IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO.51 OF 2020

SANDALA MADUHU
SABINA JOHN } **..... APPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the District Court of Bariadi - Nyangusi-RM)
dated the 8th of June, 2020
in
Criminal Case No.10 of 2017

JUDGMENT

4th November,2020 & 26th February,2021.

MDEMU, J.:

In the District Court of Bariadi, the two Appellants were charged of the following two counts: Rape contrary to the provisions of sections 130(1)(2)(e) and 131(1) of the Penal Code, Cap.16 in the 1st count for the first Appellant and Sexual Exploitation of a Child contrary to the provisions of section 138B (1) (b) & (2) of the Penal Code, Cap.16 as amended by section 179 of the Law of the Child Act, No.21 of 2009 in the 2nd count for the second Appellant.

Particulars of the offence in both counts were to the effect that on or about divers dates of August, September and October, 2016 at Badugu village

within Busega District, the second Appellant unlawfully procured for one Sandala Maduhu, the first Appellant to have sexual intercourse with Nyanjige Thomas (PW1), a fifteen (15) years old girl. It is on record that, the first Appellant asked the assistance of the second Appellant to have sexual intercourse with PW1 after his attempts became unsuccessfully. PW1 and the second Appellant are neighbours. When the day came, the second Appellant followed PW 1 and took her to her premises where the first Appellant was.

It was night. The second Appellant offered a room for the two who proceeded for sexual intercourse. Sometimes in the course, it came to their knowledge regarding interference of their privacy. The first Appellant disappeared thereat. It is stated that, the second Appellant hidden PW1 in one of the rooms where there were maize sacks. She also covered her with some clothes to eliminate possibility of being seen, the reason why those who responded searched the house in vain. The following morning, PW1 returned home and told those present that she was at the second Appellant's premises having sexual intercourse with the first Appellant.

The two Appellants were thus arrested, though pleaded not guilty to the charge, the trial court convicted and sentenced them to thirty (30) years imprisonment, in the first count for the first Appellant and to fifteen (15)

years imprisonment in respect of the second Appellant in the 2nd count. This was on 20th of July, 2017. They appealed to the High Court in which Mkeha J. nullified the proceedings and judgment there by quashing conviction and sentence and ordered retrial of the Appellants. This was on 2nd of August, 2019.

The trial court tried the Appellants as ordered by this court. At the end of trial, the Appellants were found guilty as charged and accordingly convicted and sentenced to thirty (30) years prison term in the 1st count for the first Appellant and fifteen (15) years imprisonment in respect of the 2nd Appellant in the 2nd count. This was on 8th of June, 2020. The Appellants were not happy hence, the instant appeal on the following grounds; for the first Appellant:

1. *That, the learned Magistrate erred in law and fact to hold conviction on week evidence and contradictory evidences of public witnesses thus create doubts hence it left the shadow of doubts that, the case was proved to the standard stipulated by the law.*
2. *That, the learned Magistrate erred in law and fact to pass a sentence without considering that, even a doctor who*

examined a girl confirmed before the court that there was no penetration even sperms.

3. *That, the learned Magistrate erred in law and fact by failure to evaluate the evidence of the witnesses to testify before the court.*

For the second Appellant:

1. *That, the learned Magistrate erred in law and fact by failure to evaluate the evidence of the witnesses to testify before the court that I committed the offence.*
2. *That, the learned Magistrate erred in law and fact when he convicted me on the contradictory evidences.*
3. *That, the learned Magistrate erred in law and fact when she failed to consider that the prosecution side failed to prove their case beyond reasonable doubt.*

This appeal came for hearing on 4th of November, 2020 in which, the two Appellants appeared fending for themselves whereas the Respondent Republic had the service of Mr. Nestory Mwenda, learned State Attorney. The latter resisted the appeal.

In his submissions in support of the appeal, the first Appellant simply adopted his four grounds of appeal as part of his submissions. He opted to rejoin after the Respondent had submitted. On his part, the second Appellant, along with adopting her grounds of appeal as part of her submissions, she opted also to hear first the learned State Attorney, then will rejoin.

