

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MOROGORO DISTRICT REGISTRY**

**AT MOROGORO**

**CRIMINAL APPEAL NO 104 OF 2022**

*(Arising from Criminal Case number 23 of 2022, of Kilosa District Court)*

**ELISHA YAKOBO ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

Date of last order: 06/03/2023

Date of judgement: 24/03/2023

**MALATA, J**

This Judgement is in response to an appeal by the appellant herein being aggrieved by the decision of Kilosa District Court where the appellant was charged and convicted of offence of Rape contrary to section 130(1) (2)(e) and 131 (2)(a) of the Penal Code cap 16 R.E 2019.

To prove the charges against the appellant, the prosecution called four witnesses to prove the case. The appellant defended himself on oath. At the end of trial, the appellant was found guilty and convicted for the

offence of Rape and sentenced to serve a term of thirty (30) years imprisonment.

Aggrieved thereto, the appellant appealed to this court armed with twelve grounds of appeal. These are;

*1. That, the learned trial court Magistrate misdirected himself to convict me relying on the insufficient evidence of the Prosecution.*

*2. That, the learned trial court erred in law and fact to convict me relying on the evidence of the tender age witnesses which has been taken without complying to the legal procedures, viz;*

*i) Examination of the witnesses to assess the credibility of the evidence of the children of tender years*

*ii) Recording of the reasons in the proceedings satisfying the court that the child of tender years is telling nothing but the truth.*

*iii) Promise of the witnesses to tell the court the truth and not the lies*

*3. That, the learned trial court Magistrate deliberately misdirected himself to not taking into account that, key element*

*of rape offences that is Penetration was not proved to the standard required. Pw1 testified that there was neither bruises nor injuries on the private parts of the victims.*

*4. That, the learned trial court magistrate erred in law and fact to convict me relying on the evidence adduced by the incompetent witness to testify as expert.*

*5. That, the learned trial court magistrate misdirected himself to convict me relying on the improperly tendered and admitted two PF3 collectively.*

*6. The learned trial court magistrate misdirected himself to convict me on the offence of Rape relying his conviction on the words of the purported victims that they have been raped without taking into account the legal technicalities of the word "Rape"*

*7. That, the learned trial court magistrate erred in law and fact for his failure to take into consideration the good evidence from the purported victim that they were not entered with the penis into their vaginas. Walikuwa wanapakwa mate.*

8. That, the learned trial court magistrate erred in law and fact for failure to take into account that no injuries on the private parts of the purported victims were proved taking into account the tender ages of them.

9. That, the learned trial court magistrate erred in law and fact in convicting me without taking into account the importance of summoning key witnesses who said to receive information of the crime immediately to testify on circumstantial evidences.

10. The learned trial court magistrate misdirected himself to convict me relying on the unreliable, fabricated and contradictory evidence of PW 3

i) Kupaka mate katika vibibi

ii) Nothing was entered into her private parts

iii) I do not love her on the reasons that I always slap her

iv) Rabia walikuwa wanapakana mate na Neema

11. That, the learned trial court magistrate erred in law and fact for failure to observe important contents of Judgment which are points for determination, the decision thereon and the reasons for the decision.

*12. The learned trial court magistrate erred in law and fact to enter Judgment in my absence without issuing warrant of arrest of accused person and the sureties to show cause as to why the court should not proceed with a case in absence for matter of Justice.*

The appellant prayed to the court to consider the grounds of appeal and allow the appeal, quash conviction and set aside the sentence imposed to him by the trial court.

When the appeal was called up for hearing, the appellant appeared in person unrepresented, while the respondent enjoyed the service of Mr. Emmanuel Kahigi, learned State Attorney.

The appellant had nothing to submit but prayed to the court to consider his grounds of appeal and allow the appeal.

In reply thereto, Mr. Kahigi, the learned State Attorney supported the appeal. Mr. Kahigi out rightly informed the Court that, the Republic supports the appeal for mainly two reasons, **first**, on the issue of credibility of evidence of PW2 and PW3 and **two**, that the judgement has no reasons thereto thus contravening section 312 of the Criminal Procedure Act, Cap. 20 R. E. 2022.

