IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

CRIMINAL APPEAL NO. 19 OF 2022

(Appeal from the Judgment of the District Court of Muheza at Muheza dated 30.12.2021 in criminal case No. 49 of 2021)

SIRAJI SEIF ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last order: - 8/6/2022
Date of Judgment: -3/08/2022

JUDGMENT

L. MANSOOR, J

The appellant appeared before the District Court of Muheza at Muheza charged with rape c/s 130(1)(2)(e) of the Penal Code [CAP 16 R.E 2019].

The particulars are that, on 22nd day of April 2021 at about 07.00 Hrs at Pangamlima within Muheza District in Tanga Region the appellant did have carnal knowledge of one Victim ZS (Not actual name to hide her identity), a girl of 15 years old.

The appellant entered a plea of not guilty therefore, a trial was conducted. The prosecution/respondent availed a total of four witnesses and one exhibit (P1) while the appellant defended himself.

In a nutshell this are the brief facts of the case.

On records it appears that the appellant is an uncle of the victim (PW1). On 5/3/2021, as stated by PW1 father (PW2), the victim disappeared from home. PW2 called the accused and confirmed that he was with the victim at Michungwani and assured him that the victim was to return on the next day, but the victim returned on unknown date of April 2021. Upon her return PW2 noted some unusual behaviour though not disclosed.

On 22/4/2021 at around 23.00 hrs, the victim disappeared again. This time PW2 reported the matter to the headmaster and to the police station. On 12/05/2021 PW2 was tipped that the victim had been seen at Maguzoni.

PW2 called one Omar Nguku (PW4) who rushed at Maguzoni area and found the victim with the accused person in a small hut, but the accused successfully escaped. PW4 took the victim to the

police post at Muheza where the victim narrated how appellant had been raping her.

On 12/5/2021, a medical Doctor (PW3) conducted a medical check-up. The result revealed that the victim was 10 weeks and six days pregnant. He filled the PF3 which was admitted in court as **Exhibit P1**. The appellant was thereafter arrested and charged.

The appellant fended that he never raped the victim. He is a married person and lived with his wife for all the time stated by the victim therefore he could not have the victim in his house at the same time. He also noted and challenged the discrepancies in the evidence of the Medical Doctor (PW3) and that of the victim.

The trial magistrate having satisfied himself that the prosecution has proved the charge beyond reasonable doubt, he convicted the appellant and sentenced him to serve the minimum sentence of 30 years in prison.

Dissatisfied with the conviction and sentence, the appellant has appealed to this court by levelling a total of five grounds of appeal of which I reproduce hereunder:

1. That the learned trial magistrate erred in law and factual analysis when he failed to note that the charge against the appellant was not proved beyond reasonable doubt.

2. That the learned trial magistrate strayed into error of law when he failed to give weight the variance of the charge and the evidence adduced as the charge alleges the incident of rape happened on 22.4.2021 at 7.00 hrs while PW1 claims that it was on diverse dates without mentioning 22.4.2021.

3. That the learned trial magistrate erred in law and factual analysis when he failed to note that Exh.P1 the PF3 was not read out in court to enable the appellant to know what is contained therein.

4. That the learned trial magistrate strayed into error of law when he failed to subject the entire evidence into scrutiny, including that of the defence and as a result he rejected the defence case without analysis.

5. That the learned trial magistrate erred in law and factual analysis when he relied on weak, inconsistency, contradictory with material discrepancies and uncorroborated prosecution evidence.

The Appellant, therefore, humbly prays this Honourable court to allow the appeal, quash the conviction, set aside the sentence, and set him at liberty.

At the hearing of the appeal, the appellant appeared in person while Ms. Elizabeth Mhangwa, Learned State Attorney appeared for the respondent. The appeal was argued by way of written submission.

Submitting on the first and second grounds of appeal, the appellant submitted that the charge is incompatible with the evidence adduced. First there is variance of dates and place of incident. The actual date and place of the offence is uncertain. He avers that while the charge states that the incident happened on 22.4.2021 at Pangamlima village to the contrary the victim (PW1) says the incident materialised on 20.4.2021 at Michungwani - Segera and continued for almost three weeks.

PW2 also claims that on 05.3.2021 and before April 2021 the appellant cohabited with the victim something which the victim herself never confirmed.

