IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 125 OF 2022

(Originating from Criminal Case No. 101 of 2019 in the Resident Magistrate Court of Kiteto at Kibaya)

LAURENT S/O HASSAN _____ **APPELLANT**

VERSUS

THE D.P.P _____ **RESPONDENT**

JUDGMENT

03/05/2023 **&** 18/08/2023

BADE, J.

In the District Court of Kiteto at Kibaya (henceforth "the trial court"), the appellant herein was arraigned, prosecuted and convicted of an offence of Rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2009.

It was alleged by the prosecution that on 17th to 20th of June, 2019 at Kibaya within Kiteto District in Manyara Region, the Appellant did have sexual intercourse with a girl aged 15 years old whose identity shall be referred to as XX. The Accused person now Appellant patently denied the charge preferred against him.

The brief facts of the case as can be gathered from the testimonies of the witnesses during trial is to the effect that the victim and the appellant were in a relationship, and that on 16/06/2019 the victim left her homeplace and went with the Appellant to his house where they stayed together until on 21/06/2019 when the victim went back home. According to her testimony she has been having sexual intercourse with the Appellant in all the days that she stayed with him. Her testimony was corroborated with that of PW2 her mother who testified that on 16/06/2019 the victim disappeared from home and that they looked for her in vain until when she came back home and told them that she was at the house of the Appellant. PW3 the doctor who examined the victim also testified, and he stated that on 24/06/2019 the victim was brought to the hospital where he examined her and found out that she has been having sexual intercourse, he thereafter filled the PF3 which was tendered in court, and admitted as exhibit P1.

After close of the prosecution case, the Appellant entered his defence denying the commission of the offence he stood charged with. He claimed that, he has been in a dispute over his land with a person whom he did not know his name and that the said person has been threatening him.

He alleged that he was arrested by the police and they took him to the Police Station where he was charged with the offence of Rape.

After hearing the evidence of both the prosecution and of the defence, the Trial Magistrate was fully satisfied that the offence against the Appellant was proved to the hilt. He was thereafter convicted and sentenced to serve thirty (30) years imprisonment.

Aggrieved by both conviction and sentence imposed on him, the Appellant has preferred this appeal on five grounds of appeal as summarized; Thus the Appellant was convicted without affording him the right to cross examine PW1 (The Victim), that, the trial court erred in law when it convicted and sentenced the Appellant when PW1, PW3, and PW4 did not take Oath, that the trial Court convicted and sentenced the Appellant in a case full of contradictions, discrepancies, and unreliable witnesses' account, that the trial Court erred in law and in fact when it relied on PF3 and Exhibit P1 which was tendered by PW4 without taking Oath, and lastly, that this case was not proved to the required standard of the law which is beyond reasonable doubt.

It was the Appellant's prayer that the appeal be allowed, urging this Court to quash the conviction and set aside the sentence imposed by the trial court, and set him at liberty.

At the hearing of the appeal before me, the Appellant appeared in person unrepresented, while Ms Alice Mtenga, learned State Attorney represented the respondent, Republic. The appeal was disposed of by way of written submissions which I shall consider while determining the grounds of appeal. Apparently, the said grounds shall be argued in the following manner; grounds number 1, 2, and 4 shall be disposed of separately, on the other hand, grounds number 3 and 5 will be deliberated jointly as they are relatedly intertwined.

Submitting on the first ground of appeal, the Appellant argued that the trial court erred in law and facts when it convicted the appellant without affording him the right to cross-examine Pw1 (victim). Expounding on this ground of appeal, the Appellant stated that he was not accorded the right to cross-examine the victim. He went further to state that, on page 8 of the typed proceedings it is not indicated as to who between the prosecutor and the Appellant cross-examined PW1.

Replying to the above submission Ms. Mtenga strongly opposed the above argument and was of the view that the Appellant was afforded an opportunity to cross-examine the victim as evidenced on page 8 of the trial court's proceedings where after PW1 had finished testifying, the

Appellant asked PW1 many questions. Therefore, it is her opinion that this ground is unfounded and therefore it should be dismissed.

