IN THE HIGH COURT OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL No. 98 OF 2021

(Originating from Criminal Case No. 190/2020 of RM's Bukoba)

ELIZEUS JOSEPH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

In the Resident Magistrates Court of Bukoba, the Appellant was charged and convicted under three counts which are Rape contrary to Section 130 (1) (2) (e), Burglary contrary to section 294 (1) and (2) and Stealing contrary to section 265, all being the provisions of the **Penal Code, Cap 16 of 2002 now 2019 RE (Penal Code).**

It was alleged in the District Court that on 11th May 2015 at about 0100 hours at Omunjoki hamlet in Kashekya Village within Misenyi District in Kagera Region, the appellant did rape one YZ. YZ has been used to refer to the victim in a bid to hide her identity. The Appellant was further alleged

that at the same date, time and place, he broke into the said house of YZ where he was as well alleged to have stolen 3 garments make vikoi, 3 solar lights, a light and its solar panel, a solar panel, a pair of kitenge a blanket and two keys all being properties of YX.

The Trial Court found the Appellant guilty as charged and sentenced him to 30 years imprisonment for the first count, 6 months imprisonment for the second count and 6 months imprisonment for the third count. Being dissatisfied with both conviction and sentence, the appellant has preferred this appeal with 15 grounds covering the following:-

1. Conviction based on defective charge sheet.

2. Conviction based on wrong citation in the rape offence.

3. Trial Reliance on a caution statement obtained by torture.

4. Trial Court reliance on improper identification.

5. Lack of death certification of the victim who failed to attend the trial.

6. Trial Court fauilure to read out to the appellant the statement of the victim which contravenes Section 211 (3) of the Criminal Procedure Act, Cap 20 of 2002 now 2019 RE (CPA).

7. Trial Court failure to observe the Court of Appeal order to expedite trial and consider the time spent in prison while sentencing.

8. Trial court reliance on six times rape while the medical examination revealed no sperms in her vagina.

9. Trial court reliance on a certificate of seizure which was procured illegally contrary to section **38 (3) of the CPA.**

10. Over detention of the appellant in police custody and failure to be allowed to call a relative or taken to justice of peace under Section 28 of the **Tanzania Evidence Act, Cap 6 of 2002 now 2019 RE (Evidence Act)**

11. Lack of DNA test to clear contradictions and shortcomings in prosecution evidence.

12. Victim's failure to mention the items listed in the certificate of seizure.

13. Reliance on exhibit P4 to corroborate exhibit P3 while Exhibit P4 was defective for having variation in the name of the officer who supervised the caution statement and not signed by the suspect but by his name inserted by E 8575 D/Cpl Laurent.

14. Failure to consider the victim's failure to raise alar or escape when the appellant took break in rape sessions by going to have some sweet potatoes in the kitchen of the victim.

15. The sentence of 30 year to be not consonant with the offence of rape he was charged with.

The appeal was heard orally by virtual court as the Appellant participated while in Kwitanga Prison in Kigoma. Upon the request by the Appellant, the Respondent started submissions.

In his submission Mr. Aman Kilua, SA, responded to grounds 1st, 2nd & 15 together as one category and grounds 3, 10 & 13 in another category and grounds 4 and 5 together. He argued the rest, one after another separately.

Concerning the 1st 2nd & 15th grounds asserting the charge sheet to be defective contrary to **Section 135 (a) (ii) of the CPA**, Mr. Kilua did not dispute an error in the charge sheet, that it cites **Section 130 (1) (2) (a)** of the Penal Code instead of **Section 130 (1) & (2) (e).** However, he has a view that this error is not fatal because the particulars of offence were clearly explained, and the Appellant understood the well the nature of the offence. He supported his argument with the case of **Jamal Ali Alas Salum vs. Republic Criminal, Appeal No. 52 of 2017** where the Court of Appeal stated that if the particulars of offence made the applicant understand the nature of the offence, date and time of commission of the offence, and the age of victim, them irregularity of non-citation in the particulars of offence is curable under **S. 388 of the CPA.**

