THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 42 OF 2022

(Arising from Criminal Case No. 28 of 2021, District Court of Mvomero)

RAMADHANI ALLY SUDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Last order date on: 14/09/2022
Judgment date on: 20/09/2022

NGWEMBE, J.

The appellant in this case, one Ramadhani Ally Sudi was arraigned before the District Court of Mvomero facing two counts of sexual offences under the **Penal Code (Cap 16 R.E 2019)**, to wit; Rape contrary to sections 130 (1) (2) (e) and 131 (1) and Unnatural Offence contrary to section 154 (1)(a).

It was alleged in the first count, that on diverse dates between October 2015 and February 2020 at Changarawe village, Mzumbe ward within Mvomero District, in Morogoro region, the appellant had carnal knowledge of the victim, a girl of 15 years old. In respect of the second count, it was alleged on same range of time and the same place, the appellant had carnal knowledge of the victim, a girl of 15 years old against the order of nature. The victim's real names are anonymized.

Having heard the evidence from both parties, the trial court convicted the appellant on both counts and accordingly sentenced him to thirty (30) years imprisonment for each count, sentences to run concurrently.

The judgment and sentence delivered on 14/04/2022 did not amuse the appellant, he contemplated to challenge it by way of appeal. Thus, lodged his notice of intention to appeal on 22/04/2022 and the grounds of appeal were instituted in this court on 13/07/2022. Reading sections 361 and 363 of **The Criminal Procedure Act [Cap 20 R.E 2019]**, the appeal was filed within time and no question of time limitation arose on the hearing.

The appellant's grievances constituted six (6) grounds, which in my understanding makes three complaints: - *One:* Exhibit P2 was improperly admitted. *Two:* - Key witnesses were not called. *Three:* - the offences were not proved beyond reasonable doubt.

On the hearing date, unfortunate the appellant appeared in person, while Mr. Emmanuel Kahigi, learned State Attorney appeared for the respondent/Republic. Being unrepresented the appellant did not submit anything viable on his grounds of appeal, rather prayed this court to consider his grounds of appeal and let him free.

What was laid in the appellant's Petition of appeal is summarised that, he contends on the trial court's reliance on the opinion of PW3, a Medical doctor who examined the victim whose evidence was just an opinion, which did not prove penetration, while the victim was not virgin and had Sexually Transmitted Disease (STD) named *gonorrhoea*. The statement by the victim that the appellant "raped" her was general and the technical meaning of the word was not considered. Also, exhibit P2,

a letter purported to have been written by the victim to the appellant was improperly tendered by PW5 and not PW2 (the victim) who authored it. Lastly, the trial court did not consider the importance of key witnesses, other kids who were watching TV at the crime scene.

On the other hand, the learned counsel strongly opposed the appeal, arguing all six complaints. Facing the issue of penetration, the learned State Attorney argued that the victim disclosed that she had sexual relationship with the appellant since the year 2015. To him, the evidence given by the prosecution proved penetration, and the best rape evidence comes from the victim as she testified. The contention that the victim had venereal diseases was not proved to be from the appellant. The learned State Attorney discredited it as not the only evidence on rape. Added that the letter written by the victim established all process of rape, such letter was tendered by a competent witness.

Mr. Kahigi added that the judgment by trial court was based on facts, evidence, law and precedents. Therefore, the appeal has no merit, same should be dismissed.

Having pointed the main grounds of contention above, this court will determine the main question of whether the appeal has merits. In so doing, while going along the points of complaints levelled by the appellant also will consider all relevant legal principles.

The principle in respect to the first appellate court has statutory duty to evaluate the evidence before it and make its findings on both law, facts relevant to the case and precedents. Where it appears that the trial court did not make a proper analysis or at least there is a complaint raised in the appeal, that the evidence or law were not properly appreciated, the appellate court can re-evaluate the evidence

and reach to appropriate findings. But it is known, matters of fact and demeanour of witnesses are in the trial court's domain and thus, findings on that sphere may not be easily overturned by the appellate court, unless there is a serious misapprehension of facts or law or where there is a miscarriage of justice.

