

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CRIMINAL APPEAL NO. 147 OF 2022**

*(Originating from Criminal Case No 268 of 2021 of Bagamoyo District Court at  
Bagamoyo before Hon. M.B. Mmanywa -RM)*

**HUSSEIN JUMA PILIPILI.....APPELLANT**  
**VERSUS**

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

**JUDGMENT**

*Date of last Order: 3<sup>rd</sup> April, 2023*

*Date of Judgment: 5<sup>th</sup> May, 2023*

**E.E. KAKOLAKI, J.**

The appellant before this Court was convicted before Bagamoyo District Court at Bagamoyo on one count of Rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E 2019 now 2022]. It was prosecution case that, on 30<sup>th</sup> day of July 2021 at Kidongo Chekundu area within Bagamoyo District in Coast Region did have canal knowledge of one *RH* (name withheld for the sake of covering her identity) a girl of 15 years old.

Upon the appellant protesting his innocence when the charge was put to him, the prosecution paraded three (3) witnesses *RH* the victim (PW1),

Mwajuma Daudi (PW2) and Dr. Festo Yared (PW3) and relied on one (1) documentary exhibit (exh. P1) in a bid to establish the accused guilty. On his party, appellant relied on his own testimony. After full trial the court was convinced that, the prosecution proved its case beyond reasonable doubt, found the appellant guilty as charged, convicted and sentenced him to serve the mandatory sentence 30 years imprisonment. It is the said decision that triggered this appeal in which the appellant is before this Court fronting four (4) grounds of appeal as summarized hereunder:

1. That the learned trial magistrate erred in law and fact to place reliance on sole evidence of a victim (PW1) to convict the appellant in the absence of proper analysis and assessment of credibility of her evidence whether she was telling nothing but the truth.
2. That the learned trial Magistrate erred in law and fact to convict the appellant relied on the evidence of visual identification led by PW1 without satisfying himself upon assessment of such evidence that there was no reasonable possibility of mistaken identity.
3. That the learned trial Magistrate erred in law and fact to find corroborative evidence from a medical doctor (Pw3) without considering that upon examination made by him to PW1, her vagina

had no bruises or blood, also even the PF3 which he tendered and admitted as exhibit P1 was not read out in court after being admitted as exhibit.

4. That, the learned trial magistrate erred in law and fact to convict the appellant basing on evidence of the prosecution which was not proved beyond reasonable doubt and not assessed in line with defence evidence.

On the strength of the said grounds of appeal, appellant prays this Court to allow the appeal, quash the conviction set aside the sentence and set him free from the prison.

Hearing of appeal took the form of written submission at the instance of the appellant, and the appellant fended himself while respondent was represented by Ms. Olomi, learned State Attorney. In his submission appellant consolidated the first and second ground of appeal and submitted on the remaining two grounds separately, while Ms. Olomi answered the grounds of appeal in seriatim. However, in this Judgment and for the purposes of consistency and proper determination of the said four (4) grounds, I am proposing to combine and determine first the first and third grounds of appeal as they interlink and then the rest if need be.

It is appellant's complaint in the 1<sup>st</sup> and 3<sup>rd</sup> grounds of appeal that, the trial court erred to convict him relying on sole improperly analysed and assessed evidence of PW1 who was not a witness of truth corroborated by deficient and contradictory evidence PW3 and exhibit P1. On these grounds, it was the appellant's submission that, PW1 was not a truthful witness, as her testimony at page 6 of the record of proceedings she told the trial court that, when raped by the appellant, she felt so much pain and bled, but when medically examined by PW3 immediately after the incident, her vagina was found to have no bruises or blood as reflected at page 14 of the typed proceedings. He argued that, the inconsistency between the evidence of PW1 and PW3 cast a shadow of doubt on truthfulness of PW1, because if she was telling the truth, how could blood come from vagina without bruises or scratch. He took the view that, had the trial court tested and assessed the credibility of PW1, her testimony would have not passed the test of truthfulness as required by section 127 (6) of the Evidence Act (Cap 6 R.E 2022) because her evidence is self-contradictory and materially contradicted by other witness, particularly PW3. Relying on the cases of **Robinson Mwanjisi and 3 Others vs R** [1994] TLR 203 and **Rashid Amir Jaba and Another vs R**, Criminal Appeal No. 204 of 2008 (unreported), he added

after its admission exhibit P1 was not read aloud in court as required by the law hence should be expunged from the record, in which no evidence on penetration will be left to prove rape against him. He argued that, it is trite law that where the evidence of a witness is contradictory or materially contradicted by other witness or witnesses, the same will destroy or corrode the credibility of the witness. He referred the court to the case of **Lucas Kapinga and 2others vs Republic** [2006] TLR 374 and **Michael Haishi Vs. R**, [1992] TLR 92.

