IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL No. 119 OF 2020

(Arising from the Judgment of the District Court of Kibaha at Kibaha Criminal Case No. 105 of 2019)

ROBERT MTWANGO.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

23th August, – 5th October, 4th November, 2020

J. A. DE-MELLO, J;

The lower Trial Court at **Kibaha District** heard, convicted and, sentenced the Appellant with a **Rape** offence, contrary to **section 130 (1) (2) (e) & 131 (1)** of the **Penal Code Cap. 16 R.E 2002.**

He is currently serving a thirty years (30) jail term (30).

Dissatisfied and, now on Appeal with the following nine (9) grounds.

1. **That, the learned Trial Magistrate grossly erred in law and, when accepted to work under influence of social welfare officers to extend of including them in Court quoram which is contrary to judicial ethics, hence the Court have not delivered a just decision.**

2. That, the learned trial Magistrate grossly erred in law and fact when concluded that PW1 (the alleged victim) knew the nature of oath yet no such question was put to her, neither did she (PW1) promise to tell the truth, hence the Appellant conviction was procured under evidence of a witness whose voire dire test was un-procedurally conducted.
3. That, the learned Trial Magistrate grossly erred in law and, fact by convicting the appellant based on exhibit PE 1 (Clinical card) tendered by PW3 to prove the age of PW1 but it was not read out loud in Court, he wrongly relied upon.
4. That, the learned Trial Magistrate grossly erred in law and fact by convicting the appellant, based on PW1 PW2, PW3 and PW5 's evidence without first assessing exhaustively to their veracity.
5. That, the learned Trial Magistrate grossly erred both in law and fact by convicting the Appellant in a case where the Appellant lawyer were denied to hear the testimony of PW1, PW2, and PW3 afresh when they were re called by the Court despite them being ready to foot the witness allowance, hence the Appellant was not accorded a fair trial.
6. That, the learned Trial Magistrate grossly erred both in law and, fact by convicting the Appellant based on Exh. PE (PF3) which was un-procedurally tendered by the P.O who assumed a role of a prosecutor and a witness at the same time yet he was not under oath. not proved beyond reasonable doubt.

7. **That, the learned Trial Magistrate grossly erred both in law and fact by convicting the Appellant in a case where section 210 (3) of Cap. 20 was not fully adhered to.**
8. **That, the Trial Magistrate grossly erred both in law and, in fact when failed to assess the variance of the dates and months in prosecution witnesses as to when the alleged incident was revealed and when the Appellant was arrested hence the Appellant defence ought to have been accorded weight.**
9. **That, the Trial Magistrate grossly erred both in law and, fact by convicting the Appellant in a case that was not proved to the required standards.**

Opposing the Appeal and, commencing to submit on the Appellant's own request who is limited and, unrepresented, Counsel Ndakidemi stated that, social welfare was in Court as part of his duty under the law whose role is as well defined under the law for reporting and, protecting the child best interest. It is through him that, the victim is availed an enabling environment for adducing evidence. This is in accordance with the **Law** of **Child Act 2009** which provides for this cardinal principle. **Secondly, State Counsel Upendo** reminded the Appellant of the inapplicability of the '**Voire Dire**' since **2019** and, based on this new position, which the Trial Court relied upon as depicted in **page 7** last paragraph but three reads; **"...nothing but the truth". Thirdly**, **exhibit PE1** was used to prove not only age but, the offence itself and, against a minor and, was read out loud as seen in **pages 7** para 2, **page 11** and **13** hence, not violating the rights of the Appellant. With regard to the fourth ground,

Counsel contended that **PW1** the victim demeanor was credible as seen in **pages 7 -10** of the proceedings with **PW2, PW3 & PW5** corroborating her testimony. With respect to **ground 5** she asserts that, Counsel was afforded opportunity to recall afresh of **PW1, PW2 & PW3** herself purely for cross examination as opposed to examination in chief as alleged. She finds nothing procedurally contravened in terms with the tendering and, admitting **exhibit PE2,** the **PF3** form and, by none other than, **PW4** the doctor, who drew it. He was the maker and, author hence thus justified. He wasn't in any way the prosecutor as alleged. Neither was **section 210 (3)** violated as **pages 10 paragraph 8** indicates compliance, nor variance seen as to date of incident. It is between **April** and **May** when the alleged abuse was conducted and, three times. The Appellant was arrested on the **5th** of **May 2019,** at around **1:30 p.m** much as **PW3** testified not to remember the exact date and which is normal. The case of **Deogratius D. Guntu** vs. **Republic Criminal Appeal No. 553 of 2016** was cited to support the contention that attributes to normal errors such as, **"...memory lapse owing to time, mental disposition, shock and horror..."** as some of situation for forgetting much as **PW3** was a parent of the victim. Lastly, on failure to prove to the standards set, Counsel sternly emphasized and, to satisfaction, to have been proved. The reason more why the Trial Court was moved to convict and, sentence the Appellant, accordingly. She concluded by praying for dismissal of the Appeal, it lacking in merit.

Responding, the Appellant pointed out that, he was arrested on the **8th** of **July, 2019** as opposed to the **5th** of **May, 2019** challenging the generality of as to when the offence occurred blankly by stating from April to May. He

even claimed to be incapacitated to consummate as his penis is not erecting, something which the Trial Court ignored amidst the fact that it was brought to its attention. This notwithstanding, he attributed the whole affair out of hatred, rendering it fabrication. He is now of **seventy five (75)** years old and prayed for mercy and, leniency.

In the case of **Minani Evarist** vs. **Republic, Criminal Appeal No. 124 of 2007** amongst other things it was observed;

"It is generally accepted that in determining cases a Court has to look at the peculiar facts of the case. In other words, each case has to be decided on the basis of its own facts. This is important because the facts may not necessarily be the same as the other".

Above it all, Courts have embraced and, cherished the other principle in rape cases that, the victim themselves are the **'best witnesses'.** The case of **Selemani Mkumba** vs. **Republic, Criminal Appeal No. 94 of 1999 (Unreported)** can not be over emphasized. In the case of **Tumaini Mtayomba** vs. **Republic, Criminal Appeal No. 217 of 2012 (CAT) at Mwanza, Kimaro J.A** on rather almost similar facts ranging from '**age, a student, manner and modality of hijacking, disappearance and, put under key lock, threats and, several forceful sex for two days** did disregard all the grounds of appeal from **a 'defective charge, voire dire requirements, violation of section 192 of Cap. 20, Non Compliance of section 240 (3), failure to indicated specific date on which the offence was committed, failure to summon the police investigator, and insufficient evidence on the part of the Prosecution,** as the Court categorically observed that, none of all these

did occasion any miscarriage justice to water down the credible and reliable evidence from the victim herself. However and, as evidenced from **page 6** of the judgement drawn from the Appellant's own testimony, not to be sexually active, as read from proceedings in **pages 29 & 30** something which raises doubts, much as proof is wanting. This again has been the Appellant's position all along and claiming to be called **'babu'** by the victim and, aged **seventy five (75) years**. Unless and, until this is cleared the matter is wanting, more so when in **page 29** during the commencement of the defense case, **DW1** the Appellant now, was recorded to be **twenty five years (25).** Before this Court on Appeal, I see an aged old person as opposed to a youth male of twenty five years (25) as recorded. With this contradiction, I therefore order for a retrial by the lower Trial Court by the another Magistrate with a view of ascertaining first, the **medical health status** of the Appellant's sexual capacity as well, that of his age, whose findings shall be lodged as part of this Appeal for my determination, within one **month (1)** from the date of this order.

I so order.

J. A. De-Mello

JUDGE

4/11/2020.