IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 18 OF 2021

(Originating from the District Court of Temeke, in Criminal Case No. 243 of 2019 by Hon. Mwankenja, RM)

BONIFACE NYERERE SENDA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: ***22/9/2021***

Date of Judgment: ***27/10/2021***

ITEMBA, J;

This appeal arises from the decision of Hon. Mwankenja, Resident Magistrate in the District Court of Temeke. Boniface Nyerere Senda, herein the applicant, was charged with the offence of rape contrary to sections 130(1) and (2) (a) of the Penal Code Cap 16 R.E 2002. He was convicted and sentenced to (30) thirty years imprisonment, compensation of Tshs. 500,000, fine of Tshs. 10,000 and corporal punishment of five strokes of cane.

Upon being aggrieved by the said decision, the appellant filed the present appeal with the following grounds:

1. *That the trial court erred in law and fact by failure to evaluate and analyze properly the evidence of the prosecution and the defence side, thus failed to detect the weaknesses of the prosecution case thus wrongly proceeded to convict the Appellant for the offence of rape and consequently wrongly sentencing and fining the Appellant based on the evidence which was not sufficient to prove the offence the Appellant stood charged.*

2. *That, the trial court erred both in law and fact by wrongly determining the case and convicts the Appellant for rape offence and sentencing the same based on the incurably defective charge which differs greatly between the evidence adduced by PW1, PW2 and PW3 which in totality alleges the offence of gang rape while the charge was for rape alleged to be committed by Appellant alone.*

3. *That the trial magistrate erred in law and fact convicting the accused based on the weak and uncorroborated evidence.*

4. *That, the trial magistrate erred in law and fact by not taking into account into his judgment uncontested evidence by the defence side that there were prior mis-understanding between PW1 and DW2 emanating from the breaking of their love relationship and that was a cause of PW1 to file a cooked case, thus ending up wrongly convicting the Appellant for the offence of rape.*

5. *That the trial court erred in law and fact by stating that the evidence of PW1 was not cross examined by the Appellant, further wrongly held that be being not cross examined means that the Appellant admitted such adduced evidence, thus wrongly ended up to convict and consequently sentence and fining the Appellant for the offence of rape based on such evidence.*

6. *That the trial magistrate having expunged in record exhibit P2 which was PF3 and exhibit P1 which was statement of the appellant, the trial court went further by not considering the reasonableness on the extent of contradiction evidence remained after expunging such exhibits, thus wrongly convicting the*

Appellant for rape offence based on such contradictory evidence which was not corroborated thereafter and without giving benefit of doubts to the Appellant.

7. *That, the trial court erred in law and fact by not taking into account the evidence adduced by PW1, PW2 and PW3, and the act of the prosecution for not summoning the mentioned key witnesses, thus not giving benefit of doubt to the Appellant and consequently wrongly convicting and sentencing the Appellant for the offence charged with.*

The appellant prayed for the appeal to be allowed and conviction, sentence, fines and orders of the trial court be set aside.

The facts of this case in brief are that one 'JS' who will be herein referred to as PW1 or the victim, had a fiancée named Nashiru. Nashiru was a friend of the appellant. On the fateful day, PW1 met the appellant and his other friends who PW1 refers to as her brothers in law. The said crew told PW1 that Nashiru was calling her. PW1 believed them, she went up to the appellant's house and waited for her fiancé. After waiting for some time without her fiancé appearing PW1 informed the appellant that she wanted to leave. The appellant brought a knife from his house threatened PW1, the appellant together with his said friends, took PW1 inside the house and raped her. She screamed for help but her mouth was muzzled. After raping her, the appellant instructed his fellows to pour a bucket of water on PW1 aiming to destroy the evidence. PW1 went home, narrated to her grandmother what happened to her and the following day the two reported the matter to police. The appellant was arrested.

During trial, an investigator, WP 3515 D/CPL Catherine (PW2) tendered a cautioned statement Exhibit P1 and a police officer Renalda Chuwa (PW3) tendered a PF3 as exhibit P2.

In defending himself, the appellant admitted that on the incidence day the victim went at his place. However, he denied the liability stating that the victim actually, was her lover but they had grudges that is why she framed a case against him. The appellant also paraded his brother as his witness who supported the fact that himself and the victim were lovers and were no longer in good terms and that the victim had once threatened the appellant.

When the appeal was scheduled for hearing Mr. Nimrod Msemwa, appeared for appellant. In his argument, he prayed to consolidate the 1st and 2nd ground which were referring to weakness of prosecution case and the appellant being charged based on a defective charge.

