THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 155 OF 2020

(Originating from Mbeya Resident Magistrate Court Criminal Case No. 246 of 2019 – D. Luwungo, RM)

THE REPUBLIC ..... APPELLANT

VERUS

JOSEPH JUMA KYANDO ..... RESPONDENT

JUDGMENT

Date of last order: 13/06/2022

Date of judgment: 19/07/2022

NGUNYALE, J.

On 23rd of October 2019 a charge of Rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code was filed against the respondent in the Resident Magistrate Court of Mbeya at Mbeya. According to the charge sheet, the prosecution alleged that the respondent JOSEPH s/o JUMA KYANDO on diversre dates of April, 2019 at Itanji street, Igawilo ward within the City and Region of Mbeya had carnal knowledge of a girl aged 11 years old.

In order to understand the circumstances underlying the commission of the offence it is important to appreciate the facts giving rise to this case which may simply be that; the victim of the offence hereinafter to be referred to as ATU for the purpose of hiding her proper identity was a girl aged 12 years old a standard VI pupil at Ifumbo Primary School. The respondent was owning a shop around the premises where the victim was living and he was well known to the victim even before the tragedy. ATU has a friend called Rebecca. The respondent one day around April 2019 met with Rebecca and Christina the friends of ATU at his shop, there, he told Rebecca to go to his house the following day to clean his house.

The following day Rebecca while accompanied with ATU went to the house of the respondent. The respondent's house is situated near '***Chuo cha wachungaji***'. They found the respondent at his home. The respondent called Rebecca to his room where he stayed with her for a while and she returned. She then called ATU to his room. She went there. The respondent touched her chest and he penetrated his finger in her vagina. She attempted to refused to be touched but the respondent threatened her to remain silent. After he finished, he told them to clean his house and then he gave them 500/=. They returned home with a request from the respondent to return back there next day. Next day they

went again and he called one after another to his room. He repeated to touch the chest and to penetrate his finger to ATU's vagina. After he finished, he gave Tshs. 1000 and he left them to leave the scene.

The following day they went again to the respondent's home. As usual ATU was the next to be called after Rebecca to the room of the respondent. she found the respondent seated on his bed. The respondent undressed pants of ATU and thereafter he took his penis and put in the vagina of the victim (ATU) and he forced sexual intercourse with her. After he had finished lavishing her, he gave them 3000/=. It is alleged that next day Rebecca went with the money to school, the news about money reached her mother. The fact of having money raised suspicious to the parents and as a result the inquiry enabled broke of the explosive about the evil acts of the respondent. The respondent was arrested and arraigned before the Court to answer the charges levelled to him as stated hereinabove.

Upon a full trial, on 16th June 2020 the trial Magistrate found the charge was not proved beyond all reasonable doubt the standard required in criminal cases, therefore, the respondent was acquitted accordingly for the offence charged.

Aggrieved, the appellant preferred the present appeal against the verdict of the trial Court. The appeal was premised in three grounds of appeal per petition of appeal dated 11th November 2020 as filed subsequently after the notice of intention to appeal dated 22nd June 2020. The grounds of appeal are; -

One, the trial Court erred in law and fact by disregarding the evidence of prosecution and hence arrived at improper conclusion, **two**, that the trial Magistrate erred in law and fact to rule out that there were contradictions which goes to the root of the case and **three**, the trial Magistrate erred in law and fact for acquitting the respondent while prosecution proved the case beyond reasonable doubts against him.

The respondent was dully served by publication but he never showed appearance. His failure to appear made the Court to continue to determine the appeal on his absence as legally accepted.

The appellant under representation of HANNAROSE KASAMBALA learned State Attorney filed their written submission in support of the appeal. Ms. Kasambala submitted together all grounds of appeal that the prosecution ought to prove that the victim PW1 was under the age of 18-year-old and that there was penetration. It was proved during trial by PW1 and PW4 that the victim ATU was 11 years old which means she was below 18

years old. PW1 stated that the respondent took his penis and put in her vagina where she felt pain. The fact that he did put his penis proves that there was penetration. The testimony of ATU points a finger to the respondent as the person who penetrated his penis to her vagina.