Generally, the examination of witnesses is guided by the provision of section 146 of the Evidence Act, Cap 6 R.E 2019 which states:

> *"146.-(1) The examination of a witness by the party who calls him is called examination-in-chief.*
>
> *(2) The examination of a witness by the adverse party is called cross-examination.*
>
> *(3) The examination of a witness, subsequent to the cross-examination, by the party who called him is called re-examination"*

In the instant case the Appellant is challenging that he was not accorded the right to cross-examine PW1 who is the victim of the incident. This allegation takes me back to the proceedings of the trial court in particular on page 8 where after PW1 had finished giving her testimony the court recorded "CROSS-EXAMINATION", actually here is where the center of the controversy lies, where the Appellant alleges that the court did not indicate as to who between the Appellant and the Prosecutor cross-examined the witness. As already cited above, Section 146 of the Evidence Act regulates the examination of witnesses. Simple logic would have it that since PW1 was the prosecution witness when she was being

examined by the prosecution side, and according to Section 146 (1) her evidence is termed as *"Examination in chief"*, subsection 2 of the said section also states that examination of a witness by the adverse party is called cross-examination, therefore, irrespective of the omission by the trial court to indicate as to who did the cross-examination to PW1, it can be said with certainty that it was nobody other than the Appellant who cross-examined her. Furthermore, much as PW1 was the prosecution witness, it is irrationally absurd under the circumstances to imagine let alone to assert that the said witness was cross-examined by the prosecutor. That being said I find no merit in this ground of appeal and therefore it is bound to fail.

On the second ground of appeal, the appellant submitted that PW2, PW3, and PW4 were not affirmed or sworn before testifying. According to him, these witnesses were sworn after the prosecution had started leading them to give evidence, stating further that normally, as a matter of practice, the witness who comes to testify before the court is first sworn or affirmed, then the prosecutor starts leading him/her to testify. Contrary to this practice, in the case at hand what transpired during trial when PW2, PW3, and PW4 were testifying is quite different because they were never sworn or affirmed before the prosecutor could lead them to give

their evidence. He alleges that this is an irregularity as the trial Magistrate did not observe the proper manner and practice of taking and recording the witnesses' testimony. He claims that this irregularity is fatal and cautioned that the evidence of PW2, PW3, and PW4 lacked evidential value.

Responding to the above the learned State Attorney referred this court to pages 11, 15, and 21 of the trial court proceedings where it is clearly evidenced that PW2, PW3, and PW4 were all either affirmed or sworn respectively before giving their testimonies. According to her position, the complaint by the Appellant that the mentioned witnesses were not sworn or affirmed before giving their testimonies is baseless.

As a matter of fact, this ground of appeal does not need to detain me much as I have thoroughly gone through the proceedings of the trial court, where the prosecution summoned four witnesses, PW1, PW2, PW3, and PW4. A scrutiny of the said proceedings has shown that all the witnesses took oath before giving their testimonies. With due respect, this court has failed to understand the allegation of the Appellant in respect of the approach taken by the trial Magistrate in taking the oath of the witnesses and basically, I find no fault in the manner the oath was taken to all witnesses before they gave their evidence. I am subscribed to the

decision of the Court of Appeal of Tanzania in the case of **Menald Wenela vs The Director of Public Prosecutions,** Criminal Appeal No. 336 of 2018 (Unreported), where the Court of Appeal insisted that being sworn before giving evidence is a mandatory requirement under section 198 of the Criminal Procedure Act, Cap 20 R.E. 2019.

For ease of reference the provision is reproduced below:

> *"(1) Every witness in a criminal case or matter shall, subject to the provisions of any other written law to the contrary be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

This ground of appeal also disposes ground number four where the appellant challenges the reliance of exhibit P1, the PF3 stating that the same was tendered by a witness who did not take an oath. As already stated above that, this court is fully satisfied that all witnesses either took oath or were affirmed before giving their evidence, therefore it is my firm view that this ground of appeal is miserably untenable.

