IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

DC CRIMINAL APPEAL NO. 16 OF 2023

(From the District Court of Tabora, Criminal Case No. 03 of 2022)

BATHOLOMEO KILANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 16/06/2023
Date of Judgment: 30/06/2023

KADILU, J.

In the District Court of Tabora, the appellant was convicted of rape contrary to Sections 130 (1) (2) (e) and 131 (3) of the Penal Code [Cap. 16 R.E. 2002]. He was sentenced to life imprisonment. It was alleged by the prosecution that on 24/12/2021 during the evening hours at Kipalapala area, Itetemia Ward within the Municipality and Region of Tabora, the appellant did have carnal knowledge with a child of 05 years, whom I shall be referring to as the victim. It is the prosecution's account that at the time of the incident, victim was a kindergarten pupil in St. Joseph Primary School which is owned by Kipalapala Catholic Church and the appellant was a choir singer.

The facts which led to the conviction of the appellant are these. On the fateful day, the victim went to the church for choir practice and Juto called her saying he wanted to sing and play piano with the victim. The two

went to Juto's room where he took off the victim's garments and have sexual intercourse with her. After finishing, the appellant escorted the victim up to one, mama Eliza's home, then the appellant went back to the church. According to the victim's mother, on 25/12/2021, she saw the victim's hands, stomach and chest swollen. On inquiry, the victim informed her mother that she fell down and got injured.

On 27/12/2021 when the mother was bathing the victim, the victim complained of pains whereby the mother noticed changes in the victim's vagina. On further inquiry, the victim informed her mother that she was raped by Juto. The mother reported the incident to victim's choir trainer, one sister Evamaria Wille. On 29/12/2021, the mother and sister Evamaria reported the incident to Tabora Police Station. On the same day of 29/12/2021, the victim was taken to Kitete hospital. Cautioned statements of the victim and that of her mother were recorded on 30/12/2021 and 31/12/2021 respectively.

During the trial of this case, the prosecution informed the court that the victim and her mother had shifted to unknown place and that, they could not be called to testify. As a result, their statements were admitted under Section 34B of the Evidence Act [Cap. 6 R.E. 2019]. The statements were tendered by a police officer who recorded them. She testified as PW2 and the statements were admitted by the court as exhibits P2 and P3. To support documentary evidence of the prosecution, the medical Doctor who examined the victim after the incident testified as PW1. He tendered an examination

report of the victim. The appellant was then convicted and sentenced as already shown. Aggrieved, he filed this appeal consisting of the following grounds:

1. *That, the prosecution case was not proved against the appellant beyond reasonable doubt as required by the law.*
2. *That, the learned trial Magistrate erred in law and facts for failure to note that there was no proof that reasonable steps were taken by the prosecution to procure attendance of the victim and her mother as required by Section 34B (2) (a) of the Evidence Act.*
3. *That, the trial court was not told whether Juto who was mentioned in the statement of the victim as the culprit is one and the same person as the appellant herein.*
4. *That, the trial court erred in law and facts for failure to make adverse inference on the prosecution for not summoning the alleged sister of the church who in the circumstances of this case, was material witness.*

When the appeal was called for hearing, the appellant was represented by Mr. Kanani Chombala, Advocate whereas the respondent was represented by Ms. Suzan Barnabas, Ms. Joyce Nkwabi and Ms. Upendo Florian, all learned State Attorneys. In support of the appeal, Mr. Chombala submitted that the prosecution did not prove the case against the appellant beyond reasonable doubt because there was unexplained delay in reporting the incident to the police. The incident occurred on 24/12/2021 and it came to the knowledge of the victim's mother on 25/12/2021, but she reported to police on 29/12/2021. Mr. Chombala stated that in absence of reasonable and sufficient explanations, the delay of 5 days in reporting rape incident creates doubt whether the offence was really committed.

Mr. Chombala submitted further that while evidence of the victim is crucial in rape cases, in the instant case there was no victim's evidence as she was not called to testify. According to Mr. Chombala, the trial court admitted cautioned statement of the victim without precaution, something which is dangerous in the administration of criminal justice. He said, before relying on Section 34B of the Evidence Act in admitting the statement, the trial court was supposed to ensure that the prosecution had undertaken due diligence to satisfy itself that the victim and her mother could not be found as required by Section 34B (2) (b) of the Evidence Act.

Mr. Chombala added that Sections 101, 102, 103 and 108 of the Criminal Procedure Act [Cap. 20 R.E. 2019] were not complied with since the proceedings of the trial court are silent about whether or not summons were issued and served to the victim and her mother. In addition, there was no an affidavit which was sworn to show that initiatives were made to procure attendance of the victim and her mother to the court, but proved futile. Mr. Chombala said, the assertation that the victim and her mother could not be found is a mere statement from the bar.

