IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 11 OF 2022

(Appeal from the Criminal Case No. 162 of 2020 in the District Court of Rufiji at Utete (Maximillian, RM) dated 11th of August, 2021.)

MWARAMI JUMANNE LUKASA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

14th February, & 21st March, 2022

ISMAIL, J.

This appeal arises from the decision of the District Court of Rufiji at Utete, which convicted the appellant of statutory rape and sentenced him to imprisonment for thirty years. The said appellant was arraigned in court on the allegation that on 24th December, 2020 at about 1400 hours, he raped SHM, a primary school student of 16 years of age. The offence was allegedly committed at Mbunju Mvuleni area in Mkongo village within Rufiji District.

The contention by the prosecution is that the victim, who featured as PW2 in the trial proceedings, was tending to the family's rice farm, when the appellant appeared and asked her to step closer to where he was. The appellant then pulled the victim and dragged her down, after which he addressed her before he undressed himself and had a carnal knowledge of the victim. As all this was happening, a Mr. Mtambo was observant and recorded every event. He called PW1, the victim's father who, on arrival, informed him that his daughter had just indulged in sexual intercourse with the appellant. When they went to the rice farm the found PW1 who, on interrogation, she admitted that she had been raped by the appellant. PW1 contended that the appellant wore a condom that had been thrown in the field after the sexual act.

The matter was reported to the police from whom assistance was enlisted. The victim was taken to Kwa Bwakila hospital in Ikwiriri for medical examination. A swoop conducted after the incident led to apprehension of the appellant who, on interrogation, he denied any wrong doing. The culmination of all this was the arraignment of the appellant in court where he pleaded not guilty to the charge. Three witnesses testified for the prosecution against a sole witness for the defence and, in the end, the trial

court was convinced that a case had been made out against the appellant. He was convicted and sentenced to a maximum custodial sentence of thirty years.

The conviction and sentence were too much to bear for the appellant. He chose to institute the instant appeal. Ten grounds of appeal have been raised as reproduced in verbatim and with all their grammatical challenges as hereunder:

1. *That, the learned trial magistrate erred in law and fact by convicting the appellant in a case which the prosecution side failed to prove any penetration so as to establish statutory rape contrary to the provisions of section 130 (4) of the Penal Code (Cap. 16 R.E. 2019.*

2. *That, the learned trial magistrate erred in law and fact by convicting the appellant when the trial court wrongly failed to inform the accused person/ appellant of his right to require the person who made the purported PF 3 report to be summoned in accordance with the provision of section 240 (1) of the C.P.A (Cap. 20 R.E.2019).*

3. *That, the learned trial magistrate erred in law and fact by failing to draw an inference adverse to the prosecution side for failing to summon the material witnesses i.e. the said MTAMBO who phoned to police station or any arresting officer so as to establish the reason for the appellant's apprehension contrary to the provisions of*

section 122 of the Evidence Act, Cap. 6 R.E. 2002 (as amended by Act No. 4 of 2016).

4. *That, the learned trial magistrate erred in law and fact relied on the evidence of PW1, PW2 and PW3 which was weak, incredible, insufficient and not watertlght for lacking of linkages between the appellant and the charge he is facing, hence the prosecution failed to tender in court the said video and sound clips in order to prove their allegation.*

5. *That, the learned trial magistrate erred in law and fact by wrongly subjecting the appellant to an unfair trial and/or unfair hearing when erroneously contravened the mandatory provisions of section 210 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2019 which governs fairness, transparency and authenticity in the manner of recording evidence.*

6. *That, the learned trial magistrate erred in law and fact by convicting the appellant relied on insufficient and not watertight evidence adduced by the prosecution witnesses for failure to explain why the victim's PF3 report and the alleged Government chemist report in regarding to the said condom with sperms were not tendered in court to prove their allegation.*

7. *That That, the learned trial magistrate misdirected himself by failing to observe that PW1 and PW2 lied in court when PW1 introduced himself to be Mndengereko while PW2 introduced herself to be*

Mnyamwezi hence the same testified in court to be father and daughter biologically.

