THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 11 OF 2021

(Originates from judgement of the District Court of Morogoro dated 11th May 2021 in Criminal Case No. 305 of 2019)

MANENO RASHID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing on: 22/11/2021

Judgement on: 17/12/2021

NGWEMBE, J:

The Appellant Maneno Rashid is in this court, appealing against the conviction and sentence of life imprisonment meted by the trial court. Being dissatisfied with that conviction and sentence, within time, issued notice of intention to appeal and finally, appealed to this court armed with six (6) grievances which may conveniently be summarized into four grounds namely:-

1. That, the learned trial Magistrate erred in law by failing to draw an inference adverse to the prosecution side for failure to call key witnesses like her mother, aunt and uncle.

2. That, the learned trial Magistrate erred in law and fact by convicting the appellant relied on insufficient, contradictory, inconsistency and uncorroborated evidence of the victim.

3. That the learned trial Magistrate erred in law and fact by failing to evaluate; analyze weigh and consider the defense evidence properly before arriving to the conclusion.

4. That, the learned trial Magistrate erred in law and fact in convicting the appellant while the prosecution failed to prove the case beyond reasonable doubt.

For convenient purposes, the genesis of this appeal, traces back to 6th & 7th September 2019 at Mindu area within Morogoro Region, where the appellant was alleged to have carnal knowledge with a girl of nine (9) years (her name is reserved due to her age). The girl alleged that on 6th September 2019, while playing at Yusta's home, the accused person instructed her to go inside his house to take money for buying a pencil. When she was inside the appellant's house, also the appellant entered in there. Instead of giving her some money, he undressed her and himself then proceeded to rape her. To assure that she does not raise alarm, the appellant covered her mouth by a hand while rapping her. At the end she was threatened if she can tell anyone. The same action was repeated on 7th September 2019. On that second day, the ordeal occurred when she was passing near to the appellant house, he took her inside and raped her.

Such rape remained a secrete between the two until on 9 September 2019 at around 10:00 am when her grandmother (PW2) noticed unusual movement of the victim when she was walking around. She walked

while expanding her legs. PW2 questioned her, but she did not cooperate and disclose what happened to her. However, upon inspecting her private parts, she found bruises, reddish, open and bad smells. Thus, called the victim's mother; aunt; and uncle. Though she refused to cooperate, after some slapped from her uncle, she cooperated and named the appellant Maneno Rashid to have done "bad act to me." Meaning had sexual intercourse with her (Rape).

Consequently, she was reported to Police station and PF3, was issued later proceeded to hospital for medical checkup. On the same date of 9th September, 2019, the appellant was arrested and arraigned in court, charged for the offence of rape contrary to sections 130 (1) & (2) (e) and 131 (3) of the Penal Code Cap 16 R.E. 2002 now referred to as [CAP 16. R.E 2019].

Upon hearing both sides, the court found the appellant liable, hence convicted and sentenced to life imprisonment. Being dissatisfied with that conviction and sentence, timeously, lodged notice of appeal and finally, instituted this appeal.

On the hearing date of this appeal, the appellant did not procure services of learned advocate, as such he had no useful contributions on his grounds of appeal, rather prayed to rely on his grounds of appeal be considered and leave him free, for he never committed the alleged offence of rape

In turn the learned State Attorney Edgar Bantulaki, strongly opposed all grounds of appeal. On first ground, he contended that, the evidence of

PW1 being a child of tender age, was properly taken as she did promise to speak truth as required by section 127 of the Evidence Act.

On second ground, the learned State Attorney submitted that, failure to call PW1's mother; aunt and uncle as prosecution witnesses did not vitiate the offence and the testimonies of PW1 was corroborated by PW2 & PW3. Their evidences were satisfactory to find the appellant liable.

Arguing on the third ground, also he dismissed as irrelevant. Added that the evidences of PW2 was satisfactory and that proof of the offence does not need corroboration. More so, the evidences of PW1 & PW2 were corroborated by PW3. Thus, making this ground irrelevant.

