IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

CRIMINAL APPEAL NO. 36 OF 2021

(Originating from Criminal Case No. 86 of 2019 in the District Court of Hai)

NOEL DANIEL SWAI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

MUTUNGI .J.

The appellant was charged before the District Court of Hai with one count of rape contrary to **Section 130 (1)(2)(e) and 131 of the Penal Code Cap 16 R. E 2019**. It was alleged that on unknown date of March, 2019 at different times at MasamaRoo village, within Hai District in Kilimanjaro Region, the Appellant did have sexual intercourse with one Sabrina Adilsi a girl aged 9 years old, a standard four student at Nkokashu Primary School.

The accused pleaded not guilty and thereafter the prosecution marshalled four (4) witnesses to prove the offence, whereas the defence had only one witness. After hearing both sides, the trial magistrate was satisfied, the prosecution had proved its case to the required standard and convicted the appellant as charged, sentencing him to thirty years imprisonment.

The brief facts leading to this appeal are that on 21/3/2019 after the victim's mother had woken up, she tried to wake up the victim. To her surprise the victim refused to go to school on allegations she had lower stomach pains. The victim's mother got curious and demanded to know the cause of the persistant pains. It is when the victim spilled out the beans that, she had been raped by the appellant. He had done this to her on several occasions and normally after school. The first time was on 1st March 2018 when the victim had gone to play with on Lydia at the appellant's home. Once the said Lydia left, the appellant pulled her on the coach and raped her. On other occasions he raped her on his bed, kitchen and under the mango tree. The victim admitted had not revealed these incidences to her mother for the reason, the appellant had threatened to kill her in the event she narrated the incidences to her.

The victim's mother reported to the police station (gender desk) and later the child (victim) was taken for medical examination. The Medical Doctor confirmed the victim had been raped.

Aggrieved by the trial courts findings, the appellant has filed the present appeal based on 7 grounds of appeal which are: -

1. *That the learned Honorable trial magistrate grossly erred both in law and fact in failing to note and appreciate that the allegedly particular incident date indicated in the charge i.e 21st March 2019 wa totally at variance with the evidence adduced by the prosecution witnesses. Hence the charge was fatally defective. Furthermore there is variance bewteen the date when the victim was presented to the hospital and the date when the doctor examined/received the victim(PW1).*
2. *That the learned Honorable trial magistrate erred both in law and fact in failing to positevely assess the victims uncorroborated evidence and assign the reasons for the satisfaction on the credibility and truthfulness of the victim, considering that*

the successor trial magistrate did not assess the victim's demenour while testifying before the court. Hence the trial court's judgement flouted the manadtory provisions of section 127(7) of T.E.A Cap 6 RE 2019.

3. *That the learned Honorable trial magistrate erred both in law and fact in failing to note that, non reporting to any person at the earliest possible opportunity the alleged incedents of rape could not attract the confidence, credibility of the victim's(PW1) evidence, since she (PW1) alleged that she was raped five times by the appellant, therefore if it was not for the alleged pain below her stomach, the alleged incident would remain a secret to the victim.*
4. *That, the learned Honorable trial magistrate erred both in law and fact in convicting the appellant on an irregular proceedings which flouted the mandatory provisions of section 214(1) of the Criminal Procedure Act(CPA) cap 20. RE 2019 whereby there is no reasons stated and subsequently being recorded in the court proceedings on why the predecessor magistrate (i.e. D. J. Msoffe-RM) who took over the case and*

conducted the preliminary hearing (PH) on page 6-7 of the proceedings failed to complete the trial.

