THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 84 OF 2022

(Originating from the District Court of Masasi at Masasi in Criminal Case No. 35 of 2022)

ABDUL JUMA @ KATOTO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last Order: 26.06.2023
Date of Judgment: 11.08.2023

Ebrahim, J:

This appeal arises from the judgment of the District Court of Masasi at Masasi in Criminal Case No. 35 of 2022 against conviction and sentence handed down by the trial Court. The appellant was charged with the offence of rape contrary to **Sections 130 (1) (2) (b)**

and 131 (1) of the Penal Code, [Cap. 16 R.E.2019 Now 2022]. On 15th day of March, 2021 at or about 16:47hrs at Napupa Mashambani within Masasi District in Mtwara Region, the appellant did have carnal knowledge of one MM (identity concealed) a woman aged sixty five (65) years of age without consent. He refuted the accusation and trial ensued. At the conclusion of the trial, he was convicted and sentenced to serve thirty (30) years jail term meted against him.

The essence of the appellant's incarceration in prison as particularized in the charge was that; on 15.03.2021, the victim (PW1) testified that when she was returning from her farm at 5:00hrs on the way suddenly she was grabbed on her neck by the appellant and he told her not to raise alarm and he took her to the forest and he had panga from his trouser, the appellant ordered her to sleep down the he took his manhood and penetrated into her vagina after finishing they returned to the place she was grabbed and departed, since she knew the appellant before, she meet with three boys on the way and reported the incident to them. On the same date she reported the matter at the police station that she has been

raped by Katoto (the appellant), she was given PF3 and went to the hospital at Mkomaindo and she was examined, and she was found with bruises in her vagina. After sometimes she found the appellant at Tandale market, she called Mussa who went with another boy to arrest the appellant and took him at the police station.

In total prosecution side called four witnesses and tendered two exhibits. Defence side called one witness, the Appellant himself. After hearing the evidence from both sides, the trial Magistrate found the appellant guilty of the charged offence and convicted him as per the law. Aggrieved by the impugned judgment, the Appellant preferred five grounds of appeal and five grounds of additional grounds of appeal which however can be reduced into five main grounds, namely:

1. That the trial court erred in law and fact by admitting exhibits P1 and P2 (Cautioned Statement and PF3) as evidence unprocedural, in contravention of section 210 (3) and section 50 (1) of the Criminal Procedure Act, [Cap 20 R.E 2022] to convict the appellant;
2. That the trial court erred in law and fact in convicting and

sentencing the appellant without considering defence evidence as required under Section 235 (1) of the Criminal Procedure Act, [Cap 20 R.E 2022];

3. That the trial court erred in law and fact by convicting and the Appellant basing on contradicting evidence of PW1 and PW2 and
4. That the trial court erred in law and fact in convicting and sentencing the appellant without consider that there was uncorroborated of evidence between PW1 (alleged victim) and PW3 (medical officer/doctor); and
5. That the trial court erred in law and fact by convicting and sentencing the appellant while the prosecution side failed to prove their offence against the appellant beyond reasonable doubt as required by law.

In the hearing of the appeal, the appellant was unrepresented. Mr. Mwapili, learned State Attorney represented the Republic. When accorded the opportunity to address the court on the appeal, the appellant prayed the prosecution to begin and reserved his right of rejoinder.

On his part, the learned State Attorney submitted on the 1st ground

of appeal, he forthrightly supported the ground by conceding that exhibit P1 and P2 were not read in court after the admission, it caused the appellant to have failed to understand the content and to cross-examine effectively. The effect of which is to expunge the exhibits from court records as stated in the case of **Robert P. Mayunga & Another vs Republic** (Criminal Appeal No. 514 of 2016) [2019] TZCA 487 (6 December 2019) page 7, 8 and 9.

However, the evidence of PW1 remained in court records proves the offence of rape by the appellant on the fact that it is credible and reliable, see **Selemani Makumba Vs. Republic, Godi Kasenegala Vs. Republic,** Criminal Appeal No.10 of 2008, page 11.

Submitting on the 2nd ground of appeal, contradiction of PW1 and PW4, he admitted on the said contradiction at page 10 and 20 of the typed proceedings of the court, that PW1 testified to be raped on 15.03.2021 but PW4 received PW1 on 13.03.2021, he referred to the case of **Said Mohamed Matula Vs. R,** [1995] TLR 3 CAT, the court to address on the inconsistences. He further referred to the case of **Marando Slaa Hofu and 3 others Vs. R,** Criminal Appeal No. 246 of 2011, he concluded by arguing that the contradiction was minor and does not go to the roots of the case.

Responding on the 3rd complaint, about the cautioned statement to have been recorded out of the prescribed time in law i.e., Section 50 (1) of the Criminal Procedure Act, [Cap. 20 R.E 2022. He argued that because exhibit P1 would be expunged from the court records, hence it does not serve any purpose.

Responding on the 4th complaint, on failure to prove the case beyond reasonable doubt, he submitted that prosecution had four witnesses including the victim, who elaborated how she was raped by the appellant and her testimony was corroborated by PW2, PW3 and PW4.

