IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)
AT MOSHI

CRIMINAL APPEAL NO. 41 OF 2022
(C/F District Court of Moshi Criminal Case No. 14 of 2020)

MARCO ZAKARIA PAULI..... APPELLANT
VERSUS
REPUBLIC..... REPONDENT

JUDGMENT

Last order: 24/04//2023
Date of Judgemet:29/05/2023

MASABO, J.:-

This is an appeal against the decision of the District Court of Moshi at Moshi in Criminal Case No. 14/2020 in which the appellant herein was convicted of rape contrary to section 130(2) (e) and 131(1) of the Penal Code [Cap 16 RE 2019] now [RE 2022] and sentenced to serve 30 years in jail. The conviction and sentence have aggrieved him and he is currently challenging them before this court.

In the trial court, it was alleged that on 10th December 2020, at Majengo Kyomu area within Moshi District in Kilimanjaro Region, the appellant had carnal knowledge of a 11-year-old girl. For concealment of identity, I shall refer to her as the victim or simply, PW3. The appellant d disputed the accusation and the case proceeded to full trial after which it was held that the case against him was proved beyond reasonable doubt. His appeal is based on the following six grounds of appeal vide which the appellant has lamented that the trial court grossly erred in law and fact by, **one,** relying on the evidence of PW3, a child of tender age which was recorded in

contravention of section 127(2) of the Evidence Act; **two,** convicting him while the prosecution's evidence was tainted with contradictions and discrepancies; **three,** convicting him while one Mzee Swalehe and PW3's young brother who are material witnesses were not called; **four**, convicting and sentencing him while there was clear variation between the charge and evidence on the date of commission of offence; **five,** by convicting and sentencing him while exhibit P4 (certificate of seizure) was not read out in court and **six**, by convicting and sentencing him while the case was not proved beyond reasonable doubt.

The hearing proceeded partially in writing and through oral submissions at the request of the learned state Attorney and consent of the appellant. The appellant was unrepresented while the respondent enjoyed the services of Ms. Rose Sule, learned State Attorney.

In his written submissions, the appellant submitted on the 1st, 2nd, 3rd and 5th grounds separated and consolidated the 4th and 6th grounds together. Submitting in support of the 1st ground, the appellant argued that the trial court offended the requirements under section 127(2) of the Evidence Act [Cap 6 RE 2022] as prior recording PW3's testimony, it asked her some questions to determine if she understood the nature of oath and she replied in the affirmative. Afterwards, PW3 stated; *"...I shall speak the truth".* He argued that, the reply fell short of the requirement of section 127(2) of the Evidence Act that a child witness of tender age must promise to tell the truth and not to tell lies. PW3's promise was only to tell the truth. She did not promise not to tell lies and therefore her promise was incomplete. He supported his argument with the case of **Rajabu Ngoma**

Msangi vs Republic, Criminal Appeal No. 22 of 2019 at pages 8-9 where the court did not accord evidential value to the evidence of a child of tender age as she did not promise to tell the truth and not lies. Citing the case of **Godfrey Wilson vs Republic**, Criminal Appeal No. 168 of 2019 at Bukoba (unreported), he prayed that the testimony of PW3 be expunged from the record.

On the 2nd ground, he submitted that the trial magistrate failed to observe that the prosecution evidence was loaded with contradictions and discrepancies which affected the credibility of witnesses and made them unreliable. Without diverging the specific contradictions, he averred that there were contradictions between the testimony of PW3 and PW1. Submitting on the 3rd ground, he argued that PW3's young brother who was allegedly in the house on the material day, was not brought as witness before the court. Also, one Mzee Swalehe who is alleged to have arrived to help PW3 after she screamed for help, was also not brought before the court as a witness. These two, he argued, were crucial witnesses and if they were brought, they would have corroborated the prosecution's evidence. The failure to call him attracts an inference adverse to the prosecution's case a fact which the trial court overlooked. On the 5th ground of appeal, he submitted and argued that exhibit P4, the certificate of seizure was not read out in court after its admission. Thus, it ought not to have relied upon in holding that the seized items were indeed seized and that they belonged to him. He prayed that this document be expunged from the record.

