IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 96 OF 2020

(Originating from Criminal Case No 34/2019 of Kisarawe District Court)

FARAJI HUSSEIN ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

Date of last Order: *07/06/2021*

Date of Ruling: *09/06/2021*

J U D G M E N T

MGONYA, J.

Before this Honorable Court lies an Appeal where the Appellánt was found guilty of the charges against him and sentenced to a term of imprisonment of 30 years from two counts that were levied against him.

Being aggrieved by the decision of the trial Court, the Appellant knocked the doors of this Court with 14 grounds of appeal being:

1. ***That your Honourable Judge, the learned trial Magistrate erred in law and fact by convicting the appellant in a case where the evidence of PW1 (victim) was procured unprocedurally the court contrary to procedure of law.***

2. *That the learned trial Magistrate grossly erred in law and fact by convicting the appellant in a case where the age of the victim (PW1) wasn't proved beyond reasonable doubt, as neither the victim (PW1) not the victim's father (PW2) stated the date of birth of PW1 or tendered any Birth Certificate/clinical card to prove the same contrary to procedure of law.*
3. *That the learned trial Magistrate grossly erred in law and fact by convicting the appellant in a case where "PENETRATION" wasn't proved contrary to procedure of law.*
4. *That the learned trial Magistrate seriously misdirected herself by believing in the incredible, unreliable and contradictory evidence of PW1 (victim) as;*
    (i) *There is material contradiction in PW1's evidence regarding the number of times she was allegedly raped in her examination in chief and examination by court (see; page 6 and 8 of court records respectively).*
    (ii) *PW1 didn't state the date alleged offence took place.*
    (iii) *PW1 wasn't led by the prosecution to touch/point the appellant for proper*

identification (Dock) contrary to procedure of law.

5. ***That the learned trial Magistrate grossly misdirected herself in law, when she shifted the burden of proof to the appellant and failed to properly consider the defence case against the prosecution case objectively in her Judgment hence rendering the same fatally defective.***
6. ***That the learned trial Magistrate, erred in law and fact by convicting the appellant in a case where Exhibit P.1 collectively (2 letters) and Exhibit P.2 (PF3) were admitted unprocedurally as they were not read out aloud in court contrary to procedure of law.***
7. ***That the learned trial Magistrate grossly erred in law and fact by failing to appraise the prosecution evidence objectively and hence convicting the appellant from the alleged offence he was charged with.***
8. ***That the learned trial Magistrate grossly erred in law and fact by filing to realize that PW3's (doctor) evidence didn't mention the reason why her hymen (PW1) wasn't intact and he also failed to apply the principle that "An old broken HYMEN cannot be prove of a recent defilement"***

9. *That the learned trial Magistrate erred in law and fact by convicting the appellant in a case where there was material contradiction between the evidence of PW1 (VICTIM) and PW4 (INVESTIGATOR) regarding: -*
   (i) *The number of times and places where the victim (PW1) has been raped.*
   (ii) *The clothing (Exhibit P.3) allegedly belonging to the appellant.*
10. *That the learned trial Magistrate erred in law and fact by convicting the appellant based on an incurably defective charge sheet as the evidence on record varies with the statement and particulars of offence stated in the charge sheet.*
11. *That the learned trial Magistrate erred in law and fact by failing to appraise objectively PW's incredible and improbable evidence as the same would have led her to realize that PW2 is the main ORCHESTRACTOR and chief FABRICATOR of the alleged offence against the appellant.*
12. *That the learned trial Magistrate erred in law and fact by convicting the appellant based on the incredible, inconsistent and contradictory evidence of PW1, PW2 and PW4.*

13. ***That the learned trial Magistrate erred in law and fact by convicting the appellant in a case where Exhibit P3 collectively (one t-shirt and MZULLA) were tendered and admitted un-procedurally as the Doctrine of chain of custody wasn't complied with.***
14. ***That the learned trial Magistrate erred in law and fact by convicting the appellant in a case that wasn't proved beyond reasonable doubt.***

Wherefore, the Appellant prays this honorable court to allow appeal, quash conviction and set aside sentence passed by the trial Court and release the Appellant from prison.