5. *That, the learned Honorable trial magistrate erred both in law and a fact in failing to be scrupulous to note that the case at hand was a concocted one against the appellant, since the medical doctor(PW4) stated to have attended the victim (PW1) ON 25.03.2019 and he asserted that 72hours was not yet lapsed since the victim was raped. Therefopre going by the simple calculation it goes thus; from 25th March 2019 backward an uncompleted 72 hrs would have had been 22nd or 23rd March,2019 astonishingly the charge sheet indicates that the alleged incident occurred on 21.03.2019 which is 4days past.*
6. *That, the learned Honorable trial magistrate erred both in law and fact in convicting the appellant basing on weak, tenuous, contradictory, incredible and wholly unreliable prosecution witnesses testimonies.*
7. *That the learned Honorable trial Magistrate erred both in law and fact in convicting the appellant*

despite the charge being not proved beyond reasonable doubt and to the required standard by the law.

When the appeal was called up for hearing, the appellant appeared in person, while Mr. Ignas Mwinuka, learned State Attorney represented the Respondent/Republic. The parties agreed to proceed by way of Written Submissions.

Submitting on the 1st ground of appeal, the Appellant is faulting the trial magistrate for failure to note the variance on the dates in the charge and the witnesses' evidence. He submitted, the charge indicates the offence was committed on 21st day of March 2019, the Preliminary Hearing indicates it was on unknown date and PW1 in her evidence stated it was in March 2019. On the other hand PW2 (victim's mother) stated on 21st March 2018 she noticed her daughter had been raped. The Appellant was of the view that if this evidence is well scrutinized, one will note the prosecution evidence is inconsistent with the charge.

The Appellant also raised contradictions on the date alleged the victim was taken to hospital. PW1 (the victim) and PW2 (her mother) stated it was on 21st March 2019 while PW3 (victim's father) stated it was on 22nd March 2019

and lastly PW4 stated he received the victim on 25th March 2019. The variance in dates shakes the prosecution evidence, it was thus erroneous to convict him based on such unreliable evidence.

The Appellant was of a further view he was not informed on the punishment when he was called to plea to the charge and therefore such omission rendered the charge fatally defective. The Appellant complained further, he was charged under the law which was inapplicable at the time. He explained the alleged offence was committed on 21st March 2019 and he was charged under section 130 (1),(2),(e) and 131 of Cap 16 R.E 2019. The same had come into operation on 30th day of November 2019. The Appellant argued the same contravened Article 13(6) (c) of the 1977 Constitution as amended from time to time. In that respect, it was Appellant's argument he was convicted on a defective charge.

On the 2nd, 3rd and 6th grounds he averred, the victim's evidence was unreliable, uncorroborated and untruthful in the sense, she kept on changing her story. Referring to concrete examples the appellant submitted, she had first stated was playing with Lydia at Lydia's place and sometimes she said she was playing at Appellant's home

then Lydia left. When cross examined as to whether Lydia and Appellant lived together, she said they were not. The Appellant further referred the court to page 13, 12th line where the victim said her mother is the one who washed her but when cross examined, she said she bathed herself. When cross examined by the court she said her mother is the one who washed her clothes. When cross examined by the prosecutor, she said she bathed herself and washed her own clothes. Another further example was the victim testified she was playing with Lydia then Lydia left, thereafter the Appellant pulled her inside but changed the story by stating she was picking mangoes when the appellant asked her as to who allowed her to pick mangoes, then he pulled her onto the coach and raped her.

The appellant also faulted the trial magistrate's failure to comply with the requirements of sections 127(2) and 186(3) of the Tanzanian Evidence Act, Cap 6 R.E 2019. He expounded had the successor magistrate conducted a *vore dire* examination, could have observed whether PW1 understood the duty of speaking the truth or not; or the intelligence of the witness. On the same point the Appellant added, it was dangerous to convict him on the

evidence where she did not observe the demeanour. He referred the court to the case of ***Msami Ally vs Republic, Criminal Appeal No 280 2015,*** (CAT unreported at Arusha at page 8).

In concluding the Appellant prayed the court allows the appeal and quashes both the conviction and sentence of the trial court.

