IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 156 OF 2019

(Appeal from the Criminal Case No. 139 of 2014 in the District Court of Bukombe at Bukombe (Swallo, SDRM) dated 2nd of April, 2015.)

REVOCATUS S/O JOHN @ DAVID ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

26th, & 30th October, 2020

ISMAIL, J.

The appellant was arraigned in the District Court of Bukombe at Bukombe on an allegation of rape, contrary to sections 130 (2) (e) and 131 of the Penal Code, Cap. R.E. 2002 (now R.E. 2019). The contention by the prosecution was that on 5th February, 2014, at about 11:00 hours at Runzewe within Bukombe District in Geita Region, the appellant did unlawfully have a carnal knowledge of BCD (in pseudonym), a girl of sixteen years of age, (the Victim).

The appellant pleaded not guilty to the charge, necessitating a trial which saw the prosecution marshal the attendance of five witnesses against one for the defence. At the conclusion of the proceedings, the trial court convicted the appellant and sentenced him to imprisonment for thirty years.

Deducing from the facts as read out during the preliminary hearing, it is gathered that the victim, then sixteen years of age and a student at Uyovu Primary School, was allegedly involved in a love affair with the appellant. Sometime in April, 2014, the victim allegedly informed the appellant that she was carrying a pregnancy, and that she had stopped attending classes. Out of panic, the appellant proposed that the duo flee to an unknown place but the victim refused. News of the victim's pregnancy filtered out, reaching the police who apprehended the appellant. On interrogation, the appellant denied any involvement. He was, however, arraigned in Court on 10th June, 2014, on the allegation that on 5th February, 2014, he raped the victim. The appellant protested his innocence at trial, denying any knowledge of the victim or being involved in the alleged incident. The appellant argued then, that evidence against him was cooked up.

The trial court could was not convinced by the defence. The learned trial magistrate held the view that a case had been made out and that the prosecution had proved its case at the required standard. He convicted the appellant and imposed the jail sentence.

The trial court's decision has utterly aggrieved the appellant. He has instituted the instant appeal, challenging both the conviction and the sentence on the following paraphrased grounds:

1. *That, the trial magistrate erred in law and in fact when she failed to properly examine and evaluate the evidence before her, thereby arriving at a wrong conclusion.*
2. *That, the trial court erred in law and in fact when it convicted and sentenced the appellant while the prosecution had not proved its case.*
3. *That, the trial court erred in law when it convicted the appellant based on evidence which was suspect, and when it failed to conduct a trial within a trial when PW3 tendered her testimony.*
4. *That, the trial court erred in law when it failed to consider the appellant's defence.*
5. *That, the trial court's conviction was wrong as it was not based on a testimony which was not cogent enough to sustain a conviction.*

Hearing of the matter pitted the appellant who fended for himself against Ms. Ghati Mathayo, learned State Attorney, who represented the respondent. Being a lay person, the appellant offered the respondent the opportunity to present first while he, would submit last. Addressing the Court, Ms. Mathayo, supported the appeal and declined to support the conviction and sentence passed by the trial court. Picking ground five of the appeal to justify her stance, the learned counsel argued that the prosecution's case which was mainly dependent on the testimony of PW3, the victim, was not proved beyond reasonable doubt. Ms. Mathayo held the view that a witness can be considered credible if his testimony meets the test set out in ***Edson Mwombeki v. Republic***, CAT-Criminal Appeal No. 94 of 2016 (unreported). She submitted that the first test is coherence while the second is consistency. Evaluating PW3's testimony, the learned counsel argued that the same is suspect. She asserted that at page 6 of the proceedings tells quite clearly that it is the police who took her. In this case, it is the police that initiated the process which led to the appellant's apprehension. Making reference to page 7 of the proceedings, the respondent's counsel testified that the police coerced her into testifying against the appellant which is quite unusual. Furthermore, the learned

counsel held the view that there is no testimony that suggests that the appellant threatened PW3 not to disclose the incident.

Highlighting the prosecution's evidence, Ms. Mathayo contended that PW3 testified to the effect that they had a sexual intercourse with the appellant at home without disclosing whose home that was. The learned counsel argued further with respect to the question of the victim's age. It was her contention that the victim's age was disclosed while the victim was at the dock but without any details on when exactly she was born and where she was attending school to, if at all. The learned attorney argued that the expectation was that the issue would be clarified by PW4 and PW5, the victim's parents, who chose to say nothing. She concluded that, in view thereof, the testimony on which the conviction was founded was neither credible nor was it reliable to ground a conviction.

Ms. Mathayo further contended that the prosecution witnesses marshaled for testimony talked about pregnancy but that was not an offence with which the appellant was charged. She further argued that, even after the child's birth, no DNA test was carried out. This, she said, left a mere assumption that the pregnancy came as a result of the alleged rape. Overall, the learned attorney submitted that the prosecution did not prove the case beyond reasonable doubt. She prayed that the appeal be

allowed and the trial court's decision be set aside and the appellant be set at liberty.

