

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL No. 52 OF 2021

***(Original Criminal Case No. 145 of 2020 of the District Court of
Ilemela District at Mwanza)***

DENIS LEONIDAS -----APPLICANT

VERSUS

THE REPUBLIC -----RESPONDENT

JUDGMENT

14th & 30th June, 2021.

TIGANGA, J.

The appellant herein, Denis Leonidas, stood charged before the District Court of Ilemela, at Ilemela with offences of rape contrary to section 130(1) (2)(e) and 131 (1) of the Penal Code [Cap 16 R.E 2019]

The particulars of the offence as reflected in the charge sheet were that, on 25th day of August 2020 at Igombe area within Ilemela District in the City and Region of Mwanza, had unlawful sexual intercourse with one **S** d/o **A** (names in initials) a girl aged fourteen 14 years old.

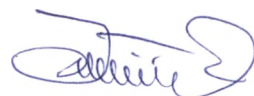
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When he was arraigned before the trial court, he pleaded not guilty to the charge; consequently a preliminary hearing was conducted in which he admitted to his names and personal particulars as they appear in the charge sheet. The prosecution side called four witnesses to prove the case, while defence called one witness. After full trial the trial court found the case to be proved beyond reasonable doubt, consequence of which he was found guilty convicted and sentenced to thirty years jail imprisonment.

Aggrieved by the decision, the appellant through the service of Mr. Fidelis Mteweale, Advocate, filed two grounds of appeal as follows:

1. That the trial Court erred in law and facts for convicting the appellant while the prosecution side failed to prove their case beyond reasonable doubt.
2. That the trial Court erred in law and fact for considering the evidence which are full of contradictions and unreliable.

In consequence thereof he asked for the appeal to be allowed, the proceedings, orders and decision of the trial Court be quashed and set aside as well as any other order as this court may deem fit to grant.



When this appeal was called for hearing, the appellant appeared through the representation of Mr, Mtewe, Advocate, through audio teleconference, while the respondent, Republic was represented by Ms. Rehema Mbuya, learned Senior State Attorney.

Called upon to argue his appeal, the counsel for the appellant, adopted and consolidated the two grounds of appeal and argued them together. He submitted that, his appeal based on three main grounds namely contradictions, credibility and burden of proof.

He submitted further that, the conviction based on the evidence of PW1, PW3, and PW4 which were full of contradiction, as well as the weakness of his defence as exhibited by the judgment at page 13 paragraph 2 where the trial magistrate, held as follows;

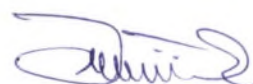
"By looking to the testimonies of PW1, PW2, PW3 and PW4 did not state lies in this court other than the truth."

According to her, the conviction was based on the above findings and pages 17 and 18 of the judgment at last and first paragraphs respectively. He said the evidence of PW1 as reflected at page 7 line three is hearsay as the witness did not say he was present at the time when the offence was

being committed. Further to that, he also said the evidence of the victim, PW2 as reflected at page 13 of the proceedings, shows that the victim was received by PW3, Mamalishe and stayed with her from 25/08/2020, up to 18/09/2020 when she handed her over to the chairman and later to her parents. While the evidence of the PW3 as reflected at page 17 of the proceedings she said that, she took the victim to the chairperson on 26/08/2020, to the chairperson and gave her the transport fare to go back home having stayed with the victim for about two days before releasing the victim to go home.

In his opinion, the contradictions on the evidence of PW2 and PW3, regarding the dates creates doubt on the truthfulness of the charge. The other contradiction in the evidence of PW3 is at page 17 of the proceedings where PW3 told the court that the victim told her that she is not a student while the evidence of PW2 who is the victim shows that she was a student. These being some few examples of contradictions, he asked the court to find that the contradictions create doubt in the prosecution case, which doubt should be resolved in the favour of the accused.

He also submitted that there is no evidence of the eye witness who witnessed the commission of the offence and there is no PF3 which was

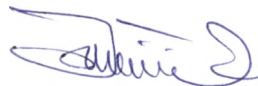


tendered to prove penetration as one of the ingredients of rape, and no Doctor or nurse who was called to testify regarding the penetration of the victim.

He also submitted that the prosecution did not call important witness that WP 3680 DC Leah of police Kirumba who investigated the case, as well as one Evalist Chikanga who was listed as witness.