On what is asserted in **ground No. 15** that the trial Court erred to sentence the appellant 30 years imprisonment in absence of a correct Section of offence, Mr. Kilua reiterated that the error is curable under **Section 388 of the CPA.** In his view, it is well known that, the offence of rape is punishable by not less than 30 years imprisonment. He referred to the case of **Onesmo Laurent @ Salukoki vs. Republic, Criminal**

Appeal No. 458 of 2018, CoA (unreported). He stated that, in this case the Court of Appeal stated that omission to mention punishment section is curable under **Section 388 of the CPA.**

Concerning grounds 3, 10 & 15, Mr. Kilua, SA started with the Appellant's ground challenging reliance on caution statement asserting to have been taken on duress, where the appellant was beaten. According to Kilua, SA, this ground touches **exhibits P4** which is caution statement. He submitted that the issue of torture was considered in a case within a case and the Court found the objection to have no merit and admitted the caution statement as **exhibit P4**. According to Mr. Aman SA, one of the basis of the objection was that there was no caution statement given by the appellant in the police station but surprisingly the appellant has changed the course in this appeal, he is now saying it was taken after he had been beaten. In Mr. Aman's view, this is an afterthought, and it was once addressed in **Ally Hassan Abdallah vs. Republic, Criminal Appeal No. 383 of 2021** where the Court of Appeal held that the appellant wants to ride two horses at the same time and that the Court disregarded the issue

and considered it an afterthought. Mr. Kilua prayed for this ground to be dismissed.

Concerning the **10th ground**, asserting the appellant to have been not taken to the justice of peace as per **Sestion 28 of the Law of Evidence Act. Cap. 06 of 2022 RE,** Mr. Kilua is of the view that it is the option of an accused person to go to the justice of peace and not a mandatory requirement. He referred to the case of **Vincent Hamo and others vs. Republic, Criminal Appeal No. 387 of 2017 CAT (unreported)** and state that the Court of Appeal made it clear that the suspect can be taken to the justice of peace at any point on his preference.

On the **13th ground**, on assertion that **Exhibit P4** had variation in the name of the supervising officer and that it was not signed by the suspect, Mr. Kilua repeated that this is an afterthought after the Appellant had refused totally to have written the said caution statement. According to page 25 of the typed proceedings, the appellant agreed to have signed but now he is denying.

On **grounds 4th, 5th & 14th** the appellant is challenging virtual identification, lack of certificate of death of victim and 6 times rape and yet

failed to raise alarm in the first two times especially when the appellant took break to have a meal in the victim's kitchen. Responding on the death certification, Mr. Kilua submitted that the victims was alive at the first time of hearing before the matter was brought for retrial from the Court of Appeal. That when the matter came back for retrial the victim had already died hence her statement was tendered in Court under **Section 34 (b), of the Evidence Act** due to the information supplied by the village Executive Officer of the area concerning her death. Mr. Kilua refuted tha assertion that the death was not proved. According to him, it is not necessary for a death to be proved by certificate of death as per **Mathias Bundala vs. Republic Criminal Appeal No. 62 of 2004 (unreported)** where the Court of Appeal stated that death is not mandatory to be proved by a Doctor, but any person can testify to prove it. Noting the requirement of corroboration in a statement produced under S. 34 (b), Mr. Kilua submitted that corroboration was there vide the evidence of **PW2, PW3** together with Exhibit P4 which could solely prove the case against the appellant.

On **ground No. 06** that **Exhibit P3** was not read in Court, Mr. Kilua submitted that the reason is not meritious because in these cases prove

can be done even in the absence of the victim as it was in the case of **Joseph Damian Saveli vs. Republic, Criminal Appeal No. 294 of 2018 at page 11** where the Court of Appeal held that the accused can be convicted even in the absence of the statement of the victim.

On the 7th ground on failure to determine the matter expeditiously, Mr. Kilua submitted that the order of the Court of Appeal was complied with and the matter was determined expeditiously.

Concerning the 9th and the 11th grounds on certificate of seizure not having complied with **Section 38 (3) of the CPA**, Mr. Kilua argued that the said certificate was not tendered as exhibit.

