THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL APPEAL NO. 72 OF 2021

(Originating from Katavi Resident Magistrates' Court in Criminal Case No. 19/2020)

JUAKALI ALON @ RICHARD..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 21ST April, 2022

Date of Judgment: 23rd May, 2022

NDUNGURU, J

Before the Resident Magistrates' Court of Katavi at Mpanda, the appellant was arraigned, it being alleged that, on diverse dates between 11th day of November, 2019 and the 17th day of December, 2019 at Kamsanga village within Tanganyika District in Katavi Region did have unlawful sexual intercourse with the victim one M.S (identity hidden) a girl aged 15 years of during the time of the offence c/ss 130 (1) and (2)

(e) and 131 (1) (a) of the Penal Code. Despite protesting his innocence when the charge was read over to him, at the end of the trial, the appellant was found guilty, convicted and sentenced to be jailed for thirty years.

Being dissatisfied with both, conviction and sentence, the appellant preferred the present appeal consisting of four grounds of appeal which are as extracted herein;

1. That, the trial Court erred in law of point by convicting and sentencing the appellant for the offence which the prosecution failed to prove the charge against the appellant.
2. That, the trial Magistrate misdirected himself by convicting and sentencing the appellant by believing that the victim was a student at Kabungu Primary School while mis observed that there was no attendance which was tendered before the Court to prove if the victim was a student at that school.
3. That, the trial Court erred in law point and fact to convict and sentence the appellant relying on the evidence adduced by PW1 up to PW5 without considering that no caution statement or Police officer who appeared before the court to prove the allegation as required by law.

4. That, the trial Court totally went astray by convicting and sentencing the appellant without considering the defence of the appellant and ended drawing a null conviction for the appellant.

On the hearing day, the appellant had no legal representation which he represented himself while the respondent was represented by Mr. John Kabengula, learned State Attorney.

In support of his appeal, the appellant prayed the court to receive and adopt his grounds of appeal.

On the other side of the coin, Mr. Kabengula resisted the appeal and supported the conviction and sentence handed down against the appellant.

Mr. Kabengula submitted that as the appellant filed four grounds of appeal, he will start by arguing the 2nd ground of appeal. He argued that, the appellant was charged with a statutory rape, being a student or not it is immaterial provided that the victim was below the age of 18 years old. Thus, he added the second ground of appeal is devoid of merit, the prosecution proved the age of the victim that she was 15 years when she was raped, and he prayed for this ground to be dismissed.

Mr. Kabengula proceeded by arguing on the 3rd ground that the appellant never admitted to have committed the said rape when interrogated at the police station, thus no caution statement could have been tendered. He added, as per Section 143 of TEA the witnesses who testified were sufficient to prove the case. He believes that this ground too is devoid in merit.

As regard to the 4th ground, Mr. Kabengula submitted at page 8 of the typed judgement the trial Magistrate considered the appellant's defiance though in brief, and found that it had not casted any doubt. But he reminded this court that it has the power to revisit the appellant's defiance.

Submitting on the 1st ground, Mr. Kabengula argued that this ground is the gist of this appeal. He proceeded that in this case the prosecution was required to prove the age of the victim. He stressed that at page 4 of the proceedings the victim mentioned her age and date of her birth and at page 6 the mother of the victim testified on the age of the victim.

The learned State Attorney winded up by submitting that the prosecution needed not to prove on consent since it was statutory rape and therefore consent was not required. He added, though PW1 (victim)

was not consistent but named the appellant to have begged for sexual intercourse with her, thus the victim had proved that there was penetration.

In addition to the above, he submitted that the medical officer testified that by using his two fingers, he proved that there was penetration, but the learned State Attorney insisted that what was important was the evidence of the victim. Nevertheless, Mr. Kabengula admitted that there were some shortfalls in the proceeding and the judgement, but he insists that his side had proved the case against the appellant was proved beyond reasonable doubt.

The four grounds of appeal revolve around one main complaint that the prosecution's case before the trial court was not proved to the required standard. They will therefore be considered together.

The only issue for determination is **whether there was sufficient evidence on record to lead to the appellant's conviction.** As indicated in the opening paragraph of this judgment, the charge sheet indicates that, the incident took place on diverse dates between 11th day of November, 2019 and the 17th day of December, 2019. The learned Senior State Attorney was of the firm view that there was sufficient evidence on record to prove the offence charged.

