IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 10 OF 2022

(Originating from the District Court of Mtwara at Mtwara in Criminal Case No.111 of 2020 before Hon. L.M Janga'andu, RM)

GEORGE MARTIN MAVOCHI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

6/7/2022 & 17/10/2022

LALTAIKA, J.:

The appellant, **GEORGE MARTIN MAVOCHI** was arraigned in the District Court of Mtwara (the trial court) charged with the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 RE 2019. The particulars of the offence were that on diverse dates in October 2019 at Chuno area within the Municipality and Region of Mtwara the appellant did have carnal knowledge of "PR" or the victim a girl of fourteen (14) years old.

When the charge was read over to the appellant, he pleaded not guilty. This necessitated that the matter proceeded to a full trial starting with the prosecution case and ending with the defense case. Having been convinced that the prosecution had proved the case beyond

learned Magistrate Hon. L.M Jang'andu RM convicted the appellant as charged and sentenced him to a thirty (30) years imprisonment term.

Dissatisfied and aggrieved by the decision, the appellant has appealed to this court on six grounds as reproduced below:

1. *That trial Magistrate erred in law and fact by convicting and sentencing the appellant without scrutinizing on the reliability and credibility of the PW2(victim).*
2. *The trial Magistrate erred in law and fact by receiving and acting upon the evidences of PW1, PW2, PW3 to convicting the appellant, the evidence which was received and admitted in non-compliance with the provision of section 198(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] and the Oaths and Statutory Declaration Act [Cap. 34 R.E. 2019] PART II section 3,4,5 and 8(i).*
3. *The trial Magistrate erred in law and fact by acting upon uncorroborated and inconsistence evidence of the prosecution side.*
4. *The trial Magistrate erred in law and facts by failing to comply with the requirements of section 235(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002].*
5. *That the trial Magistrate erred in law and fact by unprocedurally admitting exhibit P1 as evidence in court.*
6. *That trial Magistrate erred in law by failing to comply effectively with the provisions of the section 312(2) of the Criminal Procedure Act [Cap. 20 R.E. 2002].*

When this appeal was called on for hearing on 6/7/2022, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Enosh Kigoryo, learned State Attorney. The appellant preferred the learned State Attorney to commence with the submission in

order to afford him an opportunity to know what he would submit as far as his grounds of appeal are concerned.

The learned State Attorney started off by providing a very useful historical backdrop to the appeal. He reiterated that as it appears on the charge, the appellant was charged with the offence of rape c/s 130(1) and (2)(e) and section 131(1) of the Penal Code Cap 16 RE 2019. He was arraigned at Mtwara District Court before the Hon. L.M Jang'andu RM, was convicted and sentenced to serve a term of thirty years in prison. He added that the appellant is dissatisfied and has appealed to this court on six 6 grounds.

For convenience, the learned State Attorney prayed to consolidate the 1st and 3rd grounds and argue them collectively since, Mr. Kigoryo averred, they both touched on inconsistency and credibility of witnesses. This had no objection to that seemingly innovative lawyering aimed at saving the precious time of this court albeit without causing inconvenience to either party.

It is Mr. Kigoryo's submission that on these grounds, the appellant had complained that the Prosecution witnesses had no consistency and should not have been relied upon by the lower court. Giving specific examples, the learned State Attorney stated that it was the appellant's argument that since the offence took place in October 2017, but it was reported in January 2020, the time lapse is sufficient to raise doubts on the side of the republic. Moreover, Mr. Kigoryo narrated, the appellant asserts that medical examination was conducted on the 28th January 2020 while the offence was

committed in October 2019 adding to the reasons for lack of reliability of key prosecution witnesses.

Addressing the above grounds of appeal, it is Mr. Kigoryo agrees that PW2 (the victim) had not disclosed anything to her mother (PW3) throughout that time. Nevertheless, the learned State Attorney was quick to point out that inability to report an offence earlier cannot weaken the evidence. In the instant matter at hand, Mr. Kigoryo reasoned, PW2 had consented carnal knowledge with the appellant but being a fourteen-year-old, Mr. Kigoryo argued, she could not have reported the matter to anyone by then. Sounding more of a Legal Anthropologist, Mr. Kigoryo averred that taking into consideration the culture of Africans, the appellant had no consent of the parents or guardians of the victim to engage in what was illegal sex and she knew it to be so. Presumably that is why she did not report the same to anyone.

