IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

DC. CRIMINAL APPEAL NO. 56 OF 2022

NELSON S/O JONAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Kinondoni at Kinondoni)
(F. L. Moshi, PRM)
Dated 3rd day of December 2020
In
Criminal Case No. 108 of 2019

JUDGMENT

12/10 & 02/11/2022

NKWABI, J.:

The appellant was seriously aggrieved with the convictions and sentences imposed upon him by the trial court. After the convictions, he was sentenced to serve 30 years imprisonment for raping CB a girl aged 11 years contrary to section 130(1) (2) (a) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. He was also sentenced to life imprisonment for unnatural offence committed against the same girl contrary to section 154(1) (a) and (2) of the Penal Code Cap 16 R.E. 2019. The incidences were said to have happened between July, 2018 and 13th January, 2019 at Ubungo Msewe area within Ubungo District in Dar-es-Salaam region.

The facts leading to the prosecution, conviction and sentence of the appellant are that on 13/01/2019 PW3 told her parents she was suffering from headache and that she would go to sleep. Her father made follow-up and he did not find her in her room sleeping. He decided to look into other rooms only to find the appellant having sex with her against the order of nature. The incidence was reported to the police on the very day and during the evening of that dat PW1 was medically examined.

The appellant's defence was that the case was framed up for he was demanding for his salary from PW1. The trial court found that the prosecution had a strong case against the appellant. It dismissed his defence for it found that it had not shaken the prosecution evidence.

Even so, on 13th July, 2022, this Court directed that the appeal be argued by way of written submissions. The appellant had to file his written submission on 27/07/2022 which he complied. He laments that the respondent did not reply in time and serve him in time. However, since the appellant did not prove the date he served the respondent, I cannot condemn the respondent unheard. In the circumstances I will consider all the submissions in order that justice is dispensed to both parties.

It is due to being seriously aggrieved with both the convictions and sentences as I have already intimated above, the appellant has approached this Court so that this Court overturns the decision of the trial court and sets him free. Five justifications of appeal, prompted the appellant to advance to this Court as listed hereunder:

1. That, the learned trial magistrate erred in law and facts by convicting the appellant relying on evidence of a child of tender age (PW3) who never promised the court to tell the truth and not to tell lies contrary to mandatory requirement of section 127 (2) of the Evidence Act, [Cap. 6 R.E. 2019].
2. That, the learned trial magistrate erred in law and facts to convict the appellant relying on a birth certificate (exhibit P1) and PF3 (exhibit P2) which were tendered in court without being read out after admitted as exhibit.
3. That, the learned trial Magistrate erred in law and facts to convict the appellant basing on incredible and unreliable evidence of PW1, PW2 and PW3 which are highly suspicious, implausible and contradictory.
4. That, the learned trial Magistrate erred in law in holding that the prosecution proved its case against an appellant beyond reasonable doubt while the evidence adduced against him is lacking and valueless.

5. That, the learned trial Magistrate erred in law for not believing and or accepting the appellant's defence evidence in absence of cogent reasons for not believing such defence evidence.

While submitting on the 1st ground of appeal, the appellant contended that the trial court did not comply with the provisions of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019 for reasons that:

a. No examination to test the competence of PW3 whether she knew the meaning and nature of an oath before jumping to the conclusion that, "Child like to speak the truth during hearing of her evidence."
b. The alleged promise, is not in the catch words of section 127 (2) of the Evidence Act, "Promise to tell the truth to the Court and not to tell any lies."
c. The alleged promise is in form of an indirect speech, and
d. The alleged promise is incomplete.

The appellant cited several case laws to back his stance including the case of **John Mkorongo James v. Republic,** Criminal Appeal No. 498 of 2020. He prayed this Court to find the evidence of PW3 valueless and hold that the 1st ground of appeal is meritorious and be allowed.

Responding to that ground of appeal, Ms. Sabrina Joshi, learned Senior State Attorney, maintained that even if there was non-compliance with the law, the Court of Appeal has resolved the issue and held that the Court has to look if the evidence adduced is consistent. She referred me to the case of **Wambura Kiginga v. The Republic,** Criminal Appeal No. 301 of 2018 CAT (unreported) where it was held:

> *"Based on the understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are; first, that there must be clear assessment of the victim's credibility on record and; second, the court must record reasons that notwithstanding non-compliance with section 127 (2), a person of tender age still told the truth."*

Reinforcing his submission in chief, the appellant asserted that the evidence of PW3 did not pass the test of truthfulness as provided for under section 127 (6) of the Evidence Act, Cap. 6 R.E. 2019 because her evidence was improbable, implausible and materially contradicted by the evidence of PW1.

He fortified his argument by the case of **Mohamed Said v Republic,** Criminal Appeal No. 145 of 2017 (unreported) where it was stated:

> *"We think it was never intended that the words of the victim of the sexual offence should be taken as Gospel truth, but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in case of sexual offences requires strict compliance with rule of evidence in general, and section 127 (6) of the Evidence Act in particular, and that such compliance will lead to punishing the offenders only in deserving cases."*

I am of the view that the Senior State Attorney did not seriously dispute the violation of the procedure and properly so, because the violation is so glaring on the record. I am therefore enjoined to consider closely the testimony of PW3 to see if despite the fact that the procedure to record her testimony as of a witness of tender age was not followed, she told nothing but the truth. If PW3 was telling falsehood or the evidence is contradicted in material particular by the testimony of PW1, I will touch on that when I will be discussing the other grounds of appeal.

