IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]

AT ARUSHA.

CRIMINAL APPEAL NO. 173 OF 2022

(Originating from the District Court of Monduli, Criminal Case No. 1 of 2021)

PETRO MOSHI ..... APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

16th May & 09th June 2023

TIGANGA, J.

Petro Moshi @ Chikira, the appellant herein is challenging both the conviction and sentence entered and imposed on him by the District Court of Monduli ("the trial court") which sentenced him to serve custodial life imprisonment and payment of TZS 1,000,000/= as compensation. In the trial court, the appellant stood charged with the offence of rape contrary to section 130(1) (2)(e) and 131(3) of the Penal Code, [Cap. 16 R.E 2019]. It was alleged by the prosecution that on 18/12/2020 at Losirwa-Mto wa Mbu area within Monduli District, in Arusha Region, the appellant had carnal knowledge of one NJ, (whose identity is withheld), a girl of five years. The appellant denied the commission of the offence thus necessitating the prosecution to call witnesses to prove the charge.

The story of what happened begins with Rahel Joseph Muna (PW1), the victim's mother, who used to leave her daughter NJ, at her friend, whom she named as Mama Neema. On 18/02/22020 at 20:00hrs, she retired from her business and went to the said mama Neema to fetch her daughter NJ. Upon her arrival, she found the victim sleeping. The appellant was there alone, eating. By that time, the victim's trouser was wet, and when PW1 undressed her, the victim started crying. After inspection, PW1 found sperms in the victim's private parts. On inquiry, at first, the victim withheld the ravisher but after threatening to beat her, she named Ankoo Petro, the appellant herein.

PW1 went back to the appellant and asked him what he did to her child, whereas the appellant denied having raped the victim. She reported the incident to the ten-cell leader, John Kazimoto (PW2). The duo went back to the appellant's house, but when the appellant was asked by PW2 about the ordeal, still the appellant denied it. On instructions from PW2, PW1 went back home to take the victim with her and the wet trouser as an exhibit. When PW2 asked the appellant, this time around the appellant admitted to having raped the victim. The appellant was taken to Mto wa Mbu police station, where PW1 was given PF3 to take the victim to the hospital.

At Mto wa Mbu health center, the victim was attended by Suzana Evarist Mtalo (PW3), who after examination, she discovered that the victim had bruises and mucus in her vagina. She further discovered spermatozoa and red blood cells in the victim's vagina. PW3 filled in the PF3, which was admitted as exhibit PE1. On the very same day, at about 23:00hrs, Assistant Insp. Jacob Bulugu (PW4) recorded the confession statement of the appellant from 23:10 to 23:49.

The statement was recorded after PW4 had given the appellant all his rights, including the right to call any relative or advocate. PW4 sought to tender the appellant's statement as an exhibit, but the appellant objected on account that it was not voluntarily made. According to the trial court record, after such an objection has been raised, the court fixed an inquiry hearing on 07/09/2021.

It was later followed by four adjournments, in the absence of the appellant. On 05/10/2021, the prosecution through the State Attorney prayed to the court to admit the confession statement since the appellant defaulted appearance at the hearing of the inquiry. The trial court granted the prayer by admitting the appellant's confession statement as exhibit PE2. According to the prosecution, the effort to trace the victim's whereabouts was futile, instead of her oral evidence, her witness

statement was admitted as exhibit PE3. The summons to trace the whereabouts of the victim were admitted as exhibit PE4 collectively.

In his sworn defence, the appellant testified that he was arrested by people he did not know on 18/12/2020. He was taken to the police station where he was charged with the offence of rape. He denied knowing anything connected with the offence he was charged with. He was arraigned in court, but he did not see the victim testifying.

