

**IN THE HIGH COURT OF TANZANIA**

**(IN THE MWANZA SUB-REGISTRY)**

**AT MWANZA**

**CRIMINAL APPEAL NO. 103 OF 2022**

*(Originating from Nyamagana District Court at Nyamagana in Criminal Case No. 14 of 2022)*

**ANOLD MWOMBEKI.....APPELLANT**

**VERSUS**

**THE DPP.....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 24/03/2023*

*Date of Judgment: 22/05/2023*

**Kamana, J:**

The District Court of Nyamagana convicted Anold Mwombeki, the appellant, of rape contrary to sections 130(1), (2) (e) and 131(1) of the Penal Code, Cap. 16 [RE.2019]. The particulars are that on 11<sup>th</sup> January, 2022 at Mahina Kati Area within Nyamagana District in Mwanza, the appellant had carnal knowledge of AA (name concealed), a girl of ten years of age.

The Prosecution alleged that on the material date, the appellant went to the victim's house where he asked her about her mother's whereabouts. Upon realizing that the victim's mother was not around, the appellant told the victim that he wanted to buy her a soda. On their way to the shop, while the victim was salivating for soda, the appellant

diverted their course to the unfinished building. Thereat, the appellant undressed the victim and inserted his phallus into the victim's pudenda. The victim cried but was stopped by the appellant who threatened to kill her if she would continue to yell. Having quenched his thirst, the appellant gave the victim Tshs. 200/- and warned her not to tell a soul regarding the ordeal.

When her aunt came back home, she realized that AA was walking with difficulties. Upon questioning her, the victim mentioned the appellant as the one who had raped her. Then the matter was reported to Nyakato Police Station where a PF3 was issued. The victim was subjected to examination at Igoma Health Centre. The examination showed that the victim had been penetrated.

After investigation, the appellant was arraigned in the trial court where he was convicted of the charged offence and sentenced to thirty years in prison. Further, he was subjected to corporal punishment and ordered to compensate the victim.

Aggrieved, the Appellant knocked at the doors of this Court armed with seven grounds as follows:

1. That the trial Court erred in law and fact in convicting him based on Exh.P1 which was not admitted procedurally as

PW1 was not the author of such exhibit and it was read twice.

2. That the trial Court erred in law and fact in convicting him whilst neither PW1 nor PW2 identified him when he was in the dock.
3. That the trial Court erred in law and fact in convicting him while there was no proof as to penetration.
4. That the trial Court erred in law and fact by permitting witnesses who were not listed during the preliminary hearing to testify.
5. That the trial Court erred in law and fact in convicting him based on fabricated and afterthought evidence since there was a delay in reporting the alleged crime.
6. That the trial Court erred in law and fact in convicting him without assigning the reasons as to why it did not consider his evidence.
7. That the prosecution failed to prove the case against him beyond a reasonable doubt.

For this judgment, I will dwell on the sixth and seventh grounds of appeal that the case against the appellant was fabricated as there was a

delay in reporting the matter to the police and that the Prosecution did not prove the case beyond a reasonable doubt.

Being a lay person, the appellant did not argue the ground of appeal other than adopting it. Ms. Sabina Chogogwe, learned State Attorney submitted that three days is not a long period for the offence to be reported to the police. She further submitted that the Prosecution proved the case beyond a reasonable doubt.

As the first appellate Court, I will focus on reevaluating the evidence of both parties, while mindful that the trial Court had the opportunity to assess the credibility of the witnesses in terms of their demeanor, with the view to coming to my conclusion as to the guiltiness or otherwise of the appellant. In so doing, I will reevaluate the evidence adduced so far as the coherence of the witness is concerned and the coherence of the evidence of one witness against other witnesses. I take that course in recognition of multitudinous decisions which confer upon this Court as the first appellate Court powers to reevaluate the evidence adduced in the trial Court. **See: Emmanuel Mrefu @Bilinje v. Republic**, Criminal Appeal No. 271 of 2006 and **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2000 where in the latter case, it was observed:

*'The credibility of witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of the witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including the accused person.'*

From the records, the incident is alleged to have taken place on 11<sup>th</sup> January, 2022. This is per the evidence of PW1 (the victim's aunt) and PW2 (the victim). Gathering from the record, the matter was reported to the police on 13<sup>th</sup> January, 2022 where a PF3 (Exhibit P1) was issued. Between 11<sup>th</sup> January to 13<sup>th</sup> January, 2022 there are two days. This means that the incident was reported to the police on the third day since the same took place.

No law sets the time within which a crime must be reported to the police. However, it is an established principle that a crime must be reported within a reasonable time. Failure to report the crime within a reasonable time shakes the Prosecution case. In the case of **the Director of Public of Prosecutions v. Simon Mashauri**, Criminal Application No. 394 of 2017, the Court of Appeal had this to state:

*'Besides that, PW1 did not report to the police station at the earliest opportune time. In that night, she took shower which was not proper in the circumstances and slept. In the next morning she went to church. The question we ask ourselves, was it a wise idea going to church instead of taking the necessary steps of reporting the rape incident to the police station. PW1 said she did not do it during that night because it was late. We think, if that was the case, reporting to the police in the following day would have been the first thing to do instead of going to church and waiting to report to PW7 first. We find her evidence to be unreliable.'*

I have keenly gone through the evidence of PW2 (the victim). According to such evidence, she reported the incident to her aunt on the same day she was raped which was 11<sup>th</sup> January, 2022. She testified to have mentioned the Appellant as her ravisher after being questioned. The victim told the trial Court that after telling her aunt as to who sexually assaulted her, she showed her the Appellant's house. Then, as per this witness, they went to the Street Chairman where she narrated her ordeal. From the Street Chairman, they proceeded to the police station where they were issued with a PF3. They took the form to the

hospital where she was examined and thereafter returned the form to the police station. This evidence was also reiterated by PW1 and PW3.

