

UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IRINGA REGISTRY
AT IRINGA

CRIMINAL APPEAL NO. 41 OF 2023

(Originating from Criminal Case No. 17 of 2022 in the District Court of Mufindi at Mafinga).

BENEDICT JUMAAPPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of the Last Order: 08.08.2023

Date of the Judgment: 18.08.2023

A.E. Mwipopo, J.

The appellant, namely Benedict Juma, was convicted and sentenced by the Mufindi District Court at Mafinga in Criminal Case No. 17 of 2022 for the offence of rape contrary to sections 130(1), (2)(e) and 131 (1) of the Penal Code, Cap 16 R.E 2019. The particulars of the offence in the charge sheet reveal that on 16th January, 2022, at Utosi area Sadani ward, within Mufindi District and Iringa Region, the appellant unlawfully had carnal

knowledge of one G.L., a girl of 14 years old. The appellant pleaded not guilty to the offence, and the prosecution brought five (5) witnesses to prove the case. The appellant testified on oath and brought a witness in his defense after the trial Court found he had a prima facie case. The trial Court convicted and sentenced the appellant to serve thirty years imprisonment.

The decision of the trial Court aggrieved the appellant, and he preferred this appeal containing four grounds of appeal as follows hereunder:-

- 1. That, the learned Magistrate erred in law and facts to convict the appellant while the prosecution side did not prove the offence beyond reasonable doubt.*
- 2. That, the learned Magistrate erred in law and facts to convict the appellant based on contradictory and inconsistent evidence adduced by prosecution witnesses.*
- 3. That, the learned Magistrate erred in law and facts to convict the appellant based on evidence adduced by PW1, which was self-contradictory and unreliable.*
- 4. That, the learned Magistrate erred in law and facts for failing to evaluate the evidence adduced by the defence witnesses, which resulted in an erroneous decision.*

At the hearing, Mr. Erick Nyato, advocate, appeared for the appellant, and Mr Yahya Misango, State Attorney, appeared for the respondent. The Court invited parties to make their submission.

Supporting the appeal, Mr Nyato said on the first ground of appeal that the prosecution evidence failed to prove the case without a doubt. The prosecution was supposed to prove that there was penetration and that the appellant raped the victim. There was a contradiction in PW1's evidence on page 9 of the proceedings. PW1 said that she went to his uncle's house. However, in cross examination, PW1 stated that she was in the room of Mnyalu on 17th January, 2022. Mnyalu did run away after the incident. He said there is another contradiction in the evidence of PW1 and PW2. PW2 stated that PW1 returned home late, as seen on page 12 of the proceedings. It is a requirement of the law for the prosecution evidence to prove the offence without contradictions. Where there are contradictions, the Court has to resolve the contradiction. The position was stated in the case of **Toyidoto Kosima vs. Republic**, Criminal Appeal No. 525 of 2021, Court of Appeal of Tanzania at Kigoma (unreported). There is doubt as to where PW1 was during the incident. The uncle and Mnyalu did not testify in Court if PW1 was in their house. The Court was supposed to draw adverse

inference for the prosecution's failure to bring material witnesses as it was held in **Hemed Said vs. Mohamed Mbilu [1984] TLR 113**. These witnesses might have evidence which is contrary to the prosecution's interest. As a result, they decided to drop them.

Regarding the 2nd and 3rd grounds of appeal, Mr Nyato submitted that PW1 is not a credible witness. PW1's testimony was that after she saw her parents run away. The question is, why did she run away? The Court erred to rely on the testimony of PW1, the child of tender age, without satisfying itself that the witness is credible and reliable. The witness was not credible, and the trial court was not supposed to rely on her evidence. The exact position was stated in the case of **Selamn Yahaya @ Ziga vs. Republic**, Criminal Appeal No. 533 of 2019, Court of Appeal of Tanzania at Dar Es Salaam (unreported).

Further, the counsel said that the trial magistrate relied on the cautioned statement to convict the appellant without having any other evidence which corroborates it. The trial court was supposed to be cautious with the cautioned statement since it contradicted the testimony of PW1. The Court of Appeal emphasized the need for corroboration in the evidence of cautioned statement in the case of **Muganyizi Peter Michael vs.**

Republic, Criminal Appeal No. 144 of 2020, Court of Appeal of Tanzania at Mwanza (unreported), on page 43 of the judgment.

Concerning the last ground of appeal, he said the trial court did not consider the defense evidence that he did not commit the offence. The victim was a client who brought a phone for maintenance. If the Court could have evaluated the prosecution evidence, it could not convict the appellant. The exact position was stated in the case of **Daudi Anthony Mzuka vs. Republic**, Criminal Appeal No. 297 OF 2021, Court of Appeal of Tanzania at Mtwara (unreported).

