IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 101 OF 2022

(Originating from the District Court of Karatu at Karatu in Criminal Case No 158 of 2020)

BARIKIEL JOHN @ BOAMO ..... APPELLANT

VERUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

03rd May & 26th July 2023

KAMUZORA, J.

The Appellant herein is challenging conviction and sentence of 20 years imprisonment imposed to him by the District Court of Karatu (the trial Court) in Criminal Case No. 158 of 2020. The Appellant stood charged with the offence of grave sexual abuse contrary to section 138 C(1)(a), (2) (b) of the Penal Code Cap 16 R.E 2019. It was alleged that the incident took place on 15th day of November 2020 at Gongali-Kinihhe area within Karatu District in Arusha Region. The Appellant was arrested following an allegation that he did rub his penis over the vagina of one MP (identity concealed) a girl aged 11 years old.

The trial court found the Appellant guilty of the offence and convicted him. Being aggrieved, the Appellant brought the present appeal on the following grounds: -

1) *That, the trial court magistrate erred in law and in fact by convicting and sentencing the Appellant without evaluating the variance of dates in the charge sheet and the evidence in Court.*
2) *That, the trial court magistrate erred in law and in fact by failing to conduct the voire dire on PW2 as per section 127(2) of TEA.*
3) *That, the trial court magistrate erred in law and in fact in finding that prosecution witness PW2 was a credible witness without directing his mind properly to the vital shortcomings in her evidence.*
4) *That, the trial court magistrate erred in law and in fact tin concluding that, the prosecution proved the case beyond reasonable doubt while were serious contradictions in prosecution witness testimonies.*
5) *That, the trial court magistrate erred in law and in fact in not considering that based on the age of the victim, it was important the prosecution evidence to be supported by the police investigator.*
6) *That, the trial court magistrate erred in law and in fact in convicting and sentencing the Appellant while there was procedural irregularities in receiving Exhibit P1 before the court.*

During hearing of this appeal which proceeded both orally and by way of written submissions, the Appellant appeared in person with no legal representation while Ms. Riziki, learned State Attorney appeared for the Respondent, the Republic.

Arguing for the 1st ground of appeal, the Appellant submitted that there was variance on the date of the incident. That while the charge sheet indicated the date of incident to be 15/11/2020, PW2 testified that the incident took place on 18/11/2020. The Appellant was of the view that the prosecution was supposed to amend the charge as required by section 234 (1). He supported his submission with the case of **Abel Masiki Vs. The Republic**, Criminal Appeal No. 24/2015.

The other variance pointed out by the Appellant is based on the nature of offence. It was submitted that the Appellant was alleged to have rubbed his penis in to the victims' vagina but during preliminary hearing, the facts reveals that the Appellant was charged for the offence of rape. He also referred the evidence of PW1, PW3 and PW4 which was also to the effect that the Appellant committed the offence of rape. he requested this court to refer decision in the cases of **Shaban Gervas Vs. Republic,** Criminal Appeal No. 457 of 2019 and **Kililian Peter Vs. Republic,** Criminal Appeal No. 508 of 2016.

Arguing for the 2nd ground, the Appellant submitted that after the evidence of three prosecution witnesses; PW1, PW2, and PW3, the prosecution side amended the charge sheet. The Appellant was of the view, after the charge was amended, it was prudent for the court to comply with section 234(2) (b) to recall witnesses who testified prior to the amendment. The Appellant supported his submission with the case of **Balole Simba Vs. Republic**, Criminal Appeal No. 525 of 2017.

On the 3rd ground, the Appellant pointed at page 5 of the trial court judgment and submitted that the trial magistrate added matters which were not testified in evidence. He referred the case of **Athanas Julius Vs. Republic**, Criminal Appeal No. 498 of 2015 and prayed this court consider the trial magistrate conducts vitiating the entire proceedings.