On the consolidated 4th and 6th ground, he submitted that there was variance between the charge and evidence as to the date of the commission of the crime. He argued that the charge indicated that the offence was committed on 10/12/2020 but in her testimony, at page 13 of the typed proceedings, PW3 stated that the offence took place on 5/12/2020 and the police wrote that it was on 10/12/2020. He argued the variation presupposes that, the charges against him were fabricated. He argued further that, since the evidence given was not in support of the charge then the charge was not proved beyond reasonable doubt. Based on this, he prayed that his appeal be allowed, the custody conviction and sentence be set aside and he be discharged.

In her reply submissions, Ms. Rose Sule, learned State Attorney submitted in support of the conviction and sentence. She argued that, the charge against the appellant was proved beyond reasonable doubt. On the 1st ground, she referred the court to page 10 of the typed proceedings in which she stated, the testimony of PW3 was taken after she had promised to tell the truth and therefore the appellant's lamentation lacked merit. As to the 2nd ground, Ms. Sule submitted that there were no inconsistencies in the evidence rendered by the prosecution witnesses. All the three witnesses mentioned the date of the incident and the place at which it was committed. The inconsistence if any did not go to the root of the matter and should be ignored.

On the 3rd ground of appeal, she submitted that, the law does not specify the number of witnesses required to prove a case as stated under section 143 of the Evidence Act. All that matters is the quality of evidence and

not the quantity of witnesses. Thus, the prosecution had liberty to call the witnesses it deemed appropriate to prove the case. On the 4th ground as to the discrepancies, she referred to pages 7, 8 and 10 of the proceedings where, PW1, PW2 and PW3 respectively stated that the offence was committed on 10/12/2020 but later on she stated that she did not remember the date. The argument that the dates were at variance with no merit and should be ignored and dismissed. On the 5th and 6th grounds, she submitted that the case against the appellant was proved beyond reasonable doubt as PW3, the victim, had a good testimony. She narrated how she was raped and threatened to be killed by the appellant. Ms. Sule argued further that, it is trite law that in sexual offences the evidence of the victim is the best evidence (see **Seleman Makumba vs Republic** [2006] T.L.R.379). Since the evidence of victim in the present case was intact and credibly corroborated by PW1, PW2 and PW4, the conviction and sentence are at no faulty and should be upheld and the whole appeal dismissed.

I have carefully considered the submissions above and thoroughly read the trial court record placed before me. This being a first appeal, I will proceed under the confines of the role of the first appellate court as stipulated in a plethora of authorities, among them, the case of **Standard Chartered Bank of Tanzania Ltd vs National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008, CAT as cited in **The Registered Trustees of Joy in the Harvest vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017 (both unreported) where it was held that:

> "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 stand (**Peters v Sunday Post**, 1958 EA 424; **William Diamonds Limited and Another v R**,1970 EA 1; Okeno v R, 1972 EA 32)".

While examining the record, I have observed that in proof of its case, the prosecution called six witnesses: - PW1, Stanley Anderson Kimath; PW2, Panaska Mmari who is the victim's guardian; PW3, the victim; PW4, Dr. Sudi Mohamed, a medical doctor who examined the victim; PW5, WP 2133 SSgt Mariam, the investigator of the case and the victim's grandmother one Asha Ismail, PW6. From the testimonies of these witnesses, it was gathered that, on the fateful day of 10/12/2020 at around 10:00hrs, the appellant walked into the house of PW3 where she lived with her young brother and their grandmother, PW6 who used to trade in local brew. The appellant wanted PW3 to sell him a local brew trading by name of Wanzuki. PW3 refused to sell him the brew as it was morning hours and informed him that she would start selling the same around 16:00hrs. The appellant forced his entry to their house and sat on a bucket in their living room. He ordered her to give him 10 servings of the brew each costing Tshs 1,000/- which she did. She then went to her room and started playing a game in a mobile phone. Her young brother who was also present went outside to play.