Resisting the appeal, the learned State Attorney argued all the six grounds of appeal in two groups. The second ground of appeal of the first Appellant on failure to consider the evidence of a doctor was argued separate to other grounds which the main complaint is on failure of the prosecution to prove their case beyond reasonable doubt. His view was that, the prosecution case was proved beyond reasonable doubt.

In evaluation of evidence, the learned State Attorney submitted that, PW1 testified on how the second Appellant took her to her residence where she met the first Appellant for sexual intercourse and that, the second Appellant concealed the event by hiding her. He added that, by that time, PW1 was fifteen (15) years of age. It is in the evidence of PW2 according to Mr. Mwenda that, PW1 returned home and stated to spent a night at second Appellant's house with the first Appellant. He added that, the evidence of PW1 is corroborated by that of PW3 and PW4 who testified that the second

Appellant took PW1 to her house for love affairs with first Appellant and that on being noted, the first Appellant entered at large.

As to the age of PW1, the learned State Attorney observed that, as PW1 was below eighteen (18) years, in view of the case of **Kazimili Samwel v R, Criminal Appeal No.570 of 2016** (unreported), the first Appellant committed the offence of rape. He added that, the evidence of PW2 (grandfather) and that of PW3 (father) of PW1 established that PW1 was below the age of eighteen (18) years. In this he cited the case of **Issaya Renatus vs. R, Criminal Appeal No.542 of 2015** (unreported) to cement his position. Under the premises, he thought, the grounds of appeal be dismissed for want of merits.

On the complaint regarding evidence of a medical doctor to have not been considered by the trial court, Mr. Mwenda found that to be a misconception because in sexual offences, the best evidence is that of a victim and not a doctor. He however stated that at page 9 of the judgment, the trial Magistrate considered the PF3, thus such allegations remain unfounded. He also pointed out that, both the prosecution and the defence case was analysed by the trial Magistrate. He thus concluded that, the appeal lacks merits and let the same be dismissed.

In rejoinder, the first Appellant alleged that, the age of PW1 was not proved for want of a birth certificate. He added that, the law does not prohibit to have love affairs with an adult. He rejoined further that, as the evidence was from family members, there was a need to assemble in evidence *Wananzengo* and the Hamlet chairman who were present as they would tell if at all the offence was committed. He could not therefore observe any substance in the prosecution case.

On his part, the second Appellant rejoined, as the first Appellant did that, the hamlet chairman and those *Wananzengo* who participated in tracing PW1 in her residence would have been called in evidence. She also faulted PW1 to be contradictory in his evidence as in 2017 he testified that she was asked three times to let her in love affairs with the first Appellant, a fact which in 2019 she said it was twice. She thought the case was a fabricated one, thus urged for the appeal be allowed. Parties ended this way.

As the learned State Attorney did, the six grounds of appeal just add up to one ground that the prosecution case was not proved at the standard required in criminal cases. This being a sexual offence, it is trite law that, the best evidence in such cases is from the victim. See **Seleman Makumba vs Republic (2006) TLR 379.** This, notwithstanding, should be measured on

credence of that testimony as stated in **Goodluck Kyando vs Republic (2006) TLR 363** that:

> *It is trite law that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.*

In the instant appeal, there are five witnesses of the prosecution which the trial court and the Respondent Republic trusted their credence and accepted their testimonies. Should I take that position? A sail through the entire evidence may not be avoided.

I will begin with complaint of the Appellants that, the family evidence of the prosecution should not be trusted. I know of no law that evidence from family members should not be relied by courts in grounding conviction of the accused person. What therefore is important is credence attached to that evidence and how trustworthy those witnesses are. In the instant appeal, the trial court convicted on totality of the prosecution witnesses including PW4 and PW5 who were not family members. Perhaps the main concern of the Appellants would have been credence attached to the prosecution witnesses and if at all were to be trusted in the circumstances of this case. I will have the detail of this.

