IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL No. 145 OF 2021

(Originating from Criminal Case No. 21 of 2017 in the District Court of Monduli at Monduli)

SAIDI JUMANNE @ TEMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

18th July & 26th August 2022

TIGANGA, J

In this judgment, appellant appealed against the decision of the District Court of Monduli in Criminal Case No. 21 of 2017. He raised seven grounds of appeal as follows;

i. That, the trial court erred in law and facts to convict and sentence the appellant herein based on contradictory evidences.

ii. That, the trial Magistrate erred in law and facts that the contradictory evidence of the prosecution side does not go to the root of the matter.

iii. That, the trial court erred in law and facts that the victim who was PW1 managed to identify the accused at night.

iv. That, the trial court erred in law and fact to rely on the evidence of the victim who only managed to identify the accused for (sic) in the court and not anywhere else.

v. The trial court erred in law and facts to admit and rely on the defective and unreliable exhibits to prove the prosecution case.

vi. That, the trial court erred in law and facts to hold that the prosecution side managed to prove the case beyond reasonable doubts.

vii. That, the trial court erred in law and facts to rely on unreliable prosecution witnesses.

To understand what precipitated the arrest and arraignment of the appellant, a historical background albeit briefly is important. The appellant stood charged with the offence of rape contrary to section 130(1)(2)(E) And 131(1) of The Penal Code, [Cap 16 R.E 2002] vide Criminal Case No. 21 of 2017. He was accused of committing the offence on 03rd day of April 2017 at Mlimani area within Monduli District in Arusha Region. He was accused to have committed an act of sexual intercourse with R d/o P (names in initial) a girl who is 14 years old. The appellant pleaded not guilty to the charge and after full trial, which involved a total of six prosecution witnesses and five exhibits as well as three defence witnesses, the court was satisfied that the

prosecution proved the case beyond reasonable doubt. Having so found, it found the accused person guilty and convicted him as charged. Consequence to the conviction he was sentenced to 30 years' imprisonment.

It is that finding and sentence which aggrieved the appellant who appealed to challenge both, the conviction and sentence. Hearing was done orally in which the counsel's submission in chief commenced in which the 1st and 2nd ground of appeal were argued jointly. The appellant submitted with regards to the 1st and 2nd grounds of appeal that PW1 stated at page 14 of the trial court's proceedings that after she was raped she run towards PW5's house while carrying her underpants. At page 24 of the trial court's proceedings, PW5 stated that when PW1 run away towards his home the bulb light was on but he did not discover what she was carrying.

He further submitted that, PW1 stated at page 13 of the typed trial court's proceedings that, WEO was given information at that night that PW1 had arrived to PW5 and WEO is the one who sent her to the Police station while at page 24 of the proceedings PW5 stated that VEO is the one who was informed during that night that PW1 has arrived to PW5's home and sent PW1 to the Police station.

The Counsel for the appellant further submitted that, PW1 stated that her clothes which she was wearing were cleaned during that night while PW5 while adducing evidence stated that underwear was the only cloth which was cleaned during that night.

The appellant further submitted that at page 13 of the trial court's proceedings, PW1 while adducing her evidence stated that she went to the Police station on the 04th April 2022 and on the same date she went to the hospital and she saw the suspect. At page 24 of the typed proceedings PW6 stated that an accused was arrested on the 06th April 2017 and on that very date the cautioned statement was recorded. The question remains as to when the accused was arrested? If she went to Police on the 04th April 2017 then the cautioned statement was recorded on the 06th April 2017, it was recorded out of time. At page 22 of the trial court's typed proceedings, the Doctor stated that he attended the victim on the 05th April 2017 and it is on that date the PF3 was filed. He further submitted that the victim is not certain as to when he was raped, there is nowhere it is shown where the victim slept on the 04th April 2017. Hence he further prayed that the contradiction should benefit the appellant.

With regards to the 3rd ground of appeal, it is stated at page 13 of the proceedings that, PW1 was raped at night in the darkness and she identified the appellant because she spent the whole day with him up to night while the appellant said he met with the victim during the evening after PW1 was handed to him by one Michael Elias who did not return to take the victim and PW1 run away during that night from the appellant to the house of PW5. In the counsel's views, Michael Elias was the one to testify that on the 3rd April 2017 the Victim spent the whole day with the appellant but the Prosecution failed to bring Michael to testify. Without the evidence of Michael Elias, the fact that the victim spent the whole day with the appellant becomes doubtful.

He further submitted with regard to the 4th ground of appeal, that it is well evidenced that, the victim did not identify the accused except, before the subordinate court. This evidence is doubtful as it does not prove as to whether the victim knew an appellant before.