The above is nothing new in the jurisprudence of our jurisdiction. It has been in place for decades and perfectly expounded by the courts in countless occasions of usage. This court in the famous case, of **Pia Joseph Vs. R [1984] TLR. 161,** while also drawing from the cases of **Coghlan Vs. Gumberland [1898]1 Ch. 704** and **Pandya Vs. R [1957] E.A. 336,** held *inter alia: -*

> *"The law as regards the role of an appellate court in matters of credibility is settled beyond peradventure. The trial court which has seen and heard the witnesses, thereby being privileged to observe their manner and demeanour, is certainly in a better position to assess their credibility than an appellate court which has not had these advantages. It has therefore been consistently held that an appellate court will not lightly interfere in the trial court's finding on credibility unless the evidence reveals fundamental factors of a vitiating nature to which the trial court did not address itself or address itself properly. As a rule of practice, therefore, a first appeal assumes the character of a retrial"*

The Court of Appeal in the case of **Yasin Ramadhani Chang'a Vs. R, [1996] TLR. 489** gave the following guiding observation: -

> *"The appellate court should tread with a lot of care since it is dealing with scripts while the trial court dealt with live persons*

revealing their demeanours. Despite of that, the appellate court can differ from the trial court if its opinion is not supported by the evidence and the right inferences."

In whatever verdict this court is going to make it with serious caution as per the above important principles. In the first ground, the appellant laments that exhibit P2 was improperly admitted for being tendered by PW5 instead of PW2, the purported author. On the adverse part, the learned State Attorney argued that PW5 was a competent witness to tender that exhibit.

This court has reviewed the proceedings and studied seriously the documentary exhibits, P2 inclusive. Exhibit P2 was actually tendered by PW5, G. 2674 D/Cpl Dominic, a Police Officer of Criminal Investigation Department, Mtibwa Police Station. According to his testimony (page 31-32 of the proceedings) this officer was assigned a duty to investigate upon the victim's aunt reporting to have found a letter, which was written by the victim to the appellant. The content was that she has been raped by Ally Sudi and Ramadhani Ally Sudi. She had venereal diseases and thus was asking for money to attend medication.

In the course, the witness tendered the said letter as exhibit P2. To the appellant, this was unprocedural. I understand that **The Criminal Procedure Act** (supra) gives prescription on how to dispose exhibits and **the Evidence Act [Cap 6 R.E 2019]** gives sufficient provisions as to admissibility of exhibits and competence of witnesses. None of the two clearly states on competency of witnesses to tender exhibits. But the law and precedents as stands currently, in respect of tendering exhibits, is clear that a witness may be competent to tender an exhibit if he is an author, recipient, custodian, or at any point in time,

while in his ordinary course of business happened to posses or work on the exhibit in any way. The Court of Appeal in the case of **Selemani Abdallah Vs. R, Criminal Appeal No. 354 of 2008** expressed the principle as follows: -

> *"A person who at one point in time possesses anything a subject matter of trial, is not only a competent witness to testify but could also tender the same ...The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time albeit shortly. So, a possessor or custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question* ***provided he has the knowledge of the thing in question.***"

PW5 as earlier alluded, was the investigator of this case, interrogated the appellant, visited the crime scene and sketched a scene map, among others. The letter (exhibit P2) was laid on his hands in the due course of exercising his ordinary duties. I am in agreement with the State Attorney that PW5 was a competent witness to tender the said letter and that the trial court was correct to have admitted the said letter. Thus, this ground lacks merits.

The second point of contention is in respect of the children who are said to have been watching TV at the scene of crime when the offence was committed. The appellant qualifies the said kids as material witnesses. The failure by the prosecution to call them, he suggests, entitled the court to draw adverse inference, which would reach upon the conclusion that the offence was not proved beyond reasonable doubt.

