IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 40 OF 2020

(Arising from Criminal Case No. 142 of 2019 in the District Court of Tanga at Tanga , Hon. J.C. Bishanga – RM dated 12/03/2020)

FRANCIS DANIEL CHILELE @ DJH.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: *11/10/2021*
Date of Judgment: *25/02/2022*

AGATHO, J.:

This appeal stems from the judgment of District Court of Tanga where the Appellant was charged for the offence of Rape c/s 130(1)(2)(e) of the Penal Code [Cap 16 R.E. 2002], and the offence of Unnatural Offence c/s 154(1)(a) and (2) of the same Act. Following successful prosecution by the Republic, the Appellant was found guilty, convicted, and sentenced to 30 years imprisonment for the first count, and life imprisonment for the second count. He was aggrieved by the said decision and

appealed to this Court raising five grounds of appeal as shown below:-

(1) That the learned trial Magistrate erred in law and in fact to convict the Appellant believing on incredible and unreliable prosecution witnesses who failed to mention the exact date of the alleged offence.

(2) That, the learned trial magistrate erred in law and fact by infringing Section 26 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016.

(3) That the learned trial magistrate erred in law and fact by convicting the appellant relying on exhibit P.1 (PF.3) while PW1 (the medical doctor) failed to probe as to whom exactly raped and sodomized the victim (PW3) hence DNA test was needed.

(4) That the learned trial magistrate was not scrupulous to notice that the in preliminary hearing the appellant shown that he was charged with the offence of Rape only and not unnatural offence, hence its probable that this is framed case. This was amended. The charge was substituted.

(5) That the learned trial magistrate erred in law and in fact by failing to notice that the charge against the appellant not proved on the required standard.

When the appeal came for hearing the Court ordered the parties to conduct hearing by way of written submissions. Thereafter, the Court set the schedule for filing of written submissions. The parties complied with by filing their written submissions timely.

To determine the appeal at hand the Court examined the grounds of appeal put forward by the Appellant, the evidence on record, the law and the submissions of the parties.

It is trite law that the credibility and reliability of the witness is enhanced when s/he (the victim) names the assailant early as it was held in **Christopher Ally v R., Criminal Appeal No. 510 of 2017, Court of Appeal of Tanzania at Mbeya** at pages 12-13 citing **Marwa Wangiti Mwita v R [2000] TLR 39**, where the Court of Tanzania held

> *"The ability of a witness to name a suspect's name at the earliest opportunity is an all-important*

assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry"

In the present case the victim neither named the assailant early nor reported him to her parents or to the police. Nevertheless, the victim being a witness (PW3) testified that that she had sexual intercourse with the Appellant from July to October 2019. This is also seen in the charge sheet. The PW3 did not report the incident to her parents. And she disappeared for a week in October 2019. That is the time the parents started looking for her. It is not the law that the victim must report the incident soonest. However, as it was held in **Marwa Wangiti Mwita v R [2000] TLR 39** naming of the assailant/suspect early enhances the credibility and reliability of a witness. Again, the case of **Selemani Makumba v R [2006] TLR 379** which the trial magistrate cited and also referred by the Respondent State Attorney in his submissions, states that the best evidence in sexual offences is that from the victim himself or herself.

Nevertheless, it is my view that the case of **Selemani Makumba** (supra) applies where the witness is credible and reliable. A witness who fails to report a repeated criminal incident for about three months her credibility and reliability is doubtful.

The eyewitness (the victim) did not report the incident early that should have alarmed the trial Court. It is unclear why the parents (the mother) suspected the Appellant and went to his home. This is suspicion. And as it was held in **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda v R, [2006] TLR 395**, suspicion however strong cannot be the base of conviction. It is a standard in criminal proceedings that the case must be proved beyond reasonable doubt. That was held in the case of **Jonas Nkize v R [1992] TLR 213**.

The medical doctor (PW1) who did an examination on the victim, she opined that the victim (PW3) was raped and sodomized. But she could not tell who raped and sodomized her. She did not tell whether she saw seamen in the PW3's vagina and anus. She could therefore not say whether the seamen found were of the Appellant or not. For that reason, the testimony of PW1 did

merely corroborate that PW3 was raped and sodomized but it did not tell who raped and sodomized her. Such evidence could not support the testimony that PW3 was raped and sodomized by the Appellant. Indeed, the Appellant is right in arguing that there was no DNA test taken to show that the seamen found in PW3 vagina and anus was that of the Appellant. Since there was no semen found and no bruises it is clear that the prosecution failed to prove that the Appellant raped and sodomized the PW3. Other than mere assertion of PW3, no evidence was given to confirm that the PW3 was at the Appellant's home for one week in October 2019. The PW3's testimony is visible on pages 22 – 24 of the trial Court proceedings. I am of the view that the trial Magistrate erred in believing the testimony of PW3 as being credible in absence of any other evidence to corroborate that it is the Appellant who raped and sodomized the PW3. While every witness is entitled to credibility as stated in **Goodluck Kyando** (supra), but such credibility is given to a witness who is reliable. In the present case PW3 in my view is not a credible witness because she failed to report the incident early while the alleged sexual intercourse and sex against the order of nature have been

ongoing for three months (from July to October 2019). It will be a grave injustice to believe every story the witness gives before the Court without testing credibility of such witness or without having credible corroborating evidence. Although the law does not require that direct evidence be corroborated but in circumstance of this case there was a need for credible corroborating evidence as the only eyewitness is the victim herself. I ask myself if the victim was in a relationship with the Appellant, and they met at Kigodoro (traditional dance) and they exchanged their mobile phone numbers, why did the prosecution not tender the PW3's phone and retrieve the message or call data to show how the victim and the Appellant were intimate?

