IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 26 OF 2023

(C/f Criminal Case No. 19 of 2021 District Court of Monduli at Monduli)

BARAKA MAKUBI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24th July & 25th August, 2023

TIGANGA, J.

This appeal emanates from the decision of the District Court of Monduli, at Monduli (the trial court) where the appellant was arraigned 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 Penal Code).

Before the trial Court, the appellant pleaded guilty to the charge, and during the preliminary hearing, he admitted to his name and personal particulars and the fact that he was arrested and accused of committing the offence of rape. The trial of the appellant before the trial Court involved six prosecution witnesses and one defence witness. The prosecution tendered two prosecution exhibits namely the PF3, and sketch map of the scene of the crime, which were admitted and marked as exhibits P1 and P2

respectively. There was no exhibit tendered by the defence. According to the prosecution evidence, the offence was committed on 29th June 2021 at Mto wa Mbu area within Monduli District in Arusha Region, where the appellant herein carnally knew the victim **AJ** (true identity hidden), a girl of three years old.

According to the prosecution evidence before the trial court, the unfortunate ordeal happened when the victim, PW3 was lured with sweets by the appellant who is her neighbor and owns a shop. That, on the day of the incident, the appellant took the victim to their house and penetrated her before he left her to go home. Thereafter, the victim told her mother PW1 as well as her other neighbour that, "kaka Baraka ameniingizia kojo/jongolo lake", while pointing at her private parts. They physically examined her and reported the matter to the local authorities leader before the matter was later reported to the police, where a PF3 was issued and the victim was taken to Mto wa Mbu Health Centre where he was examined by PW2 a medical Doctor who found the victims genitalia flooded with human sperms and an indication that the there was a repetitive penetration the fact which made him conclude that, she was penetrated by a blunt object most likely, a penis. He also tendered exhibit P1, the PF3 to support his testimony.

After the matter was reported to the police PW5 the investigator went to the crime scene and drew the sketch map which he tendered as exhibit P2, while PW4-a social welfare officer together with the head of the village security Committee interrogated the victim and told the court that the victim kept on insisting that the appellant inserted his penis in her vagina.

In his defence, the appellant denied having raped the victim. He claimed that he had just been arrested on his way back from buying shop goods. He also complained that the case had been fabricated against him as the victim's mother had been demanding him to have sex with her but he refused to succumb to her trap. That refusal infuriated her, consequently, she promised to destroy him, hence, this case.

At the end of the trial, the trial court having assessed and evaluated the evidence was satisfied that the prosecution had managed to prove the case against the appellant beyond reasonable doubt. It found him guilty, convicted, and sentenced him to serve life imprisonment and pay Tshs. 500,000/= as compensation to the victim.

Aggrieved by the decision, the appellant filed this appeal with four grounds of appeal as follows;

1. That, the trial court erred in law and fact in convicting and sentencing the appellant while DNA was never conducted.

2. That, the trial magistrate erred in law and fact in convicting and sentencing the appellant while section 127 (2) of the Evidence Act, Cap 6 R.E. 2019 was not complied with during PW3's testimony.

3. That, the appellant's defence was not considered.

4. That, the trial court erred in law and fact in convicting the appellant while the case against him was not proved beyond reasonable doubt.

During the hearing which was by way of mixed mode, the appellant by written submissions while the respondent orally, the appellant appeared in person and was unrepresented whereas the respondent was represented by Ms. Akisa Mhando, learned Senior State Attorney.

Supporting the appeal, the appellant submitted on the 1st ground of appeal that, the DNA test ought to have been done to him to be certain that, the sperms found in the victim's genitalia parts were his. He argued that failure to conduct a DNA test, raises doubt and such doubt should benefit

the appellant as held in the case of **Christopher Kandidus @ Albino vs. The Republic**, Criminal Appeal No. 394 of 2015.

On the 2nd ground of appeal, the appellant submitted that the victim's testimony was taken without complying with section 127 (2) of the Evidence Act as the victim only promised to tell the truth but did not promise not to tell lies. He argued that such non-compliance renders the whole testimony invalid and should be disregarded. He cited a number of Court of Appeal cases to support his contention including the cases of **Charles William vs. The Republic**, Criminal Appeal No. 66 of 2018, and **John Mkorongo vs. The Republic**, Criminal Appeal No. 498 of 2020 which held to that effect.