It was Mr. Msemwa's submission that the appellant was charged under section 130(1)(2)(a) and 131(1) of the Penal Code, Cap 16. R.E 2002, which create the offence of rape. However, based on the evidence, PW1 was talking about gang rape, an offence which is established under section 131 A of the same Act. According to Mr. Msemwa, PW1 mentioned that the appellant and four (4) other people grabbed and raped her but it was only the appellant who was charged of rape instead of gang rape. He went on to state that, in such circumstances the charge sheet should have been amended and failure to that is fatal. He supported his argument with the cases of **Mashaka Bashiri v Republic**

Criminal Appeal No. 242 of 2017 and **Michael Gabriel v Republic** Criminal Appeal 240 of 2017.

The learned advocate also consolidated the 3rd and 4th grounds. He submitted that the trial magistrate did not consider the appellant's defence that PW1 framed the appellant in this case because he was her ex-boyfriend and the two had grudges. Referring to the case of **Kaimu Said v Republic** Criminal Appeal No. 391/2019 he submitted that it is fatal for the trial magistrate's failure to analyse defence evidence.

As regards to the 5th ground, the appellant's counsel explained that the trial magistrate was wrong to state that failure of the appellant to cross examine PW1 meant that the appellant admitted some facts while in fact cross examination was done by the appellant.

The 6th ground referred to the Cautioned statement and the PF3 which the appellant stated that they were tendered by prosecutions contrary to section 240 of CPA and that the appellant was not given an opportunity to cross examine because the author of the said PF3 was not called as a witness.

In the last ground Mr. Msemwa stated that the victims' grandmother was an important witness who was not called to testify, and as a result the judgement was based is only on victim's evidence. He acknowledged that in rape cases the best evidence is that of the victim but he added that if the victim's evidence is doubtful there is a need to have additional evidence. He argued that PW1's evidence was doubtful because she stated she was raped by many people, one of them was her lover and

they use to have fights. He supported his submission with the case of **Butongwa John v Republic** Criminal Appeal no. 450 of 2017.

In reply Ms. Jenifer Masue Senior State Attorney supported the appeal the reason being that the charge against the appellant was defective. Ms. Masue agreed with the appellant's counsel that the appellant was not properly charged and that the proper charge was supposed to be gang rape and not rape. She added that based on section 135 (a) (ii) of the Criminal Procedure Code, Cap 20, herein the CPA. The appellant needed to understand the charge so as to prepare his defence. She went on to state that apart from the appellant, there are other people who are mentioned by PW1 such as George, Mudi and another one whom PW1 knew only by his face and that the record is silent as to why those suspects were not charged. She agreed with the case laws cited by the appellant and added another case of **Musa Mwaikunda v Republic** (CAT) 2006 TLR 174 which sets the minimum standard for fair trial and one of them being "the accused to understand the nature of the charge".

The learned state attorney did not stop there she stressed that this defective charge could not be cured under section 388 of the CPA and since the chargesheet is the one which initiates a criminal case and it was defective, therefore the appellant was not properly charged.

Despite supporting the appeal, Ms Masue went on to respond to the rest of the grounds as follows.

As regard the 3rd and 4th grounds, she stated based on page 11 of the judgement it shows that the trial magistrate did consider the defence only that he found the same to be weak.

Concerning the 5th ground, regarding the appellant's failure to cross examine Ms Masue explained that proceedings at page 6 shows that the appellant cross examined PW1 however, she added that, according to page 10 of the Judgement the trial magistrate explained that cross examination was shallow and gave 9 reasons to support his explanation. Ms. Masue also stressed that conviction of the appellant was not based on failure to cross examine PW1.

Arguing the 6th ground, the learned senior state attorney admitted that the cautioned statement and PF3 were not properly tendered before the court. But she referred the court to page 13 of the judgement which shows that the trial magistrate did not rely on PF3 to convict the appellant. She further stated that section 127(6) of the Evidence Act allows the Court to convict the accused if the victim appears to be a credible witness.

In finalizing her submission, and arguing the 7th ground of appeal, Ms Masue stated that it was not fatal for the prosecution not to parade the victim's grandmother as a witness. She relied on section 143 of the Evidence Act which requires no specific number of witnesses to prove a case.

Having gone through court's records and both parties' submissions, the issue is whether the appeal has merit.