As already stated above, grounds number three and five shall be deliberated jointly. In these two grounds, the Appellant is challenging the prosecution evidence stating that it was full of contradictions, discrepancies and was unreliable on the dates and location at which the

offence was committed, and in view thereof, he claimed that the prosecution case was not proved beyond reasonable doubt.

The Respondent on her side was of the opinion that the variance between the date mentioned in the charge sheet and the one in the testimony of PW1 is not fatal. She argues that the same is in fact curable under section 234 (3) and 388 (1) of the Criminal Procedure Act. The learned State Attorney supported her stance through the case of **Said Majaliwa vs Republic,** Criminal Appeal No. 2 of 2020 (Unreported). She went further to state that generally minor contradictions are unavoidable as they go to human error in either memory or accounting of the sequence of events; as long as they do not go to the root of the case, they are normally discounted. It was therefore her stand that the prosecution case was proved beyond reasonable doubt.

As it is a cardinal principle of criminal law that, in criminal cases, it is the prosecution that has the burden of proving its case beyond a reasonable doubt. See the decision of the Court of Appeal of Tanzania in the case of **Pascal Yoya @ Maganga vs Republic,** Criminal Appeal No. 248 of 2017 (Unreported).

The Appellant herein is alleging that there is a variation of dates where in the charge sheet it is indicated that the incident occurred on 17th June

2019, while PW1 testified stating that she had sexual intercourse with the Appellant from 16th June 2019 to 20th June 2019. He also faulted the location of the incident where he stated that PW1 testified that the incident was committed at KIBAYA KATI while the charge sheet indicated that the offence was committed at KIBAYA area.

I have considered the contradictions as pointed out by the Appellant with regard to the date of the commission of the offence, the charge sheet indicated that the offence was committed on 17th to 20th June 2019 at Kibaya Area, which means that the charge sheet is at variance with the evidence on record. PW1 also stated the offence being committed at one place while the charge sheet is referring to another place.

The Court of Appeal of Tanzania in the case of **Credo Swalehe vs Republic** [2014] TLR 144 held that:

> "The irregularity in convicting the Appellant on a charge which carries particulars diametrically opposed to the evidence on record alone is so glaring that it has resulted in miscarriage of justice."

As the record would show, PW1 testified that she went to the house of the Appellant and stayed with him from 16th of June 2019 to 21st of June 2019. In any case, to establish that the prosecution has proved its case against the accused persons to the required standard of proof, I am guided by the provisions of Section 3 (2) (a) of the Evidence Act , Cap 6 RE 2019 stating the cardinal principle of criminal law that the prosecution has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. The accused on the other hand, only needs to raise some reasonable doubt on the prosecution case, without having to prove his innocence. On the same vein, the Court cannot convict on the weakness of the defence but rather on the strength of the prosecution case.

Explaining the beyond reasonable doubt test, the Court stated in **Magendo Paul & Another vs Republic** [1993] TLR 219 that:

> "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favor which can easily be dismissed."

Further, its is the mandate of this Court as the first appellate court to evaluate evidence of the trial court on its entirety and come up with its

own findings. I take refuge in the authority provided in the case of **Selle and Another vs Associated Motor Boat Company Ltd and Others,** [1968] EA 123 where the erstwhile East African Court held:

> "Where it is apparent that the evidence has not been properly evaluated by the trial judge or wrong inference have been drawn from the evidence, it is the duty of the appellate court to evaluate the evidence itself and draw its own inference."

It is thus my firm stand that there were inconsistencies and contradictions not only on the facts pertaining to the offence as per the charge sheet, and the same is diametrically opposed to the evidence adduced by the key prosecution witness. I say so because taking into account the totality of the evidence of PW1 who was the victim of the offence, she is supposedly a credible witness otherwise, since she vividly testified that the Appellant was her boyfriend and that she went to live with him in his house.

