IN THE HIGH COURT OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

DC. CRIMINAL APPEAL NO. 45 OF 2022

(Originating from Criminal Case No. 41/2021, Songea District Court)

LUKAS MWAKISAMBWE ..... APPELLANT

VERSUS

THE REPBULIC .....RESPONDENT

JUDGMENT

23/02/2023 & 03/03/2023

E. B. LUVANDA, J.

Lucas Mwakisambwe the Appellant herein, is aggrieved by the decision of the trial court convicting and sentencing him thirty years in jail for the offence of rape. In a petition of appeal, there are six grounds of appeal although are somehow argumentative with some subheading (sub grounds) embedded into the main grounds of appeal. For the sake of canvassing his complaints, I reproduce as hereunder:

1. The trial Court erred in law and fact to convict the Appellant based on uncorroborated evidence of prosecution side: PW1 stated that PW3 was raped in 2017, while PW2 said is 2016; PW1 said they took PW2 (victim) to Peramiho Hospital while PW2 said she was escorted

by PW1 alone; PW4 said she received and examined PW2 at Songea Regional Hospital, while PW2 said nothing.

2. The trial Court erred in law and fact to convict the Appellant relying on weak and doubtful evidence of PW2 who remained silence for nine months, then disclosed to PW3 after being given biscuits and juice; PW2 story was different, as to where PW1 was when she (PW2) was raped, to PW1 said while at farm, vikoba, church, grinding machine; to PW3 said PW1 was at Songea Town, while before the court said PW1 was to vikoba; PW2 said she was raped three times, but in court she explained only one event.
3. That, the trial Court implanted new matters in the judgment by holding that the Appellant was together with the victim's family and PW2 was escorted by PW1 and DW1, while the evidence of PW4 was different.
4. The trial Court was negligent for failure to convict the Appellant, failed to cite the provision of the law, which defect renders the judgment invalid.
5. The trial Court erred in law and fact to sentence the Appellant thirty (30) years in prison without considering that the Appellant was convicted for the same offence three times.

6. The prosecution side failed to prove the case beyond reasonable doubt as explained above.

At the hearing of appeal, the Appellant complained over delayment since inception of his trial in 2016, that the matter was entangled with a checkered history, this being his third appeal to this Court. He alleged to have been convicted while he did not commit any offence. That the trial Court erred in law to convict him relying on the contradictory testimony of the prosecution witnesses, because PW1 explained that she was raped in 2017, while the victim (PW2) stated that she was raped in 2016, pages 19, 22, of the proceedings. He pointed out the contradiction, that PW1 explained that they send their child to Peramiho Hospital, while PW2 said she was sent by her mother (PW1) only, pages 17, 21 of the proceedings. Also PW4 did not corroborate PW2, PW4 explained that she received and examined PW2. That the court below, was negligence to transplant things which were not in the Court proceedings for holding that the Appellant was living with PW1 and PW2 and that he escorted PW2 to the hospital, while the evidence of PW1 was doubtful and did not support the evidence of PW4, it was completely different, page 9 of a copy of judgment.

In reply, Ms. Tulibake Juntwa, learned Senior State Attorney, opposed the appeal.

Ground number one, learned Senior State Attorney submitted that the alleged contradictions between PW1 and PW2, in that PW1 who is the mother of PW2 (victim), explained that PW2 was raped in 2017, while PW2 said she was raped in 2016, to her view this discrepancy, does not affect prosecution case, for one thing what PW1 explained is what was done by that time. That PW1 is a mother of PW2, and in 2017 it is when she revealed that her daughter (PW2) is falling sick often. And when she took her to the hospital for treatment in September, 2017, it is when PW2 was revealed to be HIV positive, and it is when in the course of interview, PW2 said she was raped by the Appellant. The learned Senior State Attorney was of the view that it was correct for PW1 to say PW2 was raped in 2017 because is a period when she was informed by PW2, but PW2 was correct to say she was raped in 2016, because being a victim she knows she was raped on that time. The learned Senior State Attorney referred at pages 20 and 21 of proceedings, that PW2 explained to have been raped at the end of 2016, and that she was raped three times and was threatened not to disclose. That PW2 said it was in 2016 upward which obvious is in 2017. It is the contention of the learned Senior State Attorney that this is a reason a charge sheet does not mention a specific date, as to when the victim was raped. On particulars of offence, reveal January, 2016 up to 30 September, 2017, it is when it was committed.