I will start with the 1st and 2nd grounds regarding the alleged defective chargesheet. The chargesheet reflects that the appellant was charged with the offence of rape contrary to section 130(1)(2)(a) and 131 of the Penal Code R.E 2002.

For easy of reference, the sections states as follows:

*"**130**. -**(1)** It is an offence for a male person to rape a girl or a woman.*

(2) 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:

(a not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;

***131**.-**(1)** Any person who commits rape is, except in the cases providedfor in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition beordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person."*

At the same time, the offence of gang rape under section 131A of the Penal Code, which both parties propose that were the proper charge against the appellant reads as follows:

131A.-(1) Where the ***offence of rape*** *is committed by one or more persons*

in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape. [Emphasis supplied]

Therefore, so far, the following are not in dispute: **One**, PW1 mentioned the appellant and other 4 persons who raped her. The others being George, Mudi and two people who the appellant identified them only by their face. **Two**, the said other 4 persons for undisclosed reasons, were not charged. **Three**, when rape is committed by more than one person the proper offence is gang rape and not rape. **Four**, the appellant was charged with rape.

In my view it is crucial to note that not every defect in the charge sheet would vitiate a trial. As to what effect the defect could lead, would depend on the particular circumstances of each case, the overriding consideration being whether or not the defect worked to the prejudice of the person accused.

To appreciate the point raised by the appellant, I have seen necessity, for ease of reference, to reproduce the charge sheet except for the name of the victim: -

IN THE DISTRICT COURT OF TEMEKE

AT TEMEKE

CRIMININAL CASE NO. 243 2019

REPUBLIC

Versus

BONIFASI NYERERE SENDA

CHARGE

STATEMENT OF THE OFFENCE

RAPE: Contrary to section 130 (1) (2) (a) and 131 (1) of the Penal Code [Cap 16 R.E. 2002]

PARTICULARS OF THE OFFENCE

BONIFASI NYERERE SENDA on 25th day of January, 2019 at Mashine ya Maji area within Temeke District in Dar es salaam Region did unlawfully have a carnal knowledge of one (*name withheld*) without her consent.

Dated at Dar es Salaam this 25th day of March 2019

.....

STATE ATTORNEY

As shown herein above, the charge sheet shows that the appellant was personally charged of rape. However, PW1, mentions the accused and the other four men who are purported to have carnally known her. PW1 even explained the appellant's role during the incidence, that he

used a knife to threaten her and later on ordered water to be poured on her and that the incidence took place at his house.

The trial Court relied on the evidence of PW1 (the victim) to convict the appellant. As evidence by PW1 is suggesting that the appellant with his co-perpetrators had committed a gang rape against the victim, it is therefore obvious that there is a contravention between the statement of offence *visa vee* the evidence presented in support of the charge.

I am alive with the position that in criminal proceedings the prosecution has the duty of proving it's case against the accused person beyond reasonable doubt and in doing so, the duty begins at the time of framing the charge that they are duty bound to file the charge correctly. Among others is the case of **Mohamed Kaningo vs. Republic**, [1980].

Likewise, I incline to the provisions of Section 234 (1) of the CPA, which provides that where there is variance between the charge and the evidence the prosecution has to seek leave to amend the charge after noting that there was variance between a charge sheet, failure of which, renders the charge defective. The question is, in the matter at hand, was there variance between the charge and evidence, if so, *did it prejudice the appellant on his defence?*

It is my considered view that the variance which is exhibited in the present appeal is not the one which will render the charge defective and occasion injustice to the appellant, for the following reasons. One, the appellant's counsel has not explicated as to how such a defect has prejudiced the appellant in either way to establish his defence. Two, the

particulars were clear to the appellant as they were read to him on the very first day he was arraigned on 28/03/2019 and he deny the allegation by pleading not guilty to the charge. He was also addressed in terms of section 192 of the CPA on 20/06/2019 and from statement of facts he admitted only his name. During trial the appellant defended himself referring to the offence of rape against PW1 (JS). So, it obvious the appellant knew the nature of the charge he was facing and hence he was in a position to establish his defence as he did. The cited cases by the appellant's counsel are distinguished for the variance between the charge was evidence was prejudicial to the appellant. In **Michael Gabriel v Republic** (supra) for example, the variation was regarding the place where robbery took place while in **Mashaka Bashiri v Republic** (supra) the variation was in respects of the types the alleged stolen items. Whereas in the present appeal the appellant understood the offence which he was charged with was rape, which is a himself having sexual intercourse, with JS, without her consent.