In rebuttal, Ms. Olomi submitted that, as per the case of **Selemani Makumba Vs. R**, [2006] TLR 380, the best evidence in rape cases comes from the victim. And that, every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent reasons for not believing a witness as it was held in **Goodlucky Kyando vs Republic** [2006] TLR 336. She argued PW1 having affirmed in compliance with the requirement of Section 198 (1) of the Criminal Procedure Act [Cap 20 R.E 2022] for not being a child of tender age, meant she testified nothing but the truth. In her view, the trial court well analysed and assessed victims' evidence and satisfied that what the victim was telling was truthful and credible, and since it did so, then there is no reasons to doubt the trial courts

findings. She referred the court to page 5-6 of the Judgment, and the case of **Wambura Kigingira Vs. Republic**, Criminal Appeal No. 301 of 2018 at page 26, where it was held that, the best court for assessing credibility is the trial court.

Concerning the allegations that PW1's evidence was contradicted by that of PW3, it was her submission that, there was no such alleged contradiction, as it is not true that PW1 went to hospital immediately after the incident since she was taken to the hospital on 1<sup>st</sup> August 2021, 2 days and therefore 48 hours passed, that is why as per PW3, she had no bruises or blood instead of pain and tenderness in her vagina which is also a sign of penetration. Ms. Olomi referred the Court to page 13-14 of the typed proceedings to fortify her argument. It was her submission therefore that, there was no any contradiction between evidence of PW1 and PW3 as PW3 explained as to why he did not see blood or bruises when he examined PW1. Regarding relevance of exhibit P1 she confessed that, the same was not read aloud in court and prayed the Court to expunge it from the record but retain evidence of PW3. In rejoinder submission the appellant reiterated his submission in chief and stressed that, since there was no bruises or blood found in PW1's

private parts when examined by PW3, there is a possibility she pretended to feel pains for the reasons best known to herself.

Having considered the fighting arguments by the parties and thoroughly perused the trial Court's record and the case laws relied on to establish the merit or demerit of the grounds, I note that, both parties are at one on the trite law that, the best evidence in sexual offences comes from the victim as stated in a number of authorities such as **Seleman Makumba Vs. R**, [2006] TLR 380 and **Wambura Kigingi Vs. R**, Criminal Appeal No. 301 of 2018 (CAT-unreported). And that, every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent and good reasons for not believing the witness which includes the facts that, the witness has given improbable or implausible evidence or evidence has been materially contradicted by another witness. See the cases of **Goodluck Kyando vs R**, (2006) TLR 363 and **Mathias Bundala Vs. R**, Criminal Appeal No 62 of 2004 (CAT-unreported). Parties are locking their horns on the credibility of PW1's evidence and its analysis by the court against that of PW3, the fight which this court is seeking to disentangle them from. The issue therefore before this Court for determination is whether PW1's evidence is credible and the same was properly analysed by the Court to

warrant appellant conviction. In addressing the above issue this Court being the first appellate court is seized with jurisdiction to review trial court's evidence and come up with its own findings particularly where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, powers I invoke. See the cases of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424, and **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported). In **Demaay Daat** (supra) the Court of Appeal had this to say:

*It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact.*

In this case PW1, gave a detailed testimony on how on the night of 30/07/2021 while asleep in her room was raped by the appellant in absence of her mother who had gone to the burial ceremony far from home and warned not to raise alarm or disclose it to anybody before she divulged the information to PW2, who in turn phoned her (PW1) mother asking her to



come back. And that, she felt so much pains and was bleeding. It is this witness who told the court that, when her mother returned home she did not tell her anything because she was near to the appellant and that, she did not know how people knew about the matter as his father (appellant was arrested before she went to police station and interrogated and later on taken to the hospital where upon being examined the doctor confirmed she was raped. Her testimony is not in tandem with that of PW3, as it was PW3's evidence that, when examined her on 01/08/2021, 48 passed from the reported incident, she had no bruises nor blood as she had normal pains which could not disturb her. That, he did not see direct evidence of penetration but as under normal circumstances pains should not be present. And when cross examined he confirmed and stated as quoted hereunder from excerpt of the typed proceedings at page 14:

*"We did not get much evidence of penetration but found tenderness on her vagina. I did not found any bruises or wounds."*

When PW3 was re-examined said *"even tenderness may be evidence of penetration."*

In light of the above evidence of PW3 this Court is left with doubt, as to whether what PW1 told the court was nothing but the truth and that she was raped as Ms. Olomi would want this Court to believe. It is so doubted as **one**, it is impossible for the fresh wounds or bruises that caused her to bleed on the night of 30/07/2021 when PW1 alleges to have been raped to have healed and leaving no scars within two days. **Second**, it is not enough for PW3 to merely state tenderness may be evidence of penetration without suggesting what might have caused it. **Third**, PW1 informed the court that, apart from PW2 she did not tell her mother of her tale as the appellant was present, and was wondering as to how people knew the incident and the appellant got arrested since PW2 also in her evidence does not state to have informed either PW1's mother apart from asking her through phone to come back home nor report the incident at police for the appellant to be arrested. It only came to PW1's surprise that the appellant was arrested before she was taken to police and later on examined. All those doubts if were considered by the trial court in totality, I hold would have led it to find that, credibility of PW1's evidence was dented and that there was no proof that PW1 was raped, hence unsafe to rely on as exhibit P1 which was wrongly admitted is hereby expunged from the record as prayed by Ms. Olomi. In

view of the above, I answer the issue in negative that, PW1's evidence lacked credence and that, there was misdirection by the trial in analyzing the same before it was relied on to warrant appellant's conviction. I therefore find the 1<sup>st</sup> and 3<sup>rd</sup> grounds of appeal to have merits.