The appellant's submission was laconic. Besides concurring with the respondent's contention, he argued that PW4 who testified on behalf of the prosecution was not listed during the Preliminary Hearing. This means that he was not eligible for testifying and that her testimony ought to have been expunged. He urged the Court to allow his appeal and set him free.

From these concurrent submissions, one issue which requires settlement by the Court is whether the case against the appellant was proved at the required standard. This question takes into consideration the fact that the cardinal principle is that burden of proof in criminal cases is cast upon the prosecution. This imperative requirement has been emphasized in numerous decisions of this Court and the Court of Appeal. In ***Joseph John Makune v. Republic*** [1986] TLR 44, it was observed:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."*

This position was re-stated, yet again, in ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), in which it was held as follows:

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shifts back to prosecution."*

To be able to discharge this ominous duty, the prosecution's testimony, taken in its totality, must be sufficient, cogent and credible. As submitted by Ms. Mathayo, credibility of the testimony from which conviction is to be grounded is gauged by the coherence of the testimony of one or more of the key witnesses; and the way the same is considered in relation to the testimony of other witnesses. This position has been exquisitely underscored in ***Edson Mwombeki*** (supra), in which conviction of the appellant, as is in this case, hinged on the credibility of the victim. In highlighting the importance of credibility of a witness, the superior Court quoted its earlier position in ***Shaban Daudi v. Republic***, CAT-Criminal Appeal No. 28 of 2001 (unreported) in which it was held in part as follows:

*"..... The credibility of a witness can be determined in two other ways. **One**, when assessing the coherence of the testimony of that witness, **two**, when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person ...."*

As rightly contended by the respondent's counsel, conviction of the appellant was largely dependent on the testimony of PW3, the victim. The trial court was moved by the legendary position that evidence of the victim of tender age in rape offences is the most crucial and decisive force in grounding a conviction, and that the same need not be corroborated. This is a position which is premised on the provisions of section 127 (7) of the Evidence Act, Cap. 6 R.E. 2019, and as stated in many court decisions, including ***Bakari Hamisi v. Republic***, CAT-Criminal Appeal No. 172 of 2005 (unreported), wherein it was held:

".... Conviction may be founded on the evidence of the victim of rape if the Court believes for the reasons to be recorded that the victim witness is telling nothing but the truth."

This position was underscored in ***Godi Kasenegala v. Republic***, CAT-Criminal Appeal No. 10 of 2008 (unreported) in which it was stated:

"It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually

witnessed the incident, such as doctors, may give corroborative evidence."

The condition precedent, however, is that the said testimony must tell nothing but the truth. This is done after the trial court's assessment of credibility of the evidence to be relied upon. Assessment of PW3's testimony reveals that the same is stitched along with serious issues which exhibit lack of credibility. The testimony lacks any sense of coherence with itself and it provides a position that is variant from what other witnesses testified on the matter. More worrying is the fact that PW3 testified that she was coerced by the police into testifying against the appellant. This is a stunning concession of the fact that her testimony is nothing but a bunch of pathological lies which are highly inconsistent with what section 127 (7) of the Evidence Act (supra) provides. In ***Mohamed Said v. Republic***, CAT-Criminal Appeal No. 145 of 2017 (Iringa-unreported), the upper Bench urged a caution in the treatment of the testimony of the prosecutrix of rape. It held:

We are also aware that under section 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded on uncorroborated evidence of the victim. However we wish to emphasize the need to subject the evidence of such victims to security in order for courts to be

satisfied that what they state contain nothing but the truth...."

"We think it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and s. 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing offenders only in deserving cases."

It is my conviction that, in the absence of credence in the testimony of PW3, the allegation of rape against the appellant was not proved, especially where the rest of the testimony just glossed over on this issue, preferring to pitch its tent to the issue of pregnancy which was not part of the allegations contained in the charge that founded the trial proceedings.

I am overly convinced that the testimony adduced by the prosecution's witnesses was deficient and highly unconvincing, rendering the prosecution's case unproven.

The appellant has raised an issue with respect to insertion of PW5 in the list of witnesses. The contention is that, Swedi Milele, whose testimony appears at pages 11 and 12 of the typed proceedings was not listed as one of the prosecution witnesses when the matter came for a preliminary

hearing on 11th August, 2014. This is true and the record is quite clear on that.

Noting, however, that the flaws highlighted above have far more grave consequences than mere sneaking of PW5 in the list of witnesses, I choose to say nothing in respect of this issue, and decide the matter based on what I have stated with respect to the respondent's concession.

In consequence of all this, I allow the appeal and order that the conviction and the sentence be set aside, and let the appellant free, unless held on some other lawful grounds.

It is so order.

Right of appeal explained.

DATED at **MWANZA** this 30th day of October, 2020.

M.K. ISMAIL

JUDGE

Date: 30/10/2020

Coram: Hon. M. K. Ismail, J

Appellant: Present in person.

Respondent: Ms. Ghati Mathayo, State Attorney

B/C: P. Alphonce

Court:

Judgment delivered in chamber, in the presence of both parties, this 30th day of October, 2020.

M. K. Ismail

JUDGE

At Mwanza

30th October, 2020