The appellant further submitted that the doctor's evidence (PW3) never supported the charge. At page 14 line 6 of the typed proceedings, PW3 said he found the victim with ten weeks and six days pregnancy. Therefore, by subtracting ten weeks and six days from 12.5.2021 when the test was done it means PW1 was impregnated on or around 25.2.2021. The appellant therefore avers that with that variance he cannot be liable for the pregnancy.

To support his argument, he cited the case of **Abel Masikiti V. Republic, Criminal Appeal No.24 of 2015 (unreported)** where the court of appeal observed that.

'If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal'.

Submitting on Exhibit P1 (the PF3), the appellant said, when the PF3 was admitted as exhibit P1 it was not read out therefore it must be expunged. He cited the case of **Robert P. Mayunga and Another V. Republic, Criminal Appeal No.514 OF 2016 (unreported)** where the court of appeal held that.

'Failure to read out to the appellant a document admitted as exhibit denies the appellant the right to know the information contained in the document and therefore puts him in the dark not only on what to cross examine but also how to effectively align or arrange his defence. The denial, therefore, abrogates the appellant's right to a fair trial....'

Submitting on the fifth ground of appeal the appellant says the there is clear inconsistencies, discrepancies and contradictions in the prosecution case which affects the substance of the case. PW1 said she was arrested by Uncle Abasi (who never testified) while to the contrary PW4 claimed to be the one who arrested PW1.

Regarding as to when she was taken to hospital, PW1 said it was on 28.5.2021 while PW3, the Doctor said he received the victim (PW1) on 12.5.2021.

The appellant further states that the other contradiction is on the judgment. At page 8 line 12 and 13 the trial magistrate said PW1 was found with three weeks and six days pregnancy. This remarks never reflected the evidence adduced by PW3 which was ten weeks and six days pregnancy.

The appellant therefore says with all the discrepancies, omissions, irregularities and deficiency, the appellant is entitled to the benefit of doubt as there is no cogent evidence to sustain the conviction and sentence. He thus prays this court to find the appeal with merit and allow it.

In reply to the Learned State Attorney, Ms. Elizabeth Mhangwa supported the appeal. She submitted that it true that there is variation between the charge and the evidence adduced by the prosecution witnesses. PW1 never testified that on 22/4/2021 she had carnal knowledge with the appellant as shown in the charge sheet. She only mentioned the date she left with the appellant to Michungwani – Segera.

As to the effect of variation, the learned counsel said it implies that the charge against the accused is not proved. She referred the court to the case of **Edward Luambano V. Republic, criminal appeal No.190 of 2018 at page 12.**

The Learned Counsel also conceded that Exhibit P1 was not read. The position of the law is that a document admitted as exhibit must be read out in court as was held in **Omary Hussen @ Ludangav and Another V. Republic, Criminal Appeal No.547 of 2017 at page 12.**

The counsel further says that since the exhibit was not read in court it prejudiced the appellant as he did not understand its contents. The Learned counsel says the omission was fatal and cannot be cured by section 388 of the CPA [CAP 16 R.E 2019]

As to the fourth ground of appeal the Learned Counsel also conceded that the trial magistrate never analysed the evidence of the appellant. However, she was of the view that the omission is curable. The appellate court can step into the shoes of the trial court and make the analysis of the defence case.

The appellant finally submits that since the prosecution did not prove the case beyond reasonable doubt, the appeal has merit

therefore she prays this court to quash the conviction and set a side the sentence imposed thereto.

From the submissions of both parties and the evidence on record, I find that only one issue can dispose of this appeal. That is.

1. Whether the prosecution proved its case beyond reasonable doubt.

The offence at hand is a statutory rape and the punishment is provided for under section 131(1) of the Code.

131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(Underline is mine for emphasis)

Having a look at the nature of the punishment, it is obvious that the offence is a grave and a serious one. Its minimum sentence is 30 years imprisonment and therefore needs a thorough and a serious investigation and straightforward evidence.

As contended by the appellant and acceded by the Learned State Attorney, it is true that the prosecution did not prove its case beyond reasonable doubts.

A charge sheet is what moves the court to determine the guilty or innocence of the accused person. Therefore, the prosecution is duty bound to establish the guiltiness of the accused person beyond reasonable doubt failure of which the accused must be subjected to an acquittal.

In the instant case, the actual date, time, and place of the offence are uncertain. While the charge states that the act of rape occurred on 22.4.2021 around 7.00 Hrs at Pangamlima village, PW1 says the incident happened on 20.4.2021 at night hours at Michungwani – Segera.

