**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MBEYA**

**AT MBEYA**

**CRIMINAL APPEAL NO. 40 OF 2020**

*(From the Resident Magistrates Court of Mbeya, Criminal Case No. 80/2019)*

**NICKSON S/O MUNYANGO ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 15.06. 2020*

*Date of Judgment: 30.06.2020*

**Before: Dr. MAMBI, J.**

In the Resident Magistrate Court of Mbeya, in Mbeya Region, the appellant Charles **NICKSON S/O MUNYANGO** was charged with the offence of rape c/s 131(1) (2) (e) and c/s 131 (1) of the Penal Code, Cap 16 [R.E.2002].The records from the trial court show that the appellant faced his charges after being alleged to have raped a School girl aged at fourteen years old between 3/2/2015 and 15/03/2019. It was alleged that on the material date the appellant did have canal knowledge with the young girl

at Chapakazi Village Usongwe ward, The District and Region of Mbeya. The appellant was found guilty as charges where he was convicted and sentenced to 30 years imprisonment.

Aggrieved, the appellant his Appeal in this Court to challenge the conviction and sentence basing on seven similar grounds as follows:

1. That the trial magistrate erred in point of law and fact in convicting the appellant basing on the evidence adduced in court by PW2, PW3, PW4 and PW5 which was not water-tight to warrant conviction against the appellant with the charged offence of rape.
2. That the trial resident magistrate grossly erred in law and fact in rejecting the appellant's defence which had not been challenged or contracted.
3. That the trial resident magistrate erred in point of law and fact in convicting and sentencing the appellant by believing the evidence of the victim that he had sex with the victim on 03/02/2019 but the victim just kept quite until on 15/02/2019
4. That the trial resident magistrate erred in point of law and fact to convict the appellant by believing on the evidence of PW2 that on 15/02/2019 at night time he found victim and the appellant having sex but he couldn't state whether he raised an alarm for asking an assistance from his neighbors

5. That the trial resident magistrate erred in point of law and fact in convicting the appellant relying on the evidence of PW4 (MD) with exhibit P2 a PF3 but the witness in his evidence he did not state whether he noticed (a) penetration even slight in the victim's vagina
6. That the trial resident magistrate erred in point of law and fact in convicting the appellant relying on the evidence of PW5 with exh. P3 (cautioned statements) that the appellant confessed to have sex with the victim without taking into account that the said cautioned statement of the appellant was not freely and voluntary made against
7. That the trial resident magistrate erred in point of law and fact in convicting the appellant while the prosecution side failed completely to prove its charge against the appellant beyond all reasonable doubt as per requirement of the law.

Responding to ground number one, the prosecution through the learned State Attorney for Republic Ms Prosista submitted that all the grounds of appeal have no merit since the evidence was clear that the prosecution proved the case beyond reasonable doubt.

The learned State Attorney further submitted that the evidence of PW1, PW2, PW3, PW4 and PW5 under the proceedings is clear that prosecution proved the charges against the appellant beyond reasonable doubt that the appellant did rape the victim. He argued the evidence of the victim is clear that the appellant had sexual intercourse with the victim for several times. The

learned State Attorney referred this court to the decision of the Court in ***Selemani Mkumba*** which stated that, the best evidence is that of the victim.

In his rejoinder, the appellant briefly submitted that, he still rely on his ground of appeal.

Having carefully gone through the proceedings and judgment of the trial court, the grounds of appeal and submissions from both parties, I find the first issue is whether or not the prosecution proved the charges in both counts against the accused or not. The records show that the trial magistrate mainly relied on the evidence of the victim to convict the accused/appellant. I have no doubt as the law provides that the best evidence is that of the victim, however in my view the weight of that evidence must be thoroughly considered and given proper due weigh otherwise there could no needs of other witnesses. The trial magistrate at page 2 and 3 of judgment just stated that the victim's evidence connotes that she consented to have sex with the accused twice. The Trial Magistrate just support that statement with an authority (the case) with properly evaluating the evidence of the victim with reasons taking into account it took a long time (one month) before the matter was reported. In my considered view, even the PF3 could have not been much useful if the victim was raped for several times and the matter was reported after almost two weeks.