Submitting on the third ground of appeal, Mr. Chombala stated that the trial court was not told whether Juto who was mentioned in the statement of the victim as the culprit is one and the same person as Batholomeo Kilanga who is the appellant herein. According to Mr. Chombala, there was no linkage between the appellant and the committed offence. The learned Advocate referred to the case of ***Mohamed Sai v R.***, Criminal

Appeal No. 145 of 2017 and concluded that in the instant case, prosecution evidence was not sufficient to convict and sentence the appellant.

It was further submission of Mr. Chombala that, the trial court erred in law and facts when it failed to make adverse inference against the prosecution for not summoning sister Evamaria Wille who in the circumstances of this case, was a material witness. The learned Advocate explained that evidence of the sister was necessary because she was the supervisor of children in the church at the time of the incident. The matter was reported to her by the victim's mother immediately and she was the one who accompanied the victim's mother in reporting the incident to the police. Mr. Chombala prayed the trial court's proceedings to be nullified and this appeal to be allowed.

Replying on the grounds of appeal, Ms. Upendo Florian started to argue the 4th ground of appeal in which the appellant contended that sister of the Catholic Church was not called to the court as a witness. The learned State Attorney submitted that the said sister was not key witness on part of the prosecution because she was not an eye witness of the incident. Ms. Upendo explained that Section 143 of the Evidence Act is clear that no particular number of witnesses is required for the proof of any fact in any case so, the prosecution was not bound to call the alleged sister as a witness.

Concerning the second ground of appeal, the learned State Attorney replied that all procedures were complied with in relying on Section 34B of

the Evidence Act, including the issuance of notice. She referred the court to pages 15 and 16 of the trial court's proceedings in which the prosecution gave notice of its intention to rely on the above provision in tendering cautioned statements of the victim and that of her mother. She added that due diligence was undertaken to get the victim and her mother, but all were unsuccessful because the two had left from where they used to live when the offence was committed.

Whether or not Juto is the same person as Batholomeo Kilanga, the State Attorney replied in affirmative. She explained that statement of the victim shows that Juto who is the appellant herein used force in raping the victim and penetration was proved by PF3 which was admitted as exhibit P1. According to the State Attorney, cautioned statement of the victim, the medical doctor and PF3 showed that the appellant penetrated the victim forcefully. She therefore maintained that the case against the appellant was proved beyond reasonable doubt.

Finally, Ms. Upendo argued that the appellant's complaint that the incident was reported to the police lately, is baseless as there is no law which prohibits the victim of rape to report the offence at any time after the incident is realized. She then implored this court to dismiss the appeal for lack of merits.

After having examined submissions of both parties, the point for determination is whether the appeal is meritorious or not. I will begin with

the ground on non-compliance with provisions of the law with regard to admission of statements of persons who cannot be called as witnesses. As it has come to light, the victim of the offence did not testify in court. It was said that the victim and her mother had left the place they used to live. The appellant complained that cautioned statement of the victim was admitted without there being proof that the victim could not be found and without complying with the provisions of Sections 101, 102, 103 and 108 of the CPA. For easy reference, I take liberty to reproduce Section 34B (2) (b) of the Evidence Act:

> *"A written or electronic statement may only be admissible where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend."*

From the quoted provision, it is apparent that cautioned statements of the victim and that of her mother would only be admitted in lieu of their direct oral evidence if they were dead or unfit by reason of bodily or mental condition to attend as witnesses, or if they were outside Tanzania and it was not reasonably practicable to call them as witnesses, or **if all reasonable steps had been taken to procure their attendance but they could not be found** or they could not attend because they were not identifiable or by operation of any law they could not attend.

In my views, circumstances of this case dictates that for cautioned statement of the victim to be admissible by the trial court, it was mandatory for the prosecution to show that all reasonable steps were taken to procure her attendance but she could not be found. I consider that it is imperative at this point to reproduce the proceedings leading to the admission of exhibits P2 and P3. The relevant part of the proceedings starts from page 15 of the trial court's typed proceedings which goes like this:

PP: "I pray for another date of hearing. Unfortunately, the victim has not been found. We are still searching for her and her parents. We pray to proceed under Section 34B of the Evidence Act. The victim has moved from where they used to live."

Accused: "I have no objection."

The court adjourned the case to 30/12/2022. When the matter came up again for hearing of the prosecution case on 30/12/2022, the Public Prosecutor addressed the court as follows:

"The matter is coming for hearing. I do not have witnesses today as the victim and her mother have moved. I pray to file notice under Section 34B (1) and (2) (d) (e) of the Evidence Act, R.E. 2022 so that their statements may be tendered by the police and be used as exhibits if there is no objection from the accused."

Accused: "I have no objection."