After full trial, as pointed out earlier on, the trial magistrate was convinced that the charge against the appellant was proved to the required standard. The appellant was convicted and sentenced as earlier stated. Unamused by both conviction and sentence, the appellant has preferred this appeal, armed up with nine grounds of appeal, as reproduced in *verbatim*:

a) That, the trial Magistrate erred in law and fact in not finding that the appellant was tried and convicted under a defective charge sheet, hence there was variance location (sic) between charge and evidence adduced;

b) That, the trial Magistrate erred in law and fact in convicting the appellant based on the victim's statement which was tendered and admitted in contravention of section 34 B (2) (b) (c) and (f) of the Evidence Act, Cap. [R.E 2019], (hereinafter TEA);

c) That, the charged offence (sic) prepared against the appellant was not proved beyond reasonable doubt and to the yardstick of law requirement;

d) That, the trial Magistrate erred in law and fact for not affording the appellant's right to a fair and impartial hearing contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, which is a cardinal Principle (Natural Justice);

e) That, the trial Magistrate erred in law and fact in relying on the statement of the victim which was not tendered by its maker to ground conviction and sentence against the appellant;

f) That, the trial Magistrate erred in law and fact for sentencing and convicting the appellant while the material witness (Victim) was not brought before the trial court to testify;

g) That, the trial Magistrate erred in law and fact for convicting and sentencing the appellant for relying on acted upon (sic) evidence of PW1 (Rahel Joseph) which was hearsay and extracted by the way of threatening the victim;

h) That, the trial Magistrate miserably erred in law and fact for sentencing and convicting the appellant relied and acted only on hearsay evidence of prosecution witness; and

i) That, the trial Magistrate erred in law and fact for summarizing the appellant's (sic) defence without stating the point of (sic) determination.

At the hearing of the appeal, the appellant appeared in person unrepresented while the respondent Republic was represented by Mr. Stanslaus Peter Halawe, learned State Attorney. Hearing of the appeal proceeded through filing written submissions.

Submitting in support of the 1st ground of appeal, the appellant contended that the charge sheet was defective due to variance between the charge and the evidence adduced regarding the crime scene. Whereas the charge sheet shows that the rape was committed at Losirwa-Mto wa Mbu, the evidence by all prosecution witnesses did not mention Losirwa as the place where the incident occurred. In his view, the charge sheet ought to have been amended under section 234(1) of the CPA, relying on the authority in **John Julius Martin and Another vs The Republic**, Criminal Appeal No. 242 of 2020 (unreported).

The appellant combined the 2nd and 6th grounds of appeal submitting that the procedure of admitting the witness statement of the victim contravened the requirements of section 34B (2)(c) and (f) of TEA. According to the appellant, first, the victim was 5 years old which implied that she did not know the contents of exhibit PE3 but there is no indication

that the contents in that exhibit were read over to the victim. Second, exhibit PE3 was recorded in the presence of the social welfare officer in abrogation of the law. Third, the witness statement was recorded by PW4, the same officer who recorded the confession statement of the appellant, referring to the case of **Njiro and Another vs The Republic** [2002] 1EA 218. In addition to that, there was no effort exhibited by the prosecution to prove that tracing the victim's whereabouts was futile. He referred to the cherished principle that the best evidence in sexual offences is that of the victim, referring to the case of **Selemani Makumba vs The Republic** [2006] TLR 379. He alluded that in the absence of the victim's evidence, there was no evidence to rely on to warrant his conviction.

Elaborating the 3rd ground of appeal, the appellant fortified that the case against him was not proved to the hilt because the prosecution failed to summon key witnesses such as Mama Neema in whose custody the victim was placed on the material date. Failure to summon the said Mama Neema entitles this Court to draw an adverse inference that the prosecution feared that summoning her would give evidence against the prosecution. He also faulted the evidence of PW3 stating that there was no proof that the said sperms were the appellant's, insisting that there ought to have been conducted a DNA test. To buttress his argument, he relied on the following cases **Christopher Kandidius @ Albino vs The**

Republic, Criminal Appeal No. 394 of 2015 (unreported), and **Republic vs Uberle** [938] 5EACA 58.

Elaborating on the 4th ground, the appellant complained that he was not afforded the right to be heard contrary to Article 13(6)(a) of the URT Constitution. He alluded that when tendering exhibit PE2, the appellant objected but it was later admitted without giving reasons as to why the appellant defaulted appearance in court. He added that there was no effort exhibited by the prosecution to ensure that the appellant attended the court. The appellant argued that there was no fair trial, relying on the following reported cases: **Masumbuko Rashid vs The Republic** [1986] TLR and **Sadick Athuman vs The Republic** [1986] TLR 235.