Mr. Mwinuka in reply thereof stated, the variance in dates in the charge sheet and witnesses' evidence is minor/trivial which doesn't go to the root of the case. Further, he added PW2 and PW3 at page 14 of the proceedings had mentioned a date that matches with the charge. The foregoing notwithstanding Mr. Mwinuka was of the view, such contradictions in dates is curable. He cited the case of **Eliah Bariki vs Republic, Criminal Appeal Np 321 of 2016 CAT** to buttress his position. He further argued in evaluating the evidence, it should be done wholistically and not simply considering the evidence in piece meals.

Responding to the none existing law, the learned State Attorney contended Cap 16 R.E 2019 is not a new Act as what changes is only "R.E 2019" but the contents of the provision and sentence remained the same. He averred even though non/wrong citation is not a fatal irregularity.

He invited the court to the case of **Joachim Sebastian vs Republic Criminal Appeal No 295 of 2017 CAT** in support thereof.

Regarding the credibility of the prosecution witnesses, the learned State Attorney argued, the same cannot be raised at the appeal stage. The major reason being, the same is the monopoly of the trial court. He referred the court to the case of **Elia Bariki (supra)** to cement his position.

Reacting to the non-compliance of section 127(2) of TEA, Mr. Mwinuka was of the view such complaint is born out of misconception. There is clear evidence that in essence the victim had promised to tell the truth.

In conclusion it was Mr. Mwinuka's prayer the court should dismiss the appeal and uphold the trial court's judgement.

In rejoinder the Appellant reiterated his earlier submission in chief. He further reiterated his earlier prayer for the court to allow the appeal.

I have carefully perused the trial court's record, grounds of appeal and the rival submissions thereto, the following are the issues which need the court's determination.

1. ***Whether the prosecution had proved its case to the required standard.***

2. Whether there were procedural irregularities.

The first issue will cover the 1st, 3rd, 5th 6th and 7th grounds of appeal, while 2nd and 4th grounds will be discussed under the 2nd issue.

Starting with the first issue, the appellant is faulting the trial court for failure to note the variance in the dates on the charge sheet and adduced evidence. The charge indicates the offence was committed on unknown dates in March, 2019. The preliminary hearing that was conducted reveals it was on unknown date, PW2 (victim's mother) stated it was on 21/03/2018. The victim at some places at page 14 stated she didn't remember the month she was raped. The other discrepancy brought to the attention of the court is the period when the victim was allegedly taken to hospital. It is in evidence PWI and PW2 stated it was on 21/3/2019 whereas PW3 (victim's father) said it was on 22/3/2019 and PW4 (Doctor) stated he received the victim on 25th March 2019.

The foregoing notwithstanding the issue of discrepancies has been discussed in a number of cases by the Court of Appeal. In the case of **Alex Ndendya vs Republic Criminal Appeal, No. 207 of 2018** the Court of Appeal discussed in detail on the aspect of normal and material discrepancies.

It was observed that normal discrepancies do not go to the root of the case while material discrepancies do. Borrowing leaf from the cited authority, I find the variations highlighted by the appellant are normal discrepancies, neither do they go to the root of the case. This ground has no merit.

Turning to the 2nd ground which is on the applicability of section 127(7) of the Evidence Act, Cap 6 R.E. 2019. The appellant alleges the trial magistrate failed to positevely assess the victims uncorroborated evidence and assign reasons for the satisfaction on the credibility and truthfulness of the victim.

I am alive that the best evidence in sexual offences is derived from the victim though it is not the rule of the thumb. In the case of **Mohamed Said Vs Republic, Criminal Appeal No. 145 of 2017 (CAT-unreported)** stated the following: -

> *"…. 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 law is settled conviction on sexual offences can be grounded on the uncorroborated evidence of the victim if

the court is satisfied that the victim speaks the truth. Section 127 of the evidence Act which I wish to quote hereunder provides: -

> *''''Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.''*

The convicting magistrate was not the one who took the evidence of the victim and so she was not in a position to observe the demeour or else the credibility of the victim. It suffices to hold that the trial magistrate was not placed in a position to access the victim's evidence, to observe her demeanour and ascertain if at all she was firmly speaking

the truth taking into consideration she at sometimes changed the rape story as to when, how and where she was raped. Be as it may, it is on record that the victim had promised to speak the truth, when she was before the former trial magistrate. In that regard the court was to proceed as it did.

