THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO 91 OF 2019

(Arising from Criminal case No. 37 of 2019 of Lindi District Court at Lindi)

EMMANUEL THOMAS MSEMAKWELI ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Hearing date on: 24/2/2020

Judgement date on: 31/3/2020

NGWEMBE, J:

The appellant Emmanuel Thomas Msemakweli, in the help of learned advocate Isa Chiputula, preferred an appeal against conviction and sentence meted by the District Court of Lindi at Lindi in Criminal Case No. 37 of 2019. The applicant came in this court armed with two (2) grounds namely:-

1. That the learned trial magistrate grossly erred in law and fact by convicting and sentencing the appellant in both counts without the case being proved beyond reasonable doubt.

2. That the learned trial magistrate grossly erred in law and fact by convicting and sentencing the appellant relying on the evidence of PW1 and PW3 who adduced contradictory evidences, which goes to the root of the case.

Brief recap of the matter originated from unknown date of April, 2019 at Kariakoo area, within Municipality of Lindi in Lindi region, the appellant alleged to have carnal knowledge and unnatural offence with a minor aged 11 years old whose name is baptized as XY due to her age. Consequently, was charged with two counts, that is, rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code [CAP 16 R: E 2002]; and unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap 16 R.E 2002].

Upon hearing the accusations, the appellant was found guilty on both counts, convicted and sentenced to jail for a term of thirty (30) years imprisonment for the first count and life imprisonment for the second count.

On the hearing of this appeal, both parties were represented by learned counsels, while the appellant was represented by learned advocate Issa Chiputula, the Republic was represented by Eunice Makala - State Attorney.

The learned advocate submitted that, the prosecution failed to prove the case as required by section 3 (2) (a) of Tanzania Evidence Act, that it is the duty of the prosecution to prove the case beyond reasonable doubts. In the contrary, the prosecution failed to prove the case against the appellant. Comprehending his argument, he submitted that the prosecution witnesses alleged the incidence occurred on 5/4/2019, but the victim was examined on 10/5/2019 equal to 35 days after the event. In such circumstances, an immediate question is whether the alleged victim was indeed raped and unnaturally offended. He cited a case of **Alfao Valentino Vs Republic, Criminal Appeal No. 92 of 2006** (unreported), in this case the delay was only five (5) days, but the Court of Appeal doubted if at all the offence was committed for delay of only five (5) days, how about 35 days? He rightly asked.

In this appeal, the medical examination was done after 35 days from the eventful date. Thus raised serious doubt, if at all, the offence was committed. If the victim was raped and unnaturally offended on the alleged date, why she failed to report within time? The reason advanced on that inordinate delay was that the victim was threatened by the appellant. The evidence of PW3 indicates that, the offence was committed and on the same date she reported the incidence to her parents (see page 17 of the proceedings), but her parents did not take any action. The question is which trigged those parents to report the matter after 35 days? Such unexplained delay raises serious doubt if at all, there was rape at all to the victim he submitted.

The appellant and Parents of the victim are neibours as per PW1 and PW4 evidences as they are living in one village, so they know each other but no action was taken for the whole month and five days (35 days). Referred this court to a case of **Elias Yobwa Mkalagale Vs The republic, Criminal Appeal No. 404 of 2015** (unreported), that in this case the court was firm that the delay to arrest the appellant raised reasonable doubt.

Further argued that according to the evidence on record, during the incidence, the victim XY was 11 years, while the appellant was 39 years old. Under normal circumstances, she could not stay all those days without proper medication if at all, she was raped and sodomized as alleged.

Contended further, that the prosecution, failed to call material witnesses to prove the case. The testimonies of PW3 told the trial court that the mother of the victim and others went to the scene of crime, but none of them testified in court. Those were material witnesses who witnessed the place where the alleged offence occurred. As such, the law is settled on failure to call material witness, the court should draw adverse inference against the prosecution. He referred this court to a case of **Azizi Abdalah Vs R [1991] TLR 71**.

On the contradictions of evidences, that PW1 and PW3 were eye witnesses, but their testimonies are full of contradictions on what exactly happened. He questioned, if the appellant chased them away, it means they did not witness what happened to the victim bearing in mind that the event

occurred at the forest. He challenged the application of the principle derived from **Makumba's** case that the best evidence comes from the victim. The principle should be taken as a general rule, he added. The exception is to consider the circumstance of each case. To support his assertion, he referred this court to the case of **Pascal Sele Vs R, Criminal Appeal No.23 of 2017**. The appellant was charged with grave offences attracting life imprisonment, thus the prosecution ought to be careful in proving all relevant facts to the standard required by law.