Mr. Kahigi, submitted that the evidence on record did not prove the offence beyond reasonable doubt, the main reason is the credibility of PW2 and PW3. In their evidence, it stated how the appellant raped them. PW2 and PW3 explained that they used to sleep in one bed with their mother and the appellant, while asleep the appellant used to have sexual intercourse with them, that is the testimony of PW2 and PW3. However, the mother of the victims was not called to testify before the court whom one was expecting to be called bearing in mind that, she was sleeping in the same bed.

PW3 testified that the appellant used to put saliva at their private parts at night. Further PW1 testified that both victims were raped but the PF3 doesn't clearly state so.

PW1 is expressed as a doctor while at the same time is prescribed as a nurse, in the PF3 doesn't clearly state the qualification of the officer who verified the same.

The learned state attorney further submitted that the judgement is not in compliance with section 312(1) of the CPA, on the content of the judgment. There are no reasons for judgement and therefore the conviction was entered without proof beyond reasonable doubt.

Based on the afore mentioned reasons Mr. Kahigi was of the opinion that the appellant need to benefit from pointed shortcoming.

In disposing this appeal this court took into account issues of, credibility of evidence of PW2 and PW3, and consideration of other evidence on record if it sufficed to warrant conviction. Upon determination of those issues this court will be in a position to decide on whether the prosecution proved the case beyond reasonable doubt, thence conviction and sentence.

To be in a better position as the first appellate court, I have to go back to the whole proceedings of the trial court to re-evaluate the evidence adduced therein. In the case of **Mapambano Michael @ Mayanga vs. Republic**, Criminal Appeal no 268 of 2015 (unreported) at Dodoma the court of appeal placed a special duty to the first appellate court as follows;

*The duty of first appellate court is to subject the entire evidence on records to a fresh evaluation in order to arrive at decision which may concede with the trial court's decision or may be different altogether.*

Guided by the above principle, this court now re-evaluate the evidence of the trial court. To start with, the ground of credibility of witness, who are the victims PW2 and PW3. The law is clear on the receipt of evidence of a

child of tender age, PW2 and PW3 being the victims of the ordeal and whose evidence is considered to be the best in sexual offences (see **Selemeni Makumba vs Republic** [2006] T.L.R. 379).

Part of PW1's evidence states that;

*Tukiwa tunakaa Dumila tulikuwa tunakaa wote na kulala kitandani, mimi, baba na mama na dada. Usiku baba alikuwa ananibaka. Ananiwekea mate yake huku kwangu (akionesha sehemu zake za siri) halafu anamuwekea na dada. Alinipaka mate akanibaka huku kwangu.*

Part of PW3's evidence depicts that;

*Tulikuwa tunalala kwenye godoro wote wanne. Baba na mama kwa juu na mimi na Neema kwa chini (miguuni). Usiku baba Elisha alikuwa anatubaka yaani anatoka juu anatufuata chini huku mama akiwa amelala kisha ananiwekea dudu lake mimi na Neema kwenye vibibi nikamwambia mama Deo baba huwa anatubaka usiku akaniambia nisiseme kwa mtu yoyote hadi aseme kwa polisi.*

Based on that evidence and the offence which the appellant is charged with, that is rape. The essence of the offence of rape is penetration and



this is what should be proved by the prosecution as required under section 130 (4) of the Penal Code. In **Mathayo Ngalya @ Shabani v. The Republic**, Criminal Appeal No. 170 of 2006 (unreported) the Court stated that: -

*"The essence of the offence of rape is **penetration** of the male organ into the vagina. Subsection (a) of Section 130A of the Penal Code provides. For the purpose of proving the Offence of rape, **penetration however slight** is sufficient to constitute intercourse necessary to the offence of rape. For offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place, it is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence"*

Based on the evidence of PW2, she just stated how the appellant put saliva in her private parts and on PW3 private parts, there is nowhere in her evidence where PW2 stated that, the appellant penetrated her with his male organ to her vagina. PW3 stated how the appellant used to put his mdudu in their vibibi, in her evidence PW3 stated how the appellant raped them, she even testified further that PW2 had a sore in her private parts.

