**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM REGISTRY REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 110 OF 2020**

(Arising from the Judgment of the District Court of Kinondoni at Kinondoni in Criminal Case No. 379 of 2018 dated 21st November, 2019 before Hon. H.M. Hudi, **RM**)

**JOHN GODLOVE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

21st August & 02nd October, 2020.

**E. E. KAKOLAKI J**

This is an appeal by the appellant against the decision of Kinondoni District Court that convicted him of the offence of Rape; Contrary to section 130(1)(2) and 131(1) of the Penal Code, [Cap. 16 R.E 2002] and sentenced him to serve a term of thirty (30) years imprisonment in Criminal Case No. 379 of 2018. Discontented he is before this court by way of appeal expressing his dissatisfaction canvassed with eleven (11) grounds of appeal which for the purposes of this appeal can be rephrased and reduced into three grounds namely:

1. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant basing on the prosecution evidence that was not authenticated and obtained in contravention of the mandatory provision of the section 210(3) of the Criminal Procedure Act, [Cap. 20 R.E 2002].
2. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without assessing and resolving material contradictions of prosecution witnesses as follows:
   (a) Contradiction on the evidence of PW3, PW4, PW6 and PW8 regarding commission of the alleged rape.
   (b) Contradiction between the evidence of PW4 and PW6 on whether the victim was raped on the fateful day and/or had experienced sexual intercourse before.
   (c) Contradiction between the evidence of PW4, PW5 and PW8 regarding the type and colour of the motor vehicle used to abduct the victim before being raped.
   (d) Contradiction between the evidence of PW4 and PW1 regarding the place where the victim and the appellant were taken by the 2nd accused.
   (e) Contradiction between the evidence of PW4 and PW6 on the time when rape was committed and the time when PW4 was examined.
3. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without considering the fact that the prosecution case was not proved beyond reasonable doubts.

Basing on those grounds the appellant is pleading this court to quash the proceedings and his conviction and set aside the sentence meted on him and consequently order his immediate release from prison.

The facts that gave rise to this appeal as deciphered from prosecution case may be stated briefly as follows. Before the trial Court the appellant together with one Abdul Swamad Othman were charged jointly with the offence of Gang Rape; Contrary to Section 130(1)(2)(e) and 131A(1) and (2) of the Penal Code, [Cap. 16 R.E 2002]. It was prosecution case that on the 19/12/2017 at Kinondoni area within Kinondoni District in Dar es salaam Region the appellant and his co-accused had carnal knowledge of one **NWM** a girl of 17 years old. Both accused persons denied the charge the result of which moved the prosecution to call in eight witnesses in a bid to prove its case. At the closure of prosecution case the trial court found the appellant with a case to answer and called him to enter his defence while acquitting the second accused person of the charge he was facing. After entering his defence the trial court in its judgment substituted the offence of Gang Rape; Contrary to Section 130(1)(2)(e) and 131A(1) and (2) of the Penal Code with Rape; Contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, in which the appellant was found guilty and convicted of and sentenced to 30 years imprisonment in jail.

It is in further facts that, on the fateful day the victim (PW4) was coming from her extra-curriculum studies commonly known as "tuition". In the afternoon while at Mwenge ITV area within Kinondoni District preparing to go back home was abducted by the appellant and his colleague (2nd accused) who was driving a motor vehicle make Toyota Land Cruiser Prado with Reg.

No. T 611 BGN and taken to the appellant's room, undressed and raped. On coming outside the room while complaining PW4 was assisted by PW8 the appellant's neighbour and other neighbours and escorted to the commuter bus stand and managed to reach home at around 17.00 hours where she reported to her mother of what had befell her. The mother also reported to PW4's step father PW3 who together with PW4 and her mother reported the matter to Kijitonyama Police station, issued with PF3 and eventually the appellant arrested by PW2 on the 20/12/2017. PW4 was taken to Sinza/Palestina Hospital on the incident day and examined by PW6, the Assistant Medical Officer at around 15.00 to 16.00 hours who through PF3 Exh. P4 established that PW4 had neither hymen nor bruises but sperms in her vagina thus proving penetration. The 2nd accused was arrested later in August, 2018. During investigation 2nd accused cautioned statement was recorded and identification parade conducted to both accused person where by PW4 managed to identify them. The said 2nd accused cautioned statement and two identification parade registers were tendered and admitted in court as Exh. P1, P5 and P6 respectively. Also the motor vehicle alleged to have facilitated commission of an offence and its seizure certificate were tendered and admitted in court as Exh. P2 and P3 respectively.