Basing on those contradictions, he called upon the court to apply two principles namely credibility of witnesses and the burden of proof. Regarding the burden of proof he invited the court to rely on section 110 of the Evidence Act, [Cap 6 R.E 2019], to find that the burden of proof is beyond reasonable doubt.

On the credibility of witnesses, he prayed two factors to be applied **one**, when assessing the coherence of testimony of the witnesses, and **two**, when the testimony of such witness is considered in relation to the evidence of other witnesses including that of the accused. He referred this court to the case of **Raphael Mhando vs The Republic**, Criminal Appeal No. 54/2017 CAT - Tanga, at page 7 of the judgment where the Court of Appeal relied on two cases namely **Aloyce Mgovano vs Republic**, Crim.

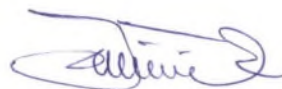


Appeal No. 182 of 2011 and **Shaban Daudi vs The Republic**, Criminal Appeal No. 28/2000.

He also made reference to the case of **Paschal Sele vs The Republic**, Criminal Appeal No. 13/2017 CAT - Tanga, at page 8, propounded two factors to consider in determining the credibility of the witnesses, at page 6, quoted the case of **Seleman Makumba vs The Republic**, [2006] TLR 379 in which it was held that case the true evidence of rape is to come from the victim.

In the case of **Pascal Sele** page 7, it was held to that effect. They said that the evidence of the victim should not be taken and wholesomely believed, he said in this case, the evidence given by the victim is one against one, and there is no corroboration of other witness who saw and witnessed the incident.

For those reasons, it is important to look for other evidence from other witnesses. Also that at page 18 and 19, the appellant was convicted on the basis of the weakness of his defence. He refereed this court to the case of **Mussa Sebastian vs The Republic**, Criminal Appeal No.



406/2018 CAT - Dar es Salaam at page 12, the accused should not be convicted on the weakness of his defence.

He also called upon this court to rely at page 13 of the decision of **Raphael Muhando vs The Republic**, to find that failure to call the material witnesses of the case attracts adverse inference against the prosecution. For that reason, he prayed the court, to set aside the proceedings of the trial court, to quash the conviction and the sentence and order the appellant to be released from prison basing on the reasons given.

In her reply, Ms. Rehema Mbuya -Senior State Attorney, supported the appeal. The base of her support is the contradictions embedded in the evidence of prosecution side. According to her, while the evidence of PW1's is based on hearsay, the evidence of PW2 leaves a lot of doubts, especially on what followed after the rape that is on 25/08/2020. According to her, PW3 is an adult and seems to be knowledgeable; she therefore knew the importance of reporting the matter to the police, but it has not been said why the matter was not reported to police.

She submitted that, PW1 and PW3 said that, they are contradicting each other. She cited another contradiction to be born in the evidence of PW4 as against that of PW2 and PW3. In her opinion, although section 127 of the Evidence Act (supra) allows the evidence of the victim to need no corroboration, but the same especially in this case should be treated with care.

The other base of supporting the appeal is the failure to tender the PF3, and failure to call the Doctor who examined the victim to prove penetration. The other short coming was the failure to call the chairman and the police officer who investigated the case, to testify; in her considered view, the evidence of the chairman was very important corroborating evidence, while the evidence of the investigator would have made clear some nagging doubts, without which the case cannot be taken to have been proved at the required standard. It is on that base, she finds the appeal to have merits, and therefore support it.

Following the concession by the learned Senior State Attorney, the counsel for the appellant did not rejoin, hence this judgment.

The law under section 110 and 111 read together with section 3(2)(a) of the Evidence Act [Cap 6 R.E 2019], requires the prosecution to



prove criminal cases to the standard of beyond reasonable doubt. This duty is two folds, **first**, to prove that the offence was committed and **second**, to prove that it was the accused who committed that offence. See **Maliki George Ngendakumana versus The Republic**, Criminal Appeal No. 353 of 2014, CAT- Bukoba (unreported).

In this case, the main complaint by the appellant is that, the prosecution evidence is full of contradictions which affect the credibility of the witnesses. It is a principle in law that, only a credible and reliable witness can have their evidence believed and relied upon for the same to form base of the conviction in criminal cases. See; **Shija Juma Vs Republic**, Criminal Appeal No. 383 of 2015, CAT (Bukoba) (Unreported).

