IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 24 OF 2021

(Appeal from the decision of the District Court of Kinondoni at Kinondoni in Criminal Case No. 454 of 2019 before Hon. E.A. Mwakalinga, **RM** dated 15/12/2020)

ABUBAKARI RASHID..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

25th Oct, 2021 & 03rd Dec, 2021.

E. E. KAKOLAKI J

Whether the two offences were proved beyond reasonable doubt against the appellant is the crux of the matter in this appeal. Before this court the appellant is challenging both conviction and sentence imposed on him by the District Court of Kinondoni in Criminal Case No. 454 of 2019, in its judgment handed down on 15/12/2020, against the offences that were facing him in two counts. These are **Rape**; Contrary to Sections 130(1)(2)(e) and 131 and **Unnatural Offence**; Contrary to Section 154(1)(a) and (2) both preferred under Penal Code, [Cap. 16 R.E 2019].

It was prosecution case on the first counts that, on diverse dates between December 2018 to 12th July, 2019 at Tandale area within Kinondoni District, the appellant had carnal knowledge of one Z.S.H, a girl of 14 years old. As regard to the second count it was claimed on the same dates and place the appellant had carnal knowledge of the said Z.S.H against the order of nature. As the appellant denied the charges levelled against him the prosecution paraded six (6) witnesses in a bid to prove its case beyond reasonable doubt while tendering one exhibit P1, the PF3 for the victim (PW1) whereas the appellant fended for himself and called one witness DW2. The court was told by the victim (PW1) and her mother (PW2) and the wife to the appellant that, the appellant and step father to PW1 who was living together with her (PW1) and her young sister aged 4 years as one family, raped and sodomised her several time at two different areas which they happened to live in being Sinza and Tandale, before PW1 disclosed it to her mother (PW2). And that at times the appellant used to commit that offence on the bed which PW1, her mother (PW2) and the little child aged 4 years were all sleeping on, while PW2 is in deep sleep due to TB medications she was taking. It is also learnt from the record that prior to his being reported as sexual offences suspect, it is the appellant who suspected first the victim was sexually abused and

reported the matter at Mabatini Police Station, issued with the PF3 (exh.P1) before he took PW1 to Mwananyamala Hospital for medical examination by the doctor (PW4). This fact was confirmed by PW3 (PW1's uncle), the doctor (PW4) who examined PW1 and PW5 the police officer who arrested the appellant at Police station on return of the said PF3. The doctor (PW4) who examined the victim on 18/08/2019 evidenced that PW1 had her hymen not intact, fresh bruises in both vagina and anal parts, suggesting that the rape and sodomy was perpetrated 3 to 4 hours prior to her examination. On his side the appellant claimed the case against him was fabricated one as he is the one who noted first that PW1 was sexually abused and suggested to his wife (PW2) to have the matter reported at police and later examination conducted at Mwananyamala Hospital under his supervision, before he was arrested when returned the PF3. He contended when PW1 was asked as to who abused her sexually she mentioned one Ismail whom after being pursued his wife's relatives were unhappy with him as they wanted to have the matter settled between them and Ismail's relative. It is his persistence in following up the matter that cause him fall into the ditch as the relatives colluded with PW6 the police officer and investigator of the crime to fix him and it really happen, the appellant lamented. He disclaimed any involvement

in the commission the offences he was booked with. It appears the trial court did not believe his defence instead was satisfied that the prosecution case was proved beyond reasonable doubt, and proceeded to convict and sentence him to 30 years imprisonment on each count, both sentence to run concurrently.

Aggrieved with such decision the appellant preferred this appeal equipped with two grounds of appeal going thus:

1. That, the trial magistrate erred in law and fact for relying on evidence of the prosecution witnesses which was contradictory to the roots of the case.
2. That, the trial magistrate erred in law by convicting the accused while the charges were not proved beyond reasonable doubt against the prosecution case.