It is doubtful if the appellant is the one who raped and sodomized the victim. The only evidence that seems to have been the base of conviction is that of the victim (PW3), and the principle in the case of **Selemani Makumba v R** (supra) that the best evidence in sexual offences cases is that of the victim.

I have already said the sooner the victim reports the incident the better as the credibility of the witness is enhanced. The witness

(PW3) never reported the rape and sodomy incidents to the parent or to the police. On top of that she disappeared from home for a week. Apart from her (PW3) claim that she was at the Appellant's home no other evidence and substantiate this. I find the 1st ground of appeal to have merits.

Regarding the 2nd ground of appeal, this has merits because the girl (PE3 - victim) was aged 14 years as shown on page 22 of the trial court proceedings. But PW3 said she is aged 15 years. That could mean she was not a child of tender age. The Appellant did not complain that the witness is a child of tender age. However, the father (PW2) testified on page 20 of the trial court proceedings that his child was born on 06/06/2005. She was thus aged 14 years meaning she was a child of tender age at the time she was testifying, that is on 03/03/2020. Section 127(4) of the Evidence Act [Cap 6 R.E. 2019] defines a child of tender age to be the child whose age is not more than 14 years. Therefore, the law applicable is section 26 of Written Laws Miscellaneous Amendment Act, Act No.2 of 2016, which has been now incorporated into section 127 (2) of the Evidence Act [Cap 6 R.E. 2019]. And the Court erred not to ask the child to promise to tell

the truth and not to tell lies as per **Godfrey Wilson v R., Criminal Appeal No. 168 of 2018 Court of Appeal of Tanzania at page 14**. Failure to do so is fatal and vitiates the trial. I thus find the second ground of appeal to have merits too.

The 3rd ground of appeal that no DNA examination was done to corroborate other pieces of evidence to prove that the Appellant did indeed rape and sodomize the PW3 has merits too. I am saying so because the only direct evidence is that of PW3 which in my view incredible for the reasons I have stated herein above. To consider that the exhibit P1 (PF. 3) as the basis of conviction is erroneous on the part of trial Court because had there been the Appellant's seamen (sperm) in the PW3's vagina and anus then that evidence could have been credible. It could have corroborated the testimony of PW3. The PW1 stated on page 20 of the trial Court proceedings that during medical examination of PW3 she did not find any sperm in the victim's genitals. I have noted that the Respondent State Attorney did not submit on the 3rd ground of appeal. I take that as being uncontested ground of appeal. The DNA test was not done. And no scientific examination of the seamen was done. In fact, the PW1 did not testify if she

found any seamen in the victim's vagina and anus. For that reason, other pieces of circumstantial evidence were crucial. It is surprising that neither PW3's sister nor Ibra was called to testify. The PW3's sister according to the PW3 was present at Kigodoro dance and saw the Appellant courting the PW3 and took her mobile phone number. Ibra is said to be the Appellant's friend who used to escort him to PW3's home.

It is also unusual that apart from PW2's testimony, no other piece of evidence which shows that the Appellant and the victim have been seen together or SMS sent to PW3's phone or to her sister's phone. These were not retrieved and tendered in the Court. There is no other evidence that the Appellant and PW3 were friends or had close or intimate contact. There are many doubts in the prosecution evidence. PW1(doctor) pages 16 – 20 of trial Court proceedings gave expert testimony on the status of PW3 genitals (vagina and anus) that she was raped and sodomized. The PW2 (father of PW3) testimony is found on pages 20 – 21 of trial Court proceedings, and PW4(WP 6738 D/C Amina - police officer) evidence is on pages 26 – 29 of trial Court proceedings. They both gave hearsay testimonies.

I find the conviction of the Appellant was based on suspicion which is in improper in law as per **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda (supra)**. Also the testimony of PW3 found pages 22 – 25 of trial Court proceedings was incredible. She failed to name the assailant early which could have elevated her credibility. She disappeared for a week without informing her parents her whereabouts, and without informing them about the alleged rape and sodomy which was ongoing from July to October 2019. It is doubtful if at all it was the Appellant who committed those offences. In absence of a credible corroborating evidence there is risk of miscarriage of justice to convict basing on testimonies of incredible witness (PW3).

For the reasons stated herein above, I find the appeal to have merits. I allow it. The conviction is quashed, and the sentence imposed on the Appellant is set aside. I proceed to order immediate release of the Appellant unless continued to be detained for other lawful reasons.

DATED at **TANGA** this **25th** Day of **February 2022.**

U. J. AGATHO
JUDGE
25/02/2022

Date: 25/02/2022

Coram: Hon. Dr. U. J. Agatho, J

Appellant: Present

Respondent: Present

B/C: Zayumba

Court: Judgment delivered on this 25th day of February, 2022 in the presence of the Appellant, and the Respondent State Attorney.

U. J. AGATHO
JUDGE
25/02/2022

Court: Right of Appeal fully explained.

THE HIGH COURT OF TANZANIA

U. J. AGATHO
JUDGE
25/02/2022