The appellant had the brew and after he had finishing sipping it, he locked the outer door and entered PW3's bedroom. While threatening to kill her if she cried or screamed, he forcefully pulled her to a bed, took off her pant and his trouser and boxer. He then put down the knife he was

holding, tied her legs and arms to the bedside and thereafter he inserted his manhood into PW3's vagina. PW3 stated further that the incident was painful but could not shout in the fear of being killed. After he had finished, she managed to cry out for help whereby one Mzee Swalehe came to her rescue where, he found the accused still inside. When he asked to him to leave, he refused and threatened him whereby he screamed for help and when the neighbors responded, the appellant ran away leaving away his mobile phone, gumboots and a sheet which were seized. PW3 was sent to hospital and upon being examined by PW4 she was found with no hymen suggesting that a blunt object had penetrated her vagina. PW4 filled in a PF3 which was later on tendered and admitted in court as exhibit. The items seized were also tendered and admitted as exhibits.

In defence, the appellant averred that, the case had been farmed up by his employer, one Mzee Swalehe who only paid his wages once and refused to pay him thereafter. When he demanded his pay, the said Mzee Swalehe threatened to 'fix him' and a few months later he was arrested and charged with the offence herein.

Upon weighing the evidence of both parties, the trial court found that the case was proved beyond reasonable doubt hence convicted and sentenced the appellant.

My task therefore, is to revisit the evidence, determine the grounds of appeal and ultimately answer the question whether the case against the appellant was proved beyond reasonable doubt and he deserved the

conviction and sentence passed against him. In this endeavor, I prefer to start with the fourth ground of appeal as regards the alleged variance on the dates of the incidence as appearing in the charge sheet and the evidence on record.

It is trite law in our jurisdiction that, when a specific date, time and place is mentioned in the charge sheet, the prosecution is duty bound to lead evidence in proof that the offence was committed on that specific date time and place. A variance, if any between the charge sheet and the evidence led by the prosecution can be cured through an amendment of the charge at any time before the judgment under Section 234 (3) of the Criminal Procedure Act [Cap 20 RE 2019] (See decision of the Court of Appeal in **Said Msusa vs Republic**, Criminal Appeal No. 268 of 2013 (unreported), **Salum Rashid Chitende v. R**, Criminal Appeal No. 204 of 2015 (unreported) as followed **Godfrey Simoni & Masai Yosia v The Republic**, Criminal Appeal No. 296 of 2018).

In the present case, the appellant has alleged that there is variance between the date of the incidence appearing in the chargesheet and the one mentioned by prosecution witnesses in that, the charge sheet shows that the offence was committed on 10/12/2020 whereas PW3 stated it was committed on 5/10/2020. In my scrutiny of the record, I have observed that, all the witnesses who were directly involved in the rescue of the victim stated that the incident happened on 10/12/2020. These include PW1 who was the first to arrive at the scene whereby, he found both the appellant and the victim in the house, PW2 who received PW3 at the village office and who has since then taken the victim under her

custody as a guardian and PW4, the doctor that examined PW3 who testified in court that when PW3 was brought to her for examination on 10/12/2020 she was informed that the incident had happened in past 5 hours. Also relevant is the evidence of PW5, the investigator of the case whose uncontroverted testimony was that, the items were seized on 11/12/2020, which was one day after the incidence. It has been further observed that even PW3 had on two instances during examination in chief mentioned 10/12/2020 as the date of the incidence. The confusion on her account of the date occurred in the course of cross examination whereby she mentioned 5/12/2020 as the date of the incidence and on further cross examination, she relayed she was unsure of the date of the incidence.

From the foregoing, it is crystal clear that, much as the law provides for amendment as a cure for the disparity, in the circumstances of the present case, such amendment was unnecessary considering that the overwhelming evidence was commensurate to the date of the incidence appearing in the charge sheet. I find it to be in the broad interest of justice to accord the present case a treatment peculiar to its circumstances due regard being to the trauma which the victim, a child of tender age and an orphan, might have endured because of the serial rape incidents (as per her testimony and the testimony of PW2), the life threat inflicted on her during the incidence by the appellant who was the same person cross examining her, the sense of rejection by her grandmother who instead of providing her the love, care and the protection she needed, sided with her assailant and threaten to kill her for ruining her local brew business. When these facts are put together, the chances of the confusion exhibited by

PW3 and the reasons thereto, becomes too obvious. As the record will show, in the course of cross examination she broke into tears and uttered statements which best explains her sense of rejection and endurance. At page 12 to 13 of the proceedings, she was recorded saying "mimi sina haki sababu baba yangu amefariki hivyo bibi yangu anakutetea tu, ili auze pombe yake' and having said these words she started crying.

