

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

MOROGORO

CRIMINAL APPEAL NO. 88 OF 2022

(Arising from Criminal Case no. 71 of 2021 of Mvomero District Court)

LEO JULIAS CHANDE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

Date of last order: 13.02.2023

Date of Judgement: 10.03.2023

MALATA, J

The appellant, **Leo Julius Chande** is serving thirty (30) years imprisonment for the offence of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code Cap 16, R.E 2022. It is on record that, the appellant raped PW3 on the 29th July, 2021 at around 17:00hrs.

According to the charge sheet the incident of rape occurred on 29th July, 2021 at Changarawe area within Mvomero District in Morogoro region.

To prove the charge the prosecution lined up six witnesses and tendered three exhibits. At the end of prosecution case, the trial court ruled that, the prosecution case established prima facie case against the accused, thus called the accused to enter defence. The appellant called two witnesses himself and another (DW1 and DW2).

It is depicted that; the appellant is the landlord and the victim's mother (PW4) is a tenant. On 29/07/2021, the appellant dragged the victim (PW3) in his room and raped her. On completion, the appellant gave PW3 TZS 1000. Further, the evidence by the victim's sister one Shakira (PW2) was to the effect that; on 29/07/2021 around 17:00 hrs she arrived at home from school and met Chande (the appellant) just behind his house. The appellant looked worried; She greeted him but he did not respond. As she opened the main door to the house, she saw PW3 coming from the appellants room, holding TZS. 1000/= and socks on her hand. She testified that, PW3 also placed her hand on her private parts and walking improperly. She asked PW3 as to what was the problem, PW3 did not answer. She took PW3 to "*mama mdogo*" (PW1) and went back home. On the way, she met her mother (PW4) coming back from work and told

her what happened. She escorted PW4 to PW1. PW2 left her mother there and went back home.

While PW3 (victim) testified that, the appellant pulled her into his room, undressed her, covered her mouth and threatened to kill her, he then inserted finger into her private parts, pushed her to bed and inserted his "mdudu" to her private parts. Afterwards the appellant forced her to take Tsh 1000/= by placing the money on her hand. It is the victim evidence that the appellant has done to her three times, and all the incidents happened in the appellant's room.

PW1 testified that at around 17:00hrs PW3 and PW2 went to her house where PW3 was holding socks and TZS 1000 on her hand. PW2 told PW1 that, she saw PW3 coming from the appellant's room. PW1 asked PW2 in which condition you have seen her. PW2 told her that the appellant was worried. She asked PW3 who gave her TZS. 1000? She replied that, the appellant pulled her inside and thrown her on the bed covered her on the mouth and threatened her with a knife and penetrated her. PW1 checked her private parts and noted mucous like fluid in PW3's vagina. PW1 took PW3 back home, on the way they met PW3's mother and went together and checked PW3 once again.

Other evidence corroborated the same includes PF3 which states that, the victim was found with no hymen swollen with bruises, affected with

bacteria, Vagina had serious mucous with bad smell and no virginity was discovered.

Upon scrutinization of the adduced evidence, the trial court found the accused liable, thence convicted and sentenced him accordingly.

Aggrieved with conviction and sentence, the appellant appealed to this court armed with seven grounds of appeal listed hereunder.

1. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where a magistrate failed to properly comply with section 127 (2) of the Evidence Act, as the victim PW3 only promised to tell the truth but deliberately failed to promise not to tell lies. Hence lied through her testimony in court.
2. The learned trial magistrate erred in law and fact by sentencing and convicting the appellant relying on contradictory evidence at PW1, PW2 and PW3.
3. The learned trial magistrate erred in law and fact by convicting the appellant relying on contradictory evidence PW1 (the said mama mdogo) and PW3 (the victim)
4. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant by relying on incredible and implausible evidence of PW3 the alleged victim.

5. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where PF3 was not properly identified.
6. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where it is apparent that the charge was fabricated to make the appellant look guilty.
7. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case which the prosecution failed to prove the case beyond reasonable doubt.

