IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 67 OF 2022

ABDALLAH HAMIS @MOHAMEDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Bagamoyo at Bagamoyo in Criminal Case No. 31 of 2022)

JUDGMENT

2nd and 28th February, 2023

KISANYA, J.:

The appellant was arraigned before the District Court of Bagamoyo at Bagamoyo (the trial court) for the offence of rape contrary to section 130(1)(2)(c) and 131 (1) of the Penal Code, Cap. 16, R.E. 2019. It was stated in the charge sheet that, in January, 2021 at Zinga Hospital within Coast Region, the appellant did have carnal knowledge of one N.H. (name withheld), a girl of twelve (12) years of age. He was convicted as charged and sentenced to serve thirty years imprisonment.

The facts upon which the conviction and sentence were based are as follows: The appellant is the victim's father. The victim who testified as PW1 told the trial court that the appellant started to have carnal knowledge with her in March, 2019 when she was in standard five in March, 2019. It was her further

testimony that the appellant told her that the sexual intercourse was a means of curing her challenge of urinating on the bed. She stated that she did not raise an alarm because the appellant threatened to kill her mother.

At the end of the day, the victim narrated the story to her friends and her teachers. The incident was reported to Mapinga Police Station where PW2 G7049 DCPL was assigned to investigate it. Thereafter, the victim was taken to Kerege Hospital. She was attended by PW3 Dr. Hussein Juma. His opinion as stated in the Medical Examination Report- PF3 (Exhibit P1) was that the victim had been raped for several times. Other witnesses called by the prosecution were the victim's teachers, PW4 Nazra Hassan Khamis and PW5 Baina Fidelis Ungele of Mshikamano Primary School.

In his defence, the appellant denied raping the victim. He also paraded other three witnesses to support his defence.

The trial court after assessing the evidence that was adduced by the prosecution and the defence, it was satisfied that the prosecution had proved the offence that was laid against the appellant. Thus, the appellant was convicted and sentence as shown above.

The appellant filed the following grounds of appeal to challenge the conviction and sentence that was imposed on him:

1. *That, the trial Magistrate erred in law and fact to convict and sentence the appellant with an offence which was not proved beyond reasonable doubt.*
2. *That, the trial Magistrate erred in law and in fact to convict and sentence the appellant without evaluating evidence adduced by the defence side.*
3. *That, the trial Magistrate erred in law and in fact to convict and sentence the appellant on contradictory evidence adduced by the prosecution.*
4. *That, the trial Magistrate erred in law and in fact to convict and sentence the appellant basing on hearsay evidence which is hopeless and has no legal basis.*
5. *That, the trial Magistrate erred in law and in fact to convict and sentence the appellant without providing reason for the decision which is contrary to the law.*

When the appeal was called on for hearing, the appellant entered appearance personally and was represented by Mr. Yusuph Mkanyali, learned advocate. The respondent/Republic was represented by Ms Fidesta Uisso, learned State Attorney.

Mr. Mkanyali commenced his submission by informing the Court that he had dropped the fifth ground of appeal. He then combined the first and second grounds of appeal to the effect that, the prosecution did not prove its case beyond all reasonable doubts. The learned counsel cited the case of **Jonas Mkize vs R**,

[1992] TLR 213, in which it was held that the prosecution must prove its case beyond reasonable. He was of the view that the case laid against the appellant was not proved due to the following reasons:

One, the appellant was not charged with the offence after its commission. According to Mr. Mkanyali, the appellant was arrested on 25/01/2021 and brought before the trial court on 29/01/2021 and thus, beyond the time set out by section 64(1)(c) of the CPA. It was argued that the prosecution did not give reasons for failure to charge the appellant within the time prescribed by the law. Referring to the case of **Samson Peter Ondile vs R**, Criminal Appeal No. 84 of 2021, he argued that the unexplained delay to arraign the appellant raise doubt in the prosecution on occurrence of the offence.

Two, the victim gave contradictory evidence which implies that she was not credible. The learned counsel pointed out that the victim stated that she was schooling at Nia Njema Primary School while her friend (PW4) and teacher (PW5) stated she was the pupil of Mshikamano Primary School. On that account he submitted that the prosecution did not prove its case because PW1 did not speak the truth. To bolster his argument, the learned counsel cited the cases of **Seleman Mkumba vs R** [2006] TLR 379 and **Mohamed Said vs R,** Criminal Appeal No. 145 of 2017 (unreported).