I now turn to consider the complaint which is condensed to include the 2nd, 3rd and 4th grounds of appeal, that the trial Magistrate erred in law and facts to convict the appellant basing on invalid exhibits P.1, P.2, contradictory, inconsistent and highly implausible and improbable evidence of PW1, PW2 and PW4. He beefed up on that saying the testimonies of the witnesses were self- contradictory and contradicted the testimonies of other witnesses. He cited the case of **Aloyce Mridadi v. Republic,** Criminal Appeal No. 208 of 2016 (unreported) among other decided cases. He stressed that PW1 gave improbable evidence as how could he determine that they were having sex against the order of nature. He urged me to discount the evidence.

Expounding in his complaint against the exhibit P.1 and P.2 he said they should not be used since they were not read out in court. He exemplified **Robinson Mwanjisi & 3 Others v. Republic,** [2003] T.L.R. 218 where it was categorically held:

> *"Whenever it is intended to introduce any document in evidence, it should be cleared for admission and be actually admitted, before it can be read out."*

The learned Senior State Attorney admitted that the documentary evidence complained against were truly not read out in court. I proceed to expunge

them from the record. All I have to do is to use the oral evidence of the witnesses who prepared the same. In this approach, I am fortified by the decision of **Wambura Kiginga** (supra).

As to the discrepancies and contradictions, Ms. Joshi maintained that not all discrepancy in the prosecution case will cause the prosecution case to flop. She brought to my attention the decision of **Said Ally Ismail v. The Republic,** Criminal Appeal No. 249 of 2008 (unreported). In this case the Court of Appeal observed:

> *"Yes, we agree with Ms. Mushi that there are contradictions within the case for the prosecution. However, it is not every discrepancy in the prosecution's witnesses that will cause the prosecution's case to flop. It is only where the gist of the evidence is contradictory then the prosecution's case will be dismantled."*

I agree, I do not think that the discrepancies go to the root of the matter. The gist of the oral evidence of both PW1, PW2 and PW3 is that the appellant had sexual intercourse with PW3 both anal and vaginal. I do not accept the argument by the appellant that their testimonies are highly implausible and improbable.

Lastly, I consider the 5th ground of appeal which was couched that the learned trial magistrate erred in law for not believing and or accepting the appellant's defence evidence in absence of cogent reasons for not believing such defence evidence. The appellant was of the view that is contrary to the case of **Goodluck Kyando v Republic,** [2006] TLR 363, (CA) in which the Court held:

> *"... 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 the witness. Their testimony was not challenged."*

The appellant added that no good and cogent reason was assigned by the trial court for not believing the appellant's defence evidence despite that his defence evidence was highly plausible, probable and not materially contradicted by prosecution witnesses. Thus, he urged I decide that the trial court denied the appellant the right of fair hearing that offends and or repugnant to the right to be heard. He prayed I find that this appeal has merit.

In reply submission, Ms. Joshi stated that the argument of the appellant on the 5th ground of appeal is an afterthought because when PW1 appeared in court the appellant never cross- examined him on the issue of fabrication and the court considered his defence and accorded no weight to it at page 12 of the judgment. She prayed the appeal be dismissed.

In my considered view, this case was determined on the credibility of witnesses as stated in the case of **Sangaru Lugaira Mathias v. S.M.Z.,** Criminal Appeal No. 183 of 2005 C.A.T. (Unreported):

> *"The basis of the conviction was the dying declaration of the deceased and the admission of the appellant to PW1, PW2, PW3 and PW6, the officers*
>
> *It was a matter of credibility and acceptance of the evidence. As said before, the evidence was accepted by the trial Chief Justice."*

The oral evidence given by PW3 was materially corroborated by the oral evidence of PW1 and that of PW2 Dr. John Elias. PW2 in his oral evidence confirmed that PW3 had her vagina and anus penetrated by a blunt object.

In essence, the trial court dismissed the defence of the appellant when it stated:

"... it does not make sense that being in conflict with the complainant could be the source of implicating him to the serious offences of this nature as defending himself, ..."

Given the evidence that is available in the court file coupled by the failure by the appellant to cross-examine PW1 on the alleged bad blood, it is difficult to fault the findings of the trial court in respect of the credibility of the witnesses of the prosecution. Had it not been so, this Court would have not hesitated to step into the shoes of the trial court and re-evaluate the evidence of the appellant and come to its own conclusion. On that approach, I am guided by **Jafari Musa v. DPP,** Criminal Appeal No. 234 of 2019**,** CAT (unreported) in which it was stated that:

"The position as it is now, where the defence has not been considered by the courts below, this Court is entitled to step into the shoes of the first appellate court to consider the defence case and come up with its own conclusion."

It is worthy to note here that the prosecution did not entirely depend on the testimony of PW3. The gist of the prosecution witnesses evidence is that the appellant carnally knew PW3 against the order of nature. It was also the

strong gist of the evidence of the prosecution that PW3 had also been raped by the appellant.

It is for the above reasons that the trial court's conviction against the appellant cannot be faulted by this Court.

Consequently, I conclude by dismissing the appeal for it being devoid of any merit. The convictions entered and sentences meted out to the appellant by the trial court are upheld.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 2nd day of November 2022.

J. F. NKWABI

JUDGE