That being said, I am positive that the mere fact that the offence was committed by many but only one was charged cannot be interpreted as prejudicial to the appellant. That is a type of variance which is curable under the provisions of section 388 of the CPA because it did not occasion any failure of justice. Hence, the 1st and 2nd grounds have no merit.

As regard the 3rd and 4th grounds regarding the defence raised by the appellant, I would like to produce an extract from the trial court's judgment at **page 11:**

"...I have gone attentively through defense case to ascertain on how doubts against prosecution case was raised by an accused. On my evaluation, consideration and analyzation of the evidence adduced by prosecution camp especially PW1 and having considered the defense case, the prosecution case is cogent and credible since have successfully proved the offence against the accused person beyond reasonable doubt. I am satisfied that the questions of sexual intercourse and without consent have been proved to the standard required under criminal trial that of beyond reasonable doubt. Therefore, I am satisfied indeed that PW1 was raped by an accused person with four men without her consent."

The trial magistrate went through the raised defence but did not see it as reasonable. I agree with the trial magistrate on his decision because the issue of PW1 being the appellant girlfriend and that PW1 had grudges with the appellant featured during the defence. The appellant said PW1 warned him by saying "nitakuonyesha" which is literally translating to "I will show you" (who I am). However, the issue of grudges between the appellant and the victim being a sensitive issue the appellant to cross examine PW1. I find it to be an afterthought, it should have come up immediately during the prosecution case. The trial magistrate was at the

best position to assess the credibility of the victim and the appellant. I therefore agree with the learned state attorney that the trial magistrate warned himself on the danger of not considering defence evidence and he stated that after considering the defence evidence, he found the prosecution evidence to be watertight against the defence raised. As there are no reasonable doubts raised by the defence. Hence, the 3rd and 4th grounds have no merit.

The 5th ground refers to the appellant not cross examining the PW1. Concerning this ground, records show at page 10 of proceedings that the trial magistrate raised 9 issues which were not cross examined by the appellant which were, I will quote page 10 of the Judgment.

> *"The evidence of PW1 revealed the following feature.* ***One,*** *she knows the accused person and his home residence.* ***Second*** *she was taken by an accused and four men in the accused home.* ***Third*** *accused with four men undressed her pant without her consent.* ***Fourth,*** *the accused with four men had a carnal knowledge with her on the mattress penetrated penis to her vagina without her consent.* ***Fifth*** *she felt a lot of pain when the accused with four men did carnal knowledge without her consent.* ***Sixth*** *accused told his fellow four men to take bucket of water and pooling on PW1 private parts in order to destroy the evidence.* ***Seventh*** *PW1 did not raise an alarm either shout since her mouth was covered.* ***Eighth*** *after the incidence PW1 told her grandmother where the next day the*

matter was reported to Tambukareli Policestation and PF3 was issued for further medical treatment. Nineth. PW1 revealed that she knows the accused persons with four men even before the incidence as they were brothers in law. The above highlighted features were not cross examined by the accused person ....

Meanwhile page 6 of the proceedings shows the cross examination by the appellant as briefly as follows:

"Cross examination by accused person

-You told me I was being called by my fiancé

-You covered my mouth with your hands that was why I could not be able to shout for help

-I was with you and I did not know the other person

-That's all."

Thus, it is true that the appellant cross examined PW1 but he was limited to only few aspects on the role of the appellant before and after the incidence, and the rest were not cross examined.

Nevertheless, as rightly stated by the senior state attorney that the appellant was not convicted based on just failure to cross examine PW1 but based on the strong evidence from PW1. Thus, this ground has no merit.

The 6th ground, regards the fact that after the trial magistrate expunged Exhibit P1 (cautioned statement) and the PF3 (exhibit P2) the remaining evidence was contradictory and lacked corroboration. From the

record, at page 9 of typed proceedings, it is true that a cautioned statement was admitted as exhibit P1 but it was not read out loud before the Court. It is also on record, at page 16 of typed proceedings that a PF3 was admitted as exhibit P2, read over. However, the appellant was not given an opportunity to cross examine the author of PF3 as he was studying overseas and therefore could not be called as a witness. Under those circumstances the trial magistrate chose to rely neither on PF3 nor on the caution statement in reaching his conclusion.