Mr Yahya Misango, State Attorney, opposed the appeal. He said on the 1st ground of appeal the appellant was charged for the offence of rape contrary to sections 130(1), (2) (a) and 131(a) of the Penal Code, Cap. 16 R.E. 2022. The prosecution proved that the victim was penetrated, and the appellant penetrated the victim, who was aged below 18 years. The evidence of the victim shows that the victim boarded the car owned by the appellant. While inside the vehicle, the appellant undressed the victim and inserted his penis into her vagina. The victim's evidence on the act of penetration was not disputed during cross examination. It means the victim proved that there was penetration of the appellant's penis into her vagina.

On the issue of the victim's age, the state attorney said the victim proved that at the time of the incident, she was 14 years old as she was born on 03rd June, 2008. The victim's evidence is supported by the evidence of her mother (PW2), who said the victim was born on 03rd June, 2008 in Temeke District in Dar Es Salaam Region. This evidence proved that at the time of the incident, the victim was aged 14 years.

Regarding the appellant's cautioned statement (Exhibit P1), where he confessed to having sexual intercourse with the victim on 16th January, 2022, Mr. Misango said that Exhibit P1 corroborated the victim's testimony. The confession provides in detail what happened during the incident. He cited the case of **Frank Kinambo vs. DPP**, Criminal Appeal No. 47 of 2019, Court of Appeal of Tanzania at Mbeya (unreported), where the Court held on page 17 of the judgment that the very best of witnesses in any criminal trial is an accused person who freely confesses his guilty. Exhibit P1 was sufficient to corroborate the testimony of PW1.

Mr Misango submitted in reply jointly to the 2nd and 3rd grounds of appeal. He said there are no contradictions in the evidence of PW1 and PW2. The charge and testimony of PW1 show that the incident occurred on 16th January, 2022 and not on 17th January, 2022, when PW1 was found at the

house of Mnyalu. If the incident happened on 17th January, 2022, there might be doubt in the prosecution's case. The incident occurred on 16th January, 2022, according to the testimony of PW1 and PW2. PW2 said PW1 informed her that the appellant raped her on 16th January, 2022. The fact that on 17th January, 2022, PW1 ran away or went to her uncle's or Nyalu's house does not affect the prosecution's case. The contradictions, if any, are minor and do not go to the case's root. The contradiction mentioned by the counsel for the appellant does not go to the gist of the case, and they do not affect the prosecution's case.

On the last ground of appeal, the counsel said that the trial court considered defense evidence and evaluated it before holding that the defense evidence does not raise doubt about the prosecution's case. This is found on page 5 of the judgment. The appellant's allegation that the trial court failed to evaluate the defense case and ended up with a wrong decision has no basis.

In his rejoinder, Mr Nyato reiterated his submission in chief and added that the contradictions in the testimony of PW1 and PW2 go to the root of the case.

Having heard the rival submissions by the parties, the main issue to be determined by this Court is whether this appeal has merits.

In determining the appeal, I will consider each ground of appeal submitted by the parties. The counsel for the appellant said concerning the 1st ground of appeal that the offence against the appellant was not proved beyond reasonable doubt as there is a contradiction in the evidence of the victim (PW1) and PW2. He argued that the prosecution did not prove penetration which is the ingredient of a rape offence, as PW1 is not a credible witness. In reply, the counsel for the respondent said the prosecution proved beyond reasonable doubt that the appellant penetrated the victim. PW1 is a credible witness, and if there is any contradiction, the same does not go to the root of the case.

Considering the arguments by both parties, penetration is among the element in proving the offence of rape. In rape offences, the prosecution is duty-bound to prove the presence of penetration of the penis into a vagina. Section 130 (4) (a) of the Penal Code provides that evidence establishing penetration of the male's manhood into the female organ is necessary, and such penetration, however slight is sufficient to constitute sexual intercourse. In the case of **Kayoka Charles vs. Republic**, Criminal Appeal No. 325 of

2007, Court of Appeal of Tanzania at Tabora, (Unreported), it was held that penetration is a crucial aspect, and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ. The penetration in sexual offences must be proved beyond a reasonable doubt.

In this case, the evidence of the victim (PW1) revealed that on 16th January, 2022, while going back to her parent's home in Saadan from Mafinga, the appellant asked her to board his car so he could give her the phone which he was repairing. Instead of giving her the phone, he took her to the bushes outside the town and had sexual intercourse with the victim after threatening her with a machete. The appellant undressed and inserted his penis into the victim's vagina. This evidence shows a penetration of the appellant's penis into the victim's vagina.

PW1 evidence shows that after having carnal knowledge of her, the appellant took her to the Mafinga bus stand and gave her the bus fare. He warned her not to say anything to anybody. The victim went to her uncle's house, where she found her cousin's brother, Mkapa. She informed Mkapa about the incident, and he told her to sleep there, and on the following date, he will take her to her parents. In cross examination, PW1 said that on 17th January, 2022, the police called the appellant to the police station. She said

further that she was found in the room of Mnyalu by her parents when her parents were looking for her after she disappeared. After seeing her parents, PW1 said that she had run away. The counsel for the appellant stated in his submission that the evidence of the victim (PW1) contradicted the evidence of PW2 (victim's mother) regarding the time and date when she returned home.

