IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 13 OF 2022

(C/f Criminal Case No. 75 of 2022 Resident Magistrate's Court of Arusha at Arusha)

KELVIN S/O WILFRED LAIZER ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

05th June & 07th August, 2023

TIGANGA, J.

The appellant was charged with and convicted of the offence of rape contrary to sections 130 (1), (2) (e), and 131 (1) of **the Penal Code,** Cap 16 R.E. 2019, by the District Court of Arusha at Arusha (the trial court), in Criminal Case No. 75 of 2022.

The particulars of the offence show that on diverse dates between January and 21st March 2022 at the Murieti Patel area within the City, District, and Region of Arusha, the appellant had sexual intercourse with one **DDH** (true identity hidden) a girl of eight (8) years. The appellant pleaded not guilty to the offence hence, a full trial involving three prosecution witnesses and four defence witnesses was conducted.

At the trial court, the evidence showed that, on an unknown date and month, the appellant lured the victim and her three friends Caren, Beatrice, and Nancy into his studio for listening to music as well as watching movies. While there, the appellant and his friend called Ibrahim locked them inside, tied them down, undressed them, raped and sodomized them in turns. They gave them Tshs. 200/= each afterward opened the door and let them go home. Another day, Nancy returned to the studio and was seen by their school teacher, upon being questioned she told the teacher that, they usually go to the studio with her friends, and when they were all questioned is when they revealed the whole ordeal. Parents were notified, the appellant was arrested and the matter was taken to court.

In his defence, the appellant denied having raped the victim and claimed that, the victim's mother requested to be paid Tshs. 10,000,000/= which he refused hence, the matter he was charged that is why he stayed at the police station for so long before he was arraigned in court. In the end, the appellant was found guilty and convicted to serve life imprisonment. Aggrieved, he brought this appeal raising a total of ten (10) grounds of appeal as follows;

1. That, the learned trial magistrate erred both in law and fact in convicting and sentencing the appellant on a defective charge.
2. That, the learned trial magistrate erred both in law and fact in failing to prove the elements and sentencing the appellant on a non-existence offence as per the evidence of the victim.
3. That, the learned trial magistrate erred both in law and fact in failing to prove the elements establishing the offence of rape.
4. That, the learned trial magistrate erred both in law and fact in convicting the appellant while there were a lot of doubts within the prosecution evidence.
5. That, the learned trial magistrate erred both in law and fact in convicting the appellant while the prosecution side failed to prove their case beyond reasonable doubt, a standard required by law.
6. That, the learned trial magistrate erred both in law and fact in convicting the appellant without taking into consideration the victim and PW3's evidence which supported the offence of gang rape offence which was leveled against the appellant.
7. That, the learned trial magistrate erred both in law and fact in failing to evaluate and analyze the evidence on record properly as to the age of the victim as per the charge sheet hence leading to an erroneous decision.

8. That, the learned trial magistrate erred both in law and fact in failing to consider the appellant's defence of alibi hence miscarriage of justice.
9. That, the learned trial magistrate erred both in law and fact in failing to call material witnesses who were at the appellant's place as per records of the trial court.
10. That, the learned trial magistrate erred both in law and fact in convicting and sentencing the appellant by relying on exhibit P1 which contradicts the charge sheet, and the same was wrongly admitted and received by the trial court.

During the hearing of this appeal which was done by way of filing written submissions, the appellant was represented by Mr. David Saimalie Lairumbe, learned Advocate while the respondent was represented by Ms. Caroline Costantine Asenga, learned State Attorney.

Supporting the appeal, Mr. Lairumbe submitted that, the charge sheet filed at the trial court was fatally defective as it contravened section 135 (a) (i) of the **Criminal Procedure Act**, Cap 20, R.E. 2019. He argued that the offence of rape that the appellant was charged with was preferred under section 130 (1) (2) (e) and section 131 (3) and not section 131 (1) of the Penal Code which is the sentencing provision until 14th December, 2022. He preferred the court to the cases of **Musa Mwaikunda vs.**

Republic [2006] TLR 388 and **William John Owenya vs. Republic**, Misc Criminal Appeal No. 40 of 2021, HC, Moshi Registry which underscored the importance of the accused person to understand the nature and seriousness of the offence so that he can prepare for his defence.