During defence the appellant denied to have committed the offence alleging that he was framed up in that case by one police officer going by the name of Jose after they had quarrelled with over his girlfriend. That upon his arrest believing associated with misunderstanding between him and Jose was surprised to be charged with rape offence together with unknown person to him. He denied knowledge of the victim generally.

The trial court having considered both parties evidence was satisfied that prosecution case was proved beyond reasonable doubt and that the appellant's defence did not raise doubt to the prosecution case, thus proceeded to convict and sentence him according.

When the appeal came for hearing the appellant appeared unrepresented from remote in prison with aid of video conference facility, whereas the respondent was represented by Mr. Adolf Kisima, learned State Attorney. In arguing his appeal the appellant invited this court to consider all his grounds of appeal while at the same time opting to hear first from the learned State Attorney so as to enter his rejoinder submission. On his part Mr. Kisima from the outset informed the court that the respondent was supporting the appeal on two grounds that, **one**, there was non-compliance of the provision of section 210(3) of the CPA by the trial court and **secondly,** contradictions on the testimony of prosecution witnesses that affected the prosecution case as stated by the appellant in his grounds of appeal.

Submitting on the first ground in support of the appeal Mr. Kisima said, after going through the proceedings he noted and agrees with the appellant's first ground that there is non-compliance of section 210(3) of the CPA, as the trail magistrate failed to read to the prosecution witnesses the recorded evidence as required by the law. He however observed, the omission did not prejudice the appellant anyhow and is curable under section 388 of the CPA. He relied on the case of **Athuman Hassan Vs. R**, Criminal Appeal No. 84 of 2013 (CAT-unreported). On the contradictions by prosecution witnesses he said, there was material contradiction between the evidence of PW3, PW4, PW6 and PW8 on the time when the offence was committed, the time

the victim (PW4) arrived home and the time she was examined by PW6. He reiterated while PW3 says PW4 arrived home after 17.00 hours on the 19/12/2017, taken to police for reporting the incidence and issue of PF3 before examined by PW6, PW6 states that he examined PW4 at about 16.00 to 17.00 hours the time which PW8 testified was the time when the offence committed. According to PW8 the appellant arrived at appellant's home at 15.50 and the rape incidence lasted for 30 minutes later on. Mr. Kisima said, it is impossible for PW4 to be at home, at the scene of crime and examined by the doctor at the same time. The contradictions to him raised doubts as to whether the offence of rape was committed at all and if yes whether committed by the appellant.

I have had an opportunity of visiting the entire record of this matter. It is true and I agree with both the appellant and Mr. Kisima that, the trial court violated the provisions of section 210(3) of the CPA, that requires the trial magistrate soon after recording witness's evidence to inform the witness that he has a right to have his testimony read over for him to comment on. Subsection (3) of the section provides.