On the 4th ground, the Appellant submitted that section 127(2) of the Evidence Act allows the child of tender age to give his or her evidence on oath or affirmation after the court is satisfied that the child know the meaning of oath and where the child does not know the meaning of oath, his evidence can be recorded after the child promise to tell the truth and not lies. He referred the case of **John Mkorongo James Vs. R,** Criminal Appeal No 498 of 2020. He insisted that the child of tender age who is brought before the court must be examined to see

if he or she understands the meaning and nature of oath before the court conclude that she can give his evidence on a promise to tell the truth and not telling lies as per section 127(2) of the Evidence Act. Reference was also made in the case of **Jafari Manjani Vs. Republic**, Criminal Appeal No 402 of 2019. For the matter at hand, he pointed out that there was no brief examination of PW2 to ascertain if she was able to take oath or affirmation. That, it is not clear from the court record how and why the trial magistrate jumped to the conclusion that the witness could promise to tell the truth. That, there was an omission of PW2 to say her promise in telling the truth and not telling lies. The Appellant was of the view that the evidence of PW2 violated the dictate of section 127(2) of the Evidence Act.

On the 5th ground, it is the Appellant's submission that the evidence of PW1 and PW3 contradicts that of PW2 on the nature of the offence committed. That, the evidence of PW5 and PW4 is also contradictory as they reveal that the Appellant had no any infection while there is evidence that he transmitted the bacteria causing gonorrhoea to the victim.

In her reply Ms. Riziki supported the conviction and sentence. On the first ground, she conceded to the fact that there is contradiction on

the date of the incident that was mentioned under the charge sheet and that mentioned by PW2. She however argued that the contradiction is typo error and a minor one which does not go to the root of the case because all other witnesses stated the date that is in the charge sheet save for PW2 who is the minor and likely to forget the date in considering that it is too long since the incident took place. She urged this court to refer the case of **Emmanuel Lyabonga Vs R,** Criminal Appeal No. 257 of 2019 in which a similar contradiction was discussed.

The learned state attorney further submitted that the Appellant was charged for grave sexual abuse and not rape. She argued that even if it was so recorded during preliminary hearing both grave sexual abuse and rape are acts of sexual abuse.

Responding to the second ground, Ms. Riziki submitted that section 127 was not contravened. She pointed at page 8 of the proceedings and submitted that the witness was examined and the court was satisfied that she could testify as the victim promised to tell the truth and testified without oath.

Responding to the 3rd ground, Ms. Riziki submitted that the evidence of the victim was credible and clear and that she responded to all the questions that was put to her under cross examination. That she

narrated the facts of the case. That, as the incident occurred during afternoon, the Appellant was identified by the victim as they are neighbours.

On the 4th ground, it is the submission by Ms. Riziki that the case was proved beyond reasonable doubt as the victim explained the whole incident and her evidence was watertight. Reference was made to the case of **Selemani Makumba Vs. R**, TLR [2006] 329. She insisted that the victim's evidence was supported with the evidence of the doctor which shows that the victim had fluids which was not normal in her vagina. That, the evidence of Veronica Sule shows that while washing the victim's clothes she saw male sperms and she informed the victim's mother.

On the 5th ground that the investigator was not called to testify, the Respondent counsel submitted that in sexual offences the important witness is the victim. Citing section 143 of the TEA she added that, there are no specific number of witnesses needed to prove a case.

On the 6th ground, the learned counsel submitted that Exhibit P1 (the PF3) was tendered by a doctor. That, although it was not indicated if it was read in court, the magistrate indicated that the witness was reading from the exhibit thus, proving that the same was read in court.

She added that even if it is concluded that the said exhibit was not read, still the evidence of the doctor remains intact proving what the doctor saw when examining the victim. In concluding the Respondent's counsel prayed that the appeal be dismissed.

In his brief rejoinder the Appellant insisted on the case laws he referred in his submission and prayed for this the court to consider them and set him free.

I have clearly considered the grounds of appeal and the submission by the parties that triggered though perusal of the trial court's records. Starting with the first ground, it was contended by the Appellant that the trial court magistrate erred in convicting and sentencing the Appellant without evaluating the variance of dates in the charge sheet and the evidence in Court. the Respondent's counsel admitted the variance but insisted that it was a minor one. It is true as submitted by the counsel for the Respondent that the variance on date was found only on the victim's evidence which however upon reading the original records it was written 15/11/2020. I therefore agree with the learned state attorney that the typed proceedings contained typographical error by recording 18/11/2020. This ground therefore is meritless.