He rested his submission by arguing on admissibility of exhibits P1 and P2 which are PF3 that should be expunged from the record, for there were no witness who testified on the source of those exhibit.

On the adversarial side, the learned State Attorney firmly, supported the conviction and sentence meted by the trial court. Therefore, all grounds of appeal are irrelevant, since the republic proved the case beyond doubt as required by section 3 (2) (a) of the Evidence Act. The prosecution proved the offence of rape and unnatural offence committed by the appellant to the victim.

To prove rape is to establish penetration of a male reproductive organ to a female organ (Vagina). PW1 proved that she was raped and sodomized. During the incidence, the victim was threatened, which evidence is supported by PW2 and PW3 a medical doctor, who proved that her private parts of PW1 was penetrated. She cited the principle in the case of

Seleman Makumba Vs R, [2006] TLR 384, whereby the court held that cases of sexual offences, the true evidence comes from the victim.

On the delay to report the offence, she argued as irrelevant issue for the testimonies of PW1 provided the reason for the delay. Under section 143 of the evidence Act, there was no need to call other witnesses to prove a fact which is already proved by the victim herself.

On contradictions of evidence of PW1 and PW3, same do not go to the root of the case, because the issue is rape and unnatural offence. She cited a case of **Emmanuel Josephat Vs R, Criminal Appeal No. 323 of 2016** at page 11-13, in which there was contradictions based on time, which did not go to the root of the case itself. To support her argument she cited also a case of **Rajabu Yusuph Vs R, Criminal Appeal No. 457 of 2005**, whereby the court held that, minor contradictions do not affect the root of the case so long the victim explained how she was raped.

The admissibility of PF3 as an exhibit was rightly made as was tendered by PW2 who testified that PF3 were obtained from police. Therefore, there is no reason to expunge them.

On the delay to arrest the appellant, she argued as irrelevant, for the offence was rape and Sodomy, but when the accused was arrested is not an issue. Soon after the incidence the accused ran away.

On improper application of the principle on the true evidence on rape comes from the victim, is likewise, irrelevance because the appellant

threatened to kill her, even the deminor of the victim demonstrated the truth of what happened to her.

In rejoinder, the learned counsel reiterated to his submission in chief and distinguished the case of **Rajabu Yusufu** as not applicable to this appeal.

In considering this appeal, it is wise to combine both grounds, because they boil down into one issue, that is, whether the prosecution proved the case of rape against the appellant beyond reasonable doubt. It is a trite law that in criminal proceedings the burden of proof lies on the prosecution as rightly provided for under section 110 of the evidence Act [CAP 6 R.E 2002] read together with section 3 (2) (a) of the Act. This position was also held in the case of **Jonas Nkinze Vs Republic [1992] T.L.R 213,** held:-

> *"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"*

Undoubtedly, and as a general rule, the prosecution has a noble duty to establish a prima facie case and prove the offence against the accused beyond reasonable doubt. The same principle was repeated in the case of **Joseph John Makune Versus The Republic [1986] T.L.R 44,** held:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence".

I have perused all the proceedings and judgment of the trial court to see if the prosecution proved the offence of rape as provided for under section 130 (1) (2) (e) and 131(1) of the penal code [CAP 16 R.E 2002], and the offence of unnatural offence contrary to section 154 (1)(a) of the same Act. These provisions are clear that, having a sexual intercourse with a girl who is under 18 years old with or without her consent constitutes rape. Also having sexual intercourse against nature, constitutes unnatural offence. I agree with the Republic that, to prove an offence of rape, there must be penetration as was rightly held in **Seleman Makumba's Case, (Supra)** where the Court of Appeal held:

"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".

Therefore, even slight penetration constitutes the offence of rape. Likewise Section 130 (4) of the penal code [Cap 6 R: E 2002] is to the effect that:-

"130 (4), for the purposes of proving the offence of rape;

Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"

It is likewise, important to prove penetration by obtaining a medical opinion from a qualified Medical Doctor, who examined the victim soon after the incidence. Though, such medical report remains an expert opinion and not binding to the court, but its relevance is unqualified in proving the offence of rape. However, in this appeal the said report was tendered in court marked Exhibit P1, indicates that the victim was examined on 10/5/2019, while the alleged offence was committed on 5th April, 2019 which is equal to 35 days from the day of the alleged offence. In the case of **Alfeo Valentino (supra)** the court doubted the delay of only four (4) days. The same position was also repeated in the case of **Johanes Kisulilo Vs Republic, Criminal Appeal No 315 of 2017**, the court held:-

> *"From the above analysis it is clear that the prosecution side left a lot of questions which creates doubts as to whether the appellant is the one who committed the crime"*

Similar circumstances occurred in this appeal. The victim was examined by a Medical Doctor after 35 days from the date of event. The question is whether the appellant was the one who committed the offence, if at all. Whether there was no possibility that someone else could have committed that offence and allege same to be done by the appellant? Is it safe to convict an accused person in such unexplained delay of more than a month since the occurrence of the offence? There are many more questions which answers are not forthcoming.