Regarding the 5th ground, the appellant submitted that, the trial court erred in relying on the witness statement of the victim which was tendered by a person who was not the maker. He also urged the court to discard the evidence of PW4, whose evidence was untenable.

Substantiating the 7th and 8th grounds of appeal, the appellant asserted that his conviction and sentence were based on hearsay evidence, placing reliance on the case of **John Mkorongo James vs The Republic**, Criminal Appeal No. 498 of 2020 (unreported). He accounted that all the prosecution witnesses testified what they were told informed

of the offence but none of them witnessed the appellant committing the offence.

Expounding the last ground of appeal, the appellant pondered that the defence evidence was not subjected to thorough scrutiny. In addition to that, there were no points for determination in the trial court judgment in compliance with section 312(1) of the CPA. To bring his argument home, the appellant referred to the case of **Theobald Charles Kessy and Another vs Republic** [2000] TLR 186. Based on his submission, the appellant implored the Court to allow the appeal by quashing the conviction and setting aside the sentence meted on him, letting him at liberty.

In rebuttal, the learned State Attorney in response to the 1st ground of appeal contended that there was no variance between the charge sheet and the evidence adduced regarding the crime scene. Reference was made in the evidence of PW1 and PW2. He asserted that the charge shows that the incident took place at Losirwa-Mto wa Mbu, while PW1 and PW2 testified that they were living at Mto wa Mbu. The learned State Attorney added that PW2 clearly stated that he lived at Losirwa- Mto wa Mbu as a tell cell leader, hence Losirwa is an area within Mto wa Mbu. He also referred to exhibits PE1 and PE3, both showing that the incident took place at Mto wa Mbu.

Resisting the 2nd, 5th, and 6th grounds of appeal simultaneously, the learned State Attorney accounted that reasonable steps were taken to ensure the victim's attendance to testify in court but they did not yield fruits because she was nowhere to be located. He referred to the summonses issued to PW2 to trace the victim without success. According to the learned State Attorney, exhibit PE3 was tendered after a copy of the statement was issued to the appellant on 28/07/2021 with a notice that the prosecution intended to use the statement in court instead of direct oral evidence, but no objection was filed from the appellant. Mr. Halawe accounted that exhibit PE3 was signed by the victim by affixing her thumbprint, and the statement had a declaration verifying that what the witness recorded is true to the best of her knowledge and a declaration showing that the statement was read over to the victim.

Regarding the failure to summon key witnesses, it was Mr. Halawe's submission that there is no number of witnesses required to prove a particular fact. He said so relying on section 143 of TEA. He was convinced that the strong evidence adduced by PW1, PW2, PW3, and PW4 as well as the documentary exhibits PE1, PE2, and PE3, sufficiently proved that the victim was raped by the appellant. It was his further view that his exhibit PE3 was admitted in compliance with section 34B of TEA.

Reacting on the 3rd ground of appeal, it was the learned State Attorney's submission that the prosecution proved the case beyond any shadow of doubt referring to the evidence of PW1, PW2, and PW4 which was corroborated by PW3 who confirmed that the victim was raped.

Responding to the 4th ground of appeal, it was learned State Attorney's submission that, there was no business because, from the time the appellant was arraigned in court, he received a fair trial. He was bailed out once he had sureties, but unreasonably, he jumped bail. During his absence, the court had no recourse rather than proceeding with a hearing in absentia in consonance with the principle that litigation must come to an end. To bring his argument home, the learned State Attorney relied on the case of **Bank of Tanzania vs Said Marinda & 30 Others**, Civil Reference No. 32 of 2014 (unreported). He insisted that the appellant should blame himself for misusing his right while he was bailed out by jumping bail.

In response to the 7th and 8th grounds of appeal, Mr. Halawe averred that the trial court reached its verdict based on the reliable and credible evidence of PW1 which was corroborated by that of PW3 and exhibit PE1. Further, the evidence of the victim which was received in exhibit PE3 supports the fact that the trial court did not base on hearsay evidence.

In the last ground of appeal, the learned State Attorney challenged the submission by the appellant stating that his defence was considered by the trial court as reflected in the trial court judgment, only that the appellant's defence fell short to cast any doubt on the prosecution evidence. He referred to page 5 of the typed judgment showing that the trial court considered the defence evidence. Based on his submission, the learned State Attorney prayed that the appeal be dismissed for being devoid of merits.