From the proceedings, particularly PW2's evidence, the rape and unnatural offence incidents took place several times, several places. One of the scenes is at the room of the accused's brother where she went to watch TV. May be is important to quote part of the victim's testimony at page 22 of the proceedings: -

> *"The accused's brother is the tenant at my grandmother house. I normally went to accused's brother's room to watch Tv. On the Tv room they were other kids. The accused insert his fingers on my private parts. The accused also came there to visit his brother who is a tenant to our house."*

From the excerpt above, the first day of rape was committed in the presence of other kids or at least the preparation of it was in the presence of other kids. I do not defy the principle that best evidence comes from the victim and that number of witnesses does not count, but credibility, reliability and weight of the evidence matters a lot. (section 127 (6) of **The Evidence Act (supra).**

All circumstances taken aboard, the said children were important and material witnesses. I meditate the law of evidence together with the principles glanced above, there is nothing from the principles above would apply to pardon the prosecution from bringing at least one of the youngsters to testify what they knew and saw on the said dates. I agree with the appellant on this point that the trial court had a duty to address the omission, but that alone does not *ipso facto* bring in a conclusion that the appellant was not guilty.

In fact adverse inference even when drawn for failure to call a material witness, does not automatically end in favour of the adverse

party in the verdict. Obvious what determines the verdict of the suit is the analysis of the whole case and circumstance of the case.

In considering the third ground whose basis is on whether the offences were proved. I wish to reiterate some basic principles applicable in Criminal Law. It is trite law that prosecution bears the burden to prove the offence under the Latin maxim *"semper necessitas probandi incumbit ei qui agit"* meaning *he who alleges must prove*. That requirement in law, is called burden of proof also enshrined under section 110 of **The Evidence Act(supra)**, as quoted hereunder: -

> **Section 110 (1)** *"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

The standard of proof in criminal cases is beyond reasonable doubt. The same is provided under Section 3 (2)(a) of **The Evidence Act** where is quoted: -

> **Section 3 (2)** *"A fact is said to be proved when -*
> *(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"*

Proof beyond reasonable doubt has been interpreted by this court in **Tino s/o John Mahundi Vs. R, Criminal Appeal No 21 of 2020 HCT at Mtwara** among others, also the Court of Appeal in **William Ntumbi Vs. Director of Public Prosecutions, Criminal Appeal No.**

320 of 2019 and **Nyabohe Nyagwisi Nyagwisi Vs. R, Criminal Appeal No. 243 of 2020** wherein the old case of **Magendo Paul & Another Vs. R, [1993] T.L.R. 219** was referred. In all those cases the court held: -

> *"If the evidence is strong against a man as to leave only a remote possibility in his favour, which can be dismissed"*

This court having taken a serious note on that principle, the question remains, whether rape and unnatural offence in this appeal were proved beyond reasonable doubt. I followed the wording of sections 130 (1) (2) (e) and 154 (1)(a) of the **Penal Code [Cap 16 R.E 2019]**.

There is no need to reproduce the provisions, but the substance is that the offence of statutory rape in the first count is complete if a man has sexual intercourse with a girl under eighteen years of age, consent is immaterial. An unnatural offence is created under section 154 (1)(a) of the **Penal Code** as follows: -

> **Section 154** (1) *"any person who -*
> *(a) has carnal knowledge of any person against the order of nature, commits an offence and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years."*

The age of the victim was proved by PW1 Mwajuma Mohamed Iddi, the victim's aunt who testified that at trial in year 2021, the victim was 16 years old. Tendered the affidavit affirmed by the victim's mother who failed to appear before the court for being sick. The said affidavit and the testimonies established that the victim was born on 12/09/2005.

To establish whether the victim was raped and carnally known against the order of nature, the prosecution depended basically on the victim's evidence, which was supported by exhibits P2 and P3. Also, other witnesses like PW1 and PW3 testified in court.

What was stated by the victim among other things is that the appellant raped her several times and some other times against the order of nature. She claimed that she did not mention the appellant or report it to any one for five years, that is from 2015 when she was 10 years old to 2020 when she was 15 years old. The reason for keeping the secret, she claimed was due to threats, which the appellant pressed on her that he will beat her. She got infected by STDs from the regular intercourse.

Continued to testify that when the appellant disappeared, she decided to write a letter to him asking for financial assistance. One day before she could send that letter to the respective person, went missing. The truth is that it was spotted by her brother PW4 (Omary Rashidi) who suspected it and took to her mother and then the letter was taken to Mtibwa Police Station. The same was tendered by PW5.