8. *That, the learned trial magistrate misdirected himself in law and fact by failing to evaluate, analyze, weigh and consider the appellant's affirmed defence evidence which was not disproved by the prosecution side contrary to the procedure of law.*

9. *That, the learned trial magistrate erred in law and fact by convicting the appellant based on the evidence of PW1 and PW3 whose evidence was deficient while the principle of law directs that however suspicion is strong/grave cannot be the basis of the conviction.*

10. *That, the learned trial magistrate erred in law and fact by convicting the appellant in a case that the prosecution side grossly failed to prove their case beyond reasonable doubt as required by law.*

Hearing of the appeal, conducted by way of written submissions, pitted the appellant himself against Ms. Laura Kimario, learned State Attorney, for the respondent. The appellant's submission was based on four issues that he framed to reflect grounds of appeal.

The 1st issue touched grounds 1, 2 and 6, and the contention is that the prosecution failed to prove penetration as an ingredient of statutory

rape. The appellant argued that, penetration which is one of the ingredients of rape was not established. He submitted that the victim, PW2, did not say that the appellant inserted his penis in her vagina, or if the appellant undressed himself and wore the condom she said he had. In the absence of such evidence, the appellant contended, penetration was not proved. The appellant further submitted PW1, PW2 and PW3 who alleged that they were issued with PF3 for the victim's medical examination did not tender the PF3 of a report of the Government Chemist to prove if there was penetration. There was no proof, either, that the sperms in the condom came from the appellant. The appellant bolstered his arguments by citing the case of ***Watende Sultan Mwingo & 3 Others v Republic***, CAT-Civil Appeal No. 233 of 2012 (unreported).

The appellant's view is that failure to call a medical doctor to tender and testify on penetration as stated in the PF3 weakened the prosecution's case. This, in the appellant's contention, weakened the prosecution's case as no rape case would be proved without proving penetration.

Regarding the second issue, the appellant's contention is that the trial magistrate misdirected himself when he failed to draw an adverse inference for the prosecution's failure to call a Mr. Mtambo who was to tender a video

clip to prove the allegation, consistent with section 122 of the Evidence Act, Cap. 6 R.E. 2019. He contended that the trite position is that failure to call a witness to testify on a missing link in a case justifies drawing of an adverse inference. This is in terms of section 143 of Cap 6, and as emphasized in ***Samwel Japhat Kahaya v. Republic***, CAT-Criminal Appeal No. 40 of 2017 (unreported).

There is yet another contention which castigates the trial magistrate's failure to observe the requirements under section 210 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2019.This requires the court to inform witnesses of their entitlement to have their evidence read over and provide comments if so required by a witness. He cited the case of ***Mussa Abdallah Mwiba & 2 Others v. Republic***, CAT-Criminal Appeal No. 200 of 2016 (unreported), wherein the rationale behind this requirement was stated.

With regards to the fourth issue, the complaint by the appellant is that defence testimony was not considered in this case and that the conviction was predicated on the prosecution case alone. The appellant contended that, other than summarizing the evidence, nothing was done to factor it in the deliberations that culminated in the verdict of guilt against the appellant. This, in the appellant's view, is a flawed indulgence by the trial court and

infracted the position laid out in a multitude of cases, including ***Leonard Mwanashoka v. Republic***, CAT-Criminal Appeal No. 226 of 2014 (unreported); ***Hussein Iddi & Another v. Republic*** [1986] TLR 166; and ***Lockhart Smith v. Republic*** [1965] EA 211.

On the fourth issue, the argument is that the case was not proved beyond reasonable doubt. The appellant took a swipe at the prosecution's testimony, contending that the same was inadequate. A number of questions were raised. One, that whereas PW2, the victim's father, was said to be a Nyamwezi, the victim herself said she was a Mndengereko. Two, that the result of the medical examination allegedly conducted on the victim was not tendered in court. Three, that there was no penetration. Four, that the sperms in the condom were not verified if they came from the appellant. Five, if at the time of his arrest the appellant was on foot or riding a motorcycle; and six, if PW2 knew the appellant before the material date.