I have critically examined the grounds of appeal, the record of appeal, and the submissions for and against the appeal. The main issues for consideration are three: **First**, whether there was a variance between the charge and the evidence adduced; **second,** whether the admissibility of the documentary exhibits PE2 and PE3 complied with the law; and **third**, whether the charge against the appellant was proved to the required standard.

Beginning with the first issue which covers the 1st ground of appeal, the appellant argues that the charge was defective based on the existence of variance between the charge sheet and the evidence adduced on the crime scene. His complaint is couched in the sense that the charge shows that the rape incident took place at Losirwa-Mto wa Mbu while in the adduced evidence all the prosecution witnesses did not point out Losirwa-

Mto wa Mbu as the crime scene. On his part, the learned State Attorney resisted the submission maintaining that all the prosecution witnesses testified that the crime scene was Losirwa an area within Mto wa Mbu.

At the outset, I subscribe to the submission by the learned State Attorney that there is no variance as the appellant purports. The record depicts that while testifying PW1 stated that she lived at Mto wa Mbu with her mother. Even when recording her particulars, PW1 stated that she was a resident of Mto wa Mbu. While testifying, PW1 accounted that on the material day she was from her business, retiring back to her home Mto wa Mbu. Similarly, PW2 while giving out his particulars before testifying, stated that he was a resident of Losirwa Mto wa Mbu. Likewise, PW3 testified that she was a clinical officer at Mto wa Mbu health center. PW4 as well testified that he was a police officer CID department at Mto wa Mbu police station. As pointed out by the appellant the charge sheet shows that the crime scene is Losirwa-Mto wa Mbu. From the above narrations from the prosecution witnesses, I do not buy the appellant's argument that there is variance between the charge and the evidence adduced regarding the crime scene.

The appellant's argument that none of the prosecution witnesses mentioned Losirwa as the crime scene is misconceived because the charge sheet itself does not mention Losirwa alone as the crime scene. It rather

points Losirwa-Mto wa Mbu insinuating that Losirwa is an area within Mto wa Mbu. That being the case and taking into account that all the prosecution witnesses pointed out Mto wa Mbu as the crime scene, it also included the Losirwa area since it is a place within Mto wa Mbu locality. That said, I do not find merit in the first ground of appeal, the same is dismissed.

The next issue for consideration is the admissibility of exhibits PE2 and PE3, the confession statement of the appellant, and the witness statement of the victim. This covers the 2nd, 4th, 5th, and 6th grounds of appeal. The record shows that on 25/08/2021 when PW4 sought to tender the confession statement of the appellant, the appellant objected based on the reason that, he was forced to sign the said statement by being brutally beaten. The court fixed the case for an inquiry hearing. However, for the next four consecutive adjournments, the appellant defaulted appearances, and on 05/10/2021 the prosecution sought to tender the statement as exhibit, whereas the trial court granted the prayer by admitting the confession statement as exhibit PE2. The question is whether the procedure for admitting exhibit PE2 was appropriate.

The prosecution purports to say that it was the appellant who jumped bail, therefore waived his right to have the inquiry conducted. The record shows that the case was adjourned from 25/08/2021 when an

order to conduct an inquiry was first issued, it was fixed for an inquiry hearing on 07/09/2021, 13,09/2021, 22/09/2021 and 30/09/2021, but in all those dates, the appellant was marked absent. The position of the law is that once an objection to tendering of a confession statement is raised, the trial court must stop everything and conduct an inquiry to determine the voluntariness of the accused in giving that statement. This cherished position of the law is rooted in the Court of Appeal decision in **Twaha Ali and Others vs The Republic**, Criminal Appeal No. 78 of 2004 (unreported), where it was held:

> *"In other words, the confession must be free from the blemishes of compulsion, inducement, threat, promises, or even self-hallucinations. However, we wish to associate ourselves with what was stated by the Supreme Court of Kenya in the case of N. V. LAKANI v R. [1962] E. A 644. In that case, the said Court stated clearly that it is not the law that there is a presumption that a confession or statement was not made voluntarily until the contrary is proved. On the contrary, it will be presumed to have been voluntarily made until objection to it is made by the defence on the ground that it was not so or that it was not made at all, etc. If that objection is made, after the trial court has informed the accused of his right to say something in connection with the alleged confession,* ***the trial court must stop everything and proceed to conduct an inquiry (or a***

trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence. (Emphasis added)

That position was followed in a number of decisions including, **Paulo Maduka & 4 Others vs The Republic**, Criminal Appeal No. 110 of 2007, **Daniel Matiku vs The Republic**, Criminal Appeal No. 450 of 2016, and **Shinje James vs The Republic**, Criminal Appeal No. 408 of 2017 (all unreported), to mention, but few.