Moreover, by analysing the evidence of the Medical Doctor (PW3), the calculation of the ten weeks and six days pregnancy backwards as from on 12.5.2021 when the chek up was

conducted, it is vivid that PW1 was impregnated on or around 25.2.2021 contrary to the particulars of the charge.

The other uncertainty is noted on the evidence of PW2. This is the father of the victim. By his evidence, the victim disappeared twice. At first it was on 05/3/2021 and returned home in April 2021 almost a month after discovering that she was with the accused person at Michungwani. It is silent as to what the appellant and the victim were doing at that period.

The second time it was on 22/4/2021 at around 23.00 hrs. Currently though the date is the same in the charge, but time differs to a great extent. Whereas the charge depicts morning hours, PW2 says it was night hours.

The effect of variation between the particulars in the charge and the evidence in proof of such case is that the offence was not proved was held in the case of **Edward Luambano (supra)** and **Abel Maskiti V. Republic (supra)**

As to the issue of Exhibit P1 (the PF3), it is settled law that documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being

expunged from the record of proceedings. There numerous decisions expounding that stance. See, for instance, **Juma Kuyani and Another vs Republic, Criminal Appeal No. 525 of 2015, Misango Santiel vs Republic, Criminal Appeal No. 250 of 2007, (all unreported decisions of the Court).** I therefore expunge Exhibit P1 from records.

I am aware, as was stated in **Seleman Maumba V. Republic [2006] TLR 379,** that in sexual intercourse, good evidence comes from the victim. However, having expunged Exhibit P1 from the record, I find no other evidence available to sustain a conviction. As already discussed herein above the evidence of the victim (PW1) has also suffered a fatal blow for being uncertain and incredible.

The other aspect of error is failure to analyse the evidence adduced by the accused/appellant person. As correctly pointed out by the Learned State Attorney the omission is curable. This approach has been reinforced by the Court's previous decisions including; **Joseph Leonard Manyota v. R, Criminal Appeal No. 485 of 2015 (unreported) followed in Julius Josephat v. R, Criminal Appeal No. 3 of 2017, Karimu Jamary v. R,**

Criminal Appeal No. 412 of 2018, Idrisa Omary v.R, Criminal Appeal No. 554 of 2020 (all unreported). See also; Director of Public Prosecutions v. Jaffari Mfaume Kawawa [1981] TLR 149.

The accused greatly and extensively challenged the weakness and discrepancies in the evidence of PW4, PW1 and that of PW3. There is ample evidence as correctly pointed out by the appellant that PW4 did not identify him, he only said he saw the man running. He never evaluated if the man was the appellant.

At page 16 of the typed proceeding P4 said; '*when I was parking the motorcycle outside the hut one man immediately runs (sic) from inside the hut and inside I found the daughter of Siraji with only 'sidiria' and shorts'*

Though PW4 claimed to know the appellant as among the two men who lives in that hut, he however never availed convincing evidence as to how he identified the man who ran being the appellant. The expression ***I saw one man running*** implies that he never identified him.

As to the age of pregnancy, PW3 testified to be ten weeks and six days pregnancy contrary to the testimony of the victim who

testified that they cohabited with the appellant for three weeks. It was due to this weakness and discrepancies that the appellant claims to be exonerated, of which I concur with him.

However, the trial magistrate disregarded his evidence on reason that the defence casted no reasonable doubt on the prosecution side. With due respect this was a wrong analysis and evaluation by the trial magistrate.

May it be noted that the only evidence to support the conviction relied mainly and wholly on the evidence of PW1 and PW3. Therefore, I am inclined to hold that the discrepancies, as noted in their testimonies casted reasonable doubt on the prosecution case.

It is trite law that it is miscarriage of justice by convicting an accused person on weak evidence. Had the trial magistrate analysed and evaluated the defence evidence with due diligence and accord its weight he would have arrived at fair and just decision.

Having reasoned as herein, I find all the grounds of appeal with merit. I therefore allow the appeal, quash the conviction, and set aside the sentence met on the Appellant. I order for the

Appellant be released from custody immediately unless otherwise held for any other lawful reason(s).

DATED, SIGNED and DELIVERED at Tanga this 3rd day of August, 2022.

L. MANSOOR
JUDGE
3/8/2022