Submitting on the fifth ground, the learned State Attorney dismissed it for obvious reason that page 11 of the proceedings of trial court speaks louder.

In grounds 4 & 6, jointly argued that the accused was charged for rape contrary to section 130 (1) & (2) (e) and 131 (3) of the Penal Code, but in page 20 of the proceedings it is clear that the appellant and the victim are relatives, hence the appellant ought to have been charged for incest by male contrary to section 158 of the Penal Code. He rested his submission by a prayer that this court may wish to revise the whole evidence and convict the accused and sentence him on the proper offence of Incest my male.

I find quite important to revisit the whole testimonies recorded by the trial court as required by law, bearing in mind that this is a first appellate court. The evidence of the victim referred the event occurred twice on 6th and 7th September, 2019. This fact is recorded on pages 18

& 20 of the proceedings. However, such offence remained secret between the victim and the appellant until 9th September, 2019 when PW2 observed the victim walking unusual. The evidence of PW2 is in page 22 of the proceedings that at 10:00 am on 9/9/2019 observed the victim walking strangely thus forced her to check on her private parts thus, observed the vagina is open, bruises, reddish and bad smell. Therefore, she reported to the street chairperson, then on the same date they went to police for PF3 and went to Regional Referral Hospital for medication. The PF3 was filled in on the same date and was returned to police station. At page 24 she testified that on 20/9/2019 they went back to hospital to report on recovery of the victim.

Moreover, the testimonies of Medical Doctor Zamoyoni Abdallah Mngombe strongly testified that he examined the victim at around 8:00am on 20/9/2019 and proceeded to fill PF3 which same was tendered in court as exhibit P1. In the whole evidences of PW3, he never said anything in respect to the date of 9/9/2019. Reading exhibit P1, it is clear that the medical examination of the victim was done on 20/9/2019 as opposed to 9/ 9/2019. That was the end of prosecution case.

The defence case was blessed by four defence witnesses. The whole evidences were centred on 9/9/2019 that they were digging well on that date when the appellant was arrested and taken to police. The appellant admitted to have lived with the victim's grandmother called Jamila as her wife. They all failed to testify on what happened on 6th & 7th September, 2019.

Having summarized those testimonies as recorded during trial, apart from the grounds argued by both parties, I will add four other issues as follows:- first, when the alleged rape was committed and when was reported into both, police station and to the hospital? Whether the prosecution proved the offence of rape against the appellant to the required standard of law? And finally, whether the offence was properly investigated?

According to the evidences narrated herein above, it is evident that only the victim knew when the alleged offence of rape was committed. This because only the victim alleged in her testimony that the one who raped her was the appellant, and that it was twice in two different dates, that is on 6th and 7th September, 2019. Worse still she never disclosed to anyone until 9th September, 2019 when was discovered by her grandmother (PW2), failure of which would have remained a secret to herself and the rapist.

The evidence of PW2 indicates that on the same date she reported into three different institutions, first she reported to the street chairperson, second to police station and third to hospital for medication and check-up. This piece of evidence is contrary to the evidence and report of the medical doctor who testified quite clearly that he received the victim in the morning of 20th September, 2019 and examined her, hence filled in his examination to the PF3. His assertion is supported by exhibit P1.

Based on the testimonies of PW1, PW2 & PW3, do not answer the question of when the victim was medically proved to have been raped? Whether was on 9th September as per PW2 or on 20th September as per

PW3 and exhibit P1? Unfortunate the prosecution did not clarify that ambiguity.