In the foregoing of the above, I find the contradictions in PW3's account of the date of the incidence a minor discrepancy and for the reasons above discussed, excusable and less injurious to the prosecutions case. The fourth ground of appeal consequently fails.

The first ground of appeal to which I now turn, concerns compliance with the requirement of section 127(2) of the Evidence Act whereby it has been argued that, the testimony of the victim, PW3 was procured in contravention of this provision and she did not undertake to not to tell lies. For the respondent, it has been submitted that, there was no faulty as section 127(2) was duly complied with by the trial court.

This provision has been prominently litigated in our courts. It recognized a child of tender age as a competent witness but requires that, the testimony of such a child should be procured on oath or upon an undertaking to tell the truth. It states thus:

> "A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."

Interpreting this provision in a plethora of authorities, the Court of Appeal has directed that, before recording the testimony of child of tender age, he should be made to answer a set of questions vide which her competence shall be tested after which she may be led to give evidence on oath or upon an undertaking to tell the truth (see, **Shomari Mohamed Mkwama vs Republic,** Criminal Appeal No. 606 of 2021 [2022] TZCA 644; **Ramson Peter Ondile vs Republic, C**riminal Appeal No. 84 of 2021 [2022] TZCA 608**; Omary Salum @Mjusi vs Republic, C**riminal Appeal No. 125 of 2020 [2022] TZCA 579 and **John Mkorongo James vs Republic,** Criminal Appeal 498 of 2020, [2022] TZCA 111 (all from TANZLII).

The victim in the present case being of 11 years was of a tender age hence subject to the procedure above. As per the evidence on record, I have observed that, PW3 was subjected to a set of simple questions and in reply, she stated her age, her religion and knowledge of the oath. She thereafter made her undertaking to tell the truth. The appellant has invited me to consider the undertaking partial as the victim did not undertake not to tell lies. With respect, I decline the invitation. The victim's undertaking that she shall speak the truth, suffices the requirement of section 127(2) of the Evidence Act. To this end, the first ground of appeal is found to have no merit.

On the 2nd ground, the appellant claims there are inconsistencies or discrepancies in the evidence rendered by the prosecution witnesses notably, PW1 and PW3, the details of which was not disclosed. Looking at the testimony of these two witnesses I have observed that, save for the

date of the incidence which I have thoroughly considered and determined, these three witnesses slightly differ in the narration of the events after that followed the incidence. Whereas PW1 narrated that PW3 is the one who opened the door, PW3 testified that PW1 is the one who untied his legs which had been tied to the bedside by the appellant. The law requires that, where there are discrepancies in the evidence, they must be addressed to ascertain whether they are grounded on root of the matter hence prejudicial or they are just minor and inconsequential (See **Dickson Elia Nsamba Shapwata and another vs Republic** (Criminal Appeal No. 92 of 2007) [2008] TZCA 17; **Mohamed Haji Ali vs Director of Public Prosecutions** (Criminal Appeal No. 225 of 2018) [2018] TZCA 332 and; **Swaibu Amani Shabani vs Republic** (Criminal Appeal 87 of 2021) [2023] TZCA 110 (all in Tanzlii). From the judgment of the trial court, it is apparent that this discrepancy was neither addressed nor resolved. In resolving the same, I have found minor and inconsequential to the case as it concerns things that transpired after the commission of the offence hence does not go to the root of the case. Accordingly, the second ground of appeal fails.

The complaint in the 3rd ground of appeal is that, some material witnesses were not summoned to testify in court and these include PW3's young brother and one Mzee Swalehe Stanley and on the basis of this it has been argued that, I draw an inference adverse to the prosecution while on the other hand, the learned state Attorney has argued that the adverse inference is unwarranted considering that no specific number of witnesses is required to prove the case and that it is within the discretion of the prosecution to decide who between the witnesses is a material one.

