**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**CRIMINAL APPEAL NO. 19 OF 2021**

**FRANCIS s/o SETH @ MARIBE ..... APPELLANT**

***VERSUS***

**THE RESPUBLIC ..... RESPONDENT**

***(Arising from the decision of the District Court of Serengeti at Mugumu in Criminal Case No. 100 of 2020)***

**JUDGMENT**

4th and 31st August, 2021

**KISANYA, J.:**

The appellant, Francis Seth @ Maribe was arraigned in the District Court of Serengeti at Mugumu for the offence of attempted rape. It was averred in the particulars of the offence that, on 21st February, 2020 at Nyagasense Village within Serengeti District in Mara Region, the appellant attempted to have sexual intercourse with Judith d/o Protas, a girl aged 20 years. The charge was preferred under section 132 (1) of the Penal Code, Cap. 16, R. E., 2019.

Having heard the evidence of four witnesses paraded by the prosecution and the appellant's defence, the trial court found the appellant guilty as charged. He was therefore convicted and sentenced to thirty (30) years imprisonment.

The brief facts leading to the arraignment of the appellant and his subsequent conviction may be stated as follows: Pursuant to the victim (PW1),

the appellant was her brother in law. On 21st February, 2020, she was sleeping at her house. She welcomed in the appellant who sought for a refuge from the rain. As soon as the rain stopped, the victim urged the appellant to leave her house.

As the appellant left, the victim went to fetch water at the backyard. On her way, she was grabbed and pushed down by the appellant who undressed and tore her underpants. The victim raised an alarm which was responded by several people including PW2 Stella Protas (her mother) and PW3 Juma James (her neigbour). The appellant fled and left behind his shirt and belt. PW2 and PW3 collected the appellant's shirt and belt and the victim's underpants. They reported the matter to the Police Station on the next day. PW4 E.75D/SGT Titus was assigned to investigate the case. He tendered in evidence the said belt, shirt and underpants (Exhibit PE1 collectively).

In his evidence, the appellant, who was the only witness for the defence, testified that he went at the victim house on 21st February, 2020 at 10.00 to ask her to return to her husband's house and take care of their children. He testified further that he told the victim's mother (PW2) to pay back the bride price paid by the victim's husband. The appellant added that he was arrested on the next day (22/02/2020) and implicated in the case at hand.

In her judgment, the learned trial Resident Magistrate found that the prosecution had proved its case beyond reasonable doubt. She found that PW1,

PW2 and PW3 identified the appellant as the one who committed the offence. With regard to the appellant's defence, the learned trial Resident Magistrate held the view that the same did not raise any doubt. Thus, she convicted and sentenced the appellant as indicated earlier.

The appellant was dissatisfied with the decision of the trial court. He preferred this appeal which is predicated on three grounds which may be consolidated into two grounds as paraphrased below:

1. That the learned trial Resident Magistrate erred in law and fact in convicting and sentencing the appellant without according him the right to be heard.
2. That the learned trial Resident Magistrate erred in law and fact in convicting and sentencing the appellant basing on the wrong evidence adduced by PW1, PW2 and PW3.

When this appeal came up for hearing, the appellant appeared in person, unrepresented while Mr. Tawabu Yahya, learned State Attorney appeared for the respondent Republic.

When he was called upon to argue his grounds of appeal, the appellant chose to let the learned State Attorney submit first in reply to the grounds of appeal. He reserved his right to make rejoinder submission.

The learned Stated Attorney supported the appeal on the ground that there were doubts on the prosecution case. He contended that the prosecution

witnesses contradicted themselves on the time at which the offence was committed. He pointed out that while PW1 and PW2 testified that the offence was committed at 1400 hours, PW4 testified that it was during night hours. The learned counsel was of the view that, if it is taken that the offence was committed at 2.00 am (during the night), there are doubts as to how the victim could go to fetch water at that hours of the night. Therefore, he asked the Court to quash the conviction, set aside the sentence and acquit the appellant.

On his part the appellant had nothing to submit in rejoinder. He merely prayed to the Court to acquit him.