In the appeal under consideration, the appellant's confession statement was admitted without conducting an inquiry. Failure to conduct the inquiry was precipitated by the appellant's absence in court on several dates. While agreeing with what was correctly stated by the learned State Attorney, that the case could not be adjourned to infinity, because the law demands that litigation must come to an end. I am however in disagreement that, the right recourse in the circumstances like the one at hand was for the court to admit the confession statement without conducting an inquiry. In my view, the situation would have been treated similarly to the circumstances where the accused had absented himself after he had pleaded not guilty to the charge. What the republic normally do is call the witness and prove the case in the absence of the accused person. This finding is rooted in the principle provided under section 27(2)

of the TEA that once it has been raised that the confession was not voluntarily made, it becomes the duty of the prosecution to prove that it was made voluntarily. To bring home the concept, the said provision is hereby reproduced;

> ***"27*** *(2) The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution."*

Based on the provision above, it was incumbent for the court to require the prosecution, after the accused had complained that he did not give it voluntarily, to prove that the same was voluntarily made even if that was to be proved in the absence of the accused. Under the circumstances, it was highly irregular for the trial court to admit the confession statement without conducting an inquiry as earlier scheduled. Omission by the trial court to conduct an inquiry was therefore fatal. Admission of exhibit PE2 did not conform to the required procedure.

Next but linked to the above is the admissibility of the witness statement of the victim (exhibit PE3), which was tendered and admitted on 20/10/2021, in the absence of the appellant. Since the statement contained the victim's evidence, which is considered the best evidence in sexual offences cases, the appellant who was absent on the day it was tendered and admitted in evidence was denied the right to cross-examine

such evidence. As the record bears, the decision of the trial court heavily was based on exhibit PE3 to convict the appellant. After noting that the appellant was absent in court, there is no record showing that the trial court took the trouble to trace his whereabouts, including summoning his sureties to state the whereabouts of the appellant or show cause why they should not pay the bail bond they signed. Failure by the trial court to follow the prescribed procedures to ensure the appellant's attendance, and the fact that it proceeded to receive the exhibits in his absence, tells it all that the appellant did not receive a fair trial.

The question is what is the way forward? Since the 2nd, 4, 5th and 6th grounds of appeal manifest that the trial magistrate in the conduct of the matter casually dealt with the case without observing the procedural requirements of the law, the better this Court can do is to order a retrial. That is resolved in tandem with the fact that the rest of the grounds of appeal hinge on the above-deliberated grounds. Hence the determination of the rest of the grounds will serve no useful purpose since their conclusion would be similar.

Grounds upon which retrial can be ordered are said to be when the original suit was illegal or defective as echoed in the famous decision of the erstwhile Court of Appeal for Eastern Africa in **Fatehali Manji vs Republic** [1966] 1EA 343 which held that:

"In general, a retrial will be ordered only when the original trial was illegal or defective/ it will not be ordered where the conviction is set aside because of insufficiency of evidence or to enable the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

In the appeal at hand, the case is found defective based on the procedural flaws above outlined. In the interest of justice, the circumstances, in this case, attract an order for a retrial. Consequently, I allow the appeal and proceed to nullify the proceedings of the trial court from 05/10/2021, when to exhibit PE2 and subsequently exhibit PE3 were admitted in evidence. Eventually, I quash the conviction and set aside the corresponding sentence as well. Finally, I order the file to be remitted back to the trial court for a retrial from the stage of an inquiry to be conducted expeditiously before another magistrate. In the meantime, the appellant shall remain in prison.

DATED and delivered at **ARUSHA** this 9th June 2023

HIGH COURT OF TANZANIA

J. C. TIGANGA

JUDGE