As to the 3rd ground of appeal, the appellant challenges the trial court's decision for not considering his defence evidence. He asserted that the import of defence evidence is to cast doubt on the prosecution case and not to prove his innocence as held in the cases of **Marandu Suleiman vs. Serikali ya Mapinduzi Zanzibar** (SMZ) [1998] TLR 375 in which it was held that, the trial court is not supposed just to summarize the defence evidence rather put it under scrutiny. He argued that, in the appeal at hand,

the trial court did not bother to analyze the defence evidence as required by law because had it done so, it would have come up with a different verdict.

On the last ground of appeal, the appellant submitted that the case against him was not proved to the required standard as there are a number of doubts which can be noted. He mentioned one of the doubts as a variance between the charge sheet and the evidence adduce, he said, it is not certain as to whether the incident occurred at Magadini or Mto wa Mbu area hence, the charge sheet ought to have been amended before judgment under section 234 (1) of the **Criminal Procedure Act**, [Cap. 20 R.E. 2019].

Another highlighted contradiction is the variance between witness testimonies. According to him, PW1 said, that after the incident, the victim told her father and one Mama Theopista that, she felt pain in her genitals and the latter examined her. However, according to PW6, it was the victim's mother who examined her. He averred that, although, it is a trite principle that, in sexual offences, the testimony of the victim has to be given weight, however, the same should not be taken as gospel truth.

Another pointed-out contradiction built on the time at which the offence was committed. This question arises because according to PW1, the

victim notified her mother around 16:00hrs that, she felt pain whereas according to PW6, the victim was in her office around 7:00hrs for interrogation on the same day of 29th June, 2021. Based on these contradictions it is found that the contradictions create doubts which should be resolved in the favour of the appellant, He said.

Opposing the appeal, Ms. Mhando submitted on the 1st ground that, the main ingredient in sexual offences, is the fact that the victim was penetrated. The DNA test is never one of the ingredients of the offence. To cement her argument, she cited the case of **Aman Ally @ Joka vs. The Republic**, Criminal Appeal No. 353 of 2019 where the Court of Appeal observed that, a DNA test is not a requirement in proving sexual offence cases. He therefore prayed for the court to find the ground to have no merits.

On the 2nd ground, Ms. Mhando submitted that section 127 (2) of the Evidence Act was complied with contrary to the appellant's allegation because before giving her evidence, the victim promised to tell the truth. She said, that although PW3 did not promise not to tell lies, she promised to speak the truth which satisfied the trial court to be credible considering her age.

On the 3rd ground of appeal, it was the learned State Attorney's submission that, on page 10 of the trial court's judgment, the defence evidence was thoroughly considered and the same did not cast any doubt on the prosecution evidence. On the fourth and last ground of appeal, she submitted that the case against the appellant was proved at the required standard that, the victim was penetrated and it was the appellant who penetrated her. As to the doubts pointed out, she argued that the victim properly identified the appellant, and her testimony was corroborated with the evidence of other prosecution witnesses as that of PW2 whose examination of the victim proved that the victim was penetrated.

She further contended that there was no variance between the charge sheet and the prosecution evidence regarding where exactly the incident took place. Also, there were no contradictions between the witnesses' evidence and if there were any inconsistencies, they were minor and did not go to the root of the case. She prayed that the appeal be dismissed.

In his rejoinder, the appellant reiterated his earlier submission and maintained his innocence that, he did not commit the offence alleged

offence. He said the case was not proved beyond reasonable doubt. He consequently prayed for the appeal to be allowed.

After going through both parties' submissions and the trial court's records, I now proceed to determine the grounds of appeal starting with the 1st ground of appeal which challenges the trial court for not finding that the DNA test was important to prove whether the appellant was the one responsible for raping PW3, the victim. From the record, it is obvious that the victim's vagina had a lot of sperms and after examination, PW2 proved that they were human sperms. However, no DNA samples were taken from the appellant to confirm that the said sperms were his. When cross-examined on this fact, PW2 told the trial court that, at his health center they had no facility to conduct DNA sampling and testing.