One, there is contradiction between PW1, PW2 and PW3 as to who picked PW1 to the second Appellant for love affairs. PW1 and PW2 all through stated that, the second Appellant did that job whereas PW3 testified that, the first Appellant is the one who picked PW1.At page 14 of the typed proceedings, PW3 testified that:

And I was told the one who took her there was Sandala Maduhu.

Two, PW3 himself, the father of PW1 has two versions. As seen above, he said the first Appellant picked PW1 for love affairs. In the same testimony, PW3 stated that when PW1 returned home in the morning said to have been picked by the second Appellant. In my view, unless one Shida Joseph who disseminated information to PW3 was called in evidence, the evidence of PW1 and PW3 on that aspect may not be trusted.

Three, PW2's testimony has to be taken with caution. Her evidence that after being informed by the mother of PW1 that the latter is missing, she went straight to the second Appellant where, through light from cell phone torch, saw the first Appellant and PW1 in one bed. It was through the window anyway. Several questions might be asked. How did PW3 knew that PW1 is at the premises of the second Appellant? I am saying so because PW3 is silent as to whether she had information of the whereabouts of PW1 from her

mother. How did she identified the source of light to be from cellular torch, an article which was not in his possession? Was the window open, how bright was the said light?

Four, as complained by the Appellants, the evidence of the prosecution witnesses has weaknesses and can only be trusted if the Hamlet Chairman and those *Wananzengo* who responded to the call when tracing PW1 were called in evidence. It was relevant so as to eliminate fears of the Appellants on fabrication of the case and also that evidence from family members in the circumstances of this case should not be trusted.

Five, is the evidence that when the first Appellant took to his heels, PW1 was left in the house of the second Appellant hidden in maize sacks. This evidence again needs a careful appraisal. In the first place, there is no any evidence that in the residence of the second Appellant there were maize sacks. Neither *Wananzengo* who entered the house when tracing PW1 nor PW4 police detective in investigation, dared to state that there were such sacks thereon.

Six, there is the question of age of PW1. The Appellants' complaint is that, there should be furnished in evidence, the birth certificate for proof thereof. That being the case, it is most desirable that the evidence as to proof

of age be given by the victim, relative, parent, medical practitioner, or where available, by the production of a birth certificate. See **Isaya Renatus v R** (supra) at pages 8-9.

In the instant case, PW1, the victim and her father PW3 stated categorically that, PW1 was born on 25th of April, 2001. However, in the circumstances of this case, production of the birth certificate may not be dispensed with. I am saying so because, in the first trial which was nullified, PW1 simply said to be of 15 years of age without such details and his father PW3 was silent all through on this. In my view, the retrial ordered occasioned an opportunity to the prosecution to build their case. The conduct of the prosecution in retrial violated principles stated in **Fatahali Manji vs (1966) EA. 341.** On that account, circumstances of this case required production of the birth certificate so as to establish the age of PW1.

I have also considered observation of the learned trial magistrate on the manner she treated contradictions in the prosecution case. At page 8 through 9 of the judgment she stated that:

> *In his defence he said the prosecution evidence has some contradictions, but I did not find any contradictions which goes to the root of the charge.*

My understanding to this version is that the learned trial magistrate noted contradictions and inconsistencies in the prosecution case which do not go to the root of the matter. In my view, the learned trial Magistrate complied with principles in **Mohamed Said Matula v. Republic 1995 TLR 3** by addressing, resolving and deciding whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter. As I pointed above, I do not agree with the trial magistrate on such findings and also the observations of the Respondent that the contradictions and inconsistencies are minor.

On that note, this appeal is hereby allowed. Conviction and sentence in all counts are hereby quashed and set aside. The Appellants be released in prison unless, for lawful cause, they are held thereat. It is so ordered.

Gerson J. Mdemu
JUDGE
26/02/2021

DATED at **SHINYANGA** this 26th day of February, 2021.

Gerson J. Mdemu
JUDGE
26/02/2021