> *210(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.*

The appellant's complaint on that non-compliance is that the evidence obtained is not authentic and the court cannot rely on it to convict him, which

omission Mr. Kisima submitted is curable under section 388 of the CPA. After examining this complaint I share Mr. Kisima's submission on this point and hold that the omission is salvaged under section 388 of the CPA as the appellant was not prejudiced in any way since the complaint was supposed to come from the prosecution witnesses and not him. I have however noted that, neither the prosecution witnesses nor the appellant complained to have been prejudiced for mis-recording of his or her evidence, hence the omission is not fatal. That position of the law was also adumbrated in the case of **ATHUMAN HASSAN V. REPUBLIC,** Criminal Appeal No. 84 of 2013 (CAT-Unreported) where the Court of Appeal had this to say:

> *"The record of the proceedings of the trial court shows that there was no compliance of section 210(3) in the process of record the evidence of the witnesses. However, we do not see the substance of the appellant's complaint because it was the witnesses who had the right to have the evidence read over to them and make a comment on their evidence. We do not even think that the omission occasioned a miscarriage of justice to the appellant. See the case of* ***Jumanne Shaban Mrondo V R*** *Criminal Appeal No. 282 of 2010 (CAT-unreported)"*

The same was also the holding in the case of **Issa Juma Idrisa and Another** V. R, Criminal Appeal No. 218 of 2017 on the interpretation of the provision of section 210(3) of the CPA, where the Court of Appeal had this to say:

*"...we think the position is settled that, in terms of section 213(3) of the CPA, it is the witness who has the right to question the authenticity of the record and the appellant being one f the witnesses did not raise such complaint. In absence of such complaint such anomaly is not fatal [see* ***Republic V. Hans Aingaya Macha****, Criminal Appeal No. 499 of 2016 (Unreported) in which the case of* ***Jumanne Shaban Mrondo Vs. Republic*** *(supra) and* ***Athuman Hassan Vs. Republic****, Criminal Appeal No. 84 of 2013 (Unreported) were cited]. We, therefore. Agree with the learned Senior State Attorney that no miscarriage of justice was thereby occasioned. The infraction is curable under section 388 of the CPA"*

For the foregoing the complaint by the appellant in the first ground is meritless and is hereby dismissed.

I now turn to consider and determine the issue as to whether contradictions of prosecution witnesses as raised in the 2nd ground of appeal and conceded to by Mr. Kisima created doubts to the prosecution case to the extent of affecting conviction of the appellant. It is trite law that where there is alleged contradictions and inconsistencies of evidence in the case the Court has a duty to examine them and establish whether they are minor or material and whether they go to the root of the case. This position of the law was adumbrated in Court in the case of **Mohamed Said Matula Vs. R** [1995] TLR. 3 in the following words:

*"where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible , else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"*

This being the first court has power to discharge that duty as it is alleged the trial court failed to so do. To start with let me examine the evidence of PW4 and PW6 as to whether PW4 was raped. It is in PW4's evidence that she was rape by the appellant. And when cross-examined by the appellant at page 25 of the typed proceedings whether she was virgin said she, she had never been involved in sex before the day she was raped and that after being raped she came out of appellant's room with her clothes stained with blood. Her evidence is contradicted by doctor's testimony PW6 at page 40 of the proceedings when stated that, his findings after examination of PW4 were that she had no hymen and bruises except sperms in her vagina. Now if truly PW4 was raped why lying to the court that she had never have sexual engagement before and that on the fateful day her clothes were stained with blood resulted from the said rape. This in my opinion dilutes the credibility of her evidence. That apart, no evidence was advanced by prosecution through PW6 to tell how long the said sperms lasted in the victim's vagina to prove whether the alleged rape was committed on that day. With all these contradictions and deficiencies of evidence by PW4 and PW6, PW4's evidence cannot be spared from being untrustworthy and I so hold. I

therefore hold that, it is doubtful whether PW4 was raped and if so on the alleged day.

With regard to the time when the alleged rape was committed and PW4 examined, PW3 is on record that after receiving the report of PW4's rape incidence from PW4's mother (his wife) at around 17.00 hours the matter was reported at Kijitonyama police station and later on the victim examined by the doctor PW6. PW6 gave the contrary evidence on the time he examined PW4 to be between 15.00 to 16.00 hours the time which as per evidence of PW8 the alleged rape was yet to be committed. In her evidence PW8 said the appellant and one lady whom she did not even identify in court arrived at the appellant's house at 15.50 and 30 minutes later heard someone crying from the appellant's house before she noted it was the lady who entered therein with the appellant. PW4 in her evidence confirms that she arrived at home about 17.00 hours. Looking at the evidence of PW3, PW4, PW6 and PW8, and if it is to be believed that PW8 was referring to PW4 as victim, one will note that there is material contradiction on the time of commission of the offence and time when examination of PW4 was conducted by PW6 if really at all examination was done. It is beyond imagination that examination of PW4 could have been performed even before commission of the said offence something which raises doubt to the evidence of PW6 and the report in the PF3 Exh. P4.

