclusions that, the defence was nothing but a mere tricky to escape the course of justice.

The appellant in his own words, admitted sleeping in the same room with the victim, a ten year old daughter while PW1 was sleeping in the kitchen, and this reveals more than meets the eye. We will let the

appellant's words appearing at page 36 of the record of appeal paint a picture. He is recorded as saying upon cross examination:

> *"Yes, the said Sayuni Ndone is my daughter. We were sleeping in the same room."*

On the strength of shocking revelation by PW2 and PW6 that the appellant was sleeping with the victim a ten year old daughter at the time of the incident while PW1, the wife of the appellant was sleeping in the kitchen, and coupled with the evidence of the other prosecution witnesses in particular PW1, the mother of the victim who noticed that the victim was walking awkwardly limping, PW3 the medical doctor who established that the victim was raped and sodomized and PW5 the investigator who testified how it all started with the teachers who suspected that the victim was sexually abused, the appellant cannot escape liability as the perpetrator of the crime as he stood charged before the trial court and affirmed by the first appellate court.

Next, we will consider the complaint by the appellant that the conviction based upon the contradictory evidence of PW1, PW2 and PW6. Admittedly, PW6 testified about the incident that occurred in the night of 1st January, 2020 that the victim was sleeping near the door and hit herself on the tree while running from her mother but this fact was also testified

by PW1 who equally described the event of that day, 1st January, 2020 when she came back around 21:00 Hrs and found the victim sleeping near the door waiting for her father to come back and refused to sleep with her.

In our considered opinion there is no any material contradictions or inconsistences in the testimony of the two witnesses, and if any the same does not go to the root of the case which is rape and sodomy of the victim by the appellant. In the case of **Said Ally Ismail v. Republic**, Criminal Appeal No. 242 of 2010 (unreported) in which the Court was faced with analogous situation, we held that:

> *"Contradictions by witness or between witnesses is something which cannot be avoided in any particular case."*

We note that, there may have been some confusion or lapses of memory between PW1 and PW6 as to what exactly happened in the night of the incident on 1st January, 2020, but the evidence is very clear that the appellant slept with the victim upon return as it used to be in the other days. We are alive to the fact that due to frailty of human memory a witness is not expected to be accurate in minute details when retelling his story and more in particular if the matter is on details. See, for instance **Evarist Kachembeho and Others v. Republic** [1978] L.R.T. 70 and

John Gilikola v. Republic, Criminal Appeal No. 31 of 1999 (unreported). In our view, this discrepancy is very minor and does not go to the root of the matter and therefore, it can be glossed over.

We are satisfied in our minds that, on the evidence in record the trial court and the first appellate court were right in finding that the appellant was guilty as charged. Thus, for the foregoing reasons, we find this appeal to be without a semblance of merit and, in the result, we dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 29th day of January, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 6th day of February, 2024 in in the presence of the Appellant in person and Mr. Daniel Lyatuu, learned State Attorney for the Respondent/Republic vide video link from the High Court of Tanzania at Iringa, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL