IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO 66 OF 2021

(Originating from Criminal case No. 06 of 2018 of Muleba District Court)

EVODIUS ADOROPH .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

20/08/2021 & 01/09/2021

NGIGWANA, J.

The appellant namely Evodius Adoroph was charged in the District Court of Muleba sitting at Muleba with two (2) offences; Abduction contrary to section 33 of the Penal Code Cap 16 R: E 2002, now (R: E 2019) (The Penal Code) and Rape contrary to sections 130(1) (2) (e) and 131 (1) of Penal Code. In the trial court, it was alleged on the first count that the appellant on 1st day of January 2018 at Nashamba Village within Muleba District in Kagera Region, with intent to marry C. S (Identity concealed), a girl aged 17 years old did take her away against her will.

As regards the 2nd count, it was alleged that the appellant on 1st day of January 2018 at Nshamba Village within Muleba District in Kagera Region, did have carnal knowledge of C.S (Identity of the child hidden), a girl aged 17 years old. In this judgment I will also refer to C.S as PW1 or the victim.

The appellant denied the charges and as a result, the case proceeded to a full trial at which the prosecution paraded six (6) witnesses while the appellant was the only witness for defense. At the conclusion of the trial, the trial court found the appellant guilty hence was convicted. Subsequent to the conviction, the appellant was sentenced to three (3) years imprisonment in respect of the first count and thirty (30) years for Rape. He was also ordered to pay TZS 500,000/= to the victim as compensation

Aggrieved by the decision of the trial court hence this appeal. He is armed with five (5) grounds of appeal as follows;

Though the grounds appear to be five (5) in number, for purpose of clarity this court grasped the context and summarized the raised appellant's grounds of appeal into two grounds; **One,** that the trial Magistrate erred in law and facts by convicting and sentencing the appellant while the charge had not been proved beyond reasonable doubt. **Two,** that the trial court erred in law and fact by convicting the appellant without affording full right to be heard. **Three,** that the trial court proceedings were tainted with gross and incurable irregularities

When this appeal was called on for hearing the appellant appeared in person and represented by Mr. Zedy Alli, learned counsel while Mr. Grey Uhagile, learned State Attorney appeared for the Republic.

Expounding on the 2nd and 3rd grounds Mr. Zedy Alli submitted that, in this case, gross irregularities were noticed, **One,** section 214 of the Criminal Procedure Act (Cap. 20 R:E 2002) was not complied with because the Successor Magistrate after giving reason that the case was re-assigned

to her following the transfer of the Predecessor Magistrate to another working station, did not move to stage two of informing the appellant the right to have the three witnesses testified before the Successor recalled, hence was not afforded a fair trial. The learned counsel made reference to the case **of Balole Simba versus R**, Criminal Appeal No525 of 2017 CAT (Unreported). **Two,** that before the trial court the exhibits to wit; PF3 (Exh.P1), the victim's birth certificate (Exh.p2) and Attendance register (Exh.p3) were tendered by the public Prosecutor. Mr. Zedy referred the Court to the case of **Dominick Cornel and Another versus R,** Criminal Appeal No. 287 of 2018 **Three**, that the admitted exhibits were not read out in court as required by the law hence that the same be expunged from the record. The learned counsel referred the court to the case of **Ernest Nyamtemba versus R**, Criminal Appeal NO.196 OF 2020. CAT (Unreported). **Four,** that, the trial court does not reveal as to whether the witnesses were sworn or affirmed before testifying. Mr. Uhagile, learned State Attorney who appeared for the Respondent/Republic conceded to the existence of the pointed-out irregularities.

Now, the duty of the court is to determine whether the 2nd and 3rd grounds have any merit.

As correctly pointed out by Mr. Zedy, and conceded by the learned State Attorney, Mr. Uhagile, section 214(1) of the Criminal Procedure Act was not fully complied with by the Successor Magistrate.

Section 241(1) of the Criminal Procedure Act Cap 20 R: E 2019 provides;

" *Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings*"

In the case of **DPP Versus Laurent Neophiotus and 4 Others,** Criminal Appeal No.252 of 2018, the Court of Appeal of Tanzania interpreting the herein above provision had this to say;

" *The change of trial magistrates is not a simple act to be taken casually but such a serious matter which should be approached with the seriousness it deserves that is to say; whenever it is compelling for a new trial magistrate to take over from a previous one,* ***he must record the reasons for doing so and invite the accused person to express his position if he will require that the witnesses whose evidence had been***
taken by the previous Magistrate be recalled to testify before a new trial Magistrate, *and the non-compliance* with section 214(1) of the CPA renders the proceedings before the new magistrate a nullity for lack of jurisdiction.

In our case, let page 15 of the trial court proceedings speak for itself;

"**Date: 9/7/2018**

Corum: A.H. MWETINDWA

D/Sgt: A/Insp Zakayo

Accused: Present

B/Clerk: P. Kijeru

PP: Case for hearing. I have no witness

Court: The case has been re-assigned to me following the transfer of the trial Magistrate C. F. Waane

Accused person has been addressed in terms of section 214 of the CPA CAP OF 1985"

In the case at hand, it is very clear that the Successor Magistrate partly complied with the said provision because she assigned reasons for the takeover of the proceedings but she did not invite the accused person to express his position if he will require that the witnesses whose evidence had been taken by the previous Magistrate be recalled to testify. The court of Appeal further insisted in the case of **Gharib Ibrahim Mgalu versus R**, Criminal Appeal No.05 of 2019 CAT (Unreported) that as per section 214(1) of the CPA Cap. 20, an accused should be informed of **his right to have the trial continue** or **start afresh** because the right to be heard is fundamental, and therefore the court has an obligation to conduct a fair trial in all respects. Also see **Richard Kamugisha @ Charles Samson**

and five Others, versus, R, Criminal Appeal No.59 of 2002 **and Salim Hussein versus R,** Criminal Appeal No.3 of 2011 CAT (both unreported).

In our case, the omission at that stage attracts the conclusion that the appellant was not afforded a fair trial.

Again, as correctly submitted by the learned counsel for the appellant, and conceded by the learned State Attorney, the public prosecutor who was not a witness assumed the role of the witness (PW4) and tendered PF3 as exhibit P1. Part of the trial court record reads;

"PP: We pray to tender the victim's PF3

Accused: No objection

Court: The same is marked as Exh. P1 "

PP: I pray to tender birth certificate as exhibit

Accused: No objection

ORDER: Birth certificate of the victim admitted as PE2

PP: I Pray to tender attendance Register

Accused: No objection

COURT: Attendance Register admitted as PE3"

The consequences of a prosecutor to act as a witness is to disregard all what he testified in court and tendered in court as a witness while he was also acting as a prosecutor. Any document tendered by such prosecutor as

exhibit in court must be expunged. See **Athuman Abdala Marambo versus R, Criminal Appeal No,114 of 2020**.

It is also apparent that, even after admissions, the documents were not read out in court and this was another irregularity. In the case of **John Mghandi @Ndovo versus The Republic**, Criminal Appeal No.352 of 2018 (Unreported), the Court of appeal of Tanzania emphasizing on the need to read out and explain the contents of the documentary exhibits had this to say;

"We think we should use this opportunity to reiterate that whenever a document exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defense. That was not done in the matter at hand and we agree with Mr. Mbogoro that, on account of the omission , we are left with no other option than to expunge the document from the record of the evidence"

In our case, since Exhibits **P1, P2** and **P3** were tendered by a wrong person, and were not read out and explained to the appellant, I accordingly expunge them from the record of evidence.

Another thing which was complained of by the appellant was the issue of uncertainty as to whether prosecution witnesses; PW1, PW2, PW3, PW4 and PW5 who testified before the Predecessor Magistrate C. F. Waane (RM) were sworn or affirmed. Mr. Zedy submitted that in this case, the said witnesses were neither sworn nor affirmed.

There is no doubt that that oaths, affirmation and declarations are governed by the Oaths and Statutory Declarations Act, Cap 43 R: E 2019. The first Schedule to the Rules which were made under section 8 provide for the format of administration of oaths and affirmation in judicial proceedings. Rule 1 and 2 provide respectively, that Christians take oath and Moslems take affirmation.

In our case, the record bears out that all the five witnesses who testified before the Predecessor Magistrate were Christians. When recording the particulars of each witness the predecessor Magistrate indicated the religion each one professed to be Christian. For instance, the particulars of PW5 read;

"PW5 H.349PC Gwamaka, adult, Nyakyusa, Tanzanian, Christian, s/s and states as follows: -"

It is very clear that the confusion or uncertainty was caused by the use of the abbreviation "**s/s**" and that fact that it was not clearly stated in the judgement that the witnesses gave a sworn evidence. It appears that, the confusion has been caused by the Predecessor Magistrate when she used uncommon abbreviation "**S/S".**

I am aware that some abbreviations may confuse some readers in different ways because the same abbreviation may mean different things in different contexts. It is very important to understand the context in order to know what the abbreviation mean. Though the court does not encourage the use of unknown and/or uncommon abbreviations in court proceedings, in our case, considering the context under which the

abbreviation was used, and the fact that all five witnesses were Christians, it is very simple to discover that **S/S** was used to mean **Sworn/Swear and states.** Having found so, the complaint or allegation that the witnesses were not sworn lacks merit, hence must fail.

As regards the first ground of appeal, the relevant question to be answered is whether the evidence adduced by the prosecution witnesses in the trial court was sufficient to establish the guilty of the appellant beyond reasonable doubt

It must be noted that, the cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt

Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019 provides;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

The High Court of Tanzania speaking through Katiti J (as he then was) in **JONAS NKIZE V.R [1992] TLR 213** *held that,*

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking"

The test applicable was well stated in the famous South African case of **DPP VS Oscar Lenoard Carl Pistorious Appeal No. 96 of 2015,** as follows;

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

The trial court has done its role whereas the matter is now in this court as the first appellate court. Describing the duty of the first appellate court, the court of Appeal of Kenya in the case of **David Njuguna Wairimu vs. Republic [2010]** eKLR held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is

clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also **Ally Patric Sanga versus R**, Criminal Appeal No.341 of 2017 CAT (Unreported)

In doing so the appellate court must always bear in mind that unlike the trial court, did not have the advantage of hearing or seeing the witnesses testify, thus the guiding principle is that a finding of a fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles. ***See OKENO V. R [1972] EA 32***

As regards the first count, the appellant was charged under section 133 of the Penal Code which states as follows;

> *(a) "Any person who with intent to marry or have sexual intercourse with a woman of any age, or to cause her to be married or to have sexual intercourse with any other person, takes her away, or detains her, against her will, is guilty of an offence and is liable to imprisonment for seven years"*

It follows therefore that, in order to convict the accused with the offence of abduction, the following elements must be proved;

> *(a) That the appellant took away or detained the victim who is a girl or a woman of any age*
>
> *(b) That the taking away or detaining must be with intent to either to marry or to have sexual intercourse with the victim, or the victim to have sexual intercourse with any other person,*

(c) That the taking away or detaining must be against the will of the victim.

It was the evidence of PW1 that she was taken by the appellant to his home against her will where they stayed for two days. The evidence of the investigator PW6 is to the effect that during interrogation via cautioned statement the appellant denied to have abducted the victim, however admitted that the victim was found at his home on 3/01/2018 when she went there to look for a job (house girl). DW2 who is the appellant's wife acknowledged that the victim arrived at their home in the absence of the appellant, and she welcomed her as she was looking for a job. She added that, later on the Appellant arrived and found the victim there, but the police arrived and put them under arrest. The trial court in its judgment did not at all consider the defense evidence, but trusted the victim. The Successor Magistrate concluded that "**this court had time to observe the victim when testifying and it has satisfied that what she testified is nothing but the truth"**. However, in reality the one who heard and observed the victim's demeanor when testifying was the Predecessor Magistrate. The evidence of PW2, PW3, PW5 and PW6 as to whether the victim was abducted by the appellant was hearsay evidence. The Magistrate ought to have considered the defense of the appellant. It was argued by Zedy ally that failure to consider the defense evidence was an irregularity which occasioned injustice to the appellant, the court would have seen that the appellant had raised reasonable doubt as to his guilty. Mr. Uhagile, learned State Attorney conceded to that position of the law,

and added that, the evidence in support of the offence of abduction was weak to ground conviction.

This court is in agrees with Mr. Zedy Ally and Mr. Uhagile that, an imperative duty was not performed by the trial court. In **Bahati Kabuje v. Republic Cr. Appeal No. 252 of 2014 CAT at Mbeya (un-reported)** where the Court of Appeal of Tanzania held:-

"The position of the law is that, generally failure or improper evaluation of evidence inevitably leads to wrong and biased conclusion resulting into miscarriage of justice. From that premise, it has been held that failure to consider the defence case is fatal and usually vitiates the conviction".

Apart from assuring that the trial is fair, the evaluation is aimed at seeing whether the defence side has raised any doubt on the prosecution case. This sacred and holistic duty was emphasized in the case of **Henry Mpangwe and Two Others v. R (1974) LRT No 50** which quoted with approval in the case of **Ndege Marangwe v. R (1964) EACA No. 156.** The court held as follows: -

"It is a duty of the trial judge when he gives his judgment to look the evidence as a whole; it is fundamentally wrong to evaluate the case of the prosecution in isolation and then consider whether or not the case for defence rebuts or casts doubt on it".

As regards the 2nd count, the appellant was charged under Section130(1), (2) (a) and 131 (1) of the Penal Code.

130 (1) of the penal code Cap 16 R: E 2002 provides

"It is an offence for a male person to rape a girl or woman"

Section 130 (2) of the Penal Code provides;

"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(e) ***with or without her consent when she is under eighteen years of age,*** *unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

For the offence of statutory rape upon which the appellant was charged with since PW1 was alleged to have 17 years old, among the vital and apparent elements which the prosecution needs to prove are: -

(a) Penetration of the penis into the vagina of the victim;

(b) The age of the victim;

(c) That it was the appellant who is responsible for such act.

As regards the first ground that the trial Magistrate erred in law and facts by convicting and sentencing the appellant with the charge of Rape; I would like to state at the outset that the PF3, attendance register and the victim's birth certificate (birth certificate was sought and obtained on 06/03/2018 while the alleged offence was committed on 01/01/2018) were tendered by the Public Prosecutor contrary to law and, were not read out in court and explained to the appellant as required by the law, thus as pointed out earlier the exhibits have been expunged from the record of evidence.

It is undisputed that one of the ingredients of statutory rape is age. In the case of Mathayo **Kingu versus The Republic,** Criminal Appeal No.589 of 2015, CAT Dodoma (Unreported) it was held that;

"The age of the victim was important to be mentioned and proved to ascertain as to whether real the victim was a girl aged below 18 years to constitute the offence of Statutory rape"

In this case, the victim is alleged to have 17years old when the offense was committed, however after expunging the birth certificate for reasons earlier stated, as correctly submitted by Zedy Ally and conceded by Uhagile, learned State Attorney, there is no evidence oral or documentary leading to prove the age of the victim. Since, it is legal requirement for the age of the victim to be proved, and the same has not been proved in this case, it cannot be said statutory rape has been established.