Regarding ground 11 concerning contradiction in the evidence, which required DNA, Mr. Kilua submitted that the issue of DNA is not mandatory in rape cases as per the case of **Hamis Shaban vs. Hamis Ustaadhi vs. Republic, Criminal Appeal No. 259 of 2010 (unreported)** where the CoA stated that it is not a mandatory requirement in these kinds of offences to use forensic evidence to connect the accused person with the offence.

On these arguments, Mr. Kilua prayed for the Court to dismiss the appeal for lacking merit.

In his reply submissions, the Appellant started by the 3rd ground of appeal and insisted that he was tortured while in the police station and forced to sign the caution statement. He added that after his arrest, he was sent in three police stations within 10 days. He lamented to have been wrongly convicted and sentenced because of the torture he got from the police station forcing him to sign the caution statement. According to him, he was tortured firstly at Gera, then Kyaka and lastly at central police in Bukoba Urban while being forced to sign a statement which he did not write but presented to him already in writing. He considered being taken through 3 police stations as torture. He prayed for the Court to hold this ground valid in law.

On the **firth ground** on the death of the victim and the failure to have the victim's attendance in Court, the appellant contended that this was a big error in the prosecution's evidence because the information of death was not confirmed by the responsible person but brought by the chairperson of sub division (kitongoji) who came with a letter from the village chairman

who was not called to confirmed that he was the one who wrote that letter. In appellant's view, information about death cannot be confirmed by a village or Kitongoji chairman without a certificate of death issued by the Registrar of deaths of the district. In his view, the Court was misled and went contrary to law.

Submitting on ground 13 that the Magistrate erred in using **Exhibit P4** to corroborate **Exhibit P3**, the appellant contended that **Exhibit P4** which was the caution statement was defective for having different names of the officer who supervised the writing of caution statement. He contended that Pascal Protas was the name which appeared at the beginning of the statement but at the end, the name changed to Pascal Joseph are two distinct people. According to him, the person who was a militia who accompanied the police to arrest him appeared and pretended to be his relative. He prayed for the court to reconsider the validity of the caution statement. He questioned the signature of Corporal Laurent E 8575 after his signature in the statement.

Concerning the **10th ground** that the appellant was kept in police station for 10 days, the appellant challenged that he was arrested while at home

where he had his relatives and a wife but the police refused his request to call them, and instead they brought that Pascal Protas who was not his relative and refused his request to be sent to a justice of peace.

On ground 7, The Appellant averred that the Court of Appeal ordered retrial, and shall he be convicted, the 5 years already served in prison be deducted, but the Court did not deduct the 5 years he served in jail but the trial court proceeded to sentence him to 30 years. In his view, the utterance of the Court of Appeal is binding upon the lower Court.

On **11th ground**, the Appellant contended that there are contradictions in the evidence and prosecution ought to have conducted DNA test and this is according to law. In his view, could the DNA taken, he wouldn't have been convicted. I therefore asked for the Court to reconsider the doubt raised by failure to conduct DNA test.

On **ground 14**, the appellant questioned the complaint's failure to raise alarm during the first and the second rape especially when he was alleged to have left her in her room and go to the kitchen for a meal and went back and continued with rape. He wondered why she did not raise alarm

even after when he left for a meal. In his view, this shows how the case is fabricated.

Concerning the **4th ground** on identification, the appellant contended that no evidence that the identification was good on the scene of incident and that there was no proper explanation on how the victim identified him as it was 3:00 am. He finally prayed for the Court to release him basing on these grounds.

In rejoinder Mr. Aman reiterate that the 3rd issue is an afterthought. He added that a death incident can be reported by any person. He is of further view that Exhibit P4 alone is sufficient to convict a person, yet it was corroborated by PW1, PW2 and PW3.

According to Mr. Kilua, there is evidence that the accused did not ask to be sent to the justice of peace.

Having considered the parties submissions, the next task is to determine as to **whether the Appeal has merits**.