However, as this is the 1st appellate court, it is entitled to re-evaluate the evidence on record and come up with its own findings. See the case of **Kaimu Said v. Republic, Criminal Appeal NO 391/2019** which cited with approval the case of **Siza Patrice v. Republic, Criminal Appeal No. 19 of 2010** (unreported) where it was categorically stated that: -

> *"We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary."*

Going through the records of the trial court, starting with the Charge Sheet, the offence is said to have occurred on diverse dates, meaning on the on the 11th November, 2019 and 17th December, 2019. To the best of my understanding and the support from the **BLACK'S LAW DICTIONARY Eighth Edition**, the word *Diverse* means;

> *"Showing a great deal of variety; very different."*

The testimony from the victim (PW1) herself, told the trial court that from the 11th day of November, 2019 to the 17th day of December the same year, in the company of the appellant, they used to go to the farm together, while at the farm, the appellant was seducing the victim to

have love affairs with him. And on the 17th December, 2019, she met with the appellant at the farm and was forced by him to have sexual intercourse. She continued to describe on how the event took place.

Her testimony was corroborated by the testimonies of PW2 (Felister Peter, victim's mother). She said, on the 17th December, 2019 around evening hours she arrived at home and did not find the victim. That, the victim came home at around 21:00 hours and when asked about her whereabouts, she said that she was with the appellant at the farm and they had sexual intercourse.

The question I may ask myself was whether these testimonies by the witnesses at the trial court were sufficient to conclude that the Charge against the appellant was proved, and that they were reliable and credible to warrant conviction. As narrated above, what the witnesses testified means the offence did not occur in diverse dates as the charge sheet suggests, the witnesses only testified that the offence occurred on the 17th day of December, 2019. None of the prosecution's witnesses led evidence to the effect that actually, the incident of the victim being raped, took place on diverse dates, am inclined to conclude the charge sheet on that aspect it was not proved.

It is now a settled position of law that in cases of this kind, it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet to which the accused person will be expected to know and prepare his reply. **See: Anania Turian vs. Republic Criminal Appeal No. 195 of 2009**

Nevertheless, in my keen perusal I found out that the prosecution witnesses' testimonies are contradictory and inconsistent. PW1 testified that after arriving she was asked by her mother about her whereabouts and she directly replied that she was at the farm with the appellant and that they had sexual intercourse. But, when cross examined by the appellant, the victim said that her mother was punishing her while pressing her to mention the person she had sexual intercourse with, and she mentioned the appellant. How am I expected to understand what was done first, was the victim punished first and mentioned the appellant or did she mention the appellant as soon as she was asked as to where she was?

Again, PW2 testified that at around 21:00 hours, the victim came home and the former asked the latter as to where she was and the reason for her delay, and the latter replied that she was at the farm with the appellant and that they had sexual intercourse. After the incidence

was revealed to her (PW2), it's when she punished the victim and thereafter phoned her father who directed PW2 to report the incidence to the hamlet chairman. To make the matter worse, PW2 when cross examined by the appellant said the victim refused at first that she did not have sexual intercourse, but after punishing her, she admitted that she had sexual intercourse with a man.

The testimonies of PW1 and PW2 are too contradictory and inconsistence on which the appellant's conviction was largely based. In his evaluation of the evidence the learned trial Magistrate made not a single reference to these inconsistencies and contradictions.

In the case of **MOHAMED SAID MATULA v REPUBLIC 1995 TLR 3**, it was held that;

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."*

At some point, the evidence of the prosecution side did ring a bell into the mind of the trial Magistrate that made him jump off the train by saying;

*"In that regard, one cannot rebut the **presumption** that the charge against the accused person has been proved beyond reasonable doubt."*

It is unfortunate, the learned trial Magistrate forgot that criminal cases are being decided when the allegations against the accused person are proved beyond reasonable doubts alone and not on presumption of any sort. There is plethora of authorities on that aspect, I need not to waste time on it.

For the foregoing reasons, it is my holding that the charges against the appellant were not sufficiently proved before the trial court. I thus quash the appellant's conviction in respect of the offence of rape with which he was charged and convicted before the trial court. The earlier imposed sentence is set aside. I proceed to order immediate release of the appellant from custody unless he is held therein for other lawful causes.

It is so ordered.

D.B. NDUNGURU

JUDGE

23.05.2022