In sexual offences, the best evidence in sexual offences comes from the victim as per position established in the case **Selemani Mkumba versus R [2006] TLR 379.**

In this case, the evidence of PW2, PW3, PW4, PW5 and as to whether the victim was raped is hearsay evidence, therefore the remained evidence is that of the victim. The decision of the Court of Appeal in the case of **Makumba** (Supra) is very clear that true evidence in sexual offences comes from the victim but the same Court currently, while addressing the evidence of the victim in sexual cases in the case of **MOHAMED SAID V.R, Criminal Appeal No.145 of 2017 (Unreported**) stated that,

"We think that it was never intended that the word ***of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness……."***

The learned Justice Professor Lilian Tibatemwa Ekirikubinza of the Supreme Court of Uganda, in the case of **NTAMBALA FRED V. UGANDA Criminal Appeal No.34 of 2015** referring what Lord Justice Salmon stated in **R V. Henry Maning (1969) 53 Criminal Appeal Rep** 150,153 observed that;

"In cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases, girls and women do sometimes tell an entire false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all'

The emphasis here is that, in order to convict an accused person basing on the evidence of the victim, the trial court must be satisfied that what the victim has testified is nothing but the truth, because what matters in evidence is not the number of witnesses testified but the quality of the evidence presented before the court. See section 143 of the evidence Act, Cap 6 R: E 2019.It follows therefore that the witness must be a credible witness,

However, it has to be noted that the credibility of witness is the monopoly of the trial court. In **Shabani Daudi v. R. Criminal Appeal No. 28 of 2000** (unreported) the court held: -

"The credibility of witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of the witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including the accused person".

In this case, the Magistrate who heard five (5) prosecution witnesses is not the one who composed the judgment, thus was not able to talk about the demeanor of those witnesses. It was the submission of Mr. Zedy that, reading the prosecution evidence as a whole, the same was not strong enough to ground conviction. The learned State Attorney well supported that position, and asked the court to allow the appeal on the ground that the case against the appellant was not proved beyond reasonable doubt. PWI alleged that the accused had sexual intercourse with her against her will, and the same time she contradicted herself as shown in page 6 of the typed proceedings. Let the trial court record speak for itself;

"..... I headed to his kiosk at Nshamba centre, but I did not find him. I waited for him and he came later at 9:00pm and he opened his kiosk where he had a room and we entered his room and had sex for two days with my consent..."

In the case of **Paschal Sahel, versus R,** Criminal Appeal No.23 of 2017 the Court of Appeal went a step further discussing the position of law given in the case of **Makumba**, and held that

"While we agree that the above is the position of the law, we hasten to say that it does not mean such evidence should be taken wholesome, believing and acted on to convict the accused persons without considering other circumstances of the case. In the present case, apart from the words of PW1, the victim, there was no eye witness to the incident of rape...."

Applying the same principle, in the instant case it is hard to believe the victim's evidence alone since no cogent evidence that the victim was a child, and that the appellant had sexual intercourse with her, and that she was not consented to the act. The victim in her evidence has contradicted herself to the extent of making this court rule that she was not such a credible witness to believe.

Indeed, in absence of any other evidence, it cannot be said that the prosecution had managed to discharge its duty of proving the case beyond reasonable doubt, as the principle that the accused can only be convicted of an offence on the basis of the strength of the prosecution case, and not on the basis of the weakness of the defense case because the accused has no duty at all to prove his innocence.

In the premise, I am constrained to allow the appeal and, respectively, quash the conviction and set aside the sentences of three (3) years imprisonment and thirty (30) imprisonment respectively as well as the order for compensation of TZS. 500,000/= imposed upon the appellant by the trial court. I further order for an immediate release of the appellant from prison custody unless if he is held for some other lawful cause

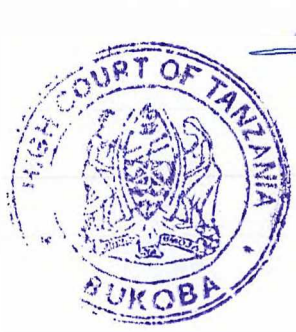
It is so ordered.

E.L. NGIGWANA

JUDGE

01/09/2021

Court: Judgment delivered this 01st day of September 2021 in the presence of the appellant, by virtual court link while in Bangwe Prison Kigoma, Amani Kilua learned State Attorney for the Republic, and E. M. Kamaleki, Judge's Law Assistant.



E.L. NGIGWANA

JUDGE

01/09/2021