In this regard, one of the key question to be desired is that; was the evidence of the victim (PW1) who was alleged to be raped for

several times by the appellant reliable?. The evidence of the victim show that she was raped for several times between February and March 2019 and the matter was reported after almost one month that is on March 2029.

Looking at the records and the evidence from the witnesses it appears that the victim was alleged to have been raped in April for several times between 2/2/ 2019 and 15/03/2019but the victim and even her parents or guardians kept quiet until 15/03/2019after almost one month. The trial magistrate at page 3 under paragraph one is also doubting as to who reported the matter and when though she ended assuming that it was the police who reported the matter. Since her doubt was based on the matter of evidence, in my view she could not make an assumption on the matter that is purely based on the evidence. In my considered view one month was a long time for the witness to be more reliable on her evidence. The question to be asked here, is why the victim just kept quiet such a long time after one month when she decided to mention the appellant responsible and not to mention him on earlier?. Even the evidence of PW2 (grandfather who was staying with the victim) who could be in better position to corroborate the evidence of PW1 creates some doubts as he testified she left the young girl at home and went to the farm but when she came back she didn't both to look for the child who was alleged to have slept the appellant's home. Indeed the victim in her evidence just said that she slept with the he appellant and had sex two times but

PW2 who was staying with the victim did not support this evidence to show if the victim was absent at his house for two days or not. The timing of mentioning the appellant creates some doubts on the reliability of the victim's evidence. I wish to refer the decision of the court of Appeal in ***MARWA WANGOTI & ANOTHER VS REPUBLIC TRL 2002*** at page 39 where the court at page 43 observed that:

> *"The ability of witness to name a suspect* ***at the earliest opportunist is an all-important assurance of his reliability in the same way as unexpected delay or complete failure to do so should put a prudent court to inquiry".***

Looking at the trial court records, I am of the considered view that the trial court should consider and weigh the evidence of the witness basing on her *ability to name a suspect* at the earliest opportunity as an important assurance of her reliability as compared to her long time (one month). Since the matter was reported after the long time the trial magistrate was required to take due diligence in analyzing and keenly considering the evidence of the victim in line with other witnesses and other surrounding factors before making the decision. Failure for the victim to do so should put a trial court to inquiry and satisfy itself if such delay affected the evidence or not.

On the other hand, the prosecution argument that the PF3 presented by the doctor was enough to prove that the victim was raped cannot be solely relied as evidence since it took almost one year before the doctor examined the victim. I am aware that

the most reliable in this case in my considered view would be the victim (PW1) who was the child of 14 years old.

The question is was the testimony of PW1 enough to convict the appellant on the charges? As I observed earlier that given the fact that it took one month until the victim named the appellant to be responsible for raping and her, it follows that the evidence of PW1 had no proper probative value in the case in hand and ought to be expunged from the record from the beginning at the trial court. Now if the evidence from the key witness that is the victim is expunged will there be other reliable evidence?. As clearly observed by the court in ***AMANI FUNGABIKASI VERSUS THE REPUBLIC,*** Criminal Appeal No.270 of 2008 CAT (Unreported) that once such evidence is expunged there is no other material upon which the appellant could bear criminal responsibility for the offence in question. This is due to the fact that in rape cases, the best evidence comes from the victim.

It is without a doubt that the trial court's conviction was based on the evidence of PW1 who was the victims of fourteen years old. There is no doubt that as it had severally held that the best evidence of rape comes from the victim (See ***SELEMANI MAKUMBA VS REPUBLIC [2006] TLR 384)*** in which the court at page 379 held that:

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent; and in case of any other woman where consent is irrelevant, that there was penetration."*