It is Mr. Kigoryo's submission that according to the lower court's records, particularly the testimony of PW1 (pages 10-11 of the proceedings) the relationship between the appellant and the victim was known in the school of the victim namely Chuno Secondary School. PW1, Headmaster of the school, argued Mr. Kigoryo, had testified that the matter became known to him (the headmaster, that is) when the school conducted inspection to find out why some students were absconding from school. Referring to page 15 to 17 of the Proceedings of the trial Court, Mr. Kigoryo went on to argue that even the victim PW2 had stated that before joining Form One that is in October 2019, she lived with the appellant for two weeks as husband and wife. He argued that such contention was supported by the evidence of PW3

(the mother of the victim) as it appears on page 22-23 of the proceedings of the trial court. Based on such arguments, it is Mr. Kigoryo's reasoned opinion that the 1st and 3rd grounds have no merit and should be dismissed.

Moving on to the 2nd ground of appeal, Mr. Kigoryo helpfully summed up the complaint of the appellant thus at the trial court, the witnesses did not take oath as per the dictates of section 198(1) of the **Criminal Procedure Act Cap 20 RE 2019** (herein after the CPA) as well as sections 3,4,5 and 8 of the **Oaths and Statutory Declarations Act Cap 34 RE 2019.** Displaying an emphatic look and firm voice, the learned State Attorney assured this court that having gone through the entire proceedings, nowhere is it indicated that any witness had testified without taking oath. The appellant had misdirected himself, argued Mr. Kigoryo. To this end, the learned counsel averred, the second ground too has no merit should be dismissed.

The learned State Attorney moved on to the 4th and 6th grounds argue collectively where, it appears, the learned State Attorney dedicated more efforts and submitted even more passionately. These grounds, alluded Mr. Kigoryo, are centered on alleged contravention of sections 235(1) and 312(2) of the CPA. Mr. Kigoryo quickly conceded with this ground of appeal. Having gone through the judgement of the lower court, the learned State Attorney argued, he discovered that when the court had collected evidence from both parties, in addition to narrating the same it was duty bound to **consider, evaluate and reason** on the same something which was not done. It is Mr. Kigoryo's reasoned opinion that as a result of such omission, the learned

magistrate appears to have simply reached a conclusion of convicting the appellant. The reasoning pattern is conspicuously absent.

Arguing on the possible way forward, Mr. Kigoryo averred that, being the first appellate court, this court may enter the shoes of the trial court and analyze the evidence of both sides. In his opinion, the learned State Attorney reasoned, if such evidence is well scrutinized, this court would recognize that the offence was proved beyond reasonable doubt and that in his defense, the appellant did not raise any doubt. To support his argument, Mr. Kigoryo referred this court to the case of **Hussein Iddi and Another v. R. [1983] TLR 340** and the case of **Ngasa Sitta @Mabundu v. R** Crim App 254 of 2017 CAT, Shinyanga (Unreported) at page 12 where the Court of Appeal of Tanzania, referred the case of **D.R. Pandya v. R. [1957]** EA at 336

Still on these two grounds, Mr. Kigoryo stated that the appellant had complained that his defence was not considered. However, Mr. Kigoryo argued, upon going through the proceedings, he discovered that that the appellant was considered a false witness and could not be relied upon. In his defense, Mr. Kigoryo continued, the appellant had stated that his first witness would be his employer, but he never interrogated PW1 to show that they had such an employer-employee relationship. It is Mr. Kigoryo's submission that such failure to cross examine amounted to acceptance of the evidence. To support his position, he refereed this court to the case of **Mustapha Khamisi v. R.** Crim App 70 of 2016 CAT, Mbeya (Unreported).

Pursuing the allegation that the appellant had told lies in court and should not be trusted, the learned State Attorney referred to the case of **Paschal Mwita and 2 Others v. R.** [1993] TLR 295

It is Mr. Kigoryo's submission that the appellant had told lies when he testified that he never knew the victim and that it was in the court that he saw her for the first time. However, Mr. Kigoryo averred, during cross examination, he confessed knowing the victim as recorded on page 32 of the lower court's proceedings. To this end, Mr. Kigoryo prayed that the 4th and 6th grounds of appeal be rejected.