After the accused (now the appellant) having replied that he had no objection, the statements were then tendered by WP 7695 D/C Neema who

testified as PW2 and admitted by the court as exhibits P2 and P3. There is nothing on record to show that all reasonable steps were taken to procure attendance of the victim and her mother but they could not be found. For example, no summons was sought and served anywhere in an attempt to procure attendance of the victim prior to the production of her statement as an exhibit. This violated the provisions of Section 34B (2) (b) as correctly argued by the Advocate for the appellant. I thus, find the second ground of appeal meritorious and allow it.

The other complaint by the appellant is that the trial court was not told whether or not Juto is the same person as Batholomeo Kilanga who is the appellant herein. This ground of appeal needs not to detain me much as the record of the trial court is clear that the charge sheet which was used to arraign the appellant before the court bears the names, Batholomeo s/o Kilanga. Both the prosecution and defence witnesses referred to the appellant as such. The name, Juto only features in the cautioned statements of the victim and her mother who, as I have demonstrated, were not called to testify. Thus, cautioned statement of the victim did not anyhow link the appellant with the alleged offence.

The Court of Appeal held in the case of ***Antony Kinanila & Another v R.,*** Criminal Appeal No. 83 of 2021 that, in any criminal trial, the prosecution bears the burden to prove beyond reasonable doubt not only that the offence was committed, but also it was committed by the accused person or that he participated in the commission of the offence to the extent

and degree as prescribed by the law. In the circumstances of this case, the trial court was expected to engage into an inquiry to find out if Juto who was mentioned in the victim's statement is the same person as Batholomeo Kilanga or not. Since that was not done, I allow the third ground of appeal for being meritorious.

The appellant's other complaint is that there was unexplained delay in reporting the incident to the police since the report was made in the 05th day after the date of the alleged rape. The learned State Attorney argued that there is no law prohibiting the rape offences to be reported lately. As depicted in the proceedings, the offence was committed on 24/12/2021, but it was reported to the police on 29/12/2021. There is no dispute that there was delay in reporting the offence to the police given the nature of the offence itself.

Notwithstanding, there was no clarification from any of the prosecution witnesses as to why there was such a delay. I think in rape cases, five (05) days is a very long time to remain without reporting the incident to local authorities or to the police. Such a delay is a serious and fatal omission on part of the prosecution, weakening the credence of their case. In the case of ***Marwa Wangiti Mwita & Another v. R.***, [2002] TLR 39, it was held that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability.

It is also the appellant's contention that the prosecution failed to summon the Catholic Church sister to whom the incident was firstly reported by the victim's mother. Although it is true that there is no specific number of witnesses required in proving a certain fact, I am of the considered view that the circumstances of this case suggests that the alleged sister was an important witness. I therefore do not agree with the submission by the learned State Attorney that the prosecution was not bound to call the alleged sister for it to prove its case. Nevertheless, the appellant was at liberty to call the said sister as a defence witness. As he did not do so, he cannot be heard complaining that the prosecution failed to call her while she was a material witness. This ground of appeal is thus baseless hence, it is dismissed accordingly.

Coming to the question whether or not the case against the appellant was proved beyond reasonable doubt, it is the finding of this court that the prosecution had managed to prove that the girl was indeed raped, but still it was its burden to prove cogently that it was the appellant who raped the girl. *See* the case of ***Maliki George Ngendakumana v R.***, Criminal Appeal No. 353 of 2014, Court of Appeal of Tanzania at Bukoba, in which it was held that the prosecution's duty to prove the offence is two folds, first to prove that the offence was committed, and second to prove that it was the accused who committed that offence.

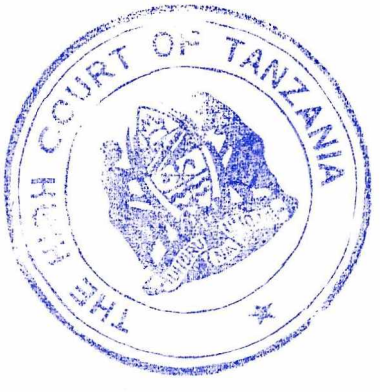
As I have shown, prosecution evidence in this case was surrounded by numerous weaknesses making it unreliable as I have endeavoured to

illustrate. For the reasons, I hold that the case against the appellant was not proved beyond reasonable doubt. I allow the appeal, quash the conviction and set aside the sentence against the appellant. I order immediate release of the appellant from prison unless held for some other lawful cause. Right of appeal is fully explained.

Order accordingly.

KADILU, M.J.,
JUDGE
30/06/2023

Judgement delivered in Chamber on the 30th Day of June, 2023 in the presence of Mr. Kanani Chombala, Advocate for the appellant and Ms. Upendo Florian and Ms. Joyce Nkwabi, State Attorneys, for the Respondent.



KADILU, M. J.
JUDGE
30/06/2023.