Ms Kasambala went further to submit that in cases of sexual nature, the best evidence is that of the victim, she referred to the case of **SELEMAN MAKUMBA VS. REPUBLIC** [2006] TLR 384 which states categorically that true evidence of rape has to come from the victim. The testimony of the victim was found to be credible and her demeanour was appreciated by the trial Court basing on the way she testified in Court. The Court was referred to the case of **Goodluck Kyando vs Republic** (2006) TLR367 where the Court held that; -

> *"it is a trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness"*

That the trial Court went ahead and contradicted itself by disbelieving the evidence of PW1 and PW2 by stating that their evidence contradicted itself because of the number of times they went to the respondent's home and on the date of incident as PW1 stated that they went three times and PW2 stated that they went twice. It was the view of the learned State Attorney that the contradictions that the trial Court raised did not go to the root of

the matter because the fact remained that the victim was raped and the rapist was the respondent. Therefore, the trial Court misdirected itself on the issue of contradiction as in the case at hand, there was no good reason for the trial Court to disbelieve the evidence of the victim (PW1) because her evidence was consistent and coherent.

In her further submission Ms Kasambala stated that the evidence of PW1 was corroborated by the evidence of PW2 who was her friend who also proves presence of the victim in the house of the respondent and she was also present when the incidents were occurring as she was also raped. The testimony of PW1 was also corroborated by PW3 the Medical Doctor who examined her and found that the victim had no hymen. His findings were reduced in the PF3 exhibit No. P1 as marked by the Court during admission.

In the last part of her submission the appellant attorney submitted that the trial Court did not evaluate well the evidence of the prosecution evidence, because the first appellate Court has power to re-evaluate the evidence as a whole and reach its own conclusion, she called the Court to subject the whole evidence to re-evaluation if it will find a need to do so. (See **Prince Charles Junior v R**, Criminal Appeal No. 250 of 2014 CAT at Mbeya (unreported).

At the end the appellant prayed the Court to allow the appeal and the respondent be convicted and sentenced accordingly because the prosecution proved its case beyond all reasonable doubt.

Having in mind the basis of the decision of the trial Court, the grounds of appeal and the submission of the appellant, now it is the duty of the Court guided by the law and practice to decide as to whether the trial Court erred in law and fact to rule in favour of the respondent or not.

The trial Court based its decision on contradictions between the testimony of PW1 and PW2 Rebecca. On page 9 of the typed judgment, he said I quote; -

> *"The contradiction under reference are as follows; -*
>
> *First, that while PW1 told this court they went to the house of the accused three consecutive days, PW2 on his hand said they went there only two days.*
>
> *Secondly, while PW1 said they were raped in the third day, PW2 on her side said they were raped in the second day, that it was Sunday in the afternoon.*
>
> *Thirdly, while PW1 said they went to the said house for the first time in the evening after they come from school, PW2 on her side said they went there during the weekend. That is if they were raped on Sunday, means they go there for the first time on Sunday.*
>
> *The question which I asked myself at this point is whether the above contradictions goes to the root of this case or not?"*

The trial Magistrate ended with a conclusion that the contradictions are major as they are going to the root of the matter.

I had time to read again and again the proceedings and noted that the trial Magistrate entered the verdict without considering the defence case. The fact that the defence case was not considered I found boung to take the stance of the appellants that the Court has power to re-evaluate evidence by subjecting it to proper scrutiny, analysis and evaluation to end up with a correct and independent finding.