Starting with the first ground, on asserted reliance on defective charge sheet the appellant claimed that he was convicted under a defective charge

sheet which was not drafted in compliance with **Section 135 (a) (ii) of the CPA.** According to the Appellant, he was charged with rape contrary to section 130 (1) and (2) (e) while evidence indicates that the alleged rape was committed to an adult. Mr. Kilua is of the view that the omission to cite the sub section is not fatal provided that the charge sheet contains information which is sufficient to inform the Appellant about the nature of the offence. In his view, the error is curable under **section 388 (1) of the CPA** which provides that omission of such minor information in the charge sheet is not fatal. He supported his position by the case of **Jamal Ally @ Salum v. Republic, Criminal Appeal No. 52 of 2017 (unreported).** According to him, the Court of Appeal decided that if the appellant understood the nature of the offence and the date and the time of commission of the offence, then a charge sheet cannot be nullified the basis of wrong citation.

To determine as to whether the charge sheet was fatally defective, I referred to the provision of **Section 132 of the Criminal Procedure Act, Cap 22 R.E 2022.** It provides;-

132. "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

From the above **Section 132** of the CPA, a charge sheet becomes sufficient if it contains statement of offence and particulars as may be necessary to give the accused person reasonable information sufficient for him to understand the nature of offence.

It is not disputed that the appellant is charged as if the victim was a girl aged below 18, but evidence indicated the victim to be above 18 years. This is an error, but according to Mr. Kilua, it is not fatal but can be curable under **section 388 (1) of the CPA.**

For ease of reference, let me produced the contents of **Section 388 of the CPA.** *It reads:-*

"Section 388.-(1) Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent

jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable.

From the above provision it is apparent that the error if not occasioned injustice, should not be a ground to reverse a finding.

As well pursuant to the case of **Jamal** cited supra by Mr. Kilua, SA, the Court of Appeal clearly made it a position that wrong citation of law does not make a trial a nullity so long as that charge sheet contains essential elements to inform the accused person on the nature of the offence.

I have examined the charge sheet to see if it contains essential elements of the offence and found that all necessary information is well contained in the said charge sheet. It gives particulars of offences mentioning the date, place and particulars of victim and the allegations. In my view this

information is sufficient to provide essential information for any accused person to understand the nature of the case. It is therefore my holding on this first ground of appeal that the error of wrong citation in the charge sheet is not fatal to vitiate the findings of the trial court and therefore the ground is unfounded.

The finding in the 1st ground of appeal answers the 2nd and 15th grounds as they all challenge the charge sheet for being defective.

Regarding the **3rd ground** challenging the trial Court for having relied on a caution statement obtained by torture, the appellant complained to have been tortured in the police custody to have the caution statement recorded. Mr. Kilua, stated that the issue of torture was considered in a case within a case and the Court found the objection to have no merit and admitted the caution statement as **exhibit P4**.

It is on record at page 37 in the proceedings of the trial court that an inquiry was conducted by a trial within a trial and a decision was made at that page which overruled the appellant's objection against the caution statement. The reasoning of the trial court in that ruling was that there were witnesses who saw the recording of the caution statement. In my

view, I see no reasons to differ with the findings of the Magistrate who did the inquiry. This ground is unfounded.

The findings in ground No, 3 resolves grounds No. 10 as they both challenge the reliability of the caution statement.

With regard to ground No 4, asserting weakness in the identification evidence, I have gone through the trial court record and found that the trial magistrate was satisfied with the statement in **Exhibit P3** which was the victim's statement in which the victim stated that she switched on her solar light and found the bandit who ambushed her to be the appellant who was known to her before as he used to live in the same village. This is well explained at page 7 of the judgement of the trial court. With this scenario, in my view, the environment was sufficient to support identification of the bandit who the victim stated was the appellant. I see no reason to differ with the findings of the trial court on the issue of identification.