In answering a further complaint, it has been settled in our criminal jurisprudence, failure of the victim to report the incident at the earliest possible time is taken to be an assurance of unreliability and puts the witnesses' credibility to question. See the case of **Marwa Wangiti Mwita and Another vs Republic [2002] TLR 39**.

It is on record the incidence was not reported by the victim to anyone until when her mother inquired as to why she was always having stomach problems. It would seem had the mother not inquired the same would remain unrevealed. There are no clear reasons why the victim had opted to remain silent. The victim had alleged was frightened by the appellant but this leaves a lot to be desired. The court has considered that the victim was raped on several occasions yet does not state with certainty when, if at all she was threatened. It beats ones mind if indeed she had been threatened to proceed to

allow the appellant to rape her repeatedly and remain silent. As young as she was is doubtful to remain silent for that long. This piece of evidence clearly pokes holes in the prosecution case.

Having found the prosecution case created doubts then automatically the 5th, 6th and 7th grounds are meritorious and the appellant should benefit from these doubts. Further, as these grounds revolve around the standard of proof, it follows the prosecution case was not proved beyond reasonable doubt.

I now turn to the 4th ground of appeal where I have painstakingly gone through the record. My visiting of the record has revealed the file had exchanged hands through various magistrates. The court observes there was a strange handling of the file and no reasons were advanced each time this was done. It all started with Hon. D. J. Msoffe on 26/3/2019 when the appellant's plea was taken. On 18/9/2021 the file was mentioned before Hon. E. N. Petro. On 27/6/2019 the same was placed before Hon. Samuel (R.M). On 11/7/2021 Hon. D. J. Msoffe re-appeared and the preliminary hearing conducted. On 25/7/2019 Hon. A. R. Ngowi took up the file and this time around the charge sheet was amended and the same magistrate on

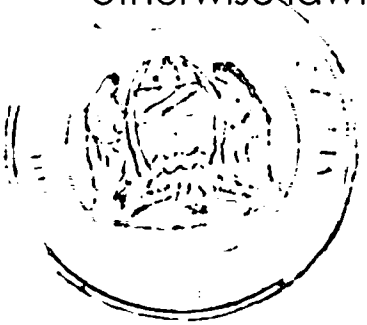
3/9/2019 conducted the preliminary hearing. On 17/9/2021 the file is remitted to Hon. D. J. Msoffe for unknown reasons for mention. On 1/10/2019 Hon. A. R. Ngowi proceeds with the hearing of 3 witnesses till 16/4/2020 when Hon. J. G. Mawole presides over and takes up the fourth witness (last prosecution witness) up to the conclusion of the case which includes writing of the judgment.

Following the above sequence of events, the same will result to an order of retrial but I ask myself if a retrial is proper in the given scenario. In the case of **Francis Alex vs. Republic, Criminal Appeal No. 185 of 2017, the Court of Appel** at page 20-21 quoted the case of **Fatehali Manji vs Republic [1966] EALR 343** with approval, the court observed the following: -

> *"In general a retrial will be ordered only when the original trial was illegal or defective, it will not be ordered when conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to*

blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where interest of justice require it"

In the present appeal, the evidence was insufficient to prove the offence of rape as discussed earlier in the judgment. On the same footing, ordering a retrial will be allowing the prosecution to fill the gaps and this will not be in the interest of justice. I accordingly allow the appeal, by quashing the conviction and setting aside the sentence. The Appellant to be released from prison forthwith unless otherwise lawfully held.



B. R. MUTUNGI
JUDGE
30/9/2021

Judgment read this day of 30/9/2021 in presence of the Appellant and Miss Lilian Kowero (S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
30/9/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
30/9/2021