Submitting on the 5th ground of appeal that defence evidence was not considered, he argued that this is the first appellate court can re-evaluate the evidence of the appellant. He referred the case of **Kaimu Said Vs. R,** Criminal Appeal No. 391 of 2019, page 14.

On additional grounds of appeal, learned state attorney contended that the 1st ground is the same as the 2nd ground of appeal in the main ground of appeal that the legal position has already been discussed.

Regarding the 2nd, 3rd, and 4th, additional grounds are on exhibit P1 and P2 which are to be expunged from the records.

Submitting on the 5th additional ground, he argued that to be baseless, even if the evidence of PW4 will not be considered, there is enough evidence to prove the offence. He prayed for the appeal to be dismissed.

In rejoinder, the appellant prayed for the court to adopt his grounds of appeal and to be set free.

I have considered the grounds of appeal and additional grounds of appeal, the submissions by the learned State Attorney for the Respondent, the records and the law. In this appeal mindful of the fact that as the first appellate court, I am obliged without fail to subject the entire evidence into objective scrutiny while considering that the trial court had an opportunity to observe the demeanour of the witnesses; see **Charles Mato Isangala and 2 Others v The Republic,** Criminal Appeal No. 308 of 2013, Page 5 of 17.

Going through the grounds of appeal, the main issue is **whether the prosecution proved the charge beyond reasonable doubt.**

The cardinal principle of criminal justice system in Tanzania that the prosecution bears the burden of proving its case beyond reasonable doubt. This is clearly provided under **Section 3 (2) (a) of the Evidence**

Act, [Cap. 6 R.E 2022]. As to what it means by proof beyond reasonable doubt, the Court in the case of **Samson Matiga v. R,** Criminal Appeal No. 205 of 2007(unreported) at page 5, had this to say:

> *"Prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence. (See also* ***Yusuf Abdallah Ally v. Republic,*** *Criminal Appeal No. 300 of 2009, (unreported)). The said proof does not depend on the number of witnesses but rather, to their credibility (See section 143 of the Tanzania Evidence Act Cap 6 R. E 2002 and the case of* ***Goodluck Kyando v. Republic,*** *Criminal Appeal No. 118 of 2003/ and* ***Majaliwa Guze v. Republic,*** *Criminal Appeal No. 213 of 2004 (both unreported)."*

Starting with 1st ground of appeal, the appellant argued that exhibits P1 and P2 were not cleared before the admission and after the admission of the same were not read before the trial court, which led the appellant failure to challenge them.

Having gone through the record of the trial court I have observed that the appellant was arrested on 16.03.2021 as it was testified by PW1 and PW2 and his cautioned statement was recorded by WP 8209 D/C Subira (PW3) on 18.03.2021 at 11:41hrs. As it is, looking at the evidence available it is true that cautioned Statement (exhibit P1) was recorded in contravention of **Section 50 (1) (a) (b) of the Criminal Procedure Act, [Cap. 20 R.E 2022]** which requires the cautioned statement to be taken within four hours from the time of restraint or that the time may only be extended if an application for such extension is made and granted under **Section 51 (1) (a) and (b) of the Criminal Procedure Act, [Cap. 20 R.E 2022]**.

1. Talk above explanation an delay.
2. Qualify that there is no extension.

Regarding on the complaint that the PF3 (exhibit P2) was admitted but it was not read over to before the Court. The record bears out that after PF3 was admitted but it was not read out in court. It is now settled law that once a document has been cleared for admission and admitted in evidence, it must be read out in court. Failure to do so occasioned a serious error amounting to miscarriage of justice. See: - **Sunni Amman Awenda v The Republic**, Criminal Appeal No 393

of 2013; **Jumanne Mohamed and 2 Others v. The Republic**, Criminal Appeal No. 534 of 2015 (Unreported).

The essence of reading the tendered document was succinctly stated in the case of **Joseph Mganga Mlezi & Another vs Republic** (Criminal Appeal No. 536 of 2015) [2019] TZCA 361 (4 November 2019), it was stated that:

> *"The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained in order to make an informed defence."*

Further to that, in **Wambura Kiginga vs Republic** (Criminal Appeal 301 of 2018) [2022] TZCA 283 (13 May 2022), it was observed that;

> *"In any event, in appropriate circumstances, the proper procedure to be followed by trial courts when accepting documentary exhibits, is that after the document is cleared for admission and accepted in evidence and properly marked, the document as soon as practicable, has to be read audibly in a language understandable to the accused. Short of complying with that procedure, generally acceptance of the exhibit is unlawful and the remedy is to expunge it."*

Also, the requirement of reading over the document after it has been cleared for admission was reiterated in the case of **Robinson Mwanjisi and 3 Others v. Republic,** [2003] TLR. 218.

Certainly, at page 14 and 20 of the typed court proceedings, exhibits P1 and P2 were tendered without objection but the same were not read over to the accused person. In those circumstances, I expunge them from the court record.