However, in the case of **Robert Andondile Komba vs. DPP,** Criminal Appeal No. 465 of 2017, CAT at Mbeya (unreported) it was held that;

> *Ground 8 faults the trial court for not resorting to a DNA test to prove the fact that the appellant had sex with PW1. The State Attorney submitted that all that the law requires is proof of penetration as per section 130 (4) of the Penal Code and that the best evidence on that has to come from the victim. We have no hesitation to as along with the learned State Attorney.* ***Proof by***

DNA test is neither a legal requirement nor the practice in our jurisdiction. Many culprits would walk scot-free if that were the case, in our view, and the suggestion by the appellant is impractical... *" (Emphasis added)*

I fully subscribe to the above authority because, as rightly submitted by the learned Senior State Attorney, in sexual offences, the main ingredients to be proved are whether the victim was penetrated and whether it was the appellant who penetrated her. More so, the law is certain and the Court of Appeal decisions are in the same rhythm that in rape offences like the present one, the best evidence comes from the victim herself. In the case of **Jilala Justine vs. The Republic**, Criminal Appeal No. 441 of 2017, CAT at Shinyanga (unreported) the Court observed that;

"... It is a trite legal principle that, in sexual offences the best evidence is from the victim while other prosecution witnesses may give corroborative evidence. See, ***Selemani Makumba v. The Republic****, [2006] T.L.R. 379,* ***Galus Kitaya v. The Republic****, Criminal Appeal No. 196 of 2015 and* ***Godi Kasenegala v. The Republic****, Criminal Appeal No. 10 of 2008 (both unreported). However, the victim's evidence will be relied upon to convict if the same is found credible..."*

In the appeal at hand, PW3 narrated what the appellant did to her, and how he did it, "aliniingizia kojo/jongoo/jongololo lake huku" while

showing her private parts after he lured her with sweets from his shop. Such ordeal was disclosed immediately after it happened and the victim identified the appellant as the one responsible. In the decision of the case of **Marwa Wangiti Mwita and Another vs. The Republic,** Criminal Appeal No. 6 of 1995 (unreported) the Court of Appeal had this to say regarding the early naming of the suspect;

> *"The ability of a witness to name a suspect at the earliest opportunity possible is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry. "*

More so, the testimony of PW2, a medical expert, corroborated that the victim was penetrated. Guided by the above authorities and analysis I am of the firm view that the victim was penetrated by the appellant and no DNA test was required. This ground fails.

On the 2nd ground of appeal, the appellant claims that the victim's evidence was taken in contravention of section 127 (2) of the Evidence Act. The section reads;

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence promise, to tell the truth to the court and not to tell lies."*

On pages 17 and 18 of the trial court's typed proceedings, it is on record that the victim's intelligence was tested in the following manner;

"PW3:- A d/o J, 3 years, Mto wa Mbu, Muslim.

This court asks PW3 the following questions:-

Court:- What is your name?

PW3:- My name is A

Court:- What is your father's name?

PW3:- My father is Juma

Court:- What is your mother's name?

PW3:- My mother is called Yasinta.

Court:- How old are you?

PW3:- I am three years old.

Court:- Where do you go to pray?

PW3:- I go to the Mosque.

Court:- Is it good to tell lies?

PW3:- No, it is not good to lie.

Court:- Do you promise to tell the truth?

PW3:- Yes, I promise to say the truth.

Order:- *This court has examined PW3 and it is the Court's opinion that A d/o J understands the duty of speaking the truth and she possesses sufficient knowledge. Therefore her evidence will not be taken under oath.*

Order:- *Section 127 (2) of the Evidence Act Cap 6 R.E 2019 Complied with.*

Sgd: E.K.Mutasi – RM
25/03/2022

This indicates that PW3 gave unsworn testimony after the trial magistrate was satisfied that she did not understand the meaning of the oath but promised to tell the truth. Even though she did not utter the words "promise not to tell lies", she acknowledged to know that it is not good to tell lies, when she said, "*No, it is not good to lie.*" Further to that, looking at her age of three years and the inquiry done, one should not expect much from her. This ground is meritless and hence disallowed.