He further submitted that the charge sheet shows that, the incident occurred on 21st March, 2022 but during the preliminary hearing the prosecution stated that, the incident occurred on 19th January, 2022 and this variation was never amended. He argued that the appellant raised this issue in his defence of *alibi* and he built his case on the date mentioned in the charge sheet that he was not present as he went to a funeral. To support his contention he cited the case of **Anania Turian vs. The Republic**, Criminal Appeal No. 195 of 2009 where the Court of Appeal observed that, when there is variation between the dates in the charge sheet the same must be amended especially when the defence of *alibi* is raised.

On the 2nd ground of appeal, Mr. Lairumbe submitted that, the prosecution's evidence was based on the offence of rape but according to the victim, PW1, she was gang raped by the appellant and another person known as Ibrahim. Also, PW2 testified that, after he examined the victim

he saw that, she had bruises in her vagina that penetrated through her anus. However, the appellant was convicted on speculations and assumption on the offence of rape and not on the offence of unnatural offence contrary to section 154 (1) (a) of the Penal Code.

On the 3rd and 7th grounds, the learned advocate submitted that, the elements of rape were not proved to the required standard because first, penetration was never proved, and second the age of the victim was also not proved. He averred that, the charge sheet shows that, the victim was eight years but when testifying she told the court that she was nine years, thus, without a proof of birth certificate, her age was not certain.

On the 4th and 5th grounds of appeal, the learned counsel submitted that there were a lot of doubts about the prosecution case for a conviction to stand. One of them is the variation of dates when the incident occurred. That, the charge sheet shows the incident occurred on 21st March, 2022, while during the preliminary hearing, the prosecution alleged that it occurred on 9th January, 2022 and the victim told the court that, she does not remember the date or month when the incident occurred. Another weakness is the fact that material witnesses such as Careen, Beatrice, and Nancy were not summoned to testify in court regarding the incident and

the fact that, PW3's testimony was hearsay as she admitted herself during cross-examination.

To cement his argument he cited the cases of **Mohamed Said Mutula vs. Republic** [1995] TLR 3 and **Aziz Abdallah vs. Republic**, [1991] 72 which underscored the importance of the prosecution to prove the case beyond reasonable doubt. He prayed that, all these doubts should be resolved in favour of the appellant.

On the 6th ground of appeal, the learned advocate submitted that the trial court convicted the appellant on the offence of rape which was not supported by evidence. According to him, PW2's evidence supported the offence of unnatural offence than that of rape and the victim's evidence supported the offence of gang rape than rape. Thus, the trial court erred in convicting and sentencing the appellant on the offence which was not proved.

As to the 8th ground of appeal, it was Mr. Lairumbe's submission that, the trial court erred in failing to consider the appellant's defence of *alibi* as he told the court that, he left for the funeral on 20th March, 2022 and returned on 22nd March, 2022. That, he was not present on 21st March, 2022 when the incident allegedly occurred and his witnesses corroborated his testimony. He referred the court to the case of **Alfeo**

Valentino vs. Republic, Criminal Appeal No. 92 of 2006 (unreported) where the Court of Appeal insisted on the importance of considering and analyzing defence evidence.

Lastly learned counsel challenged the trial court for entering a conviction against the appellant while material witnesses to his case were not summoned. He cited the case of **Aziz Abdallah vs. Republic** [1991] TLR 91 and that of **Kirstin Cameroon vs. Republic** [2003] TLR 83 to support his contention that, failure of the prosecution to summon relevant witnesses draws adverse inference against them and the same should benefit the appellant. He prayed that this Court allow the appeal, quash and set aside conviction and sentence and set the appellant at liberty.

Opposing the appeal Ms. Assenga submitted on the grounds of appeal in no particular order. On the 1st ground, she submitted that the appellant was charged with the offence of rape and the amended charge sheet showed both the offence provision, section 130 (1)(2)(e), and the sentencing provision, section 131 (1) of the Penal Code. She argued that, the particulars were very clear, as such the appellant understood the nature of the offence and was able to mount his defence.

Regarding the variance of dates, she submitted that there is no discrepancy or contradiction because the victim stated that, she was

raped on diverse dates and months from January to March. However, through her mother's testimony, the victim was examined on 22nd March 2022 hence making the 21st March, date more valid. She referred the court to the case of **Emmanuel Lyabonga vs. The Republic**, Criminal Appeal No.257 of 2019 in which the Court of Appeal held that normal contradictions which do not go to the root of the case can be pardoned.