It is trite law that the evidence of the victim of sexual offences is the best evidence. **See: Selemani Makumba v. Republic**, Criminal Appeal No. 94 of 1999. However, such evidence ought to be tested as to its veracity. In the case of **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 the Court of Appeal had this to state:

*'We think that it was never intended that the word of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness.....'*

My analysis of the evidence of the victim (PW2) which was supported by PW1 and PW3 when tested with the records of the trial Court so far as reporting of the incident convinces me that her evidence is wanting. From her testimony, one may deduce that the incident was reported on the same day of its happening, which was 11<sup>th</sup> January, 2022. However, from the records, the incident was reported to the police on 13<sup>th</sup> January, 2022. This is evidenced by the PF3 issued at Nyakato Police Station. Such discrepancy in the reporting of the crime to the police leaves me with doubt about the Prosecution case so far as the veracity of PW2 (the victim) and PW1 is concerned. Given that I hold the

view that the witnesses are not credible and their evidence cannot be used to convict the Appellant.

Further, the evidence of PW1 and PW3 is also wanting in another aspect. Whilst PW1 testified that after being informed of the incident on 11<sup>th</sup> January, 2022, she took the victim to the Street Chairman of Mahina Kati to report the matter, PW3 stated that she took the same victim to the Street Chairman for Kagomu on 13<sup>th</sup> January, 2022. Both testified that they were issued the letter to take to the police station. Reasonably and logically, I doubt this kind of evidence as it is near to impossible for the victim to be taken to different local leaders to report the same incident. With such a discrepancy, I entertain doubt about their testimonies, and in that case, I take them as not credible witnesses.

Further, in her evidence, PW1 told the trial Court that after detecting that the victim has been raped, she informed her uncle who questioned her as to who raped her. That was on 11<sup>th</sup> January, 2022. However, in his evidence, PW3 (the uncle) testified that on 13<sup>th</sup> January, 2022, he was phoned by PW1 that his daughter (PW2) is not walking properly and her vagina is widened. After receiving such information, he went back home and questioned the victim who told him that the Appellant raped her. Again, I find these two witnesses not credible. There is no coherence so far as these witnesses are concerned. They



differ materially on the date when the incident took place. While PW1 stated to have informed PW3 of the incident after realizing that the victim has been raped on 11<sup>th</sup> January, 2022, PW3 testified to have been informed on 13<sup>th</sup> January, 2022 after PW1 realized that PW2 had been raped. Deducing from the evidence of PW3, there is a likelihood that the offence of rape to have been committed on 13<sup>th</sup> January, 2022 and not 11<sup>th</sup> January, 2022 as testified by PW1 and PW2. However, I am not prepared to hold that the incident took place on 13<sup>th</sup> January, 2022 as PW4 told the trial Court that she was informed that the incident took place three days ago.

I understand that the Prosecution through D/CPL Bahati (PW4) tendered a cautioned statement which was admitted. During the trial, the cautioned objection was neither objected as per section 27 of the Tanzania Evidence Act, Cap. 6 [RE.2019] nor under the provisions of the Criminal Procedure Act, Cap. 20 [RE.2019]. The Appellant tried to object on the ground that the statement was not stamped. The objection was overruled by the trial Court. In his defence, the Appellant contended that he was lured by PW4 to confess the offence so that he can be released.

I am aware that the accused person may be convicted on the retracted or repudiated confession if the Court is satisfied that the Cautioned Statement contains nothing but the truth. However, before

convicting an accused on the uncorroborated retracted or repudiated confession, the Court must warn itself of the danger of convicting an accused without corroborative evidence. In the celebrated case of **Tuwamoi v. Uganda** [1967] EA 84 it was stated as follows:

***'In assessing a confession the main consideration at this stage will be, is it true? And if the confession is the only evidence against an accused then the court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with the degree of certainty required in a criminal case. This applies to all confessions whether they have been retracted or repudiated or admitted, but when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession is true.'*** (Emphasis added).

In the circumstances of this case where the only eye witness is the victim whose evidence is tainted with doubts as to the truth, the conviction based on the cautioned statement must pass a critical analysis as to the veracity of what is contained in the statement. I

hasten to state that the confession is not true. According to the evidence adduced by PW3, the Appellant was arrested on 14<sup>th</sup> January, 2022. The Appellant testified that his arrest was effected on 13<sup>th</sup> January, 2022. In his defence, the accused testified that he was kept in police custody for more than a week before making the statement. The cautioned statement was recorded on 14<sup>th</sup> January, 2022.

In the alleged cautioned statement, the accused stated that he committed the crime two weeks before. This means that the alleged crime was committed on 1<sup>st</sup> January, 2022. When tested with the testimonies of the victim and PW1, PW2 and PW4, I conclude that the cautioned statement is economical of truth.

Since the evidence of the victim is wanting in terms of truthfulness when tested with the records so far as the reporting of the incident to the police is concerned and considering that the evidence of PW2 and PW3 who did not witness the incident was found incoherent, what remains is the evidence of PW4 and PW5 which in my opinion had nothing linking the accused with the offence of rape. Firstly, as I have already found, the cautioned statement tendered by PW4 is economical of truths to the extent stated hereinabove, Secondly, the PF3 does not link the accused with the offence.

Those doubts should benefit the Appellant. In the circumstances, I allow the appeal. The appellant's conviction is hereby quashed and the sentence set aside. It is hereby ordered that the appellant be released from custody forthwith unless otherwise lawfully held.

Order accordingly.

Right to Appeal Explained.

**DATED at MWANZA** this 29<sup>th</sup> day of May, 2023.



**KS KAMANA**

**JUDGE**