PW3 Damas Hamisi a Medical Doctor from Mzumbe Health Centre who examined the victim on 06/11/2020, testified that the victim had a stinking smell from her vagina and the annus sphincter was lose, which indicated that the victim had intercourse against order of nature. She had gonorrhoea and other Sexually Transmitted Diseases also was not virgin exhibit P1 (PF3) disclosed same. Part of her testimony at page 22 had this to say: -

"On the first day raped, the accused followed me at the bath room and raped me. He covered my mouth when raped me.

The other day he found me at home and called me at the back of the house and raped me. Some time he took me to the unfinished house and raped me against the order of nature. When he took me, he used to have carnal knowledge on my vagina and sometimes on my anus. We stopped on 2019 when the accused disappeared. Later on, I found myself ill. I did never know when the accused went. I wrote a letter to him so as he can help me"

The said letter was negligently kept, it is pierced into three pieces and some parts are missing for being torn. However, upon reading closely, the message is not distorted. The author tells an unknown addressee that she has been in sexual relationship with the addressee's brother since when she was ten years old, they had sexual intercourse, the ordinary way and against the order of nature. Eventually the brother infected her with the STDs. She was seeking to know the whereabout of the addressee's brother so that he can assist her some money for treatment of the STDs she had contacted. Despite the witnesses' testimonies that the letter was being directed to the appellant, the letter itself did not tell who was the addressee. Considering that, it may be not easy to retrieve exhibit P2 in later days, I prefer to quote an extensive part of the said letter hereunder: -

"YAH: <u>UHITAJI WA MSAADA WAKO KWANGU.</u>

Husika na kichwa cha habari hapo juu. Mimi ni Nuru nimeona bora niandike barua hii ujue maisha yangu japo kwa ufupi sana. Nisamehe nisamehe mara 75 msamaha wangu ufike kwako kwa kukosea kutembea na wewe angalikuwa niliwahi kutembea na kaka yako RAMADHANI muda mrefu sana tena sio mara moja ilikuwa kama mchezo akinihitaji na mimi nilikuwa tayari lakini nilikuwa bado sina akili, ni mdogo sana miaka kumi. Nilikuwa nikichukuliwa na kwenda anapopataka na kunifanya kama mke

wake popote anapopataka, nyuma mbele kote alikuwa anafanya. Mimi sikukataa kwa sababu nilifikiri hakuna madhara yoyote wala baba na mama hawakujua lolote na sijamwambia mpaka leo kwa hilo nashukuru Mungu lakini kilichokuja kuniumiza ni kwamba kaka yako si mzima alikuwa na maradhi ya ngono labda mimi si wa kwanza ndo maana akayapata huko kwa mwanamke mwingine na akaamua aniambukize na kweli huo ugonjwa wa kaswende ninao mpaka leo. Fikiria nikiwa na miaka kumi na sasa kumi na tano, miaka mitano mimi naishi na huo ugonjwa. Hufikirii ni madhara kiasi gani mpaka hivi mimi ni kuisi maumivu na usaha ukeni kunitoka na hiyo hali ya kutokwa na usaha imeanza tangu nilipovunja ungo (nilipopevuka) na sikukutana na mtu mwingine tena ila wewe... na nimeamua nikujulishe mapema ili utafute dawa mapema upone. Na usishangae mimi nilichokifata kwako ni pesa ulivyosema una kibubu na kibubu hakiwezi kuwa chini ya pesa Sh. 10,000/= ndio maana nilikufuata mimi mwenyewe chumbani kwako na tukafanya mwishowe nikachukua kile kibubu kilichokuwa na shilingi 7,000/= lakini sikununua dawa kwa kuwa nilikuwa na hofu ya kuwa na mimba kwa kuwa nilifanya na wewe nikiwa mkubwa tayari lazima hofu ingekuwepo lakini cha kumshukuru Mungu sina mimba lakini kubaki uchungu tu wa kuchanganya kaka mtu na mdogo mtu. Hiyo ilikuwa ni lazima kwa sababu nilihitaji pesa na pesa yenyewe ikawa haitoshi kunitibu ni ndogo sana ndipo niliamua kutumia. Lakini nilivyofikiria wazazi wangu walizaa salama kabisa sikuwa na tatizo lolote lakini matatizo yamenipata nilipoanza tembea na kaka yako ndipo hayo maradhi yamenipata sasa nitakuja ishi na nani mimi atakayekubali kuambukizwa. Wewe nimekuambukiza na mwingine akitokea tena nimuambukize kwa sababu mimi sio mtoto tena ninaweza mpata mwingine tena nikamuambukiza inakuwa sio vizuri hata mimi naumia nahitaji huu ugonjwa unitoke ili maumivu yote yaniishe. Kwa sasa RAMA sijamuona muda mrefu sana, ila wewe ni ndugu yake waweza kunisaidia nijue wapi alipo ili nikutane naye nimwambie yaliyonisibu na yeye kama binadamu atanisaidia ili niweze kupona.