Three, evidence of PW3 who examined the victim on 25/01/2021 raises doubt as to whether the appellant raped the victim in January, 2021. His argument was based on the grounds that it is not known as to why PW3 discovered the white discharge on that date while PW1 stated that she could not remember the date of commission of the offence.

Arguing on the third ground of appeal, Mr. Mkanyali submitted that the prosecution evidence was contradictory on the name of the school where the victim was schooling as PW3 testified to be Mshikamano Primary School while PW1 told the trial court that it was Nia Njema Primary School as per evidence of PW3 and PW1 respectively. The learned counsel further submitted that the charge sheet and evidence were at variance on the date of commission of the offence. He expounded that the charge sheet is to the effect that the offence was committed in January, 2021 whereas PW1 testified that it was committed from 2019. It was his argument that the foregoing contradiction and variance suggest that the prosecution did not prove its case.

On the fourth ground of appeal, Mr. Mkanyali submitted that the trial court was duty bound to consider the victim's evidence was provided for under section 127(6) and (7) of the Evidence Act. He faulted the trial court for considering hearsay evidence adduced by PW4 and PW5. The learned counsel cited the case

of **Majaliwa Ihemo vs R**, Criminal Appeal No. 197 of 2020 (unreported), where it was held that hearsay evidence should not be considered.

In the light of the above, he prayed that the appeal be allowed by quashing the decision of the trial court and setting aside the sentence.

Ms. Oisso did support the conviction and sentence. With regard to delay to arraign the appeal, the learned State Attorney conceded that the appellant was arrested on 25/01/2021 and arraigned before the trial court on 29/01/2021. However, she argued that the delay was reasonable unlike the case of **Ramadhan Peter Ondile** (supra) where the delay was for ten months.

As for the contradiction on the school's name, she contended the alleged contradiction is minor and that it did not go to the root of the case. To support her argument, Ms. Oisso cited the case of **Sylvester Stephano vs R**, Criminal Appeal, Criminal Appeal No. 527 of 2016.

Responding on the issue of contraction on the date of commission of the offence, the learned State Attorney conceded that the charge indicated it was in January, 2021, PW1 stated that it was from 2019 and PW4 stated that the victim reported to her in January, 2021. However, she urged the Court to infer existence of certain facts under section 122 of the Evidence Act. It was her contention that nothing to suggest that the offence was not committed in January, 2021. On the

evidence of PW3, Ms Uisso submitted that the digital check-up confirmed that the victim had been raped.

When probed by the court on the victim's age, the learned State Attorney contended that PW3 proved the victim was below 18 years. That said, she was of the firm view that the prosecution proved its case.

Responding to the third ground on variance between the charge sheet and evidence, Ms. Uisso submitted that nothing to suggest that the offence was not committed in January, 2021. Thus, she contended that the charge sheet and evidence were not at variance.

Replying to the fourth ground of appeal, the learned counsel submitted that the best evidence in sexual offences comes from the victim as held in the case of **Seleman Mkumba** (supra). She went on submitting that the victim (PW1) gave direct evidence and that other witnesses corroborated her testimony. It was further argued that the evidence of PW1 was sufficient to convict the appellant.

On the account of the foregoing, Ms Uisso moved the Court to dismiss the appeal for want of merit.

In a short rejoinder, Mr. Mkanyali submitted that the victim did not prove that the offence was committed by the appellant because she was not a credible witness. He maintained his position that the delay to arraign the appellant raises

doubt on the prosecution case and that the case of **Ramson Peter** (supra) did not state the time within which the delay should be considered as reasonable. The learned counsel was of the view that the contradiction pointed in his submission in chief were not minor. He also reiterated his submission that the variance between the charge sheet and evidence on the date of commission of the offence implies that the offence was not proved and that such variance cannot be cured by invoking section 122 of the Evidence Act.

I have dispassionately considered the submission by the learned counsel for the parties, cited references and the record. This being the first appellate court, it has the duty to re-examine and re-evaluate the evidence on and comes to its own decision where the need arises. (See also Hassan **Mzee Mfaume vs R** [1981] TLR 167.

