**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE SUB REGISTRY OF KIGOMA)**

**AT KIGOMA**

**DC CRIMINAL APPEAL NO. 30 OF 2022**

(Originating From Criminal Case No. 109 of 2021 of District Court of Kigoma)

**DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT**

**VERSUS**

**MOHAMED AHMAD @ KAMBALE @ YASIN .....1ST RESPONDENT**

**SANGO VEDASTO.....2ND RESPONDENT**

**Date of last Order: 26/06/2023**

**Date of Judgement: 21/07/2023**

**JUDGEMENT**

**MAGOIGA, J.**

In the district court of Kigoma (trial court), the respondents, **MOHAMED AHMAD @ KAMBALE @ YASIN and SANGO VEDASTO** were arraigned with one offence of gang rape contrary to section 130(1) (2) (a) and 131A (1) and (2) of the Penal Code, [Cap 16 R.E. 2019].

After full trial, the trial court found the two accused persons not guilty of the offence and acquitted them.

Aggrieved with the whole decision of the trial court, the appellant preferred this appeal to this court armed with four grounds of appeal, couched in the following language, namely:

1. *The trial Magistrate erred in law and in fact for acquitting Respondents on the ground that the statement of PW2 recorded on 15/09/2021 and 21/09/2021 had a contradiction without considering her testimonial at the trial;*
2. *That, the trial magistrate erred in law and facts by relying on two statements of PW2, recorded on 15/09/2021 and 21/09/2021 while the procedure of impeaching statement of witness was not followed;*
3. *That, trial magistrate erred in law and in fact by acquitting the respondent on minor contradictions which did not go to the root of the case;*
4. *That, the trial Magistrate erred in law and fact by holding that failure of prosecution to call some witness caused adverse inference to the prosecution case without taking into consideration that the prosecutions are not obliged to call each and every witness, and witnesses testified proved the offence beyond reasonable doubt.*

On the strength of the above grounds, the appellant prayed that his appeal be allowed and judgement of the trial court be set aside.

The brief facts as gathered from the charge sheet are that on the 15th day of September, 2020 at Mlole area within Kigoma District in Kigoma Region, the respondents did have canal knowledge to one **K d/o M** (pseudo name) a girl of 13 years old.

When this appeal was called on for hearing, the appellant (Director of Public Prosecution) was represented by Ms. Antia Julius, learned State Attorney who appeared through video conference from the National Prosecution Service's Office. On the other hand, the respondents were represented by Mr. Daniel Rumenyela learned advocate ready for hearing. Ms. Julius told the court that she will argue grounds number 1 and 2 together and the rest will be argued separately. According to Ms. Julius, the trial court erred in law and fact to acquit the respondents on the ground that there were contradictions in exhibit D1, D2 and D3 without considering her oral testimony in court. The learned Attorney charged that the essence of section 164(1) (c) of the Tanzania Evidence Act, [Cap 6 R.E.2019] is to contradict the witness with his former statement at police and the one testifying in court. But to her surprise, the trial magistrate did not compare the statement of the witness but instead compared the statement of another witness, PW1. This was wrong, pointed out, Ms. Julius.

Not only that but the procedure of admitting exhibits was not complied with. To bolt up her case, Ms. Julius cited the case of **Lilian Jesus Fortes Vs. Republic, Criminal appeal No.151 of 2018, CAT (DSM) (Unreported)** which stipulated the procedure for admissibility of such statement that are as follows:

1. The previous statement must be read;
2. The witness must be shown parts which demonstrate contradictions;
3. The statement should be tendered in evidence.

The learned Attorney as such guided by the above stance, submitted that the record of appeal at pages 22 shows that the statement was not read to the witness nor was she shown which parts of the statement contradicts her previous statement to police. Further, the learned Attorney argued that in her own view, the three ingredients apply cumulatively and urged this court to expunge them from the record for failure to comply with the law and find that grounds of appeal Nos. 1 and 2 are merited.