On the hearing date of the appeal, the appellant was unrepresented while the respondent was represented by Mr. William Dastan, Learned State Attorney.

In support of the appeal, the appellant prayed to the court to consider the grounds of appeal, allow the appeal, quash conviction and set aside sentence imposed therein.

In reply thereto, the respondent strongly opposed the appeal. Submitting in support of 1st ground of appeal, the learned state attorney submitted that, since PW3 was eight (8) years old at the time of the incidence, her evidence was to be taken in accordance with section 127 (2) of the

Evidence Act thus her evidence is properly before the court. The allegations that is full of irregularities is unfounded.

On the 2nd ground of appeal, the learned counsel submitted that, there is no contradiction in evidence. PW1 did not contradict PW2, PW3 and PW4. Mr. William State Attorney cited the case of **Victory Mgenzi @ Mlowe vs. Republic**, Criminal Appeal no. 354 of 2019, CAT. As the appellant was mentioned by PW3 then the evidence by PW3 can solely be used to convict the appellant, the second ground has therefore no merit.

Submitting on the 3rd ground Mr. William submitted that the evidence between PW1 and PW3 are not contradictory and it corroborates each other in the sense that, PW3 is victim who was sent to PW1 by PW2 and taken to hospital for medical examination.

Submitting on the 4th ground the learned counsel stated that the evidence by PW3 is self-contained and proves rape beyond reasonable doubt, it is self-sufficient as the victim was found with sperms, bruises and further the PF3 proves that PW3 was raped.

As to grounds; 5, 6 and 7 of appeal, Mr. William learned State Attorney submitted that, evidence by the prosecution side proved the case beyond reasonable doubt as such the appellant was correctly convicted and

sentenced. Finally, he prayed to the court to dismiss the appeal for want of merits.

In the rejoinder submission, the appellant submitted that he had nothing more to submit but prayed the appeal to be dismissed.

Having heard the rival submission from the parties and record of the appeal

The most relevant issue for determination is whether the prosecution evidence sufficiently established and proved the case beyond reasonable doubt to sustain conviction of the appellant.

This being a criminal case, the standard of proof is beyond reasonable doubt. As such, it is the duty of the trial court to analyse and evaluate evidence adduced before it and satisfy itself if it has proved the case beyond reasonable doubt.

On the other hand, this being the first appellate court has the duty to re-evaluate the evidence of the trial court to satisfy itself on the appropriateness of the decision of the trial court.

In the case of **Standard Chartered Bank of Tanzania Ltd vs National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008 quoted in The **Registered Trustees of Joy in the Harvest vs Hamza K.**

Sungura, Civil Appeal No. 149 of 2017 (both unreported) where it was stated:

"The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court should stand (Peters v Sunday Post, (1958) EA 424; William Diamonds Limited and Another v R (1970) EA 1."

This being the first appeal, the court has the power to do what the trial court failed to do, if satisfied otherwise.

In this case the charge shows that the appellant was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code, for clarity and quick reference I wish to reproduce the provision;

130.-(1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

And section 131 (3)

(3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment.

The appellant was accused of raping PW3, PW3's evidence is to the effect that;

"I was coming from school, I was opening the door, I wanted to change my clothes. Chande called me in his room, I told him I am going to change my clothes. He came to our door he pulled me into his room. He undressed me and covered my mouth telling me that if you shout, I will kill you. He fingered me into my private parts (Pw3 is showing her genital parts). After that he pushed me on the bed, he came taking his mdudu inserted into my private parts. I felt pain, after he finished, he forced me to take money Tsh. 1000/= and the socks I refused. He opened my hand and placed the money on my hand. My sister met me coming from Chande's room crying at the time Chande already gone out. My sister Shakira asked me what has befallen me? But I did not reply to her. She took me to

Mama mdogo. There was nobody at home all of them were not yet back from work. He has done that to me three time all of them in his room."