On the 2nd, 3rd, 4th, and 5th grounds of appeal, Ms. Asenga argued jointly that, the prosecution managed to prove the case against the appellant at the required standard. She averred that, to prove the offence of rape, two ingredients have to be proved, i.e. penetration and who is the perpetrator. In the appeal at hand, the first element of penetration was proved as the victim narrated how the appellant "alitoa kitu yake ya kukojolea and inserted to my sehemu ya kukojolea" which prudently proves penetration as held in the case of **Godi Kasenegala vs. The Republic**, Criminal Appeal No. 10 of 2008 and **Selemani Makumba vs. Republic**, Criminal Appeal No. 94 of 1999.

On the 7th ground, the learned state attorney contended that the victim's age was properly proved by the victim's mother to be ten years. However, the victim testified to be nine years old when the incident occurred, hence this minor contradiction does not go to the root of the

case and the same can be disregarded as it did not prejudice the appellant.

On the 9th ground, Ms. Asenga submitted that failure to call material witnesses is immaterial in the appeal at hand because in sexual offence cases, a sole victim's testimony can warrant the accused person's conviction as that is the best evidence. More so, section 143 of the Evidence Act does not give a particular number of witnesses required in court to prove a certain fact. She argued that, even without summoning other children who were with the victim, what matters is that the case was proved at the required standard which was thoroughly done by the victim, her mother, and the medical doctor who proved that the victim was penetrated.

Replying on the 6th ground, Ms. Assenga submitted that, although the victim's testimony lays the foundation of gang rape, the other perpetrator is still at large to date. This, however, does not negate the fact that the appellant was involved in the act and the elements of the offence of rape have been proved against him at the required standard.

On the 8th ground of appeal, the appellant alleged that the trial magistrate did not consider his defence of *alibi*, Ms. Asenga argued that the same was not given under the notice as per section 194 (4) of the

CPA and the case of **Yusuph Selemani @Nduwa vs. The Republic,** Criminal Appeal No. 260 of 2020 was cited in support of that contention. However, without such notice, the court can decide whether to accord weight to such evidence or not as per section 194 (6) of the CPA which in the matter at hand it did not.

On the last ground of appeal, the learned State Attorney argued that exhibit P1, the PF3 was never contradictory and the same was properly admitted. She prayed that this appeal be dismissed for want of merit and that the trial court's decision be upheld.

In his rejoinder, the appellant's learned counsel reiterated his earlier submission and maintained that the appellant was erroneously convicted as the case against him was never proved at a required standard.

After going through the appellant's submissions and trial courts' proceedings and judgment, the issue for consideration is whether the case against the appellant was proved beyond reasonable doubt.

Starting with the first ground, the appellant alleges that, the trial magistrate erred in law and fact for convicting the appellant on a defective charge sheet as the sentencing provision was not cited until 14th December, 2022. However, the law is clear that whenever there is a variation of any kind between the charge sheet and the evidence

amendment can be done under section 234 (1) of the CPA. In the case of **Sali Lilo vs. The Republic**, Criminal Appeal No. 431 of 2013 (unreported), the Court of Appeal made an observation from **Mohamed Kaningo vs The Republic** [1980] TLR 279 that;

> *"While the prosecution must file charges correctly, those presiding over criminal trials should, at the commencement of the hearing, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if not to require that it be amended accordingly."*

Therefore, where it is found that the evidence adduced is at variance with the charge, or that the charge is defective either in substance or in form, the court may be moved under s. 234 (1) of the Criminal Procedure Act to amend the charge to reflect the evidence. However, the amendment must be made before judgment as was observed in the case of **Said Msusa vs. The Republic**, Criminal Appeal Case No. 268 of 2013 (unreported).

In the appeal at hand, the initial charge sheet showed the offence of rape but did not cite the sentencing provision to wit; section 131 (1) of the Penal Code until 14th December, 2022. Looking at pages 20 and 21 of the typed proceedings, such amendments were made under section 234 (1) of the CPA. After the charge was amended, the same was read over

to the appellant who pleaded thereto. He also agreed to continue from where the trial ended with PW3 and as a result, he was able to mount his defence. Alleging that he was not aware of the seriousness of the offence is a mere afterthought. This ground fails as the same lacks merit.