The above stated notwithstanding, how the appellant was arrested also remains a doubtful fact. It is in PW2's evidence that he arrested the appellant after being identified to him by PW4 who was also in company of PW3. That piece of evidence is controverted by PW3 and PW4 who denied PW4's

presence during the appellant's arrest. The evidence is leading further that it is after his arrest that is when PW4 identified him during the identification parade. If we are to believe PW2's evidence then one would ask why conducting identification parade to the person who already was known to the victim. Again if the evidence of PW3 and PW4 is to be believed that PW4 did not participate in the appellant's arrest process then how did the arresting officer identify the appellant before his arrest? We are not told whether PW8 who assisted the lady who allegedly was raped on 19/12/2017 assisted the arresting officer to identify the appellant apart from failure to identify in court the lady she came to testify in favour of who was raped by the appellant. All these contradictions and discrepancies in the prosecution evidence leave a lot of doubt as to whether it is the appellant who actually committed the alleged offence of rape.

The last contradiction is on the make of the motor vehicle alleged by PW4 to have been used to carry her and the appellant to the place where the offence of rape was committed. While PW4 in her testimony said it was Range Rover, PW3 and PW5 who tendered the motor vehicle in court as Exh. P2 said it is Toyota Land Cruiser with silver colour. It follows therefore even the motor vehicle which was tendered in court alleged to have facilitated the commission of an offence was not the same mentioned by PW4.

For the foregoing contradictions and deficiencies of evidence noted herein above that go to the root of the case, I would agree with the appellant and Mr. Kisima, learned State Attorney, that trial magistrate erred in law and fact in convicting the appellant basing to the evidence which was not worth of being accorded credence and weight. Had the trail magistrate addressed

himself on the raised and considered contradictions he would not have arrived to the conclusion he reached that prosecution case was proved beyond reasonable doubt. Thus the appellant's 2nd ground of appeal has merit.

The above conclusion being reached, I think the appellant's last grounds of appeal need not detain me as it is found already that prosecution case was not proved beyond reasonable doubt. I say so because in sexual offences the best evidence comes from the victim. See the case of **Seleman Makumba V. Republic** [2006] TLR 379 and **Muhsin Mfaume V. Republic**, Criminal Appeal No. 99 of 2012 (CAT-unreported). In the present matter PW4's evidence has been found to be incredible thus cannot be relied by the court to base its conviction. There is also material contradiction on the evidence PW2, PW3, PW6 and PW8 who were material witnesses whose evidence was relied on by the trial court to base its conviction to the appellant. It is trite law that where there is material contradictions the appellant has to benefit out of that. See the case of **Leonard Zedekia Maratu Vs. R**, Criminal Appeal No, 86 of 2005 (CAT-unreported). The incredible evidence of PW4 coupled with contradictions of the above referred witnesses all resolved in the appellant's favour, I would hold that prosecution case was not proved beyond reasonable doubt. Thus the 3rd ground of appeal has merit too.

In consequences, I would hold as I hereby do that, this appeal has merit and is hereby allowed. Since conviction of the appellant was predicated on incredible evidence, I proceed to quash the conviction and set aside the

sentence meted on him. I further order his immediate release from prison unless otherwise lawfully held.

It is so ordered.

DATED at DAR ES SALAAM this 02nd day of October, 2020.

E. E. KAKOLAKI

**JUDGE**

02/10/2020

Right of Appeal Explained.

E. E. KAKOLAKI

**JUDGE**

02/10/2020