The last two questions raised above will be discussed after discussing the grounds of appeal as were raised by the appellant. The issue of voire dire test is now settled after providing an amendment to section 127 of the Evidence Act (Amendment No. 2 Act No.4 of 2016). Section 127(4) of the Evidence Act defines who a child of tender age is. It is quoted that:-

> Section 127 (2) *"A child o f tender age may give evidence without taking an oath or making an affirmation but shall| before giving evidence, promise to tell the truth to the court and not to tell lies"*

From the plain meaning of this provision, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation but promise to tell truth in court. The section is couched in permissive terms as regards to manner in which a child witness may give evidence. In the case of **Geoffrey Wilson Vs. R, Criminal Appeal No. 168 of 2018 (unreported)**, the Court held that, where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies.

In similar case of **Hamisi Issa Vs. R, Criminal Appeal No. 274 of 2018** (unreported) this case supported the above assertion. In the case at hand, the record clearly shows that the trial court after satisfying itself that the witness does not understand the nature of oath, the victim promised to tell truth and not to lie. Since the victim promised to tell truth and not otherwise, I find the recording of the victim's evidence was proper as required by law.

On the second ground of appeal the appellant attacked the prosecution for failure to call material witnesses like her mother, aunt and uncle. Thus, the trial court ought to draw an inference adverse to the prosecution.

I think the law is settled in our jurisdiction that the prosecution has statutory duty to establish and prove criminality of the accused beyond reasonable doubt. This was well decided in the case of **Maliki George Ngendakumana Vs. R, Criminal Appeal No. 353 of 2014 CAT Bukoba (unreported).**

It is apparent on the face of the record that PW1 named the appellant after being slapped three time by her uncle. The same testimony was corroborated by PW2. Such evidence has two interpretations, one she named the appellant arbitrary to evade punishment from her uncle, but there is another person who raped her; second it is true that she intended to hide mentioning the appellant due to his threat that he may cause harm to her. These two interpretations cannot be avoided in the absence of any clear and reliable evidences.

It is a known principle of law that failure to call material witness who is within the reach and without sufficient reason being shown, the court

may draw an inference adverse to the prosecution. This position was clearly alluded by the Court of Appeal in the case of **Azizi Abdalah Vs. R, [1991] T.L.R 71.** However, the prosecution is always the engine of the whole prosecution. They cannot be forced to call witnesses whom are not material to them to prove their case. I therefore, find this ground is not material to this appeal.

Considering the third ground of appeal which is related to insufficiency of evidences, contradictions, inconsistencies and uncorroborated evidence of the prosecution witnesses (PW1, PW2 and P3). The question is whether or not the incident was reported on the same day that is on 6 & 7 September 2019 or 9/09/2019 or on 20/09/2019? This is a serious question which requires an answer from the trial court's proceedings. The evidence of PW2 is clear that on 09/09/2019 at 10:00 am, she saw her granddaughter walking while expanding her legs. She was shocked and inquired on what happened to her, but she never answered. She examined her private parts of the victim as matured and old woman noticed bruises in her vagina, cheeks, reddish, open and bad smell. That on the same day, PW1 revealed what happened, after being slapped three times by her uncle. Thus reported to the street chairperson who gave them a letter and went to police station and later after being given PF3 they took PW1 to Regional Referral Hospital of Morogoro for medical check-up.

The testimony of PW3 mentioned 20/09/20219 that is, while at working place at 8:00 am, he received a child brought by her mother who told him that PW1 has unusual discharge in her vagina, and that she was raped. Added that he saw bruises in PW1 female organ, her hymen was perforated and the discharge of bad smell. Exhibit "P1" recorded that:-

"Vagina ulcer, faul smell discharge no hymen"

It is obvious that while PW1 testified that they only went to police and then hospital for examination, PW2 mentioned that they also went to street chairperson, and mentioned that it was on 9/09/2019, while PW3 testified that he received PW1 and her mother on 20/09/2021 at 8:00 am at the Hospital. Such discrepancies ought to have been clarified by the prosecution. In the case of **Alex Ndendya Vs. R, Criminal Appeal, No. 207 of 2018** the Court of Appeal discussed in details on material discrepancies. Sometimes, they may be taken as normal material discrepancies which do not go to the root of the case so long the bottom line is that the offence was committed. But if such discrepancies affect reliability of the whole evidence, obvious the court will decide in favour of the appellant/accused.