On the second, third, fifth, and sixth grounds of appeal, the appellant argues that he was convicted on a non-existence offence because the appellant was charged with the offence of rape while the victim testified of gang rape and PW2 testified on penetration against the order of nature i.e. unnatural offence, hence the case was never proved at the required standard. Looking at the charge sheet the appellant was charged with the offence of rape and the trial court's judgment shows that, the appellant was convicted and sentenced on the offence of rape and not gang rape or unnatural offence.

In law, for the offence of rape to warrant a conviction, two ingredients have to be proved, first, the victim was penetrated and second, it was the appellant who did the act. See the cases of **Selemani Makumba vs. The Republic**, [2006] T.L.R. 379, **Jilala Justine vs. The Republic**, Criminal Appeal No. 441 of 2017, CAT at Shinyanga, **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 and **Godi**

Kasenegala vs. The Republic, Criminal Appeal No. 10 of 2008 (all unreported).

In the appeal at hand, the victim PW1 told the court that, she was penetrated by the appellant as "alitoa kitu yake ya kukojolea" and inserted to my "sehemu ya kukojolea" and that she felt pain but she could not shout as she was tied and her mouth was covered with a piece of cloth. Thereafter, another man named Ibrahim also raped her as they did turn with the appellant. Corroborating this evidence was PW2's testimony, the medical doctor who told the court that, after he examined the victim's genitalia he found the vagina with deep red colour and bruises in her but her hymen was not perforated. He also found deep red colour, bruises, and cuts in her anus and concluded that she was penetrated against the order of nature several times. In exhibit P1, the PF3, the same is filled that, the victim's vagina was found with a partial hymen, but had a laceration through her anus which proves that, there was both vaginal and anal penetration several times. Since the victim mentioned the appellant and Ibrahim who is at large as the ones responsible, I am of the firm view that all elements of rape which is the offence the appellant was charged with were proved at the required standard. These grounds lack merit and are hereby dismissed.

Regarding the fourth and tenth grounds, the appellant alleges that there were a number of contradictions on the prosecution side such as variation of dates, victim's age, failure to call material witnesses, and the fact that the evidence supported gang rape and unnatural offence. Starting with the variation of dates, the charge sheet shows that, the incident occurred on diverse dates between January and 21st March, 2022. The preliminary hearing shows that the incident occurred on 9th January, 2022 while PW1 stated that, she does not remember but PW2 examined the victim on 22nd March, 2022 and found fresh bruises. In the circumstances, since the victim did not remember when exactly she was raped, the prosecution's evidence that the victim was raped on 21st March, 2022 holds water. In the case of **Anania Turian vs. Republic** (supra) which Mr. Lairumbe cited, the Court of Appeal held as follows concerning the variation of dates;

> *"When a specific date of the commission of the offence is mentioned in the charge sheet, the defence case is prepared and built based on that specified date. The defence invariably includes the defence of alibi. If there is a variation in the dates, then the charge must be amended forthwith and the accused explained his right to require the witnesses who have already testified, recalled. If it is not done the preferred charge will remain unproved and the accused shall be entitled to an*

acquittal as a matter of right. Short of that, a failure of justice will occur."

Guided by the above decision, in the appeal at hand, following PW1, PW2, and PW3's testimonies, the appellant was aware that the date when the incident is said to have occurred was 21st March 2022 and that is why he gave his defence in respect of that date.

Regarding PW1's age, the law is clear that the proof of the same may be given by the victim, relative, parent, medical practitioner, or, where available, by the production of a birth certificate. In the case of **Samwel Nyerere vs. The Republic**, Criminal Appeal No. 65 of 2020, CAT at Arusha, the Court of Appeal referred to its earlier decision in the case of **Wilson Elisa @ Kiungai vs. The Republic**, Criminal Appeal No. 449 of 2018 unreported where it was held that:

"... *like any other fact, age may be deduced from other evidence and circumstances availed to the court which is permissive under section 122 of the Evidence Act, [see* ***Issaya Renatus vs Republic,*** *Criminal Appeal No. 542 of 2015 (unreported)]."*

In the appeal at hand, the charge sheet shows that the victim was eight years old when she was raped. During her testimony, she mentioned her age to be nine years old whereas her mother testified that she was ten years old as she was born on 16th August, 2012. This is a mere

contradictions that do not go to the root of the case as I find her mother's testimony more credible because as a parent she is certain of the day the victim was born, and all these years mentioned are in the range of the tender age.