On the third ground of appeal, was the argument of Ms. Julius that, the contradictions, if any, were minor and did not go to the roots of the case. According to Ms. Julius, there was evidence of PW5 and PW9 which proved where the victim was and where rape was done. While PW5 said rape was done on the ground, PW9 said rape was done on the mattress. These contradictions, if any, were minor because they did not say where the mattress was. As to the names, the learned Attorney argued that, the victim mentioned the 1st respondent as Kambale Mohamed but PW2 and PW3 mentioned him as Yasin. These contradictions, argued Ms. Julius, did not go to the roots of the matter at all because the victim explained that

the 1st accused person told her that the perpetrator is Yasin which name she mentioned to her mother.PW1 mentioned the accused to PW4 on 17/09/2020 after two days and after PW2 followed up the matter.

According to Ms. Julius, all these were minor contradictions which are curable under section 388 of the Criminal Procedure Act, [Cap 20 R.E.2019]. In support of her point, she cited the case of **Ally Ismail Vs. Republic, Criminal Appeal No.249 of 2008 CAT** in which it was held that not every contradiction can fetter a case for prosecution unless it goes to the roots of the case.

Ms. Julius strongly urged this court to find that those were minor contradictions and find merits in this ground of appeal.

On the 4th ground of appeal, it was her arguments that prosecutions are not bound to call all witnesses and the trial magistrate erred at pages 14-15 to draw adverse inference against the prosecution for failure to call Michael where rape was done but who did not witness anything as such was wrong to draw an adverse inference to such a witness who was not material at all. To bolt up her point cited the case of **Nkanga Daud Nkanga Vs. Republic, Criminal Appeal No. 316 of 2013 CAT (Mwanza)** in which it was held that **"in the present case the persons named by witnesses were not necessary in the circumstances because were not eye witnesses, hence, do not qualify to be**

**material witnesses to draw adverse inference to such witnesses."**

On the totality of the above reasons, the learned Attorney faults the trial magistrate and prayed that this appeal be allowed and this court be pleased to find that the case for prosecution was proved against all accused persons, find them guilty and consequently convict them and sentence them accordingly.

On the other hand, Mr. Rumenyela for the respondents opposed the appeal by submitting that the respondents support the trial courts findings that, the prosecution failed to prove their case beyond reasonable doubt as stipulated under section 3(2) of the Tanzania Evidence Act.

On the 1st and 2nd grounds, it was the submission of Mr. Rumenyela that the noted contradictions went to the roots of the matter. According to him, they fully support the reasoning of the trial court by the cases cited and at page 22 was for PW3.

As to PW2, the counsel for the respondents conceded that exhibits D1 and D2 and D3 were not read nor shown the part which part contradicted to oral testimony but insisted that, the trial court was right in evaluating evidence despite anomalies noted in using the said exhibits.

On the third ground, Mr. Lumenyera submitted that the contradictions were there and did go to the root of the matter. The learned advocate

insisted that any contradiction should be resolved in favour of the accused person.

On the 4th ground, Mr. Lumenyera pointed out and strongly argued that, failure to call Michael was proper for the trial court to draw adverse inference on the prosecution sides. According to Mr. Rumenyela, the evidence of Michael could not be hearsay but direct as to his permission to use the room. The learned advocate argued that they called DW3 to support the story of the defence case.

According to Lumenyera, there were no evidential value of common intention between the two accused persons. The second respondent was not even present in the room but was outside, insisted Mr. Rumenyela. At page 9 of the typed judgement, the learned counsel argued that the witness was mentioned several times but was not called without assigning any reason, hence, justifying the trial court in its decision. To bolt up the point cited the case of **Said Athuman vs R, HC Kigoma** which explained the essence of calling material witness, failure and its consequences.

Mr. Rumenyela, therefore, stood by the trial court that, the prosecution did not prove its case to the standard required in criminal cases. He thus prayed this court to dismiss the appeal for want of merits.