Hearing of the appeal proceeded viva voce as both parties were represented. The appellant hired the services of Ms. Noelina Bippa, learned advocate whereas the Respondent enjoyed the services of Ms. Monica Ndakidemi, learned State Attorney. In determining this appeal I am intending to address first the second ground of appeal where the centre of controversy is whether

the prosecution case was proved against the appellant beyond reasonable doubt. It is was Ms. Bippa's lamentation that offences facing the appellant were not proved beyond reasonable doubt for being the standard of proof of criminal charges as stated in the case of **Daimu Daimu Rashid @ Double D Vs. R**, Criminal Appeal No. 5 of 2018 (CAT-unreported). She said the dates in which the appellant is alleged to have committed the offence are at variance with the evidence adduced by prosecution witnesses to prove the case against him. According to her the doctor who examined PW1 had it that the offence was committed in not less than three to four hours prior to her examination conducted on 18/08/2019 meaning the offence was committed on that date, the date which is at variance with the dates between December, 2018 to 12/07/2019, stated in the particulars of the offence. She argued where the dates in the charge sheet are at variance with the prosecution evidence, the only remedy is to amend the charge to reflect them in the charge sheet under section 234(1) of the Criminal Procedure Act which the prosecution failed to pursue, hence denial of the appellant of his right to prepare his defence effectively for not being clear of the dates in which he was alleged to have committed the offence. To her, that was a fatal omission and invited this court to find the case against the appellant

was not proved beyond reasonable doubts. Reliance was placed on the case of **Justine Mtelule Vs. R**, Criminal Appeal No. 482 of 2016 (CAT-unreported). Further to that she added, the prosecution evidence was dented with full of doubts as it was beyond imagination how could PW2 be taken into deep sleep while her child (PW1) is being raped or carnally known against the order of nature on the same bed without knowledge. She wondered as to why the prosecution failed even to tell the court the type of that drug/medication so that it could not only be believed but also appreciated by the court that such scenario was possible. In her response Ms. Ndekidemi for the Respondent conceded to the appeal arguing that, indeed the prosecution case was not proved beyond reasonable doubt. She embraced Ms. Bippa's submission that, it is true doubt was raised by the prosecution witnesses' evidence when claimed that the abuse by the appellant was perpetrated on the same bed while both appellant, PW1, PW2 and the unnamed young child aged 4 years asleep there without knowledge of PW2. She conceded, it was important for prosecution to put in evidence the type of medication that caused PW2 to go into deed sleep hence failure to know of what was happening to her daughter, failure of which rendered the evidence of PW1 and PW2 increadible.

I have taken into consideration the submissions entered by both parties and studied the record and case laws relied on to establish the merit of this appeal. It is trite law the cardinal principle of criminal justice system in Tanzania is that, the prosecution bears the burden of proving its case beyond reasonable doubt. See the cases of **Daimu Daimu Rashid @ Double D** (supra) and **Samson Matinga Vs. R**, Criminal Appeal No. 205 of 2007 (CAT-unreported). In **Samson Matinga** (supra) on the need of prosecution to prove its case beyond reasonable doubt, the Court of Appeal had this to say:

> *"**A prosecution case, as the law provides, must be proved beyond reasonable doubt**. What this mean, to put it simply, is that **the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person**. Such **evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence**. (See also **Yusuf Abdallah Ally Vs. Republic**, Criminal Appeal No. 300 of 2009 (unreported)). The said proof does not depend on the number of witnesses but rather, to their credibility (see section 143 of the Tanzania Evidence Act, Cap. 6 R.E 2002 and the case of **Goodluck Kyando Vs. Republic**, Criminal Appeal No. 118 of 2003, and **Majaliwa Guze Vs. Republic**, Criminal Appeal No. 2013 of 2004 (both unreported)." (Emphasis supplied)*

Now, applying the above principle to the facts of this case as submitted on by Ms. Bippa and supported by Ms. Ndakidemi, the prosecution was duty bound to prove that, it is the appellant who committed the offences he was charged with. As per the particulars in the charge sheet laid against the appellant, both offences of rape and unnatural offence are claimed to have been perpetrated on diverse dates between undisclosed date of December 2018 to 12/07/2019. A deep eye to the evidence adduced by all prosecution witnesses has revealed that none of them disclosed to the court with specification any date or month between the above mentioned periods as the exact period when the alleged sexual abuse acts were committed, apart from PW2 who narrated a very long story on how PW1 came to disclose to her, her tale before the appellant was arrested. The only person who mentioned the date suggesting the two offences were committed is PW4, the doctor who examined PW1 and remarked in Exh.P1 that, her vagina and anal part were widened, with bruises. It was her testimony that, the incident took place three to four hours prior to her examination meaning the offence was committed on the date of medical examination of PW1 which is 18/08/2019. In absence of any other evidence to the contrary I am forced to hold the alleged offences were committed on the 18/08/2019. In this case

as stated above the appellant is accused by the prosecution to have committed the said offences on diverse dates between December, 2018 and 12/07/2019. It is the law that in any criminal charges prosecution must lead evidence disclosing the offence was committed on the date alleged in the charge sheet, failure of which is to render the preferred charge fatally incurable for being unproved, unless the same is amended under section 234(1) of the CPA, thus entitle the accused to an acquittal. This position of the law was taken by the Court of Appeal in the case of **Abel Masikiti Vs. Republic**, Criminal Appeal No. 24 of 2015 (CAT-unreported) where it was held:

> *"In a number of cases in the past, this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed in the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance and uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur."*

Similar stance was taken by the Court of Appeal in the case of **Justine Mtelule** (supra), when found the date in the charge sheet in which the

appeal's accusations based was at variance with the evidence adduced against him something which was not observed by the High Court acting under appellate jurisdiction. The Court of Appeal had the following observations at page 16 of the judgment:

> *"…as also found by the learned first appellate judgement, the variance is in the dates of the incidence of commission of an offence between what is in the charge sheet and the evidence on record by witnesses and not the time when the offence was committed. Thus if the* ***High Court judge would have critically considered this in light of the existing decisions of this Court on the issue, she would not have reached the conclusion she did but found that, the variance in the dates of the incidence between the charge sheet and the evidence on record, makes the anomaly fatal and not curable****." (Emphasis added)*

In this matter as observed above the dates in which the appellant is alleged to have committed the offence are at variance with the evidence adduced by the prosecution against him. The prosecution having noted that anomaly ought to have prayed the court under section 234 of the CPA to amend the charge to reflect the evidence adduced the duty which they failed to discharge. It follows therefore that omission is fatal and like the two above

named decision I hold it was incurable. This finding has the effect of disposing of the appeal. However I fill indebted to address the doubt which has been addressed by both parties in this appeal on assumption that the charge is not at variance with the evidence on record which of course is not the case. It was evidenced by PW1 and PW2 that, the appellant used to rape and sodomise PW1 in the night on the bed which they all used to sleep without knowledge of PW2 on the reason, that she was under TB dosage that was causing her deep sleep. As noted by both counsels one would not cease to wonder when trying to comprehend this reason. It was beyond any reasonable man thinking that, such act could take place without PW1 screaming for help if at all she was experiencing pains as put it in her evidence something which I believe could have awaken PW2 from the alleged deep sleep. Evidence of this nature in my opinion tells nothing than a conclusion that both PW1 and PW2 were trying to hide the truth hence affecting their credibility. It is the established principle of the law that in sexual offence the best evidence comes from the victim. See the cases of **Seleman Mkumba Vs. R**, [2006] TLR 379 (CAT) and **Daimu Daimu Rashid @ Double D** (supra). However, before entering conviction basing on such evidence court must ensure that, that evidence passes the test of

truthfulness as it was not intended that such evidence should be taken as gospel truth. This proposition of the law was taken in the case of **Mohamed Said Vs. R**, Criminal Appeal No. 145 of 2017 (CAT-unreported) when the Court of Appeal subjected in test the evidence of victim which appeared to have violated the law and proceeded to hold that:

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

As the credibility of the victim's evidence is held to be doubtful hence unreliable there would not be cogent evidence to conclude the appellant's guilty to the offences charged with was established, hence his conviction is unfounded. I would have therefore held, the case against him was not proved beyond reasonable doubt as submitted by Ms. Bippa and rightly supported by Ms. Ndakidemi for the Respondent. As alluded to above the second ground of appeal disposes of the appeal and I see no pressing issue calling me to determine the first ground of appeal, thus proposing to pause here for avoidance of academic exercise.

That said and done, this appeal has merit and the same is hereby allowed. The conviction against the appellant is quashed and sentence meted on him

set aside. This has the effect of ordering immediate release of the appellant from prison forthwith unless otherwise lawfully held, which order I hereby issue.

It is so ordered.

DATED at DAR ES SALAAM this 03rd day of December, 2021.

E. E. KAKOLAKI

JUDGE

03/12/2021.

Delivered at Dar es Salaam in chambers this 03rd day of December, 2021 in the presence of Mr. Benson Florence advocate holding brief for Ms. Noelina Bippa, Advocate for the appellant, the appellant in person, and Ms. Monica Msuya, court clerk and in the absence of the respondent.

Right of appeal explained.

E. E. KAKOLAKI
JUDGE
03/12/2021