As to the 3rd ground of appeal, the appellant challenged the trial court for not considering his defence evidence. I took the liberty of perusing the trial court's judgment specifically on page 10 and observed that the same was considered. The trial magistrate analysed the issue of not conducting the DNA test, on the appellant and the allegations that the case was fabricated against him, as he denied having sexual relations with PW1, the victim's mother. In the end, the trial magistrate concluded that the defence evidence did not raise any doubt about the prosecution case. This ground also fails.

As to the last ground which raises the complaint that the case against him was not proved beyond reasonable doubt, and in support of the ground

he pointed out some of the incidents which he believes raised doubt, **first**, that there was a variation on the place where the incident took place. Going through the charge sheet, the same shows that, the incident occurred at Magadini Chini, Mto wa Mbu. PW1 told the trial court that, she stays at Mto wa mbu Magadini and the incident occurred in their home. PW3 and PW4 told the court that, the incident took place at Mto wa Mbu, and PW5 tendered exhibit P2 which shows that the incident took place at Magadini Chini Mto wa Mbu. I thus do not see any serious variance as alleged by the appellant which goes to the root of the matter to affect the evidence proving the fact that the victim was carnally known by the appellant.

He also claimed that there was a variance in who examined the victim at home before she was taken to the hospital. Looking at the record PW1 told the court that, she was the one who undressed the victim and physically examined her together with Mama Theopista. More so, PW6 also told the court that, it was PW1 who undressed the victim together with one Zainab they all examined the victim's private parts. I do not find this contradiction to be fatal because **first,** it is undisputed that the victim was examined; **secondly**, the appellant did not cross-examine PW6 on his doubt; and **thirdly**, the contradiction is so minute that it does not shake the prosecution

case at all. **Fourthly**, all witnesses talk of the presence of PW1 as one of the people who examined the victim. Having keenly scanned the evidence on record and the judgment by the trial court, I find the case against the appellant to have been proved to the required standard.

Another doubt claimed by the appellant is at the time the incident occurred. PW1's testimony shows that the incident occurred on 29th June 2021 around 16:00hrs. However, PW5, the investigator told the court that, he received the news of the incident at 07:00hrs on 29th June, 2021 which implies that, he got the news long before the incident had occurred. Looking at the entire evidence this is the only witness whose narration as to time differed from that of the other, and second, such contradiction is minor and can be pardoned considering the fact that, the incident took place almost six months before the date he testified. In the case of **Deus Josias Kilala @ Deo vs. The Republic**, Criminal Appeal No. 191 of 2018, CAT at Dsm (unreported) the Court of Appeal in a similar situation had this to say regarding contradictions in criminal cases.

> *"We deem it necessary to reiterate that contradictions by any particular witness or among witnesses cannot be avoided in any particular case: see* ***Dickson Elia Nsamba Shapwata v. Republic,*** *Criminal Appeal No. 92 of 2007 (unreported). ..."*

The Court of Appeal went on to state that;

> *"In its earlier decision in* ***John Gilikola v. The Republic,*** *Criminal Appeal No. 31 of 1999 (unreported), the Court observed that due to the frailty of human memory and if the contradictions or discrepancies in issue are on details the Court may overlook such contradictions or discrepancies. For, as held by the High Court in* ***Evarist Kachembeho & Others v. The Republic*** *[1978] LRT No.70, which we cite with approval:*
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> > *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

Having scrutinized the alleged discrepancies and contradictions raised by the appellant, I have no hesitation in saying that they do not raise any doubt on the prosecution case. With the above analysis, I find the appeal to have no merit and proceed to dismiss it in its entirety. In the end, the appellant's conviction was deserving, and so is the sentence, thus, the trial court's decision is hereby upheld.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 25th day of August 2023

HIGH COURT OF TANZANIA

J.C. TIGANGA

JUDGE