Indeed, as per section 143 of the Evidence Act, no particular number of witnesses is required to prove a case as what matters is the quality not the quantity of evidence. It is similarly trite that, much as the prosecution exercises discretion in parading their witnesses, all the material witnesses should be summoned and the failure to parade them attracts an inference adverse to their case. Reciting these this principle in **Omary Hussein © Ludanga & Hashimu Abdalllah @ Simba,** Criminal Appeal No. 547 of 2017, the Court of Appeal stated thus;

> Much as we are aware that in terms of section 143 of the Evidence Act, Cap 6 R.E. 2019 no particular number of witnesses is required for the proof of any fact, the law is very clear where a crucial witness who is within reach is not called to testify in court. Failure to call such material witnesses entitles the Court to draw adverse inference where such witnesses are within reach but are not called without sufficient reason being shown by the prosecution - (See Aziz Abdalla v. Republic [1991] TLR 7

In my firm view, the omission to parade the two witnesses above named does not attract an interference adverse to the prosecution as none of these two was an eye witness to the rape. PW3 was not in the house when his sister was molested as he had gone to play. Similarly, Mzee Swalehe Stanley was not at the scene when the crime was committed. He came later. His evidence would merely corroborate PW3 account on the perpetrator of the crime an account which sufficiently proved by PW1. The 4th ground of appeal is, in the foregoing, without merit.

On the 5th ground of appeal, it has been ardently submitted and argued that the certificate of seizure which was admitted as Exhibit P4, should be expunged from the record as its content was not read out in court after admission. Indeed, as correctly submitted by the appellant, it is a mandatory requirement that once a document is tendered and admitted during trial, its content must be read out. Omission to read out the content is fatal anomaly pregnant with miscarriage of justice (see, **John Ngonda vs Republic**, criminal Appeal No, 45 of 2020, [2023] TZCA 13 (Tanzlii); **Jumanne Mondelo vs Republic**, Criminal Appeal No. 10 of 2018 (unreported) and **Ramadhani Mboya Mahimbo vs Republic**, Criminal Appeal No. 326 of 2017 [2021] TZCA 556 (Tanzlii)). In the instant appeal, the record prominently exhibits none adherence to this rule. After the certificate of seizure was tendered by PW5 and admitted as exhibit P4 its content was not read out. Hence, it is liable for expungement.

Turning to the final ground of appeal, it has been submitted that on the basis of the anomalies he has asserted, it is obvious that the prosecution did not prove its case beyond reasonable doubt. In the light of what I have demonstrated above, I find this argument misconceived as the trail court's finding that the case against the respondent was sufficiently proved to the required standard appears to me not to have been plunked from the air. It was based on adequate materials on record. In particular, the testimony of PW3, the victim, who gave a detailed account on the incident. She eloquently narrated how the appellant entered PW6's home where she was then residing, how he forced her to serve him the local brew, how after finishing the brew he went to the bedroom, locked her in, threatened her with his knife, undressed her, tied her legs up, pushed

down his trouser and pant and ultimately penetrated her by entering his penis into her vagina.

It is a trite law in criminal trials involving sexual offences that, in such cases the evidence of the victim, if found credible, is the best evidence and capable of mounting conviction even in the absence of corroboration (**See Seleman Makumba (supra); Aman Ally @ Joka vs Republic** (Criminal Appeal 353 of 2019) [2021] TZCA 170 (Tanzlii) and; **Mussa Sebastiani vs Republic** (Criminal Appeal 406 of 2018) [2021] TZCA 119 (Tanzlii). In the present case, the trail court which was best to assess PW3's credibility found her credible and believed her narration of what befell her. Under the premises, and since in my scrutiny of the record I did not find anything suggesting that she was not credible and no such indication has been raised by the appellant, I see no reason to doubt her.

The record demonstrates further that, much as PW3's testimony which the law regards as the best evidence was strong enough to mount a convict against the appellant in the absence of any corroboration, it was credibly corroborated by PW1, PW2 and PW4. PW1 was the first to arrive at the scene. He found the appellant in PW6's house and when he asked the appellant what had happened, he threatened him. This witness, did not end there, he immediately afterwards sent PW3 to the village office where she was received by PW2 who reported the matter police and had PW3 examined by PW4. After the examination, PW4 filled the PF3 indicating that she observed that PW3 had no hymen suggesting she was penetrated by a blunt object.

To this end, I agree with the trial court's finding that indeed the prosecution proved the offence of rape against the appellant beyond reasonable doubt.

Accordingly, save for the 5th ground of appeal which passes, this appeal lacks merit. I consequently dismiss it and uphold the conviction and sentence of the trial court.

DATED and DELIVERED at Moshi this 29th Day of May 2023

J.L. MASABO

JUDGE