Natumaini maombi yangu yatakubaliwa.

(sgd)
Nuru"

The appellant in his defence just narrated how he was arrested when he was in his ordinary business as a bus conductor. He admitted that he knew the victim in visiting his brother's home. The Republic believes that the evidence was strong and proved the offences beyond reasonable doubt, while the appellant stood firm to the stance that the offences were not proved.

In examining the above evidence, also having in mind the trite principle of law that the best evidence comes from the victim, I am satisfied that the victim was raped and even carnally known against the order of nature. The question is who committed that offences? I have observed serious weaknesses in the prosecution side in answering this question. *First,* the victim failed to report the matter for five consecutive years until when the parents unearthed the broken correspondence between the victim and the purported rapist. *Second,* there was inconsistence between exhibit P2 (the letter) and the victim's testimony on why she did not report the matter and whether the appellant threatened her. *Third,* even if the allegation of threat would be true, still the failure to disclose about the rape and sodomy would not be justified because the victim said that the appellant disappeared for almost two years. How could the threat persist in the appellant's absence? It is even amazing that in the said letter, last paragraph, the victim was seeking to meet the purported rapist. A ten (10) years old victim of frequent rape and sodomy being able to keep the secret and failure to report the matter to her guardians has exercised the conscience of this court.

The rationale of reporting the offence and naming the perpetrator is to assure reliability of the witness. This is what was held in **Marwa**

Wangiti Mwita and Another Vs. R [2002] TLR 39 and recently **Dickson Hatibu Milonge Vs. R, Criminal Appeal No. 400 of 2019, CAT at Dsm.**

Fourth, there was a failure to call key witnesses without explanation. *Fifth,* despite the victim having contacted some known STDs purported to have been infected by the appellant, no medical diagnosis was undertaken to both of them. I understand that even if the appellant would test positive, it would not *per se* lead to an inevitable positive conclusion, but it would add value to the prosecution's theme.

Such significant failure by the investigators and prosecutors disappoints criminal justice in our jurisdiction. In a lot of cases, it appears that offences are committed, but due to poor investigation and untidiness in prosecution, the perpetrators go at large and sometimes unnoticed. The same way, despite the very serious suspicions linking the appellant to the offences charged, but there were reasonable doubts on which, the trial court would have acquitted the appellant had it paid consideration.

Also, I have learned that the sentence of 30 years to the appellant in the second count was illegal. Section 54 (2) of **The Penal Code** provides for a mandatory sentence of life imprisonment. Even if this appeal would not succeed, under section 366 (1)(a)(ii) of the **Criminal Procedure Act**, that sentence would be set aside and replace with the legal sentence of life imprisonment. But having found merit on the last ground, I quash conviction in both offences and set aside the respective sentences. The appellant be set at liberty unless otherwise held for any lawful cause.

Order accordingly.

Dated at Morogoro this 20th day of September, 2022.

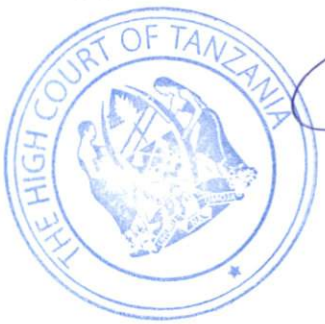
P. J. NGWEMBE

JUDGE

20/09/2022

Court: Judgment delivered at Morogoro in Chambers on this 20th day of September, 2022 in the presence of the Appellant and in the Presence of Emmanuel Kahigi Learned State Attorney for the Respondent.

Right to appeal explained.



P. J. NGWEMBE

JUDGE

20/09/2022