In view of above findings the issue of visual identification of the appellant by PW1 as raised in the 2<sup>nd</sup> ground of the appeal I hold is rendered redundant as even if this Court is to find the appellant was identified there is no cogent evidence that, PW1 was raped.

I now move to consider the 4<sup>th</sup> ground of appeal in which the complaint is that, the trial court was in error to convict the appellant basing on prosecution evidence did not prove the offence beyond reasonable doubt and not assessed in the line with defence evidence. It was appellant's argument that, evidence of PW1, PW2 and PW3 in which the trial court ground his conviction was lacking and valueless as it was not assessed in line of his defence that, the case against him was framed and concocted against him by PW2 and his wife who also failed to testify in court, based on personal grudges. He lamented, his defence was not discussed or assessed by the trial court against the prosecution evidence, hence subjected to unfair trial which resulted into miscarriage of justice on his part. He relied on the

cases of **Leonard Mwanasoka Vs. R**, Criminal Appeal No. 226 of 2014(CAT-unreported), **Elias Steven Vs. R**, [1082] TLR 313, **Hussein Iddi and Another Vs. R**, [1986] TLR 166 and **Venance Nkuba and Another Vs. R**, Criminal Appeal No. 425 of 2013 (CAT-unreported).

Concerning the allegations that appellant defence was not considered she submitted that, the same is not true as the appellants defence was considered at page 5 of the impugned judgment though the same was rejected for being an afterthought which could not raise any doubt in the prosecution, she then submitted that, appellant was given right to be heard. She contended that even if the defence was not considered the remedy is for the appellant court to step into the shoes of the trial court and consider defence case by analyzing the same and come with the decision that means ends of justice to the parties. To cement her argument, she cited the case of **Wambura Kigingwa vs R**, Criminal Appeal No. 301 of 2018 at page 18. She concluded that, the case against the appellant was proved beyond reasonable doubt.

I have dispassionately considered the rivalry arguments by the parties herein and taken time to study the impugned judgment. I do not subscribe to Ms.

Olomi's proposition that, the appellant's evidence was considered by the trial court against the prosecution evidence, as at page 5 of the impugned judgment the defence evidence was only summarized by trial magistrate and disregarded for being an afterthought without assigning reasons. In so doing the learned trial magistrate said at page 5 of the typed judgment and I quote:

*"Accused person on his defence stated that he had drudges with his wife who is not the victim which I consider it as an afterthought and the accused person on his defence testified in court failed to talk about the issue of rape."*

From the excerpt of the impugned judgment this Court is left without any scintilla of doubt that, appellant's defence was not considered against the prosecution evidence which no doubt the trial court discussed it at length. It is true that, the appellant did not say anything about raping PW1 apart from alleging that the case was concocted against him. However, the trite law is that, conviction must be based on the strength of prosecution evidence and not defence case, so the prosecution was duty bound to prove its case beyond reasonable doubt. It is already found herein above when addressing the 1<sup>st</sup> and 3<sup>rd</sup> grounds of appeal that, the sole prosecution eye witness evidence of PW1 is incredible hence could not have been relied on by the

trial court to warrant appellant's conviction. Much as there was no cogent evidence to prove appellant's guilty on the offence charged with, there is no way the trial magistrate could have avoided to consider appellant's defence that, he was not in good terms with his wife who promised to teach him a lesson for denying her to attend wedding ceremony and believe his story that the case was concocted against him. I hold that view after considering other weakness of prosecution case such as failure to parade in court for testimony PW1's mother who would have assisted to answer so many unanswered questions which dent prosecution case for instance who reported the incident at police, what offence was reported, when and why the appellant was arrest, before he was charged of rape. All these questions in all intent and purposes dent the prosecution case, hence support appellant's submission that, his conviction was based on prosecution evidence not proved beyond reasonable doubt. It is the law that, once the Court the finds evidence tendered by the prosecution is doubtful then such doubts must be resolved in the accused favour, which cause I take here and proceed to find that, in this case the prosecution failed to prove its case beyond reasonable doubt against the appellant, hence his conviction was

wrongly arrived at. I therefore find merit in the appellant's 4<sup>th</sup> ground of appeal.

Consequently, this appeal has merit and the same is allowed. The appellant's conviction is hereby quashed and sentence meted on him set aside. I order his immediate release from prison unless otherwise lawfully held.

It is so ordered.

DATED at Dar es salaam this 05<sup>th</sup> May, 2023.



E. E. KAKOLAKI

**JUDGE**

05/05/2023.

The Judgment has been delivered at Dar es Salaam today 05<sup>th</sup> day of May, 2023 in the presence of appellant in person, Ms. Imelda Mushi, State Attorney for the respondent and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

05/05/2023.