That being the case, the issues is what affects the credibility and reliability of the witness in law? In my considered view, a number of factors may affect the credibility and reliability of witnesses, few of them being the following;

- (i) Contradictions, discrepancies and the conflicting statement in the witnesses evidence,
- (ii) Failure of the witness to mention the suspect at the earliest opportunity possible,

- (iii) To give evidence basing on suspicion,
- (iv) Evidence based on hearsay,
- (v) Witness testifying as accomplice, and
- (vi) A witness with interest to serve.

Without these above listed short comings caused by these factors and others certainly not mentioned here, a witness deserves to be believed, if he is competent to testify.

It is also a principle that a trial judge or magistrate is better placed to assess the credibility of the witness, as he is in the position to grasp the inconsistencies, to assess the demeanors and the flow of the evidence. See **Goodluck Kyando vs The Republic**, Criminal Appeal No.118 of 2003 CAT- Mbeya (Unreported)

In this case, just like many cases, contradictions of the evidence of some of the witnesses has been pin pointed, most of them being apparent as indicated herein above.

It is a principle of law as indicated in the case of **Chrisant John vs The Republic**, (supra) court held *inter alia*, that;

"We wish to state the general view that, contradiction by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the

nature, number and impact of contradictions it must always be remembered that witnesses do not make a blow by blow mental recording of the incidents. As such contradictions should not be evaluated without placing them in their proper context in an endeavour to determine their gravity, meaning, whether or not they go to the root of the matter or rather corrode the credibility of a party's case".

Citing the case of **Dickson Elias Nsamba Shapwata & Another v. Republic**, Criminal Appeal No.92 of 2007, the Court of Appeal further held that;

"In evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter"

Also see, **Raphael Mhando vs Republic**, (supra), **Aloyce Mgovano vs Republic**, (supra), **Shaban Daudi vs The Republic**, (supra), and **Paschal Sele vs The Republic**, (supra), as well as **Seleman Makumba vs The Republic**, (supra) as cited by the counsel for the appellant.

In this case, the cited contradictions involves the evidence, not only of other witnesses but also of the victim, they are therefore not minor and neglectable, they are major and go to the root of the matter. They

therefore affect the credibility of the witnesses and the whole prosecution case.

In the case of **Peter Mwafrika vs The Republic**, Criminal Appeal No. 413 of 2013 CAT-Mbeya in which the CAT quoted with approval the decision in **Aziz Abdallah v. Republic**, (1991) TLR 71, the Court restated the law thus:-

*"...the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question are able to testify on material facts. **If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution..**" (Emphasis added).*

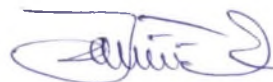
In this case, as alleged by the counsel for the appellant, some important witnesses for instance the doctor who was important to prove penetration, the Chairman who was important to prove at what time and on which date was the victim taken to him, and last the investigator of the case who would have resolved important issues regarding the doubts which remained un resolved as indicated above. There is no evidence advanced to show why the said witnesses were not called to testify. That

entitles this court to make adverse inference against the prosecution side, that either the witnesses did not do what they are alleged to have done or that had they been called they would have testified against the prosecution. Both ways, the same creates doubt which should be resolved in the favour of the accused person now the appellant.

Last but not least, it is the principle that, the accused person should be convicted on the strength of the prosecution evidence not on the weakness of the defence case. This principle is in the case of **Chritian Kale & Another vs The Republic** [1992] TLR 302 CAT and **John Makorobela & Another vs The Republic** [2002] TLR 296. In this case the appellant seems to be convicted not on the strength of the prosecution case but on the weakness of his defence.

That said, I find the appeal to have merits, it is allowed for the reasons given. The conviction of the accused is quashed, and sentence set aside. The order of immediate release of the appellant is made, he be released unless otherwise lawfully withheld.

It is so ordered.



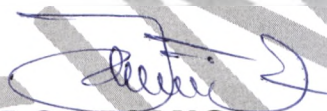
DATED at MWANZA this 30th day of June, 2021


J.C. Tiganga

Judge

30/06/2021

Judgment delivered in the presence of the counsel for the appellant on line via audio conference and Miss. Mbuya learned Senior State Attorney for the respondent. Right of Appeal explained and guaranteed.


J.C. TIGANGA
JUDGE
30/06/2021