The trial magistrate correctly disregarded the cautioned statement as it was not properly admitted. Likewise, the trial magistrate correctly expunged the evidence of the PF3 because it was admitted contrary to section 240(3) of CPA. He correctly guided himself with the decisions of **Joseph Leko v. Republic** Criminal appeal No. 124 of 2013. On the same position there are a bucket of decisions including that of **Nyambuya Kamuoga V Republic** Criminal Appeal No. 90/2003, **Kashana Buyoka v Republic** Criminal Appeal no. 176/2004 unreported and **Sultan Mohamed v Republic** Criminal Appeal no. 176/2003. Further to that, it has been held in the case of **Parasidi Michael Makulla V Republic** Criminal Appeal No. 27 of 200 that "a medical report by itself, though, it helps to ascertain that an offence has been committed, it cannot prove who committed that offence". Similarly, the case of **Mario Athanas Sipeng'a V Republic** Criminal Appeal No. 116 of 2013(unreported) explains that the case of rape is not proved by medical evidence alone.

I have revisited the judgment and specifically at page 11, I find that the ground for conviction were not based on either the PF3 or the cautioned statement but rather the testimony of PW1.

To further explain that, section 127(6) of the **Evidence Act, cap 6, R.E 2019** empowers the court to convict the accused person without corroboration the most important aspect is to satisfy itself that the victim is credible and she is telling nothing but the truth.

In the present appeal the victim's testimony as testified at pages 5 and 6 of proceedings and analysed by the trial magistrate at page 10 his judgment as quoted above in length shows which type of evidence was relied by the court to convict the appellant.

As mentioned earlier on, the victim identified the appellant among the four persons who raped her. The appellant was essentially the master mind of the plan. The offence took place at the appellant's house, and he is the one who threatened PW1 with the knife before starting to rape her. He also directed the bucket of water to hide the evidence against them.

As correctly observed by the trial magistrate the evidence of PW1 being a victim was true evidence to establish that the appellant had sexual intercourse without her consent. The defense of grudges between PW1 and the appellant was considered by the trial court but as rightly explained by the trial court, the appellant did not cross examine PW1 on such crucial aspect. The appellant was expected to have invested in cross examining PW1 about their supposed previous affairs but as seen in the proceedings and as quoted above, he did not. This makes the line of

defence to be belated evidence which cannot distort prosecution's evidence. Therefore, the sixth ground has no merit.

Regarding the last ground of appeal. I think the appellant's complaints are baseless. It was not necessary to parade the victim's grandmother as a witness. As rightly put by the learned senior state attorney, section 143 of the Evidence Act, Cap 6 states that there is no required number if witness to prove a fact. Therefore, this ground lacks merit.

Based on the above deliberation, I find no reason to fault the decision of the trial magistrate as he rightly convicted and sentenced the appellant.

Either, I would like to comment on the final observation by the trial magistrate at page 18 and 19 of the judgment, to the effect that in charging the appellant, that the prosecution ought to have cited **section 5** of the **Sexual Offences Special Provisions Act No. 4 of 1998** instead of **section 130(1)(2)(a) of the Penal Code Cap 16 R.E 2002.** As regards these two provisions, the former is of 1998 and it was repealed by the latter in the year 2002. Therefore, there is nothing wrong with the section as it is. A similar situation was noted in the case of **Antidius Augustine v Republic** Criminal Appeal No. 89/2015 where the Court of Appeal of Tanzania stated that:

> "*First, it is important to note that after the laws were revised and printed under the authority of section 4 of the Law Revision Act, No 7 of 1994 [Chapter 4 of the Revised Edition,*

2002], it was therefore not necessary to indicate in the charge that was laid at the trial court and later the first appellate court that the said provisions (that is sections 130 (2) (e) and 131(1) (2) and 131A(2) were amended by "section 5 and 7 of the Sexual Offences Special Provision Act, No. 4/1998." This is so because the Revised Edition of the Laws of Tanzania /comprises and incorporates all amendments made to various chapters up to and including 31st July, 2002.Reference could have been made, if it was necessary, to the amendment that followed thereafter."

Therefore, the charge sheet was correctly drafted and did not contravene section 135 (a)(ii) of the CPA.

In the finality, the appeal lacks merit. I dismiss it in its entirety.

It is so ordered.

Dated at Dar es salaam this day of 27th day of October, 2021.

L. J. Itemba

JUDGE

27/10/2021

Judgement delivered today, this 27th day of October 2021 in the presence of the appellant in person, Ms Rita Mahoo advocate for the appellant, Ms. Jennifer Masue, learned Senior State Attorney for the Respondent and Ms Tupokigwe RMA.

L. J. Itemba

JUDGE

27/10/2021

Right to appeal fully explained.