The last ground is on failure of the trial court to consider the defence case which is fatal. In the case of **Yusuph Amani Vs. R, Criminal Appeal No. 255 of 2015** the Court of Appeal held:-

> *"It is the position of the law generally; failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In that regard, failure to consider defence evidence is fatal and usually vitiates the conviction."*

In the case at hand, the trial court failed to evaluate the defence case before conclusion. In the circumstances of this case, I am asking quite important question of whether the prosecution established and proved the offence of rape against the appellant? Secondly, there is a serious doubt if at all the offence was properly investigated. In order for the

prosecution to prove criminality against an accused, such offence must be properly investigated.

In respect to this appeal, it is evident from the record of the trial court that, the offence of rape was not investigated, because none of the investigator appeared in court and testified the results of his investigation. It is surprising as to why police failed to investigate the matter after being informed on the alleged rape? Assuming police performed their duty of investigating the alleged offence, but why they failed to appear in court and help the court on what exactly they investigated? All these questions have no answers, because of poor or none investigation of that crime. Usually poor investigation lead into poor prosecution. I am sure had the trial magistrate directed properly his minds on these issues, no doubt he would have arrived into a different conclusion.

This court and the Court of Appeal has repeatedly lamented on increasingly poor investigation by police. Rape cases are serious offences in our country which attract long sentence imprisonment up to life imprisonment. Therefore, each person involved therein must perform his duties seriously. The victim must tell truth to whoever concerned; Police must be serious to investigate the matter immediately upon receipt of information; Doctors as experts likewise should reveal exactly what they examined to the victim's private parts; State Attorneys should be certain on the evidences they are about to build their case. They should not take any allegation to court without being sure that there is enough evidence to establish a prima facie case against the accused; and finally, the trial court should have critical minds on every relevant piece of evidence before conclusion.

The Court of Appeal in the case of **Hosea Francis @ Ngala & Maria Hosea @ Ulanga Vs. R, Criminal Appeal No. 408 of 2015 (CAT at Dodoma)** lamented on poor investigation of our law enforcers, they held:-

> *"We are obviously concerned about the failing standards of professionalism in the collection of evidence at scene of crimes. We are as surprised why, after visiting the alleged scenes where the deceased met her unlawful death, PW1 and other police officers who were in his entourage, failed to collect physical evidences which the police according to PW3 were shown"*

The same sentiments were repeated in this court in the case of **R, Vs. Issa Mohamed @ Chiwele & 3 others, Criminal session No. 39 of 2016 (HCT at Lindi).** The result of poor investigation is a prosecution case that lacks crucial pieces of evidence that one would expect in a well-handled case. Lack of seriousness on the part of police investigators result into poor prosecution and failure to net the true culprits.

Repeatedly, this court and the Court of Appeal have pronounced that due to intrinsic nature of the offences related to morality, like rape and unnatural offences, where only two persons (the victim and the accused) are involved, the testimony of the victim must be scrutinized with extreme care, otherwise, even family conflicts may lead into accusations of similar offences attracting long sentence imprisonment. Usually offences like this, the prosecution evidences must either stand or fall.

In totality and for the reasons so stated, I am certain that this suit was not properly prosecuted and proved beyond reasonable doubt. I therefore, proceed to allow this appeal, quash the conviction and set aside the sentence meted by the trial court, consequently order an immediate release of the appellant from prison, unless otherwise lawfully held.

I, accordingly order.

Dated at Dar es Salaam in Chamber on this 17th day of December, 2021.

P.J. NGWEMBE
JUDGE
17/12/2021

Court: Judgement delivered at Dar es Salaam in Chambers on this 17th December, 2021 in the absence of the appellant and in the presence of Ms. Veronica Chacha State Attorney for the Republic.

Right to appeal to the Court of Appeal explained.

P.J. NGWEMBE
JUDGE
17/12/2021