However, when cross examined by Court PW3 testified that, as I hereby quote

*Mama alikuwa amelala, sikuweza kupiga kelele, **hakuniwekea kitu chochote** bali alikuwa ananiambia nisiseme.*

Clearly there is contradiction in the evidence of PW2 and PW3, whose evidence is the best evidence in sexual offences. This contradiction is not minor it goes to the root of the matter, as I mentioned earlier the essence of the offence of rape is penetration, where the contradiction arise whether there was penetration or not, and the prosecution failed to prove the same, that contradiction becomes material. In the case of Said **Ally Ismail vs. Republic**, Criminal Appeal no. 249 of 2008 for instance, the court observed:

*"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the **gist** of the evidence is contradictory then the prosecution case will be dismantled."*

That brings the conclusion that, PW3 evidence is unreliable and incredible, the reason being, first PW3 contradicts herself and contradict the evidence of PW2 who were together alleged to have

been raped. In this case I am guided by the principle in the case of **Lukas Kapinanga and two others vs. Republic** [2006] TLR 374 where the court stated that;

*"The prosecution who changes his story on important aspect of the case is not credible and truthful witness."*

In the Judgement, the trial court stated that, the evidence by PW1 corroborates the evidence of the victims. PW1 who performed medical examination on both victims in his testimony he testified that he is a medical doctor (nurse). Difference has to be made from Medical Doctor and a nurse in their capacity to conduct medical examination of this nature, in addition even in the PF3 there is no qualification of the officer who conducted the examination of status of PW2 and PW3, this in my view leaves huge and fatal doubt as to whether there was such examination by a qualified person.

This court, among others, noted that the judgement bear no reasons for the judgment, thus in contravention of section 312(1) of the CPA which provides that;

*"312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and*

*superintendence of the presiding judge or magistrate in the language of the court and shall contain the **point or points for determination**, the **decision thereon** and the **reasons** for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."*

The above provision demands expressly that, every judgment under section 311 of the CPA must, among others, contain a point or points for determination, the decision thereon and the reasons for the decision. The above position has been insisted by numerous decisions to wit; in the case of Hamisi **Rajabu Dibagula v. Republic** [2004] TLR 181, at 196, referred to its earlier decision in **Lutter Symphorian Nelson v. The Hon. Attorney General and Ibrahim Said Msabaha** [2000] TLR 419 where the court had these to say:

*"A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum; it must show that no material portion of the evidence laid before the court has been ignored. In Amirali Ismail v Regina. 1 T.L.R. 370, Abernethy, J., made some observations on the requirements of judgment. He said: 'A good judgment is clear, systematic and straightforward.*

*Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how.* "[Emphasis added]

The Court concluded in *Dibagula* (supra), citing **Wily John v. R.**, (1956) 23 E.A.C.A. 509, that failure to comply with the relevant statutory provisions as to the preparation of a judgment would be fatal to a conviction where there is insufficient material on the record to enable the appellate court to consider the appeal on its merits.

Having reviewed the impugned judgement of the trial court in the light of the above authorities, I am in agreement with the appellant that the judgement is not in compliance with Section 312(1) of the CPA. The judgement contains summary of evidence of witnesses, the trial magistrate did not point the issue for determination and demonstrate findings of facts and the reason for each finding.

All said and done, in the circumstances of this case, the offence of rape was not proven beyond reasonable doubt.

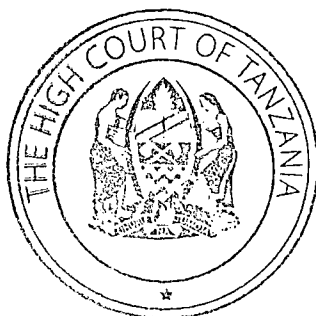
For the reason so stated, I am certain that even if the court file is remitted to the trial magistrate to compose a properly and legally acceptable judgement, yet the offence was not proved to the standard required by law based on the evidence on record.

As such, this first appellate court is satisfied that; there are cogent reasons compelling this court to interfere with the trial court's finding and decision and decide otherwise as the trial court wrongly assessed the evidence and applicable principle of law in proving criminal cases, rape cases in particular, thence arriving to a wrong decision.

Consequently, I proceed to allow this appeal, quash conviction, set aside sentence and order for immediate release of the appellant from prison, unless lawfully held for another offence.

**It is so ordered.**

**DATED at MOROGORO** this 24<sup>th</sup> March, 2023



G. P. MALATA

**JUDGE**

24/03/2022