Moving on to the 5th ground, the learned State Attorney clarified that the appellant's complaint was centered on an assertion that procedure was not complied with in tendering and subsequent admission of his cautioned statement (P1) since, Mr. Kigoryo clarified further, the appellant stated that the same was not read out loud in court after being admitted. Responding, Mr. Kigoryo quickly pointed out that the ground was baseless, and he thought the appellant had misdirected himself. To elaborate his point, the learned State Attorney maintained that on page 27 of the lower court's proceedings, it was clearly documented that the exhibit was read out loud in court after it was admitted.

Having addressed all the grounds, Mr. Kigoryo prayed to assist the court in clearing out an "anomaly" he had noticed. Having scrutinized the charge sheet, Mr. Kigoryo averred, it is indicated that the victim was 14 years old. However, reasoned the learned State Attorney, none of the witnesses had alluded to the same. They only stated that at the time they were

testifying the victim was 15 years old. However, Mr. Kigoryo said appearing thoughtful, PW4 had stated that in January when he was called upon to examine the victim, he estimated her age to be 14 years as indicated on page 26 of the lower court's proceedings.

The appellant disagreed with the learned State Attorney that his grounds of appeal had no merit arguing that that is why he filed them in the first place. The appellant prayed to start his rejoinder with the evidence of the victim PW2. He stated that in the lower court, there was an argument between him and the victim. The victim stated that she knew the appellant and the appellant maintained that he did not She only knew him as a Bodaboda rider and never mentioned his name. The appellant insisted that initially, even in the charge sheet he was referred to as George Bodaboda until the court asked him to introduce himself.

It is the appellant's submission that he met the victim in court that day. She was coming from Mtwara Central Police dressed in a kitenge wrapped around her. The appellant stated further that he was called into the court chamber along with the victim where she was asked if she knew him to which he replied: *"George Mimi Namjua".* She went on to testify that she had sexual relationship with him. Thereafter, the appellant added, he asked her what prof she had to which she replied that the appellant a protruding flesh on his back "una nyama mgongoni imeotea." Referring to page 17 of the trial court's proceedings, the appellant stated that he took off his shirt and there was no such flesh. As a result, the appellant averred, the victim panicked and wanted to cry.

It is the appellant's submission further that since he was a bodaboda and carried many people as his pilon passengers, it is possible that the victim knew my face. He stated further that the police officer who was interrogating him wanted him to sign a piece of paper, but he refused. The police officer then tightened the handcuff on him so hard forcing him to confess finally, he accepted to sign the peace of paper.

The appellant maintains that the case against him was cooked up by PW1 who owned the bodaboda he was riding. He explained that PW was the Headmaster of the School where the victim was studying and there was an agreement between them that he would collect from him TZS 70,000 every week and after a given time, ownership of the bodaboda would move to the appellant.

It is the appellants submission that it all started in 2018 when he was working with another bodaboda in 2018. He took PW1 as his passenger and in their conversation, PW1 convinced him to leave his job so he could work for him. He agreed. They entered into an agreement where the appellant was to give PW1 10,000 per day from July 2019 to January 2020. Had he continued, the appellant averred, the motorbike would have become his.

Finally, the appellant invited this court to consider the scenario where he is charged with the offence of rape, but the complainant is a teacher and not a parent of the victim. Between the teacher and the parents, wondered the appellant, who knew the records of the child better? It is the appellant's considered view that a parent is the one that takes her child to school but in the instant matter, the mother of the victim did not know anything. She was

told that her child was in a sexual relationship with one George, asserted the appellant.

The appellant concluded his submission by a prayer that his appeal be allowed. He added that he only wanted to be paid his right that is how he got into trouble.

Having dispassionately considered the rival submissions by both parties, I am inclined to determine the merits of this appeal. I should start by stating the obvious: it is upon the prosecution to prove the allegations levelled upon an accused beyond reasonable doubt. To me the phrase reasonable doubt goes beyond the quality or even quantity of witnesses and the evidentiary value of their exhibits. There must be a logical component. The different parts of the prosecution case, when brought together, must fit in like a jigsaw puzzle to the satisfaction of a court of law.

With all due respect, in the instant case that flowless coherence is conspicuously absent. The whole prosecution case simply does not add up especially considering that the offence of [Statutory] Rape is a very serious one. I will start with the first ground of appeal. Despite all cultural, anthropological and at times legal arguments by the learned State Attorney on this point, I have failed to understand why the incident allegedly took place in October 2017, but it was reported in January 2020. In the case of **Lazaro Kalonga v. Republic** Cr. Appeal, No. 348 of 2008, CAT at Iringa (unreported) the Court of Appeal found it difficult to understand the incident of rape occurred on 30 July 2006 and yet it was not until 8 August 2006 that the appellant was arrested.