With regard to the 5th ground of appeal, the counsel stated that, the court relied on exhibit PE2 which is defective, the one tendered by PW4 which was prepared on the 5th April 2017. He further submitted that the other exhibit is exhibit PE5, at page 54 of the proceedings which was

tendered by PW6. This exhibit, is a witness statement of Michael Elias but was not tendered by him who did not appear instead appeared in Criminal Case No. 13/2021 before the original court. For that reason, the 6th ground of appeal is resolved in the sense that, the court was not justified to hold that, the case was proved beyond reasonable doubt. He further state that, it is doubtful that the victim remained for the whole day in the hiace which the appellant was a conductor while Michael Elias was a Driver. He further state that, it was doubtful that, the victim was taken to Arusha town unwillingly since she was to be dropped at Waya bus station. In the end, he asked the court to acquit him basing on the weakness of the evidence brought by the prosecution.

In reply, the learned counsel for the Republic opposed the appeal and submitted with regard to the 1st and 2nd grounds of appeal that, the contradiction that PW1 said her clothes were cleaned during that night and the fact that PW5 said it was the underwear which was cleaned during that night does not touch the root of the case. She said the appellant was represented by an Advocate who had the duty to cross examine the witnesses in relation to such contradiction but he did not do that.

In her view, the fact that there is contradiction as to whether WEO or VEO is the one who sent the victim to the Police station makes no sense because the Advocate did not cross examine on that matter. He is therefore deemed to have accepted that fact. Also the fact that there was no disclosure of where the victim slept on the night of 03rd April 2017 seem to be a misplaced argument because, the learned Counsel for the appellant had ample time to cross examine on such fact, but did not do so instead he raised the matter at the appellate stage. There is contradiction that the victim stated that she went to the hospital on the 4th April 017 while PW4 told the court that, the victim was sent to the hospital on the 05th April 2017, but such contradiction does not go to the root of the case.

With regard to the 3rd and 4th grounds of appeal, it is on records that on the incident day, the appellant and the victim were together during the day and he bought her the lunch, they spent the day together until evening when they went to the appellant's mother and while on their way the appellant raped the victim on the ground before they reached to the appellant's mother. The fact that the victim identified the appellant before the trial court corroborates her evidence on identification. That, exhibit PE2 which is PF3 is defective makes no sense basing on the contraction that it

was filed on the 5th April 2017 instead of 4th April 2017. The Counsel further insisted that the Counsel for the appellant had ample time to cross examine on this during trial but not raising it at the appellate stage.

The fact that Michael Elias was not summoned as a witness before the trial court but appeared in court on 20th April 2021 in Criminal Case No. 13 of 2021 should also be disregarded since, at page 38 of the trial court's typed proceedings the witness tendered exhibit P1 and it was not objected by the appellant during trial. Hence, the fact that the cautioned statement was recorded out of time is an afterthought and an imagination.

In further reply, the learned counsel submitted that, even if the caution statement alleged to be defective is expunged from records, it cannot vitiate the reality that the prosecution has proved the case beyond reasonable doubt since the victim mentioned the appellant immediately after the incident, as it is required by law. Mentioning an accused at a very earliest stage is an assurance of her reliability as it was held in the case of **Halfan Ndubashe vs The Republic,** Criminal Appeal No. 493/2017, CAT.

Also the evidence of PW4 corroborates the evidence that, the victim was raped since during examination it was found that there were bruises in

the victim's vagina, the vagina was swollen and there were spermatozoa in the victim's vagina.

In rejoinder, the Counsel for the appellant reiterated the submission in chief save on few issues which he made for clarification. That made the end of both learned Counsels' submissions.

Looking at the records, the grounds of appeal and the submissions made in support and against the appeal, the main issue for determination which the trial court is enjoined to address is whether the prosecution proved its case beyond reasonable doubt.

In so doing, the trial court was supposed to be guided by the ingredients of the offence as provided by two sections 130(1)(2)(e) and 131(1) of The Penal Code, [Cap 16 R.E 2022]

(1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

In this case it has been proved by the evidence of the prosecution and it has not been disputed by the defence that, the victim is the girl under 18 years old and in fact she was 14 years old when the offence was committed. In law as it was held in the case of **Issaya Renatus vs The Republic**, criminal appeal number 542 of 2015 (unreported) the court stated that proof of age is given by the victim, relative, parent, medical practitioner or where available by the production of a birth certificate, in line with this position it is my view that the prosecution has managed to prove the age of the victim.

It has also been proved by the oral evidence of the victim as supported by the PW5, the woman to who the victim ran to after being raped and received her immediately after the act who saw the victim bleeding, that the victim's vagina was penetrated into. That was also proved by PW5 the medical Doctor who examined the victim and found bruises in the vagina of the victim and that the same was swollen. The evidence from these three witnesses proved that the vagina of the victim was penetrated into.