In rejoinder, Ms. Antia had nothing to rejoin rather reiterated her earlier on submission and join issues with Mr. Rumenyela.

Having carefully gone through the trial record proceedings and also having heard the submissions by the learned legal minds for the parties, I find the central issue for determination in this appeal is whether the appeal has merit or not.

I will start answering the grounds as argued by the learned counsels. In the 1st and 2nd grounds of appeal, I find the same in affirmative that the prosecution evidence is watertight and established beyond reasonable doubts that the respective respondent raped the victim **K d/o M** (pseudo name) and that the trial magistrate erred to acquit the respondents basing on contradictions of witness statements which by themselves were incorrectly admitted. I entirely agree with the learned State Attorney that the essence of tendering witness statements under section 164(1)(c) of TEA [Cap 6 R.E 2022] is to contradict his former statement at police and the one at court. The procedure to admit the witness statement as argued by Ms. Julius was as correctly elaborated in the case of **Lilian Jesus Fortes** (supra). I have traversed the proceedings of the trial court and I found the procedure was not followed because what I have noted at page 11 for exhibit D1 and page 21 for exhibit D2 of the typed proceedings are cross examinations after which prayers to tender the statements were successfully made and granted. See also the case of **Waisiko Ruchere @ Mwita vs Republic Criminal Appeal No. 348 of 2013** CAT at

Mwanza in which the steps for impeaching a witness by using his previous statements were discussed. I am impressed with the submission of the counsel for the respondents who conceded with the allegation that the witness statement for PW2 was not read nor shown the parts which contradicts the oral testimony of PW1. Failure to comply with the already explained procedure, the said exhibits were wrongly used and occasioned failure of justice in this case. Ms. Julius prayed that this court be pleased to expunge them from the court record. Mr. Rumenyela said nothing on this prayer and him conceding is an indication that same are subject to be expunged. I do expunge them from the record. Not only that but the arguments by Mr. Rumenyela that the said exhibits despite admitting that were wrongly used, then, raised contradictions which goes to the roots of the case, with due respect to him, are misconceived and rejected in the circumstances of this appeal.

That said and done exhibits D1, D2 and D3 are hereby expunged from the record for failure to adhere to the laid down procedures for their use in impeaching the credit of the witness and the purpose which was intended to cure in criminal proceedings.

In that respect, I am constrained to hold that it was wrong for the trial magistrate to acquit the respondents basing the contradiction on witness

statements which did not meet the threshold of impeaching a witness. My above findings, therefore, makes the 1st and 2nd grounds of appeal merited in this appeal.

On ground No. 3, the central issue is acquittal of the respondents basing on contradictions. Ms. Julius argued that the discovered contradiction on place where the victim showed the act was done and that the victim mentioned the 1st accused as Kambale or Mohamed while PW2 and PW3 mentioned him as YASIN. To her view those contradictions were minor and did not go to the root of the case. On the part of Mr. Lumenyera, his argument was that contradictions did go to the root of the case and that any contradiction should be resolved in favour of the accused person.

It is on record that, PW1 at pages 9 and 10 when narrating the story to her mother named the accused as Yasin saying that the accused told her his name was Yasin but also PW1 named the accused as Kambale on the other date. PW2 also named the accused as Yasin but named him as Kambale after having been asked the accused's fellow bodaboda as per the PW2's testimony at page 20 of the typed proceedings. To my considered opinion, the contradiction on the name is a minor thing due the nature of the offence committed. Yes, I agree that the name of the accused was not consistently named from the beginning to the end of the

story, however, the charge sheet included all names. Further, it is not every discrepancy in the prosecution's witnesses that will cause the prosecution's case to flop. It is only where the gist of the evidence is contradictory and goes to the root of the case, then, the prosecution's case will be dismantled. See **Said Ally Ismail vs The Republic,** Criminal Appeal No. 241 of 2008, CAT at Mtwara.