She submitted that these are minor discrepancies, which do not go to the root of a case, and does not eliminate the truth that PW2 was raped by the Appellant. That PW1 and PW2, testified on 25/10/2021, after elapse of four years counting from when this incident was committed between 2016 and 2017. To her view, minor contradictions are inevitable where there are more than one witness and the matter has taken long, as it was decided in **John Makuya vs. Republic,** Cr. Appeal No. 62/2022, C.A.T. Tanga. Regarding discrepancy between the testimony of PW1 and PW2, in that PW1 said that she (PW1) and Appellant send the victim to Peramiho for treatment, while PW2 said she was sent to the hospital by PW1 alone. She submitted that the testimony of PW1 did not explain to have been accompanied by the Appellant to hospital, rather indicate that she involved the Appellant as step father of PW2, in that they could took PW2 to the hospital, as per page 19 of typed proceedings, when the Appellant was cross examining PW1, the later said the Appellant allowed her (PW1) to take PW2 to the hospital. She submitted that, when PW1 says she took PW2 to hospital with the Appellant, it means she consulted him to take PW2 to the hospital, but he did not accompany them.

Concerning discrepancy between PW2 and PW4, the learned Senior State Attorney submitted that it is true that PW2 did not explain to have been attended by PW4 at Songea Hospital, but the purpose of summoning PW2,

was to prove that she was raped by the Appellant, which she explained on how she was raped. A fact that PW2 failed to explain to have been attended at Songea Hospital is not necessary, that is why to prove that PW2 was taken to hospital, the prosecution summoned PW4 and PW5. She submitted that this incident was reported at Peramiho Police, as such PW5 who is investigator stationed at Songea, she did what was not done at Peramiho Police Station.

On the second ground, regarding an argument that PW2 failed to explain as to where PW1 was when PW2 was raped by the Appellant, the learned Senior State Attorney submitted that they could not expect PW2 to mention the exact place, because the essence of evidence is that, PW1 was not there. To her view, it could be different if PW2 said PW1 was completely absent at home or was outside another region, that could be fatal, but here PW2 was guessing that either PW1 was on the farm, grinding machine, vikoba or church.

In reference to the argument of delayment of PW2 to report, the learned State Attorney submitted that the evidence of PW2 is satisfactory, because PW2 explained at page 21, that she was raped by the Appellant three times and restrained her to shout or explain to PW1, and in case she disclose, the Appellant threatened to kill both PW1 and PW2. The learned Senior State Attorney submitted that PW3 was a mere medical

officer, she was not in a position to interrogate PW2 as was not an investigator, PW3 reported to the gender desk to the police, for investigation.

Ground number four, regarding new matters alleged to be introduced by the magistrate, the learned Senior State Attorney submitted that it is true that at page 9 of judgment, last paragraph when the magistrate was answering, if it is true that the Appellant is a step father of PW2, the magistrate recorded that PW4 confirmed that PW2 was escorted to the hospital by PW1 and the Appellant. This was incorrectly because PW4 did not receive PW1, PW2 and the Appellant at the hospital, rather PW4 received PW1 and PW2 when they were escorted by the police officer, and she received the Appellant at his own time when he was escorted by the police, it was on 17/10/2016 and 18/10/2017, respectively.

The learned Senior State Attorney submitted that according to the proceedings, PW3 who is a nurse is the one who received PW1 and PW2 at Peramiho Hospital and explained that she received PW2 who was escorted by PW1 for treatment. PW3 explained to have been told by PW2 that she was raped by the Appellant when she was asked as to where she contracted HIV aids. PW3 explained being familiar to the Appellant after PW2 mentioned Lucas Mwakisambwe as the one who raped her. It is when PW3 recalled that the Appellant had previously escorted another

wife to receive medication, where the Appellant was also tested positive and PW3 identified the Appellant. She submitted that, the trial magistrate failed to analyze this fact, it is when the magistrate was establishing if the Appellants is a step father of PW2, and this misconception, said it proved that the Appellant is a step father of PW2. She submitted that the issue whether the Appellant is a step father of PW2, was proved even if the magistrate misconstrued facts by the sleep of a pen. It was proved by PW1 who explained to have cohabited with the Appellant for 3 years as husband and wife although did not contract marriage, PW1 explained that the Appellant is not a biological father of PW2. At page 22, PW2 said they lived for 3 years with the Appellant who married her mother (PW1). The defense by the Appellant, although cannot be used to convict the Appellant, did not refute to have relationship with PW1 and PW2, to counter their stories. She submitted that this sleep of a pen of a magistrate did not prejudice the Appellant, is a mere common error.