I have considered the appellant's grounds of appeal and the learned State Attorney's submission. In terms of the record, the appellant's complaint raised in the first ground that he was denied the right to be heard is devoid of merit due to the following reasons. **One**, the charge was read and explained to the appellant. Thus, he was well informed of the charge against him. **Two**, the appellant was present through hought the trial and given the right to cross-examine all four witnesses paraded by the prosecution. He exercised that rightly accordingly. **Three**, upon closure of the prosecution case, the appellant was addressed and informed of his rights to defend himself and call the witnesses of his choice as required by section 231 of the Criminal Procedure Act, Cap. 20, R.E. 2019. He opted to defend himself on oath without calling any witness. **Four**, it is the appellant who closed his case after giving his evidence. For these reasons, I find no merit in the first ground of appeal.

On the second paraphrased ground, I wish to address it by considering whether the offence levelled against the appellant was proved beyond all reasonable doubts. Having gone through the record, I hasten to agree with the learned State Attorney that this ground is meritorious. There are glaring contradictions on the evidence adduced by PW1, PW2, PW3 and PW4. The said contradictions attract reasonable doubts which end in favour of the appellant as shown hereunder:

**First,** while the victim (PW1) and her mother (PW2) testified that the offence was committed outside the victim's house, when she (the victim) was going to fetch water, PW4 testified that the appellant invaded and committed the offence inside the victim's house.

**Second**, while PW2 and PW3 deposed that they found the appellant on top of the victim, in her evidence, the victim (PW1) did not say anything about the appellant being on her top. Her evidence was to the effect that the appellant pushed her down, grabbed, dragged and undressed her.

**Third,** the charge does not state the time at which the offence was committed. The said time was deposed in evidence by the prosecution witnesses. As rightly observed by the learned State Attorney, while PW1, PW2 and PW3 testified that the incident happened at 1400 hours, PW4 stated on oath that the offence was committed during the night.

I am mindful to the trite law that contradiction among witnesses cannot be avoided and that only contradictions which go to root of the case can be considered to find doubts on the prosecution case or challenge credibility and reliability of witness. See **Chrisant John vs R** Criminal Appeal No. 313 of 2015 (unreported).

In the premises, I am of considered opinion that the above pointed contradictions are not minor. They go to the root of the case. For instance, it is not clear whether the offence was committed during the broad daylight or night hours. If it is taken that the offence was committed at 1400 hours of 21st February 2020, it is not known as to why PW2 and PW3 went to scene of crime with torches with them. Further, the reasons for failing to report the matter on the same day are wanting. Thus, it is not known as to why the complainant decided to report the matter on the next day.

On the other hand, if it is considered that the offence was committed during the night, the issue that arise is whether the appellant was properly identified. None of the prosecution witnesses testified that the conditions were favourable for her or him to identify the appellant. PW1 did not state the means of light which aided her to identify the appellant. As to PW2 and PW3, they did not testify on the intensity of the light of their torches and the distance at which they identified the appellant. As that was not enough, all witnesses did not depose on the time under which the appellant remained under their

observation. Therefore, guided by the decision of **Waziri Amani vs R** (1980) TLR 250, there are doubts on whether the appellant was properly identified on the material night.

It is fundamental that in criminal cases, the standard of proof is beyond reasonable doubt. In this case, the prosecution did not meet the said standard. The issues discussed herein display that the evidence adduced by the prosecution witnesses at the trial had doubts to mount a conviction against the appellant.

On the basis of the foregoing reasons, I find this appeal meritorious and allow it. As a result, the conviction of the trial court is quashed and the sentence meted out to the appellant is set aside. The Court orders that the appellant be released from the prison unless held there for other lawful cause.

DATED at MUSOMA this 31st day of August, 2021.

E.S. Kisanya
JUDGE

Court: Court: Judgment delivered this 31st day of August, 2021 in the presence of the appellant and in the absence of the respondent. B/C Gideon present.

E. S. Kisanya
JUDGE
31/08/2021