I have read the evidence of PW2 in the record. In her testimony, she said that on 16th January, 2022, around 18:00 hours, she was informed by her sister Mariam Kawaga that the victim (PW1) was returning to Saadan from Mafinga. PW1 arrived late, around 22:45 hours. PW2 asked PW1 why she returned late, and she answered that the appellant took her to the Mgalo area near Saadan Secondary School, where he had sexual intercourse with her. In cross examination, PW2 said that PW1 took the phone of one Baraka Lugenge to the appellant for repair. It is not true that PW1 disappeared on 16th to 20th January, 2022, where she was found. It is not true that PW1 was found in another man's house.

From this evidence, there is an apparent contradiction in the testimony of PW1 and PW2 as to where PW1 went after being raped by the appellant.

PW1 said after the incident, she went to her uncle's house, where she met with her cousin's brother Mkaapa and informed him about the incident. PW2 said that PW1 arrived home late, around 22:45 hours on 16th January, 2022, and she told her that the appellant had sexual intercourse with her. PW1 did not say if she returned home on 16th January, 2022. Further, PW1 did not say in her evidence that on 17th January she returned home to her mother. In cross examination, she stated that the appellant reported at the police station on 17th January, 2022, and she was found in the room of Mnyalu when her parents were tracing her after she disappeared. PW2 said that PW1 never disappeared or was found in the room of Mnyalu. The question is, who is telling the truth between PW1 and PW2? This Court is not in a position to tell.

It is settled law that where there are discrepancies in the evidence, the Court has to decide if the contradiction is minor or goes to the gist of the evidence. In **Dickson Elia Nsamba Shapwata vs. Republic**, Criminal Appeal No. 92 of 2007, Court of Appeal of Tanzania at Mbeya (unreported), it was held:-

"In evaluating discrepancies, contradictions or omission, it is undesirable for a Court to pick alibi sentences and consider them in

isolation from the rest of the statements. The Court has to decide whether the discrepancies or contradictions are only minor or whether they go to the root of the matter."

The case flop only where the gist of the case is in contradiction. In **Vuyo Jack vs. Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016, Court of Appeal of Tanzania at Mbeya (unreported), the Court held that:

"Not every discrepancy in the prosecution case will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."

The Court is aware that every witness is entitled to credence. In **Goodluck Kyando vs. Republic**, [2006] TLR 363, the Court held that:-

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness."

From above stated principle, where there is an excellent and compelling reason, the Court may disbelieve the testimony and credibility of the witness. One cause of discrediting the witness is when the evidence is fundamentally contradictory or irreconcilably contradicted by another witness. The position was stated in **Mathias Bundala vs. Republic**,

Criminal Appeal No. 62 of 2004, Court of Appeal of Tanzania at Mwanza (unreported). The Court held on page 13 of the judgment that:-

"The assumption will always be that the testimony is true unless the witness's character for veracity has been assailed, some motive on his or her part to misrepresent the facts has been established, his or her bias or prejudice has been demonstrated, and he or she has given fundamentally contradictory, or improbable evidence or has been irreconcilably contradicted by another witness or witnesses."

In the present case, the testimony of PW2 contradicts the testimony of the victim (PW1), as pointed out above. There is a contradiction regarding where the victim (PW1) went after the rape incident. PW1 said she went to her uncle's house and told her cousin Mkapa about the incident. PW2 said PW1 returned home late and informed her the appellant raped her. The contradiction is not minor as it shows where the victim headed after the rape incident and provides the first person she told about it. If it is her cousin Mkapa as she said in her testimony, the said Mkapa was supposed to be called as witness. Mentioning the suspect immediately to the first person she meets after the incident is the assurance of identification.

Further, PW2 denied that the victim did not disappear and was found in the room of Mnyalu. But, the victim (PW1), in her evidence when

answering cross examination questions, admitted that she was found in the room of Mnyalu and after seeing her parents, she ran away. This contradiction affects the credibility of PW1 and PW2. Thus, I agree with the counsel for the appellant that the evidence of PW1 (victim) is not credible, and the trial Court was not supposed to rely on it. The discrepancies were material and destroyed the credibility of the prosecution case.

After discrediting the victim's testimony, the remaining independent evidence is the confession of the appellant, which was admitted as exhibit P1. The record shows that when PW4 was tendering the cautioned statement, the appellant objected to its tendering. As the appellant did not provide the reason for objecting, the trial Court decided to admit it. It was not proper for the trial Court to admit the cautioned statement without asking why the appellant objected to its tendering as the appellant is the layperson. The same denies the appellant's right to comment on the tendering of the confessional statement. For that reason, I expunge the confessional statement (exhibit P1) from the record.

After expunging the appellant's cautioned statement, there is no independent evidence to prove the case against the appellant.

Therefore, the appeal has merits, and it is allowed. The conviction of the trial District Court is quashed, and its sentence is set aside. The appellant is released from prison immediately otherwise held for other lawful cause. It is so ordered accordingly.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

A.E. MWIPOPO

JUDGE

18/08/2023