In the appellant's view, the prosecution failed in this duty.

Overall, the appellant urged the Court to allow the appeal and set him free.

Rebutting the submission, the respondent chose to combine grounds 4, 6, 9 and 10. The respondent contended that the testimony of PW2 gave

a blow by blow account of what happened to her. She argued that the testimony was clear that the appellant had sexual intercourse with the victim while the appellant wore a condom.

The respondent argued that section 127 (6) of Cap. 6 clearly that independent testimony of a victim of a tender age may be the basis for conviction even if the same is uncorroborated, provided that the court is, upon assessment of credibility of the witness, satisfied with it. To bolster her contention, the respondent cited the decision of the Court of Appeal of Tanzanian ***Selemani Makumba v. Republic*** [2006] TLR 379, in which it was stated that the best evidence in sexual offences is that of the victim. The respondent held the view that PW2 proved existence of penetration and commission of the rape incident. The respondent further argued that this testimony was corroborated by the testimony of PW1 and PW3. She said that PW1 testified that when PW1 asked the appellant as to why he committed the offence, the latter blamed it on the devil. The respondent argued that PW2 named the appellant to PW1 at the earliest opportunity, a proof of her credibility. This, the respondent argued, showed that the case was proved satisfactorily.

With regards to grounds two and three, the respondent's contention is that since the PF3 was not tendered as evidence, need did not arise for calling the doctor who filled it. The respondent took the view that under section 143 of Cap. 6, the number of witnesses matters less as what is important is the credibility and reliability of a witness in a case. On this, the respondent cited the case of ***Siaba Mswaki v. Republic***, CAT-Criminal Appeal No. 401 of 2021 (unreported).

On ground five of the appeal, the respondent's take is that, while the record is silent on compliance with section 210 (3), the omission is not fatal because it does not prejudice the appellant in any way and it is curable under section 388 of the CPA. The respondent cited the decision in ***Msafiri Saimon Mkoi v. Republic***, CAT-Criminal Appeal No. 268 of 2019 (unreported).

With respect to variance in the tribes between PW1 and PW2, the respondent contended that the discrepancy is quite minor and one that does not go to the root of the case. She took the view that this ground has no legs to stand on.

The respondent concedes that the appellant's defence testimony was not considered. She contended, however, that the defence testimony is too

weak to raise any doubts which would wreck the prosecution's case. The respondent took the view that ground 8 of the appeal is baseless. It was the respondent's contention that in such a case, the remedy is to step in the trial court's shoes and evaluate the evidence.

Overall, the respondent took the view that the appeal is lacking in merit. She prayed that the same be dismissed.

The appellant's rejoinder did not introduce anything new. It was merely a reiteration of what he submitted in the submission in chief, and I find no reason to reproduce it here.

The broad question for determination is whether the appeal is meritorious.

Ground 2 of the appeal takes an exception to the failure by the trial court to inform the appellant of the right to require that a person who made the PF3 be summoned and cross examined, in line with the requirements of section 240 (3) of the CPA.

It is a settled position that, where a PF3 or any medical report is tendered in court, and the same is not tendered by a doctor who carried out the examination and prepared the document, then the accused must be accorded the right to call and cross-examine himon the said document.

Failure to do so constitutes an irregularity whose consequence is to render the document liable to expunging. This position was set in ***Sprian Justine Tarimo v Republic***, CAT-Criminal Appeal No. 226 of 2007 (unreported), wherein the Court of Appeal held as follows:

> *"Another fatal flaw is that the contents of Exhibit P1 were not even read out to the appellant. So the appellant was convicted on the basis of evidence he was not made aware of although he was always in court throughout his trial. In our settled view, these two serious omissions which, unfortunately, escaped the attention of the learned first appellate judge, wholly vitiated the evidential value of the PF 3. We shall accordingly discount it in our judgment."*

In the instant matter, the said PF3 was no tendered in court, meaning that the need for having the maker of it testify in court did not arise. It is in view thereof that I find this ground baseless.