PW2 testified that,

"It was on 29/07/2021 around 17:00hrs I came home from school my way I met this Chande (the appellant) just behind his house. He seemed worried, I greeted him but he did not respond the way he used to respond. As I opened the main door to the house, I saw PW3 is coming from Chande's room, holding Tsh. 1000/= and socks on her hand. She also placed her hand on her private parts walking improperly. I asked her what is the problem? PW3 did not answer me. I took Shadya to Mama Mdogo, I went back home. On the way, I met my mother coming back from work, I told her what happened. I escort mother to Mama Mdogo Maria. I left mother there I went back home I did not know what went on."

PW1 testified that,

"At around 1700 hrs PW3 and her sister came to me, PW3 was holding socks on her hand and TZS 1000, PW3's sister one Shakira (PW2) told me that she has seen PW3 coming from Chande's room. I asked Shakira in which condition you have seen her. Shakira told

me that Chande was worried. I had to ask PW3 who gave her TZS 1000? She told me that Chande her in his room pulled her inside thrown on the bed. He covered her on the mouth and threatened her with a knife he penetrated her. I had to check her private parts I noted mucous like fluid in PW3's vagina. I took PW3 going back to PW3's home, on the way I met with PW3's mother we went together and checked PW3 one again...."

PW4 testified that,

"I remember on 29/07/2021 I was coming back from work around 17.00hs before arriving home I met my daughter Shakira, she told me that, she met PW3 coming from Chande's room holding TZS 1000 and socks on her hand while crying. I went home first, before I settled, PW3 and mama mdogo came. I asked PW3 she was crying just Chande. As I was told what happened, I had to check her on her private parts. I noted sperms...."

PF3 is to the effect that,

*"Hymen swollen with bruises, affected with bacteria, Vagina has serious mucous with bad smell. Type of weapon or object used
"used knife to scare the child."*

It is a settled principle that the best evidence in rape cases comes from the victim of rape as it was stated in the case of **Selemani Makumba vs. Republic** (2003) TLR 203.

Further, this case being a statutory rape under section 130 (1)(2)(e) age is an important ingredient which must be proved. This has been observed in the case of **Robert Andondile Komba vs. DPP**, Criminal Appeal no. 456 of 2017 and **Bashiri John vs. Republic**, Criminal Appeal no. 486 of 2016, in the case of **Robert Andondile Komba (supra)** the court had this to say,

"In cases of statutory rape, age is an important ingredient of the offence which must be proved"

As to the issue of age of the victim which is the necessary ingredient in the offence of statutory rape, the age can be proved by proof of either birth certificate or by the evidence of a parent or guardian.

In the case at hand the age of the victim as shown in the particulars of the offence shows that the victim was at the age of 8 years. The age was proven by her biological mother as stated on page 15 of the proceedings. Having settled the issue of age I now turn the key issue of rape, in short the victim who bears the best evidence over all the rest of the witnesses testified that, **one**, she was threatened by the appellant, **two**, appellant pulled her into the room, **three**, appellant fingered into her private parts,

four, appellant pushed her on the bed, appellant came taking his "mdudu" inserted into her private parts, **five**, victim was given TZS 1000 by the appellant, **six**, victim was asked by PW2 as to what happened but did not reply, **seven**, victim was taken by PW2 to PW1 who asked her and mentioned the appellant, **eight**, appellant has done that to her three time all of them in his room and **nine**, the incidence occurred at 17:00hrs

Based on best evidence rule from the victim, from the above testimonies from the PW3 the victim, I failed to gather the offence of rape. There is nothing showing that there was rape. It is not known if "*He fingered me into my private parts (Pw3 is showing her genital parts). After that he pushed me on the bed, he came taking his "mdudu" inserted into my private parts*" amounts to action of rape. What is "mdudu", is it penis? But PW3 said after pushing her on bed appellant came taking "mdudu" and inserted to her private parts. What does this real mean? Was the "mdudu" elsewhere and appellant went to collect it and used it in raping the victim.

As matter of evidence, this raises doubts, if at all what the court thought of is what PW3 meant. This ambiguity ought to have been cleared.