The prosecution testimony before the trial Court pointed a finger to the respondent as the person who raped the victim. The victim in her defence admitted that he knows the victim and the mother of the victim was a friend of his wife. There were no grudges between him and the mother of the victim. He denied to have raped the victim, that he neither raped her nor gave her money. The testimony of PW1 and PW2 was direct that they went to the home of the appellant more than once. The trial Magistrate was satisfied that PW1 was a credible witness. On page 10 of the proceedings the trial Magistrate appreciated the demeanour of PW1 when she testified, the proceedings quoted below will speak louder: -

> *"Court: PW1 is credited and her demeanour was good and state*
>
> *Sgd: D. Luwungo - RM"*

The fact that her testimony was appreciated how comes to fault her testimony that she was going to the respondent with Rebecca without

considering the ingredients of the offence. The very testimony was corroborated by PW2 Rebecca. There is no reason which has been advance to fault the two facts **one**, they were going to the home of the respondent **two**, PW1 was raped by the respondent. As correctly submitted by the appellant the discrepancy raised by the trial Magistrate do not go to the root of the case. It is a rule of practice as it was stated in the case **of Shabani Haruna @ DR. Mwagilo vs The Republic**, Criminal Appeal No. 396B of 2017 Court of Appeal of Tanzania at Arusha stated inter aria that courts are duty bound to decide whether the discrepancies and contradictions are only minor or whether they go to the root o f the matter. In my view in the case at hand I think the root of the case is on the credibility of the witness and the ingredients of the offence. The trial Magistrate in his second point of contradiction said; -

> *"while PW1 said they were raped in the third day, PW2 on her side said they were raped in the second day, that it was Sunday in the afternoon."*

The appellant has submitted that the true evidence of rape come from the victim, in the case at hand the victim ATU said that she was called to the room of the respondent where the respondent undressed her pants and put his penis. It is open that she was alone to the room, Rebecca could not witness that or know what happened to ATU. How comes to say that they contradicted on the date of rape. It is very clear in evidence that

Rebecca was not there when the victim was being raped by the respondent. PW1 said when she was cross examined by the defence Counsel Ms. Mahenge '*when Rebeca entered in that room I was not there*' the version proves that each entered on its own, therefore the contradiction relied by the trial Magistrate did not go to the root of the ingredients of the offence. Since the best evidence of rape comes from the victim the principle as laid in **Suleman Makumba's case** supra the evidence of PW1 was enough to ground conviction as she was credible witness as appreciated by the trial Magistrate when PW1 testified on 19th November 2019. In the typed proceedings at page 9 in her testimony PW1 stated in part; -

> *"I get inside of his roof. After I entered inside I found him sitting on his bed, he then undressed me and there after he took his penis and put it in my vagina and canal knowledge me. When he was doing that, he was naked"*

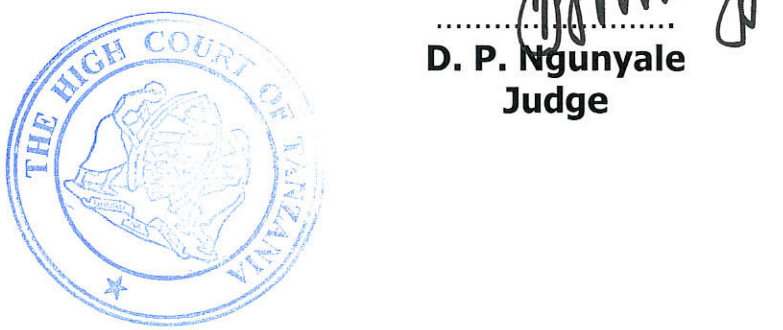
The above piece of evidence is very clear about the fact that there was penetration against PW1 as done by the respondent. The trail Magistrate ought to be very kin in dealing with this primary evidence. Therefore, I am settled in my mind that the defence case had nothing substantial to raise any set of doubts to the prosecution case.

Therefore, the prosecution case was water tight to ground conviction as analysed hereinabove, the alleged contradictions about number of times

and days the victims visited the respondent, they were raped on the same day or otherwise and whether they went to the respondent on school days or weekend does not go to the root of the case. Those are minor discrepancies which leaves the prosecution case intact. The trail Court erred to rely on such minor discrepancies to acquit the respondent.

In the end result, the Court has been satisfied that the prosecution proved their case against the respondent beyond all reasonable doubt that cardinal principle in criminal justice. The respondent is hereby convicted with the offence of Rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code Cap 16 R. E 2019. Appeal allowed. Sentence shall start to run from the date of arrest subject to legal procedures.

Dated at Mbeya this 19th July 2022.



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D. P. Ngunyale
Judge