IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 44 OF 2020

(Arising from Criminal Case No. 138 of 2020 of Kasulu District Court Before I.E. Shuli, RM

YUSUPH S/O JUMA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G M E N T

12th & 12th March, 2021

A. MATUMA J.

The appellant stood charged in the District Court of Kasulu at Kasulu for unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code Cap. 16 R.E. 2019.

He was alleged to have had carnal knowledge of a victim child of nine (9) years old against the order of nature on the 27th day of May, 2020 at Kimobwa area within Kasulu District in Kigoma Region.

After a full trial, the trial court was satisfied that prosecution case against the appellant was proved beyond reasonable doubt. The appellant was then sentenced to suffer 30 years custodial term.

The appellant was aggrieved with the conviction and sentence hence this appeal with a total of three grounds of appeal all of them raising a single complaint that; ***The prosecution case was not proved beyond reasonable doubts against him.***

At the hearing of this Appeal, the appellant appeared in person while the respondent had the service of Mr. Benedict Kivuma learned State Attorney.

The Appellant opted for the state attorney to start addressing the court and him to reply thereafter. The learned State Attorney argued that the evidence of the victim was received contrary to the law section 127 (2) of the Evidence Act whose effect is to be expunged. He however maintained that even in the absence of the evidence of the victim, the prosecution case still had strong evidence to warrant the conviction of the appellant. He pointed out the evidence of PW2 as direct evidence of a person who witnessed the crime in the broad day light, the evidence of PW3 the doctor and the PF3 which established bruises in the victim's annual, the evidence of identification parade, and the appellant's Cautioned Statement.

The appellant on his party argued that the prosecution case was not proved against him as the witnesses contradicted on the date of the crime, the victim's evidence was taken contrary to law which deserve to be expunged, PW2's companion who together allegedly witnessed the crime one Nashoni Simoni was not called to corroborate the evidence of PW2, that the evidence of the doctor has nothing touching his identification relating to the observed bruises, the village authority was not involved, the cautioned statement procured illegally and that he did not exhaust his defence as the trial magistrate ordered him to shorten his defence. He also faulted the identification parade for having unfairly conducted against him as he was very dirty from the lock up compared to the other parade members.

Starting with the evidence of the victim herself, I agree with the parties that it was taken contrary to the law as per guidelines set out by the Court of Appeal of Tanzania in the case of ***Issa Salumu Nambaluka versus Republic, Criminal Appeal No. 272 of 2018***.

In that case, it was held that a witness of tender age like PW1 the victim in this case, before giving evidence should be tested by simplified questions as to whether she/he knows the meaning and nature of oath. It is from such examination the trial court would decide whether the

witness of such tender age should give evidence under oath/affirmation or not.

If the court determines that, she/he should give evidence without oath or affirmation then it is when the witness would be required to promise telling the truth to the court and not lies.

In fact, giving evidence without oath or affirmation is an exception to the general rule under section 198 (1) of the Criminal Procedure Act which requires every witness to a Criminal trial to give evidence under oath or affirmation.

I therefore rule out that the evidence of the victim was admitted contrary to the law and the same is liable to be expunged. I do hereby expunge the same.

The learned state attorney maintained that even in the absence of the victim's evidence, the remaining evidence is still water tight against the appellant. I will thus consider such evidence along with the submissions by the parties.

I will start to consider whether the appellant was properly identified at the crime scene as a perpetrator of the crime.

The victim in this case clearly stated in evidence that she did not know the appellant and lamented that those who came for her rescue knew the assailant suggesting the appellant;

"I know you by face, the two men who help me knew you".

It is because of that fact that the appellant was stranger to the identifying victim, an identification parade was conducted after the appellant's arrest. In the circumstances, even if the victim's evidence would have not been expunged fall short of the requisite criteria for correct identification. The law provides that, for the accused who is stranger to the identifying witnesses, their must be prior description of the accused before his/her arrest so that on the arrest of such suspect, he or she is paraded for the witnesses to identify him in line to their prior descriptions. In the case of ***Eria Sebwato (1960) EA 1974*** quoted with approval in the case of ***Rashidi Ally V. Republic (1987) HC 97*** his Lordship Chipeta J, held that in order to justify a conviction solely on the evidence of identification, such evidence must be water tight and that in a case which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of the highest importance of which evidence ought always to be given.

All these were not done in this case and only dock identification was made. There was no prior description of the suspect and thus the identification parade was useless.

The evidence of PW2 Robert Elias Gwimo which stands alone as the direct evidence of a person who witnessed the crime suffers the same consequences. He did not give prior description of the appellant despite

of his assertion in evidence that he recognized the appellant by face. In law his evidence at the Identification parade cannot be safely relied upon unless he had given prior descriptions of the suspect to avoid the possibilities of ill-will or honest but mistaken identity. He also contradicted his evidence. In his examination in chief he stated that while he was in the farm heard a child crying. He followed the voice and saw a person carrying a child on his back who after seeing him run away leaving the child behind. That means, if at all there was crime, he did not witness the crime being committed. He was thus not a witness of direct evidence but of circumstantial one. But when he was being cross examined by the appellant whether he witnessed the crime he replied; *"I saw you raping the child against the order of nature".* How did he saw the appellant raping the victim against the order of nature and at the same time the appellant carrying the victim on his back!

This contradictory versions by the same witness on the vital aspect of the case on whether he witnessed the crime being committed or he arrived at the crime scene when the crime was already committed destroys the witness's credibility. Not only that but also, he was contradicted by PW7 the victim's father one Gerald Gabriel Nkona. While PW2 stated that he recognized the appellant by face, PW7 stated that when PW2 and his fellow brought his victim child at home from the crime scene they told him that they didn't recognize the culprit; *"The helpers said you runed away before they could recognize you".*

The contradictions do not end there. While the victim did not say that her dresses were torn by the culprit but merely removed, PW6 and PW7 purported that the victim's dresses were torn apart. PW6 for instance; *"The victim's clothes were dirty torn apart".* PW7 also; *"I found the victim cloth were dirty and torn".*

The learned state attorney called me to rule out any contradiction in this case as a minor one as it was held in the case of **Mohamed Said Matula versus Republic (1995) TLR 3** that whenever there is contradictions, the court would rule out whether the same are minor or not.

It is my firm finding that prosecution witnesses seems to have created their own story to gain the court's sympathy against the appellant. It was

held in the case of ***Jeremiah Shemweta versus Republic (1985) TLR 228*** that the discrepancies of the prosecution witnesses in various accounts of the story give rise to some reasonable doubts about the guilty of the appellant. I purchase the same holding the instant case as the contradictions herein above cannot be regarded as minor. They goes to the root of the case itself as they are touching vital aspects of the case such as identification of the appellant and credibility of witnesses.

Another astonishing issue in the instant case is that none of the prosecution witnesses testified on why and how was the arrest of the appellant. The appellant was stranger to the identifying witnesses, he was not named to any authority and therefore was not in any manner traced for the offence. How and when was he arrested is untold. Who gave the clue and what were the clues leading to the arrest of the appellant is a silent story. It was thus very dangerous to subject the appellant in the identification parade without any source of allegations against him which led to his arrest.

With the herein observations, I allow the appeal, quash the conviction of the appellant and set aside the sentence of thirty years meted on him. I order the Appellant's release from custody unless held for some other lawful cause.

It is so ordered.

A. Matuma

Judge

12/03/2021

Court: Judgment delivered today 12th day of March, 2021 in the presence of the Appellant in person and Mr. Benedict Kivuma learned State Attorney for the Respondent/Republic.

Sgd. A. MATUMA

JUDGE

12/03/2021