Regarding on the 2nd and 3rd ground of appeal the appellant laments that his defence was not considered by the trial Court and he was convicted and sentenced basing on the contradicting evidence of PW1 and PW2. I am aware to the settled law that, the trial Court is duty bound to analyze and consider the evidence adduced by the defence. Failure to consider the defence is fatal. This position was stated in **Sadick Kitime vs Republic** (Criminal Appeal No. 483 of 2016) [2019] TZCA 104 (16 May 2019) where the Court cited with approval its decision in **Moses Mayanja @ Msoke v. The Republic,** this court made the following observation: -

> " ... *it is now trite law that* ***failure to consider the defence case is fatal and usually vitiates the conviction.***" [Ephasize added]

am aware of the settled position that, where the defence has not being considered by Court below, this Court is entitled to evaluate the evidence adduced at the trial Court to consider the defence case and come up of its own conclusion. In **Jafari Mussa v Republic,** Criminal Appeal No. 234 of 2019 page 11 wherein it was stated that:

> *"In the past, failure to consider defence case used to be fatal irregularity however with the work of progressive jurisprudence brought by case law the position has changed. The position as it is now where the defence has not being considered by Court below, this Court is entitled to step in the shoes of the first of the appellate Court to consider the defence case and come up of its own conclusion".*

Taking a serious note of the prosecution evidence which appears at pages 6, 7, 10, 13 and 20 of the typed court proceedings, **PW1**(victim) testified to have reported the incident at the police station on the same date **(15.03.2021)** that she was raped by the appellant, she was given PF3 for her to go to the hospital. Thereafter, when she was going back to the police station, she saw the appellant at Tandale market and she called one Mussa and one

boy who went and arrested the appellant and took him at the police station. **PW2**, Rajab Abdallah told the court that on the same date PW1 went to his office and told him that she was raped by the appellant, she asked him to go and arrest him. Thereafter they did an investigation to find where the appellant was so as to go and arrest him, they found him at Tandale market, they were seven (7) people who arrested him and took him to the police station. **PW3**, WP 8209 D/C Subira testified that on 16.03.2021 the appellant was arrested by PW2. Also, PW4 who identified himself to be a doctor testified that on 13.03.2021 at noon, he was at the hospital he received PW1 who complained to have been raped, she went with the PF3 for examination.

In his defence the appellant at page 25 of the typed court proceedings, he told the trial court that he was arrested on 01.04.2021 at 9:00hrs at his home by five people. After reaching at the police station, he was charged to have injured one Chande Mhibu at the Primary Court, when he went back to the police station, he was charged with the offence of rape, he denied the offence. He was beaten by the police until he confessed, when he was arraigned before the trial Court, he pleaded not guilty.

On the consequences of such failure to consider the defence case is fatal and usually leads to a conviction being quashed. In the **Lockhart - Smith V. R** [1965] E.A 211 (TZ), the accused not to be convicted on the weakness of his defence but rather strength of prosecution witnesss the appellant, an advocate was convicted in the District Court of Dar-es-salaam on three counts of contempt of court due to certain remarks he made when representing his client in the District Court. Those words were found discourteous and disrespectful to the court and amounted to contempt of court. When convicting the appellant, the trial Magistrate made the following remarks:

> *"In the instant case, I believe the evidence of the prosecution witnesses. I find corroboration in their testimonies. I also find that the accused uttered the words alleged and perpetrated the conduct alleged. I therefore reject the accused's statement. In the result, I find the accused guilty as charged. I hereby convict the accused on each of the three counts of the charge."*

On the trial court the trial Magistrate was faulted for rejecting the appellant's defence only because he believed that of the

prosecution witnesses. Thus, Weston, J, held: -

> *"The trial magistrate did not, as he should have done, take into consideration the evidence of the defence, his reasoning underlying the rejection of the appellant's statement was incurably wrong and no conviction based on it could be sustained."*

Likewise, in the case under scrutiny, the trial court at page 5 of the typed judgment the trial Magistrate stated that:

> *"Therefore, PW2 is who established that the accused victim and himself are neighbors residing at Silabu – Masasi township, from such exposition, it is clear doubt that, the victim identified the one who raped her to be Juma Katoto, as he was not put on mask and they are neighbor knowing each other at Silabu Kitongoji."*

Furthermore, I am aware of the settled principle of law that, in any judicial criminal proceedings, where oral testimonies by the prosecution's witnesses become inconsistent and the consistence goes to the root of the case as intimated earlier. Thus, the inconsistence renders the prosecution case to be short of proof beyond reasonable doubt.

Thus, the 2nd and 3rd grounds of appeal are merited and they are sufficient to dispose of this appeal. In that case I shall not be labor

on other grounds raised by the appellant.

For the above reasons, I hereby allow the appeal, quash the conviction and set aside the sentence.

Further, I order immediate release of the appellant from prison unless otherwise held for other lawful cause.

Accordingly ordered.

R.A Ebrahim

JUDGE

Mtwara
11.08.2023