It should be noted that, under section 130(4) (a)(b) of the Penal Code, (supra) provides that, for the purposes of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence. And that, evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent. In this case, it has been proved that the penetration was there, not even slight, but vividly and injurious showing that it was done forcefully. It should also be noted that, given the age of the victim even if she is found to have been consented the fact which has not been proved by evidence, then that consent is immaterial because by her age, she has no capacity to consent.

The authority in the case of **Maliki Geoge Ngendakumana vs The Republic,** Criminal Appeal No. 353 of 2014 CAT Bukoba (unreported) provides the principle that:

> *"It is a principle of law that, in Criminal Cases the duty of the prosecution to prove the case is two folds, one, to prove that the offence was committed and two that it is the accused person who committed it."*

The fact that the offence of rape against the victim has been proved by the evidence submitted before the trial court, the next question is who committed the offence against her? In answering this issue, the prosecution alleged and actually marshalled evidence to prove that it was the appellant who committed the offence at hand. On the other hand, the defence dispute to have committed the offence as alleged.

In proving that fact, the prosecution relied on the evidence of PW1, who categorically told the court the way he met the appellant who was a bus conductor. The fact that she spent a day with him while in the motor vehicle which the appellant was serving as the bus Conductor. It is also evident that, when the victim met PW5 where she took refuge, immediately mentioned the person who raped her to be Tembo, a bus conductor. She narrated how she was promised to be taken to the appellant's mother so that, she can sleep and be taken to Waya in the following day.

These facts were disputed by the appellant, he disputed to have spent the whole day with the victim in the car he was working in. however, he does not dispute to have met the victim. He said, he met the victim after she has been handed over to him by one Michael Elias. Michael Elias according to his own evidence as contained in exhibit PE5 he is a Hiace driver working

with the appellant as his bus conductor. He confirmed that the victim was their passenger but at the time when they were retiring the work of the day, the appellant told him that the victim is his relative, so he would go with her to his home where the victim would sleep.

In such a statement Michael Elias said the appellant is also called Tembo. And he confirmed to have left the appellant to leave with the victim. As earlier on pointed out, the appellant does not dispute to have left with the victim, but what he alleges is that, the victim escaped from him when he went to the shop to buy some items.

Looking at the nature of the evidence it is apparent that, this case may stand or fail depending on the credibility of the witnesses. Which the respondent bank on the evidence of victim as supported by some legal principle like the fact the victim mentioned the appellant immediately after the act supported by the case of of **Halfan Ndubashe vs The Republic,** Criminal Appeal No. 493/2017, CAT, that mentioning an accused at a very earliest stage is an assurance of his reliability which I take to be good law. The appellant relies and heavily bank on the contradiction in the evidence of the respondent. The respondent republic though, acknowledges

contradiction them, they said, the same are very minor and do not go to the root of the case at hand.

I have keenly studied the evidence of both sides and the pointed out areas of contradiction. I am entirely in agreement with Ms. Akisa Mhando that, looking at the ingredients of the offence as highlighted from section 130 (1) (2) (e) of the Penal Code (supra), the alleged contradiction are very minor and have not gone to the root of the case.

I hold so because, in the case of **Shabani Daudi vs Republic**, Criminal Appeal No. 28 of 2001(unreported) it was held that;

> *"The credibility of a witness can also be determined in other two ways that is one by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses"*

Basing on the above position, I asses PW1 evidence as coherent one since the series of events she has stated in her evidence is alike the consequence occurred and any reasonable person could easily draw the inference that the appellant's actions since noon evidences his intention that

he was indeed in preparation of the commission of the offence in late hours which he could not be easily identified.

In the case of **Goodluck Kyando vs The Republic**, Criminal Appeal No.118 of 2003(unreported) it was stated that;

> *"It is 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."*

From what the victim has said on the issue of who raped her, I find no chance of her being framing the evidence against the victim. Weighing and assessing the said evidence, I find her to be the witness of facts and truth. Her credibility has not been shaken by either cross examination or the evidence by the defence.

It is also a settled principle of law which was emphasized in the case of **Raymond Mwinuka vs The Republic**, Criminal Appeal No. 366 of 2017(unreported), that in very rare cases the court can interfere with the lower courts' findings of facts when it discovers that on the face of records, there have been misapprehension of the nature and quality of the evidence and other recognized factors occasioning to miscarriage of justice. There are no established doubts by the appellant to convince this court to interfere

with the lower court's findings. That said, this appeal is hereby hold to lack merits, it is hereby dismissed for want of merits. The trial court decision is hereby upheld for the reasons assigned.

It is accordingly ordered

DATED at **ARUSHA** on the 26th August 2022.

J.C. TIGANGA

JUDGE.