The last ground, the learned State Attorney submitted in affirmative that the trial court did not enter convict against the Appellant, however she was of the view that law allow the matter to proceed. She cited the case of **Mabula Makoye & Another VS Republic**, Criminal Appeal No. 227/2017, C.A.T. (unreported). She submitted that a sentence of 30 years, is proper sentence in terms of sections 130 (1) and (2) (e) and 131

(1) Cap 16 R.E. 2019, that the one who commit rape the sentence is 30 years.

Ground number one, it is true that there is a discrepancy of evidence between PW1 (the victim's mother) and PW2, regarding when the act of rape was committed. The evidence adduced by PW1 suggest that PW2 was raped sometimes in 2017, while PW2 mentioned to have been raped in 2016. However, I go along with the argument of the learned Senior State Attorney that this was a minor discrepancy which cannot be said to have the effect of denting prosecution case. This is because, during cross examination, when PW1 asserted a fact that PW2 was raped in 2017, she was making reference to a date in September, 2017 when she was informed regarding a fact that the Appellant raped PW2. Indeed, PW2 said she was raped by the Appellant by the end of the year 2016.

PW2 explained that she was raped by the Appellant three times, on a different occasion which she could not recite exact dates. This portray that after being raped at the end of the year 2016, PW2 was subsequently raped in other two occasions ahead. Therefore, as alluded by the learned Senior State Attorney that both PW1 and PW2 were correct on their respective explanation. Also, a charge sheet specifically on the particulars of offence captured a period between 1st January, 2016 and 30th

September, 2017. Therefore, the Appellant was not prejudiced in any way, nor it cannot be said there is a serious discrepancy. Essentially both 2017 mentioned by PW1 and 2016 mentioned by PW2, fall within the captured period in the particulars of offence in the charge sheet.

Regarding a complaint that PW1 said the Appellant had escorted her (PW1) when PW2 was taken to the hospital, while PW2 said she was send to the hospital by PW1 alone. This complaint is without substance. Although at first PW2 was suggesting PW2 was escorted to the hospital by more than one person, as PW2 used plural (we), but nowhere mentioned specifically that they were accompanied by the Appellant to Peramiho Hospital.

At the preceding version of her testimony, PW1 made it clear that she (PW1) was troubling and shunting alone when PW2 was being medically examined, attended and given results, including when she (PW1) was taking PW2 back home. What PW1 meant is that she seeks and obtained permit from the Appellant to take PW2 to hospital. In our African culture, given a stance of African ladies in remote rural areas, as a matter of showing obedient to his paramour (Appellant) and so far, she trusted him and involved him step by step at initial plan and proposal and asked for his permission to take PW2 to hospital and so far, she was allowed, no

wonder PW2 used plural connoting involvement of her husband to take the victim to hospital. That alone to my view, and as per the African culture and contextual theory of African ladies, cannot be said it amounted to discrepancy. By the way at the cross examination, PW1 put it clear that the Appellant allowed her (PW1) to take the said child to hospital.

Therefore, this argument is closed down, in that there is no any serious departure to a version of evidence between PW1 and PW2, that the duo went to hospital without an escort of the Appellant.

Regarding a discrepancy between PW2, PW4, in that PW2 did not explain to have been attended at Songea Hospital, as suggested by PW4. It is true that PW2 was not led to explain if she was taken to another hospital other than Peramiho Hospital where she was escorted by her mother (PW1) on the first occasion. But to my view that alone does not eliminate the truth that PW2 was medically examined by PW4, via a PF3 exhibit PEA.

Indeed, what was done by PW4 was to formalize the oral testimony of PW3 who firstly attended and examined PW2 and established that PW2 was non virgin (copulated) and she tested HIV positive. As also alluded by the learned Senior State Attorney, that after all, PW2 was summoned to prove if she was raped by the Appellant, and therefore a fact that PW2

failed to explain to have been attended by PW4 at Songea Hospital, is immaterial. This is because for the first time the information as to who committed a rape, was mentioned or disclosed by PW2 to PW3. Indeed, PW3 appeared to cement it. The situation could be different, if PW2 was asked or cross examined that fact, then dispelled a fact that she was attend by PW4 at Songea Hospital. Therefore, the alleged discrepancy, although is confirmed to be there, but is ignored for reasons stated above.

Ground number two, the Appellant explained that the evidence of PW2 was doubtful because she failed to explain as to where her mother was, at the time when she was raped by the Appellant. He argued that, PW2 informed PW1 that it is at that time when PW1 went to the farm, village community banking (vikoba), church or grinding machine, on the other hand PW2 told PW3 that her mother went to Songea town, and in Court said her mother was to the village community banking.