Looking for corroboration, this court has resorted to other evidence. PW1 was the recipient of information from the victim's mouth. In her testimony she stated that, **one**, the appellant threatened PW3 by knife and

penetrated her, **two**, she took PW3 back home, on the way she met with PW3 mother and went together and checked PW3 once again, **three**, appellant was a landlord of PW3's mother. PW1 who was given a story by PW3 the victim stated that PW3 was threatened by using knife thence and penetrating the victim.

The evidence by PW1 contradicts PW3's evidence in that, PW3 the originator of the story to PW1 did not state that, **first**, she was threatened by knife, **second**, PW3 did not testify on meeting with PW4 but PW1 and PW2 only, **third**, PW2 testified that, *"I took PW3 to Mama Mdogo, I went back home. On the way, I met my mother coming back from work, I told her what happened. I escort mother to Mama Mdogo Maria. I left mother there I went back home I did not know what went on."* **Forth**, PW2's testimony is that, on the way from PW1, she met PW4 (mother) coming back from work, she told her what happened. She escorted PW4 to PW1 and left PW4 there and went back home and that she did not know what went on there. PW4 testified that, she met PW1 and PW3 at home (PW4's house). PW1's testimony is that, while with PW3 going to PW4's house on the way they met PW4 and went together at PW4's house and checked PW3 once again. PW2 testimony is to the effect she left PW4 at PW1's house, PW1 stated that, she met PW4 while on the way to PW4's house and PW4 stated that PW1 and PW3 met her at house. Meaning that, PW1,

PW3 and PW4 met at PW4's house and not on the way. As such, there are three different story. This difference in testimonies leaves a lot to be desired.

Further, PW2 testified that, she left PW4 at PW1's house and is not aware of what transpired. Lastly, PW1, PW2, PW3 and PW4 all mentioned that all incidence occurred at around 17:00hrs, what a coincidence.

PW1 and PW2 claimed to have seen PW3 with TZS 1000 and socks given to her by the appellant which fact sound similar with the evidence by PW3, amazingly, these items from the appellant are nowhere found as part of the evidence gathered from PW3 and vividly alluded by PW1, PW2 and PW3. Where are they?

Looking at the contradictions and inconsistencies of the prosecution witnesses, I am of the considered view that the contradictions and inconsistencies go to the root of the matter, as such cannot be relied upon. In **Augustine Njoroge Ritho@ Chabah V Republic**; Criminal Appeal No. 99 of 1986 the Court of Appeal of Kenya held that: -

*"It is trite law that where evidence is inconsistent
or where it is contradicted it cannot be relied upon."*

In view of the question mark on the veracity of the complainant as a

witness, I find that the evidence adduced was so riddled with inconsistencies and contradictions as to make conviction thereof unsafe. In our view, there is sufficient doubt which ought to have been determined to the benefit of the appellant. See **Mohamed Said Matula V Republic**; 1995 TLR 3 CAT and **John Glikola V Republic**; Criminal Appeal No. 31 of 1999 CAT (unreported). In **Mohamed Said Matula** supra the Court stated thus: -

"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"

Having re-evaluated and reconsidered the evidence on record, I am satisfied that, the trial court wrongly applied the evidence and principles of law as stated herein above, thence arriving to a wrong decision. In view thereof, I am justified to reverse conviction and sentence imposed to the appellant based on weak evidence by the prosecution side.

Consequently, I hereby quash conviction and set aside sentence imposed to the appellant. The appellant is therefore set free unless lawfully held.

It is so ordered.

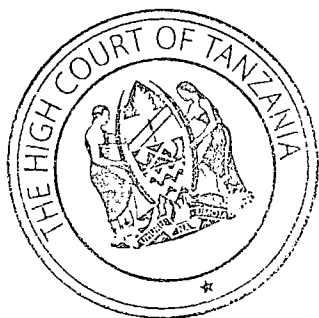
DATED at MOROGORO this 10th March, 2023


G. P. MALATA

JUDGE

10/03/2023

Right of appeal explained to the parties.




G. P. MALATA

JUDGE

10/03/2023