But even assuming, for the sake of argument, that such document was tendered and admitted, and the doctor who prepared it had not been paraded for testimony, I would still contend that chalking off the testimony would not have any adverse consequence on the prosecution's case, knowing that rape is not proved by medical evidence alone (See: ***Issaya Renatus v. Republic***, CAT-Criminal Appeal No. 542 of 2015; ***Ally***

Mohamed v. Republic, CAT-Criminal Appeal No. 2 of 2008; and ***Mario Athanas Sipeng'a v. Republic***, CAT-Criminal Case No. 116 of 2013 (all unreported)).

In ***Selemani Makumba v. Republic*** (supra), it was held:

> *".... A medical report or the evidence of a doctor may help to show that there was a sexual intercourse but does not prove that there was rape, that is unconsented sex, even if bruises are observed in the female sexual organ..."*

The foregoing picked a leaf from the position which was held in an earlier decision in ***Hilda Abel v. Republic*** [1993] T.L.R. 246, in which it was held that *"courts are not bound to accept a medical expert's evidence if there are good reasons for not doing so."*

Ground three of the appeal has taken an issue with regards to failure to draw an adverse inference against the prosecution for failing to bring material witnesses, including a Mr. Mtambo or any of the arresting officers.

The starting point with respect to this ground of appeal is section 143 of the Evidence Act (supra), which states that no particular number of witnesses is required in order to prove a fact. Applicability of the rule is subject to the position of the law on the duty of a party to bring on witnesses

whose appearance for testimony is significant, and that failure to do so attracts an adverse inference. In the old case of ***Adel Muhammed ei Dabbah v. Attorney General for Palestine*** [1944] A.C. 156, the Privy Council enunciated the following fabulous principle:

> *"It must be taken as established law that the prosecution enjoys discretion whether to call any witness they require to attend, but that discretion is not unfettered. The first principle which limits that discretion is that it must be exercised to promote a fair."*

The just quoted principle was adopted in the case of ***Azizi Abdallah v. Republic*** [1991] TLR 71 (at p.72), in which the Court of Appeal guided as follows:

> *"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with transaction in question are able to testify material facts.* ***If such witnesses are within reach but are not called without sufficient reason being shown the court may draw an inference adverse to the prosecution.***"[Emphasis supplied]

See: ***Separatus Theonest @ Alex v. Republic,*** CAT-Criminal Appeal No. 138 of 2005; ***Lubelejea Mavina and Another v. Republic,*** CAT-

Criminal Appeal No. 172 of 2006; ***Samwel Dickson & Another v. Republic***, CAT-Criminal Appeal No. 322 of 2014; and ***Issa Juma @ Jumanne v. Republic,*** HC-Criminal Appeal No. 08 of 2020 (all unreported).

Taking the principle a notch higher was the upper Bench again, the in ***Mashaka Mbezi v. Republic***, CAT-Criminal Appeal No. 162 of 2017 (unreported), wherein it held that an adverse inference may be drawn against the prosecution when a key but available witness is not called for testimony on an important aspect of the case.

Casting an eye at would be offered testimony by the would be witnesses, nothing conveys any sense that these witnesses had any significance in what they carried in their heads. An arresting officer would only give a testimony on how the appellant found himself in the hands of the law enforcement agency, a fact which has no bearing on the manner in which the proceedings were conducted. As for Mtambo, his testimony would only have a corroborative effect on the rape incident. But, amidst the fact that in rape cases it is the prosecutrix's testimony which is the best evidence and has a decisive effect, failure to call the corroborator would not have any effect that would see the appellant take advantage of, under the adverse inference rule. I consider this ground hollow and I dismiss it.

Grounds 1, 4, 6, 9 and 10 will be disposed of in a combined fashion. These grounds contend that the case against the appellant was not sufficiently proved. It should not be lost on the fact that an offence of rape has key elements. These elements were restated in ***Hassan Bacho Nassoro v. Republic***, CAT-Criminal Appeal No. 15 of 2020 (unreported), as follows:

> *"Basing on the section and precedents aforementioned, I may summarize the fundamental elements of the offence of rape as:- **First**, is sexual intercourse without consent to a woman above the age of eighteen years but if is eighteen or below consent is immaterial; **Second**, is penetration of a male penis to a female reproductive organ (vagina); **Third**, proof of age of the victim if she is below the age of majority; **Fourth**, availability of unshakable evidence proving the offence of rape beyond reasonable doubt."*

The foregoing decision built on what the Court of Appeal of Tanzania decided earlier on, in ***Mathayo Ngalya @ Shabani v. Republic***, CAT-Criminal Appeal No. 170 of 2006 (unreported), in which it was held:

> *"For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without*

elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence."