However, it is the primary duty of prosecution to prove the criminal cases such as rape beyond reasonable doubt by proving to the court that the victim was actually raped by the accused and there was penetration. It was essential for the Republic which had charged the appellant with raping and PW1 on the material date to lead evidence showing exactly that PW1was raped on the material date. See ***Ryoba Mariba @ Mungare v R, Criminal Appeal No. 74 of 2 003 (unreported)*** as discussed by the court of Appeal in ***ALFEO VALENTINO VERSUS THE REPUBLIC CRIMINAL APPEAL NO. 92 OF 2006.*** I agree with the appellant the case against the appellant was not proved beyond reasonable doubt. I am aware that the general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. This includes the burden to prove facts which justify the drawing of the inference from the facts proved to the exclusion of any reasonable hypothesis of innocence. Since the burden is proof of most of the issues in the case beyond reasonable doubt, the guilt of the accused must be established beyond reasonable doubt.My findings from the trial court records have revealed that the prosecution had to establish beyond any reasonable doubt that it was the Appellant had rapedPW1. This is in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt (See ***ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.*** In our case,

it appears the case against the appellant was entirely based on the evidence of PW1.

As rightly argued by the appellant that the prosecution has just relied evidence of PW1 who was the child of 14 years old and PW3 (the doctor) to prove a case in which the trial court wrongly convicted the appellant without properly weighing the evidence and credibility of the witnesses. This can be reflected from the case of ***MATHAYO NGALYA @SHABANI VERSUS REPUBLIC, CRIMINAL APPEAL NO. 170 OF 2006*** (unreported) where the court of Appeal held that:

> *"The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) of section 130 (4) of the Penal Code ... provides; - 'for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence.'* ***For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence****".* [Emphasis supplied].

It is on the records that the prosecution didn't make efforts and due diligence to clear all doubts on the duration of time from the first time the victim was alleged to have been raped to the date of mentioning the accused/appellant. In my considered view, failure to do so left a lot of questions to be desired. That should benefit the appellant. It appears the accused was

convicted basing on his defence or evidence weakness rather on the prosecution weakness. It is trait law that that in criminal law the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case. See ***Christina s/o Kale and Rwekaza s/o Benard vs Republic, TLR [1992***] at p.302. The standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case against the accused beyond reasonable doubts.

The Judgment of the Trial Court show that the trial magistrate did not give due weight and analyze defence evidence. I wish to quote the statement by the magistrate found at page 3 under the last paragraph which reads:

I have keenly gone through the defence case but I have not seen anywhere where the accused disputes or challenges this piece of evidence.

Reading on the judgment by the Magistrate at pages 3, 4 and 5 it appears the trial magistrate just assumed the appellant admitted all facts something which is not true. Indeed the trial court proceedings show that the accused/appellant narrated a long story in his evidence and defence but the Magistrate ignored the appellant defence and evidence and mainly relied on the prosecution evidence to find the appellant guilty.

It is a well settled principle that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has

been emphasized in various authorities by the court. If one look at the judgment it is clear that the Magistrate did not consider the defence evidence apart from just basing on the prosecution evidence. This according to the law is fatal as it can occasioned to injustice to the other party that is the defence or the appellant in our case. I wish to refer the decision of the court in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

See also ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015, the court at Page 16*** which underscored the importance of without considering the defence evidence. It is also imperative to refer the decision of the court that in ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported),*** cited in***YASINI S/O MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No.13 of 2012***where the Court warned that considering the defence was not about summarising it because:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The Court in Leonard Mwanashoka (supra) went on by holding that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken.* ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too****. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."*[Emphasis added]

My analysis of evidence and findings has revealed that the prosecution did not prove the charges against the appellant at the trial court beyond reasonable doubts. For the reasons, I am of the firm view that the guilt of the appellant was not proved beyond reasonable doubt, thus the prosecution had not established the guilt of the appellant beyond all reasonable doubt. I am satisfied that the evidence by the prosecution side was not strong enough to convict the appellant. In the circumstances, conviction quashed and sentence is set aside resulting in the immediate release of the appellant. The appeal is allowed. I order that the appellant should forthwith be

released from prison unless he is otherwise being continuously held for some other lawful cause.

**DR. A.J. MAMBI**

**JUDGE**

**30/06/2020**

Judgment delivered electronically through virtual court this 30th day of June, 2020 in presence of both parties.

**DR. A.J. MAMBI**

**JUDGE**

**30/06/2020**

Right of Appeal explained.

**DR. A.J. MAMBI**

**JUDGE**

**30/06/2020**