Concerning **ground 5**, the appellant is challenging the proof of victim's death to justify reliance on her statement. It is not disputed that when a victim of crime passes away, his/her statement can be tendered as

evidence to prove prosecution case pursuant to **Section 34 (b), of the Evidence Act.** The appellant is questioning whether the victim truly died. According to Mr. Kilua, it was confirmed by the village Executive Officer of the area that the victim passed away and that it is not necessary for a death to be proved by certificate of death. In my view, if someone testified on oath that the victim passed away, I see no reason to differ with that evidence if no evidence given to state otherwise. I agree with Mr. Kilua that there is no strict rule that a death must be proved by certification. I am guided by the case of **Mathias Bundala vs. Republic Criminal Appeal No. 62 of 2004 (unreported)** cited supra by Mr. Kilua. Since the appellant could not bring any evidence to indicate that the victim may be alive, I see no need to deny reliability of the Exhibit P3 which is victim's statement. This ground of appeal is as well has no value.

Regarding ground 6 on failure to have the victim's statement read on him, Mr. Kilua cited the case of **Joseph Damian Saveli vs. Republic, Criminal Appeal No. 294 of 2018** at page 11 to explain that even in the absence of the victim, still the court can convict an accused person.

The appellant has not stated how the failure to read the statement prejudiced his rights. This ground is as well immaterial to vitiate the trial.

On **ground No. 7** on determination of the matter expeditiously, in my view, the retrial started in 2020 and it was concluded in 2021. I agree with Mr. Kilua that this was expeditious. Concerning deduction of 5 years served in prison from the sentence, I could not see such instructions in the Court of Appeal judgment. This ground is therefore unfounded.

On ground 8 on missing spots or blood in the victim's vagina, I could not understand why the appellant demanded blood from the victim's vagina. As well, the Doctor testified to have found the vagina to have been injured with swellings and bruises and she was in severe pain. Since the victim knew what caused that situation, the doctor's evidence not mentioning sperms do not necessarily mean that the appellant was not raped. This ground holds no merits.

On **ground No. 9** concerning certificate of seizure, I agree with Mr. Kilua that since the said certificate was not tendered as evidence, I see no reasons to discuss it on this appeal.

On ground 11 concerning DNA, Mr. Kilua is of the view that DNA is not a mandatory requirement for sexual offences. I agree with him. When the identification of the bandit is not shaken, I see no need to have DNA test. I sought guidance from the case of **Hamis Shabani (Ustaa) vs. Republic; Criminal Appeal No. 259 of 2010 (unreported).** In this case the Court of Appeal held that DNA is not mandatory in sexual offences. It stated; -

> *"As to the last point of contention, there is no legal requirement that in offences of this kind, "sophisticated scientific evidence" to link the appellant and the offence is required. It is not the requirement, for example, that the assailant's spermatozoa, red and white blood (or even DNA) should be examined to prove that he is the one who committed the offence. If there is other, independent evidence to implicate the accused with the offence and the court is satisfied to the required standard (that of proof beyond reasonable doubt), that in our view, is sufficient and conclusive."*

It is on evidence according to **Exhibit P3** that the victim knew the appellant as he resided in the victim's village. This being the case, the identification was vivid. In my view this is not a case where DNA tests

should be carried out as a mandatory requirement. It is on this basis I find the ground concerning DNA test lacking merits.

Concerning ground 12 that the victim failed to identify the stolen items, I had a look at **Exhibit P3** which was the victim's statement and noted that all the items were mentioned by the victim.

From the above analysis, it is obvious that all the grounds of appeal collapses. Having found all the grounds of appeal to have no merit, the framed issue is answered that the entire appeal has no merits.

Consequently, I hereby dismiss the appeal and uphold the judgment of the Resident Magistrate Court together with its conviction and sentence.

It is so ordered.

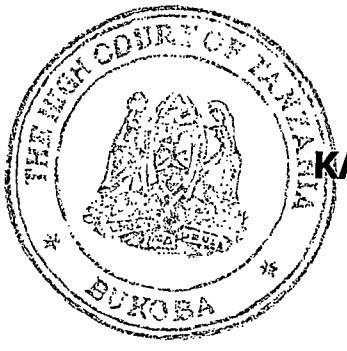
Dated at Bukoba this 16th Day of June 2023

KATARINA REVOCATI MTEULE

JUDGE

16TH JUNE 2023

Judgment delivered this 16th Day of June 2023 in the presence of the Appellant on virtual Court and in the absence of the Respondent.



KATARINA REVOCATI MTEULE

JUDGE

16/06/2023