In the instant appeal the gist of the evidence was to show that the victim **K d/o M** was raped and the perpetrator was the respondent. The fact of rape was not at issue but the name of the perpetrator. To my considered view, though PW1 contradicted the name of the respondent, still I find the same to be minor contradiction because the victim did not know the name of the perpetrator and, in her testimony, she explained that she was told the name by the perpetrator to mention that he was called Yasin and the name of Kambale came later.

Not only that but in the charge sheet, the names of the accused was **"Mohamed Ahmad @Kambale @ Yasin"** and during preliminary hearing, the 1st accused person never disputed anything to do with his names. So, whether Mohamed, Kambale or Yasin are all his names and no contradiction is noted as wrongly held by the trial magistrate.

The last ground of appeal is based on the failure of the prosecution to call a witness resulting to the trial court to draw adverse inference. Ms. Julius faults the trial court for its reasoning that failure to call Michael was material witness worth drawing adverse inference to the prosecution case. In this case I find the arguments by Ms. Julius very appalling that the issue was rape and not the way it was done or whether the perpetrator entered the room or not. According to Ms. Julius, the said witness namely Michael did not witness the act and had little to add if called. His evidence was completely hearsay and it was wrong to draw an adverse inference against such a witness. On the other hand, Mr. Rumenyela resisted that failure to call Michael was proper for the trial court to draw adverse inference on the prosecution side.

I agree with Ms. Julius learned State Attorney that, the central issue in this suit was rape which was supposed to be proved and not otherwise. The trial magistrate was required to decide whether the prosecution case was proved beyond reasonable doubts or not. It is a trite law that the offence of rape is proved by penetration, age and perpetrator. I wish to point out that I have no scintilla of doubts in mind that the victim was raped. The prosecution proved penetration. The PF. 3, Exh. P.1 corroborated the victim's evidence that she was penetrated. The PF.3

showed that the victim had perforated hymen and that she was penetrated. As correctly argued by the learned State Attorney, the place where rape took place is not amongst the required ingredients of rape. The record is silent about the involvement of Michael in this suit, neither the evidence of PW1 (victim), PW2 nor PW7 mention the name of that witness. I have named these three witnesses because these are important witnesses in proving the offence of rape.

I find Michael was not material witness in the circumstances of this appeal and I completely agree with the arguments and cases cited that in order for the adverse inference to apply, the witness must be a material witness and not just that a witness has been mentioned.

The arguments by Mr. Runyemela on this point are but misconceived and the case cited by him also insist on witness being material and not just that has been mentioned.

Having so said, I therefore find the learned Resident Magistrate misapprehended the evidence on record as such caused miscarriage of justice in this appeal by finding respondents not guilty of the offence of Gang rape Contrary to section 130 (1) (2) (a) and 131A (1) and (2) of the Penal Code, [Cap 16, R.E 2019] despite the cogent evidence of the prosecution.

I have carefully considered the evidence on record by both sides of this criminal dispute and I am constrained to find and hold that the prosecutions proved their case beyond reasonable doubt as required by law and reject the defence case which did not create any doubts to the prosecution case.

Consequently, therefore, I exercise my powers under the provision of section 43(1) of the Magistrates Courts Act, [Cap 11 R.E.2019] and proceed to substitute the order of not guilty with the order of guilty to the offence charged and convict them all as charged.

In the final analysis, the appeal by the Director of Public Prosecution is allowed. The order of acquittal is hereby set aside and the order of guilty and conviction is entered against the respondents and consequently the respondents are sentenced as follows:-

1. The first respondent is sentenced to 30 years' custodial imprisonment and shall upon release compensate the victim Tshs.1,000,000/=.
2. The second accused person considering her age and the role she played is sentenced to conditional discharge and warned not to commit such offence within a year from the date of this order.

It is so ordered.

Dated at Kigoma this 21st day of July, 2023.

**S. M. MAGOIGA**

**JUDGE**

**21/07/2023**