Above all, the counsel for the appellant argued quite convincingly, that there were apparent contradictions on the evidence of key witnesses. Referring to the evidence of PW1 and PW3 who alleged to be eye witnesses. PW1 is the victim, she testified in court as per page 10 of the proceedings that the appellant did bad thing to her when he found her fetching water with her friends. He chased them away, but PW1 remained.

In the circumstances, when she tried to run away, the appellant caught her, took knife pointing to her and threaten her that if she shouts he will kill her, took her to the bush and raped her. From that piece of evidence, it means the appellant met PW1 when she was fetching water with her friends and before committing the alleged offence, the appellant chased her friends away, including PW3. So after chasing them he managed to catch PW1 and raped her.

In the contrary, the evidence of PW3 as recorded in page 17 of the proceedings, seem to be an eye witness as she boldly, testified that, on April 2019 when they were fetching water in the well. The appellant took PW1 to the coastal area and did bad thing to her. The Appellant slept on top of PW1, when they saw that act they ran away, meaning PW3 is an eye witness of rape and sodomy to PW1. These two pieces of evidence are clearly inconsistence and contradictory. Even the alleged place of rape are different, PW1 said it was in a bush, while PW3 said in a coastal area. PW1 alleged the bad thing was done to her after chasing her friends, while PW3 such bad thing was done in their presence. I wonder why the evidences of the two witnesses are not compatible to the issue in dispute, if they were

both at the scene of crime and witnessed the offence being committed? Such contradictory evidences usually raise serious doubt which must benefit the appellant. In the case of **Silas Sendaiyebuye Msagabago Vs D.P.P, Criminal Appeal No 184 of 2017**, (unreported) at Mbeya, the Court considered contradictions on when the offence was committed in regard to the charge sheet and the evidence adduced by PW1, at the end the court held:-

> *"All these contradictions show that she gave evidence which was a suspect. It is unfortunate that both the trial court and the first appellant court did not take those inconsistencies which were crucial under scrutiny".*

The inconsistences of evidence of PW1 and PW3 are not minor, to my considered view goes to the root of the matter itself. I am aware of the reasoning in **Criminal Appeal No. 161 of 2001** between **Bakari Hamisi Ling'ambe Vs Republic,** where the court held:

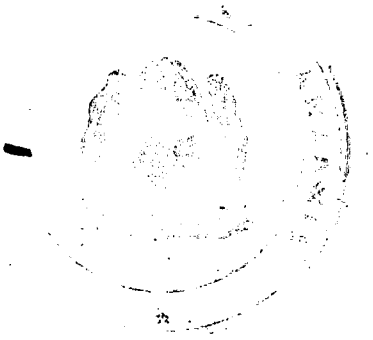
> *".....however, it is not every discrepancy in prosecution witness that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecutions will be dismantled ....."*

In our case at hand the evidence of PW1 and PW3 had material inconsistencies, which went to the root of the case itself. Accordingly, I would agree with the learned counsel for the appellant that the case was not proved to the standard required. I accordingly, allow the appeal, quash the conviction and set aside the sentence meted by the trial court,

subsequently order an immediate release of the appellant from prison unless other lawfully held.

I Accordingly order.

Dated at Mtwara this 31st day of March, 2020.



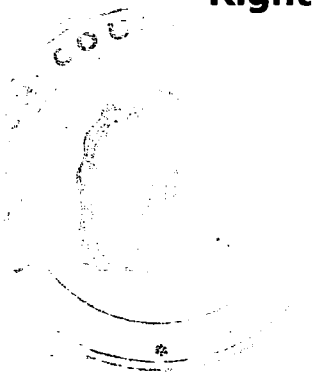
P.J. NGWEMBE

JUDGE

31/03/2020

Court: Judgment is delivered at Mtwara in chambers on this 31st day of March, 2020 in the presence of the appellant and Mr. Joseph Maugo, Senior State Attorney for the Republic/respondent

Right to Appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

31/03/2020