Regarding failure to call material witnesses, section 143 of the Evidence Act, Cap 6 R.E. 2022, does not provide for a number of witnesses needed to prove the case or certain facts. What matters is, if the ingredients of the offence are proved. In the appeal at hand, the evidence of PW1 and that of PW2 is enough to prove the offence against the appellant because in sexual offence cases, even the sole evidence of the victim suffices to warrant conviction as held in the case of **Wilson Elisa @ Kiungai vs. The Republic**, Criminal Appeal No. 449 of 2018.

On the last contradiction on whether the charge was rape, gang rape, or unnatural offence, the same has been answered hereinabove. These grounds also lack merit and the same are dismissed.

Lastly, the appellant challenges the trial court's failure to consider his defence of *alibi* and whether the same casted doubt on the prosecution case. The appellant relied on the defence of *alibi* to the effect that on 20th - 22nd March 2022, he was not around as he went to a funeral. In support of his defence, he brought one witness to support that on that date he

was attending a burial service. However, the law section 194 (4) and (5) of the CPA is very clear that prior notice has to be given before the hearing under subsection (4) or the particular of the said alibi before closing the prosecution case under subsection (5) before the defence of *alibi* is relied upon. However, under section 194 (6) of the CPA provides that;

> *"Where the accused raises a defence of alibi without having first furnished the prosecution pursuant with this section, the court may in its discretion accord no weight of any kind to the defence."*

In the case of **Director of Public Prosecutions vs. Nyangeta Somba and Twelve Others** [1992] TZCA 30 the Court of Appeal held;

> *"Where an accused person intends to rely upon an alibi in his defence, he shall give to the Court and the prosecution notice of his intention to rely on such defence before the hearing of the case."*

Further, in the case of **Mohamed Hussein Pagweje vs The Republic**, Criminal Appeal No. 556 of 2017 CAT Arusha, faced with similar circumstances it held inter alia that;

> *"...as it can be gathered from his evidence in defence from pages **23** to **26** of the record of appeal, was an alibi. It was the appellant's claim that on the material night he was at Arusha. It is on record that the appellant raised this defence at the stage when the prosecution case had been closed hence in contravention of section **194 (4)** and **(5)** of the CPA. In such circumstances and in terms of section **194 (6)** of the CPA the*

trial court had to consider it but it had the discretion to accord it no weight or lesser weight- see ***Mwita s/o Mhere and Ibrahim Mhere v. R [2005]*** *T.L.R.* ***107*** *and also* ***Sijali Juma Kocho v. Republic[1994]*** *T.L.R.* ***206.***

In the judgment of the trial court, at page 33 of the record of appeal, the defence was considered but it was accorded no weight. Likewise, the High Court in its judgment at page 49 of the record of appeal, considered the defence by concurring with the trial court that the defence was without due notice having been given and that the trial court rightly exercised its discretion to reject it. We find no reason for faulting the concurrent findings of the two lower courts. The defence raised by the appellant did not shake the credible prosecution case that the appellant was at the scene of the crime at the material time. This ground of appeal fails too."

In this case, the Court of Appeal stated the rationale behind giving such notice is to enable the prosecution to verify the truth of the *alibi* particulars and if necessary, assemble evidence in rebuttal and as such should be given before the main hearing. Moreover, further pondering about the discretion of the court under subsection (6) when such evidence is given without notice, the Court of Appeal in the case of **Kubezya John vs. Republic**, Criminal Appeal No. 488/2015, CAT, sitting at Tabora,

"...provided that subsection 6 of the provision give the court discretion to accord no weight to such defence if it wishes. It was, therefore, the duty of the trial court to see whether or not,

in its discretion, it should accord no weight to the defence of alibi by the appellant or not."

According to the above authorities, it is clear that, the trial court can use its discretion to either accord weight or not to the accused's defence of *alibi*. Looking at his defence of alibi, the appellant claimed that, on 21st March, 2022 he went to a funeral, however, none of his witnesses gave evidence to prove that they were with him throughout the whole day. Therefore, his defence of alibi did not raise any doubt about the prosecution evidence and the trial court's magistrate did not err in disregarding it. I find his defence just a mere afterthought. In the premises therefore, I find the case against the appellant to have been proved at the required standard hence, the appeal is dismissed, trial Court decision is upheld together with its conviction and sentence.

It is accordingly ordered

DATED and Delivered at **ARUSHA** this 07th day of August, 2023.

HIGH COURT OF TANZANIA

J.C. TIGANGA

JUDGE