"The essence of the offence of rape is penetration of the male organ into the vagina...."

In this case, the testimony of PW2 which was credible and unshaken by the defence proved that these four ingredients of the rape were quite conspicuous and impeccable in proving that rape was committed and the perpetrator was none other than the appellant. I find this testimony as decisive and the trial court is not in any blemished position for arriving at the conclusion that the appellant was guilty of the offence as charged. I, therefore, find these grounds destitute of fruits and I dismiss them.

Ground five of the appeal decries the trial court's failure to conform to the requirements of section 210 (3) of the CPA. This provision states as hereunder:

"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."

Going through the proceedings, there is no indication that this provision was brought into play during the trial proceedings, meaning that the witnesses' testimony was read over to the witnesses. What is clear, as well, is that none of the witnesses requested that such testimony be read out to them. This implies that this is a right that is available to a witness who testified in the proceedings. Even if the said right had not been accorded and the witnesses raised it, they would still have to demonstrate that some prejudice was suffered as a result of the failure. Nothing to that effect is evident in the trial proceedings. It should be noted that the whole purpose of having this provision in place has been a subject of judicial pronouncements, and, in this respect, the decision of the Court of Appeal of Tanzania in ***Masoud Mgosi v. Republic***, CAT-Criminal Appeal No. 195 of 2018 (unreported), stands out. It was held as follows:

> *"The rationale behind the section is not far to seek. It was intended to promote transparency in the administration of criminal justice thereby guarding against distortion in the recording of evidence by the witnesses. Luckily, the Court has dealt with similar complaints in various of its previous decisions including;* ***Republic v. Hans Aingaya Macha****, Criminal Appeal No. 449 of 2016,* ***Jumanne Shabani Mrondo v. Republic****, Criminal Appeal No. 282 of 2010,*

Athumani Hassan v. Republic, *Criminal Appeal No. 84of 2013 (all unreported). What is gathered from the above cases is that it is the witness who has the right to complain against the trial court's failure to read evidence to him. It is also evident from the above cases that the complaint can only be fatal where the authenticity of the record is in issue. There is nothing on record in this appeal that there was any complaint before the trial court that the appellant exercised his right to have his evidence read over to him. Similarly, the authenticity of the record is not in issue and thus as rightly submitted by Mr. Aboud, the irregularity did not prejudice the appellant in any manner considering that he exercised the right to cross-examine all witnesses for the prosecution. Consistent with the holdings in our decisions in* ***Hans Aingaya Macha***, ***Jumanne Shabani Mrondo*** *and* ***Athumani Hassan*** *(supra), the irregularity premised on non-compliance with section 210 (3) of the CPA is inconsequential; it is curable under section 388 (1) of the CPA. In the upshot, ground one is destitute of merit and we dismiss it ...."*

Taking inspiration from this reasoning, I hold that this ground of appeal is hollow and I dismiss it.

Ground seven is an expression of the appellant's unhappiness with the way the question of variance of tribes was handled. The variance is, in the

appellant's contention, irreconcilable and fatal. I do not think this ground need detain us any longer. While it is clear that such variance is unexplainable, nothing persuades me that this discrepancy is material or fundamental. It is a trifling variance which did not go to the root of the matter. It does not affect the central story in this case. In our case, the central story is that which relates to rape and the appellant's alleged involvement. I dismiss this ground of appeal.

Ground 8 of the appeal has taken a swipe at the failure to consider the defence testimony. This contention has been conceded to by the respondent and has readily urged the Court to step into the trial court's shoes and evaluate the defence testimony.