As if that is not enough, here comes PW4 the medical personnel who went ahead and examined the victim who, allegedly, had carnal knowledge with the appellant three years back. What exactly was the exercise meant for? I find it absurd that the finding of PW4 was that PW2 had lost her virginity and was experienced in sexual intercourse. It is elementary law that penetration is an important ingredient of the offence of rape. Conducting medical examination to examine whether the victim had been in a sexual relationship is, with due respect, not the same as establishing penetration of a male organ (penis) into the female organ (vagina). Besides, rape can be established even in the absence of a medical report See **Salu Sosoma v. Republic** Cr. Appeal No. 31 of 2006, CAT Mwanza (Unreported) if penetration has been proved including by the victim whose evidence is, in rape, the best evidence. See **Selamani Makumba v. R** [2006] TLR 379.

As I read through the evidence of PW2 (the victim) the shadow of doubt quadrupled in my mind. Rape is a very serious crime. Statutory rape is even more serious. A checklist of all essential ingredients must be always maintained to avoid enlarging the goal posts to enable one to score the goal. It is unfortunate that the prosecution in this case and even the learned State Attorney while submitting to me a few months ago, spent so much energy trying to establish that PW2 and the appellant "were in a relationship". In the case of **Hassani Bakari *alias* Mamajicho v. Republic** Cr. Appeal No 103 of 2012, CAT Mwanza (Unreported) the Court Appeal took the liberty to quote the *Dictionary of Contemporary English* on the meaning of penetration thus "the bodily act between animals or people in which the male sex organ enters the female." The Apex Court went on to provide that "the male sex

organ means the penis and the female sex organ means the vagina." The expression *"George Mimi Namjua".* (I do know George) does absolutely nothing to prove rape.

It goes without saying therefore that the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 RE 2019 has neither been established nor proved at the required standards. To this end, I am going to allow this appeal. However, before I sign off, I have a paragraph or two to put down. They are on PW1. I have nowhere else to share this than in this judgement.

Admittedly, although the prosecution has clearly failed to prove the case as I have shown, PW1's evidence has contributed significantly to pushing this court into the valley of doubts. Very serious doubts if I may be hyperbolic occasionally. It is uncommon in this country for Head of Schools (headmasters or headmistresses, as the case may be) to testify on rape cases involving their students. That is a preserve of another teacher (often a female teacher) passionately referred to by the students as "Madam" or "Matron". Since these teachers also double as counsellors, (Guidance and Counselling Teachers) they tend to know their students much more closely than the head of school. Heads of school are, understandably, busier with other administrative duties. As a matter of fact, students' welfare in general fall under the office of the assistant to the headmaster (known in Tanzanian schools as the "second" master or mistress.) Roughly that is what **KIONGOZI CHA MKUU WA SHULE (**The Head of School Manual) a well-known document in education circles provides.

A still but persistent voice of the appellant has been crying out that the headmaster (PW1) had doctored things out to put him into trouble to avoid honoring his part of the bodaboda contract. That still voice was silenced in the lower court on assertion that the appellant did not cross-examine PW1. In this court, the argument is that since the appellant did not (successfully) raise the point in the lower court, this court cannot entertain the same.

I promised to make "a paragraph or two" and this is the third. May it suffice to say that I cannot rule out the possibility that the headmaster "engineered" the case to deprive the appellant of his rights. In the same line of reasoning, I cannot condemn the headmaster without hearing his part of the story. Considering their relationship as master and servant, I cannot help but be reminded of the Latin saying:

"Non enim facile de his, quo plurimum diligimus, turpitudinem suspicamur."

Translated "We do not easily suspect evil of those whom we love most."

In the upshot, I allow this appeal. I quash the conviction and set aside the sentence of 30 years imprisonment term. I hereby order that **GEORGE MARTIN MAVOCHI** be released out of jail forthwith unless he is being held for another lawful cause.

It is so ordered

E. I. LALTAIKA

JUDGE
17.10.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 17th day of October 2022 in the presence of Florence Mbamba, learned State Attorney and the appellant who have appeared in person and unrepresented.

E. I. LALTAIKA

JUDGE
17.10.2022

Court

The right to appeal to the Court of Appeal fully explained.

E. I. LALTAIKA

JUDGE
17.10.2022