Submitting for the Appeal, Appellant prayed the Memorandum of Appeal be adopted for determination and pray that the Appeal be allowed and the court set him free from the prion as the matter at issue was fabricated.

Responding to the Appeal, **Ms. Faraja George,** the learned Senior State Attorney for Republic informed the court that, after they have gone through the 14 grounds of Appeal, it is the Republic's conviction and stand that they support the Appeal. The reason coming from a single reason and ground being the 1st ground that PW1's testimony was taken un-procedurally.

In supporting this ground, the learned State Attorney referee this court to page 6 of the trial court's proceedings

particularly to for the testimony of one **Zuhura Yusuph,** stating that her testimony was taken contrary to the legal procedure. The Learned State Attorney said, when her testimony was taken she was 14 years, and in accordance with **section 127 (2) of the Evidence Act as Amended with Act No. 4 of 2016, (herein to be referred as TEA)** it is explicitly stated that, for any witness of 14 years and below, if needed to testify before the court, the court has been allowed to take the testimony of that witness being with or without oath, and that she/he will be required to promise the court of which the court have to record that promise in proceedings.

Further that, referring to PW1's testimony, her testimony was taken simply by oath, but there is nowhere the promise by the witness is seen to have been in place and recorded. It is the Republic's concern that, lack of promise of the witness, makes the evidence of PW1 to lose weight before the law. Since the same is contrary to **section 127 (2) of TEA (Supra).**

It is from the said legal anomaly, the Counsel prayed the court to expunge testimony of PW1 from the trial court's record. Further, it was observed that, after the expansion of the PW1's testimony, the remaining is that of hearsay witnesses whose testimonies cannot stand alone as they were not eye witnesses. Further, it was observed that, the Doctor's

evidence also needs the support of the victim's testimony of which after expansion is not in place.

From the above explanation, the Counsel prayed the court to allow the appeal for the above stated reasoning.

Going through the grounds of Appeal and the Republic's submission. I am in line with the Republic's concern that the PW1's testimony was taken without taking into account the legal requirement under the provisions of the Evidence Act as well stated by Ms. Faraja George, the learned State Attorney. I'm this regard, I am referring to the recent case of **March 2021, *MASANJA MAKUNGA VS. REPUBLIC;* Criminal Appeal No. 378 of 2018 at its page 12 - 13** where the child was sworn in without any promise as per **section 127 (2) of TEA** requirements, where the child's testimony was expunged for the same above stated reasons.

Further, I am aware that in rape cases as it is well known, the best evidence is the one comes from the victim herself. Taking into consideration her testimony before the court, and being the witness who actually knows what transpired between her and the Appellant, so the court have to consider her testimony and take the same with great weight.

In the case of ***SELEMANI MAKUMBA VS REPUBLIC [2006] TLR 379*** it was also held that:

> ***"True evidence of rape has to come from the victim, if an adult, that there was penetration and***

no consent and in case of any other woman where consent is irrelevant that there was penetration".

As the PW1's testimony has been shaken to this extent, **I proceed to declare that the PW1's testimony is hereby expunged for being taken contrary to the law.** Thus, I join hands with the Republic by declaring that Prosecution at the trial court did not manage to prove its case beyond reasonable doubt to command conviction and sentence for the above stated reason.

On those circumstances explained, am of the firm conviction that the Appellant was convicted without sufficient evidence. Therefore, **appeal is has merits,** and it is for that single reason, **I accordingly allow the Appeal.**

In the event therefore, the Conviction is hereby quashed, and sentence is set aside. The accused is set at liberty, unless otherwise withheld with other offences.

It is so ordered.

L. E. MGONYA

JUDGE

09/06/2021

Judgment delivered in the presence of appellant in person (through virtual court) and Ms. Faraja George the learned State Attorney for the Respondent and and Ms. Veronica RMA this 9th day of June, 2021.

L. E. MGONYA

JUDGE

09/06/2021