I will jointly deliberate on the 2nd and 3rd grounds in which the Appellant alleged that the trial magistrate erred in for failure to comply to section 127(2) of TEA and in considering PW2 as reliable witness. It is clear from the record that the victim was a child of tender age as she was 11 years at the time she testified in court. At page 8 of the typed proceedings of the trial court it shows that, the court after recording particulars of the victim recorded as follows: -

> *"PW2, MP(Victim), Mngoni, G/Arusha, student, 11 years old, Christian.*
>
> ***Court:*** *I have conducted a voire dire test and she managed to show an excellent capacity of understanding and promised to tell the truth"*

After that statement, the trial court proceeded on recording the victim's evidence without oath. From the record above, it is evident that there was no record which led the trial magistrate conclusion that the victim understood and promised to tell the truth. In the case of **John Mkorongo James v. Republic,** (Supra) it was held that:

> *"The omission to conduct a brief examination on a child witness of a tender ages to test his competence and whether he/she understands the meaning and nature of an oath before his/her evidence is taken on the promise to the court to tell the truth and not tell lies, is fatal and renders the evidence valueless"*

Applying the reasoning from the above case, it is the finding of this court that there was contravention of section 127(2) of the Evidence Act by the trial court in recording of the evidence of PW2. This renders the said evidence valueless and it is hereby expunged from record.

This takes me to the 4th ground on whether the prosecution proved the case beyond reasonable doubt. Having expunged the victims' evidence from record, this court assess the evidence of remained prosecution witnesses and see if it proves the offence charged. In doing so the court will also consider Appellant's defence and see if it establishes any doubt in prosecution evidence. In his defence the Appellant denied to have committed the offence and he testified that on the material date of alleged incident he was in the farm together with his wife DW2. That, the victim was grazing cattle in his farm and he asked her to move the cattle out. That, he was later arrested in respect of the offence he was convicted of. He admitted to have been examined by the Doctor at the health centre.

Turning to prosecution evidence, apart from PW2 the remained prosecution witnesses were not present at the time the offence was allegedly committed. PW1 who the victim's mother was informed by PW3 that while washing victim's clothes she saw male sperms and they

discovered that the victim was raped after the victim informed them about what transpired between her and the Appellant. They did not inform the court if they examined the victim before they concluded that she was raped. They did not even explain how they made conclusion that what they saw in the victim's clothes were male sperms. PW4 is the medical doctor and he discovered that the victim had infection although she was not penetrated. He made a conclusion that she was sexually abused. However, the evidence by PW5, another medical doctor who conducted tests on the Appellant reveal that the Appellant was HIV Positive but had no any infections. This brings doubt as to whether the Appellant sexually abused the victim in considering that the Appellant had no infection while the victim had infections and contacted gonorrhoea which the doctor referred as deceased transmitted from another person. If that was the case, and if the Appellant was the reason the victim suffered gonorrhoea, it was expected for the Appellant to have been diagnosed with the same infection as well. The Appellant was diagnosed with a different disease not found with the victim. In my view, had the trial court considered those inconsistences, it could have reached to a different conclusion.

The trial magistrate at page 5 of the judgment acknowledged the doctor's evidence that the victim was not penetrated but he made a conclusion that she had sexual intercourse with a man hence, was sexually abused. Unfortunately, there is no explanation of sexual intercourse he was referring to. The prosecution evidence contained inconsistences which in my view, could not be relied upon to convict the Appellant.

From the above discussion and reasoning, it my settled mind that the prosecution evidence was not water tight to prove the offence against the Appellant beyond reasonable doubt. Since the 2nd 3rd and 4th grounds dispose the appeal, I see no reason to labour much in discussing the rest of the grounds.

The appeal is therefore allowed. The judgment, conviction and sentence passed by the trial court is hereby quashed and set aside. This court orders the immediate release of the Appellant from prison unless lawfully held for valid cause.

DATED at **ARUSHA** this 26th day of July 2023

D.C. KAMUZORA

JUDGE