I am alive to the position of the law that the determination of the issue on whether it was the Appellant who had raped the victim depended very much on the credibility of the witness, particularly the victim of the offence. Granted that the victim's evidence is the best evidence, but the

same has to pass the credibility test. It has to be coherent, consistent and the narrations make logical sense.

The Court of Appeal has guided time and again on the credibility of a witness, and in **Mathis Bundala vs R,** Criminal appeal No 62 of 2004 [2007] TANZLII TZCA 16, it held

> "....In our considered judgment if a witness is not an infant and has normal mental capacity as were PW1 Massawe, PW2 Amani, PW3 Ngasa and PW5 Lazaro, the primary measure of his / her credibility is whether his or her testimony is probable or improbable when judged by the common experience of mankind. 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."

Why would then be discrepancies in the testimony when she was narrating on when exactly she went to live with the Appellant, and where they have met – as it is noticed she explained he met him while she went to fetch some water, while being cross examined she stated that he met him when

she was buying vegetables at the market. Her evidence while being supported by that of her mother who testified that her daughter disappeared from home until when she came back home on her own, and upon inquiry of her whereabouts, she stated that she was at the Appellant's, and that they were having sexual intercourse the whole week through. I could not stop to wonder how the mother of the victim had no cause to look for her under age daughter nor was there any complaint lodged of her such disappearance from home. On the other hand, she did not testify that she was held against her will as she went to live with the Appellant at will and came back home at will. In **Peter William vs Republic** [2009] TLR 327, this Court held:

> "It is trite law that where there are contradictory accounts of the same incident, the resulting doubt must be resolved in favor of the accused."

On further re-evaluation of the evidence, the victim of the offence has not testified how she came to know the Appellant, or whether he was positively identified as the person who had sexual intercourse with the Appellant or that when the victim disappeared from their home, she actually went to the Appellant and nowhere else, and confirm that he is the one responsible. Since the only evidence relied is that of the victim

(PW1) and there is no further corroboration by the prosecution of the facts as adduced by PW1.

Another crucial issue that should have come into the scrutiny of the trial court is the issue of the age of the victim. This should have been specifically proved as the victim is said to be underage, and not only that, but the consequences of proving such an offence of statutory rape charged against the Appellant attracts a minimum 30-year imprisonment or life imprisonment if the child is younger. In the instant case, neither the victim nor her mother had adduced any evidence towards proving the age of the victim or any document tendered to prove the said age. See **Wilson Elisa @ Kiungai,** Criminal Appeal No. 449 of 2018 where it was held that age of a person may be proved by the victim, relative, parent, or, where available, the birth certificate. If the age of the victim of statutory rape is not proved, it cannot be said that the said offence has been proven. See **George Claud Kasanda vs DPP** (Criminal Appeal 376 of 2017) TANZLII [2020] TZCA 76.

In the final analysis, I find these discrepancies flopping the prosecution's case, and I will thus allow this ground of appeal.

I have also considered the Appellant's defence that this case is fabricated to him as he had a dispute over his land. The question that one must to

ask oneself is whether this defence discredits the prosecution case. It was the Appellant's contention that he had a dispute with a certain man over the boundaries of his land and that they have been meeting to reconcile in futile. And that he believes this case was fabricated against him as the man threatened him.

It is the finding of this court that the defence of the Appellant is not creating any doubt on the prosecution's case so to speak, but I am alive to the legal principle that the Accused cannot be convicted based on the weakness of his defence but rather on the strength of the prosecution's case.

In the event and for the foregoing reasons, I allow the appeal on the basis of ground no 3 and 5. I set aside the conviction and sentencing of the Appellant, and I thus forthwith acquit him on the charged offence. He should be released forthwith unless held for some other lawful causes.

It is so ordered.

DATED at **ARUSHA** this **18th** day of **August, 2023**

A. Z. Bade
Judge
18/08/2023

Judgment delivered in the presence of Accused and the State Attorney on

18th day of **August, 2023**

It is so ordered.

A. Z. BADE
JUDGE
18/08/2023