It is true that the evidence of PW1 reflect that she was told by PW2 to have been raped at the time when she (PW1) was on the farm, village community banking, church or grinding machine. In Court PW2 explained regarding one occasion of rape, that it was done by the Appellant when PW2 was at village community banking and her young relatives went to fetch water. PW3 said when she was inquiring PW2, the later said she was

raped by the Appellant when PW2 was at Songea Town. But to my view, that alone cannot be said that it amounted to contradictions, because all PW1, PW2 and PW3 testified that PW2 was raped on three occasions by the Appellant, but in all those three times, PW2 was away. Now whether PW2 was attending church services, village community banking, grinding machine, farm, or at Songea, is immaterial. To my view all those destinations and activities connote one thing that PW2 was away from her home at the time of commission of offence.

As to a complaint that, PW2 did not disclose immediately that she was raped by the Appellant or an argument by the Appellant that she (PW2) disclosed it after having been given or offered by PW3 some biscuits and juice. It is true that PW2 disclosed it in September, 2017 for the incident of rape committed in 2016. True also is a fact that PW2 disclosed it to PW3 after the former being given by the later some gifts like juice and biscuits.

To my view the reasons for none disclosure, are vivid and were explained clearly by PW2 that she was raped by the Appellant, her step father living under the same roof. Above all, PW2 put that the Appellant had threatened to kill both PW1 and PW2, in case she (PW2) shout or disclose. No wonder, even when she (PW2) was before PW3, still PW2, was

afraiding or unwilling to make a disclosure, until when her mother was expelled or asked to leave and exit outside, and on top of that until when she (PW2) was wheedled and given some gifts as aforesaid, it is at this stage PW2 was able and willing to disclose, presumably after seeing that she was in a friendly, more secure and safe atmosphere or hands. Therefore, the complaint by the Appellant is uncalled for.

Ground number four. It is true as alluded by the learned Senior State Attorney that the trial Court committed error by recording in the judgment that PW4 testified categorically that she (PW4) received the victim (PW2) for medication who was escorted by PW1 and DW1 (the Accused, who is the Appellant herein). This was a glaring error, and misconception by the trial Court. Because nowhere PW4 stated to have received PW2 being accompanied by PW1 and the Appellant together.

Rather PW4 stated to have received PW2 on 17/10/2017 at 14:00 hours and examined her and on 18/10/2017 in the morning she received the Appellant and examined him. Therefore, the trial Court is faulted in that respect. However as alluded by the Senior State Attorney, a fact that the Appellant was a step father of PW2 was proved by PW1 and PW2. PW2 stated that the Appellant is her step father who lived with her (PW2) mother for three years. PW1 also stated that she cohabited with the

Appellant as husband and wife for three years, although they did not contract marriage neither blessed with any child.

Therefore, the Appellant argument, that he never cohabited with PW1, is unmerited.

An argument of the Appellant that the trial court did not convict him for failure to mention the provision of the law under which he was convicted. This ground is unmerited. The records of judgment of the trial court reflect that the Appellant was convicted for an offence of rape. Failure to mention the provisions of the law at the verdict, to my view is not fatal. Because even the apex Court have made departure to the position where offenders were not convicted at all, but the Court of Appeal ruled it to be curable under deemed conviction. In the case of **Mabula Makoye & Another vs Republic**, Criminal Appeal No. 227/2017, CAT at Shinyanga, the apex Court had this to say, I quote,

> *'We think, with the overriding objective in our midst the position taken in **Musa Mohamed** (supra), **Ally Rajabu & 4 Others** (supra) and **Amitabachan Machaga @ Gorong'ondo** (supra), would be the most progressive path to take in the determination of this appeal. That is why, we think, the first appellate court took a proper path to entertain the appeal, despite omission by the trial court to enter a conviction before sentencing the*

Appellants. After all, that infraction prejudiced nobody, not even the law. In the premises, we find and hold that the appeal is competent before us. The complaint by the Appellants on this arm is therefore without merit'

Therefore, a mere non citation which is less serious, cannot be said to be fatal.

Finally, the Appellant complained that he was sentenced thirty years without considering a fact that he was previously convicted, the High Court ordered retrial since 2019, but whenever is sentenced, each sentence start afresh. The submission of the learned Senior State Attorney is a correct stance of the law, that a sentence of thirty years is a proper one interms of sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2019, which prescribe thirty years as a minimum sentence to the offender who commit the offence of rape.

In totality the Appellant's appeal is without merit. Therefore, conviction and sentence of thirty years, upheld.

The appeal is dismissed.

THE HIGH COURT OF TANZANIA

E.B. LUVANDA

JUDGE

03/03/2023