It is a settled position in our jurisprudence, that a trial court has a legal obligation to consider evidence tendered before it, in its totality. Evaluation of evidence in piecemeal or in isolation of one set of testimony constitutes a fundamental error and, therefore, a recipe for disaster (See ***Ndege Marangwe v. R*** 1964 EACA 156). In ***Henry Mpangwe and 2 others v. Republic*** [1974] LRT 50, it was held as follows:

> *"It is the duty of the trial judge when he gives judgment to look at the evidence as a whole ... It is fundamentally wrong to evaluate the case of the prosecution in isolation and then*

consider whether or not the case for the defence rebuts or casts doubt on it".

The Court reiterated this position in ***Elias Stephen v. Republic*** [1982] TLR 313 (HC), wherein it observed:

> *"It is clear from the judgment that the trial magistrate did not seriously consider the appellant's defence. Indeed, he did not even consider the other defence witnesses who testified to it. He merely stated 'defence of accused has not in any way shaken the evidence."*

The law has changed and the legal position, as it currently obtains, is that the Court may, on appeal, evaluate the testimony with a view to having it weighed against the prosecution's case and see if the same raised any doubts which would result in a finding of not guilty against the appellant (See: ***Edgar Litamba v. Republic***, CAT-Criminal Appeal No. 7 of 2008; and ***Zakaria v. Republic***, Cap. 124 of 2012); and ***Charles Samson versus Republic***, Criminal Appeal No. 29 of 1990 (all unreported). In the ***Director of Public Prosecutions v. Jaffari Mfaume Kawawa*** [1981] TLR 149. At p. 153, the following postulation was made:

> *"The next important point for consideration and decision in this case is whether it is proper for this court to evaluate the*

evidence afresh and come to its own conclusions on matters of facts. This is a second appeal brought under the provisions of S.5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this court only on a point or points of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence by the first appellate court. In cases where there are misdirections or non-directions on the evidence a court is entitled to look at the relevant evidence and make its own findings of fact."

The crucial question, at this point, is whether there was any misdirection or non-direction by the trial court. I agree with the respondent that the failure by the trial court constituted a non-direction which justifies intervention with a view to looking at the relevant evidence and make a finding thereon.

In this case, the defence testimony, which was not factored in the trial court's decision, is found at pages 17 and 18 of the typed proceedings of the trial court. Its substance is as quoted, in verbatim, as hereunder:

"On that day I got a passenger and took the passenger to Bondeni when I was coming back a "jamaa" stopped me I stopped and the jamaa removed my motor cycle keys I asked why he asked me where I was coming from I told him

I went to drop a passenger. An old man came and the jamaa started telling the old man that he caught me with his child the man asked where the child was, the child was nowhere near there alikuwa na vijana wenzake wanawinda ndege officers were called to come and arrest me I was kept in lock up and brought to court and that is when I got these allegations."

The Court's task is to gauge if the defence testimony is put to test, the same casts any doubts on the prosecution's case. It is clear that the prosecution's case was, by and large, predicated on the testimony of PW2, the victim, who narrated how she was met by the appellant, told to lie down, remove her clothes before the appellant allegedly inserted his genitalia into her vagina. She went ahead and testified that a condom was worn by the appellant before he entered the victim.

This testimony was not contradicted by the testimony adduced by the appellant. The latter dwelt on the events which preceded his arrest and eventual confinement in police custody. The testimony was simply irrelevant to what was at stake, and lacking in any semblance of potency which would create some doubts necessary for bringing a conclusion that a case had not been made out by the prosecution.

It is my conviction that the verdict of guilt returned by the trial court was premised on sufficiency of the testimony adduced by the prosecution. This ground of appeal is partly allowed only to the extent that the trial court erred in not considering the defence testimony.

In the upshot of all this, I hold that the appeal is destitute of merit and I dismiss it. I, in turn, uphold the trial court's conviction and sentence imposed on the appellant.

It is so ordered.

Right of appeal has been fully explained to the parties.

DATED at **DAR ES SALAAM** this 21st day of March, 2022.

M.K. ISMAIL

JUDGE