In the this appeal, I shall deliberate and determine the 1st, 2nd, 3rd and 4th grounds of appeal conjointly because they in effect address one critical issue. I find that the issue for determination in the said grounds of appeal is whether the prosecution proved its case beyond all reasonable doubts.

It is principle of criminal law that, for the prosecution to secure conviction, it must prove the charge laid against the accused person beyond reasonable

doubts. The law is further settled that any doubt on the prosecution case should be decided in favour of the accused person.

I also agree with the parties' counsel that, in terms of the settled law, the best evidence in sexual related cases is that of the victim as held in **Selemani Makumba** (supra). That notwithstanding, the court considers other factors, including credibility and reliably of the witnesses called by the prosecution. [See the case of **Pascal Yoya Maganga v. R**, Criminal Appeal No. 248 of 2017 (unreported)]. Therefore, this Court will consider whether the victim (PW1) and other witnesses were credible to the extent of proving the prosecution beyond reasonable doubt.

I propose to start with the complaint that there was delay to arraign the appellant before the trial court. It is not disputed that the appellant was arrested on 25/01/2021 and brought before the trial court on 29/01/2021. According to section 64 (1) of the CPA, a person brought under the custody of a police officer on suspicion of having committed bailable offence must be released immediately if after twenty four hours after the person was arrested, no formal charge is laid against that person, unless the police officer in question reasonably believes that the offence suspected to have been committed is a serious one.

It is my considered view that the offence rape is serious one. This is when it is considered that it attracts the minimum sentence of thirty years imprisonment. Further to this, the appellant did not testify to have been denied police bail. In the circumstances, the delay to charge the appellant within twenty four hours did not raise doubt in the prosecution. Further to this, unlike the case of **Samson Peter Ondile** (supra) in which the accused was arraigned after ten months, the appellant at hand was charged after four days. Thus, I find no merit on this complaint.

Second for consideration is the complaint that PW1 gave contradictory evidence and thus, not credible. It is settled law, which was also underscored in **Goodluck Kyando**, that every witness is entitled to credence and that his evidence must be believed unless there are cogent reasons to the contrary. As far as contradiction is concerned, only contradiction which goes to the root of the case should be taken into account to discredit the witness.

In this case, the victim stated that she was a pupil of Nia Njema Primary School. The prosecution called her teachers (PW4) and PW5) to whom the incident was reported first. Both PW4 and PW5 told the trial court that they were teachers of Mshikamono Primary School where the victim was a pupil. It is my humble

opinion that the said contradiction raises doubt on whether the victim reported the matter to her teachers thereby affecting her credibility on that issue.

Further to the above, PW4 and PW5 stated that the matter was reported to them on 22/01/2021. If the matter was reported to PW4 and PW5 on that date, it is not known as to how PW3 examined the victim on 21/01/2021 as indicated in Exhibit P1.

Another contradiction is on the date of examining the victim. Part I of Exhibit P1 and evidence of PW3 are to the effect that the victim was sent and received to the hospital on 25/01/2021. However, Exhibit P1 suggests that the victim was examined by the victim on 21/01/2021.

Similar to contradiction is the variance on the charge sheet and evidence on the date of commission of the offence. It is depicted from the charge that the offence was committed in January, 2021 while the evidence of PW1 was to the effect that the offence was committed on diverse dates from 2019. It is on record that her evidence was given on 23/02/2021. She was not led to testify on whether she was raped in January 2021. In view of the variance, the prosecution ought to have prayed to amend the charge sheet under section 234 of the CPA. It is my considered view that the appellant was prejudiced because he was not sure whether to defend on the offence committed in 2019, 2020 or 2021. Since the

charge was not amended, the offence laid against the appellant was not proved by the evidence adduced by PW1.

On the foregoing analysis, I find merit on the appellant complaint that the charge laid against him was not proved beyond reasonable doubt. Therefore, I find it not necessary to consider other issues raised in the petition of appeal.

In the upshot of the above, I allow the appeal, quash the conviction of the appellant and set aside the sentence of thirty (30) years imprisonment imposed on the appellant by the trial court. It is further ordered that, Abdallah Hamis @ Mohamedi be released from prison unless he is held for any other lawful cause.

DATED at **DAR ES SALAAM** this **28th** day of **February, 2023**.

S.E. KISANYA
JUDGE
28/02/2023