UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 32 OF 2023

(Originating from Criminal Case No. 01 of 2023 in the District Court of Wanging'ombe at Wanging'ombe)

JEREMIA S/O KILUMILE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of the Last Order: **11.09.2023**
Date of the Judgment: **22.09.2023**

A.E. Mwipopo, J.

In Wanging'ombe District Court, Said Jeremia Kilumile, the appellant, was charged and convicted for an offence of rape contrary to section 130(1), (2)(e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2022. The particulars of the offence in the charge sheet reveals that on 08/11/2022, 9/11/2022, and on 10/01/2023 at Igwachanya Village within Wanging'ombe District in Njombe Region, the appellant unlawfully had a carnal knowledge of one A.K. (the name of the victim is concealed for her

protection) a girl aged 17 years old. After a full trial, the appellant was found guilty, convicted and sentenced to serve thirty years' imprisonment. The decision of the trial District Court did not satisfy the appellant, and he filed the present appeal. The petition of appeal filed by the appellant contains eight (8) grounds of appeal as follows:-

1. *That, the trial court erred in law and fact by relying on the evidence of PW1 despite the fact that the legal requirement in regard to the victim's age was not proved by the prosecution side.*
2. *That, there was an omission by the prosecution to summon material witness i.e. Mother and Father of the victim who could have corroborated the evidence of PW2 that PW1 was a girl of 17 years and was raped by the accused.*
3. *That, the trial Court erred in law and fact by convicting and sentenced the appellant basing on contradictory, incredible and unreliable evidence of PW1, PW2, PW3, PW4 and PW5.*
4. *That, the trial Court erred in law and fact by conviction and sentenced the appellant basing on the caution and extra Judicial statements which was recorded contrary to the law.*
5. *That, the trial Court erred in law and fact by failure to consider the testimony adduced by the defense side in composing its judgment.*
6. *That, the trial Court erred in law and fact by admitting the said police form No. 03 (PF3) whose contents made by medical practitioner was not scrutinized to prove that there was*

penetration. In strictly legal sense doctor's recommendations or opinions are not final and conclusive.

7. *That, the trial Court erred in law and fact by convicting and sentencing the appellant without the prosecution proving the offence of rape beyond reasonable doubt.*
8. *The trial Court erred in law and facts by convicting the appellant basing on defective charge.*

At the hearing, Advocate Brighton Kaguo represented the appellant, and Ms. Veneranda Masai, State Attorney, represented the Respondent. The appeal hearing proceeded by way of oral submissions.

Mr. Kaguo submitted on the 1st and 2nd grounds of appeal jointly. He said that, the prosecution failed to bring material witnesses and exhibits to prove the age of the victim to be bellow 18 years. PW2 namely Faraja Fute provided evidence which is contradictory and she tendered a document which is not a proof of age. The victim (PW1) said in her testimony that she was aged 17 years at the time of incident. PW2 said the victim is her young sister and she was born on 2005. As the incident took place on 10/01/2023, the victim was 18 years at that time and not 17 years as she claims. This witness tendered baptism certificate (exhibit P1) which shows that the victim was born on 09/09/2005. But, Exhibit P1 is not a proof of

birth. The document which could prove birth is birth certificate and not baptism certificate. Baptism certificate proves that the victim was baptised.

The counsel was of the view that the victim's evidence is not reliable and not the last proof of the age. He supported his position by citing the case of **David Gerald Mhenga vs. Republic**, Dc Criminal Appeal No. 22 of 2022, High Court at Iringa, (unreported), where this Court held that human being cannot know his own age unless he is so informed by other persons who know about his birth date or he reads that facts from authentic record. The Court held that prosecution failed to prove the age of the victim and quashed the conviction and set aside the sentence of the trial court. The prosecution failed to prove the age of the victim as there is no other witness apart from the victim herself who gave evidence on her age and there is no valid document to prove the age of the victim.

As to the 3rd ground of appeal, he said that there was contradiction in the testimony of PW1, PW2, PW3, PW4 and PW5. PW1 testified that she is aged 17 years but PW2 evidence show that the victim is aged 18 years. PW1 said that the incident took place in the bushes, but PW2 saw the outside the guest house. The victim never said that she was raped in her examination in chief. In cross examination, the victim said on the date of

incident she was in the house of Baraka. PW5 testified that the victim was raped. PW5 tendered a PF3 (exhibit P4) which shows that the victim was raped on 08/01/2023 and the examination was conducted on 11/01/2023. This evidence of PW3 and exhibit P3 contradicts the evidence of PW1 and PW2 on the date of incident. This raises doubts on the credibility of prosecution evidence. Where there is contradiction in the prosecution case, the said evidence is not credible and not reliable. The court is not supposed to receive it and rely on it in its decision. To bolster his stance, he cited the case of **Jilala Justine vs. Republic**, Criminal Appeal No. 441 of 2017, CAT at Shinyanga, (unreported) at page 12 to 14.

As to the 4th ground of appeal, Mr. Kaguo said that, the cautioned and extra judicial statements of the appellant were wrongly admitted and relied by the trial court. The cautioned statement was recorded contrary to the law as its certificate cited wrong section. Certificate was recorded under section 57(4) of the Criminal Procedure Act, Cap. 16 R.E. 2022. The proper section is section 58(6) (b) of the Criminal Procedure Act. The Police General Order (P.G.O.) provide in Order 236 (b) that the police officer recording cautioned statement must read to him after recording the statement and ask him if the statement is correct. The certificate does not

show that the statement was read to the appellant. Further, the extra judicial statement was recorded on the public holiday. The statement was recorded on 12/01/2023 which is Revolution day and public offices are not opened. It is not known the reasons for the justice of peace to be in the office on the public holiday if there was no earlier plan. The Chief Justice Guidelines provides on how to record the extra judicial statement. The justice of peace must be appointed by Chief Justice and the recording of extra judicial statement must be in the court room. In this case, the extra judicial statement shows that the statement was recorded in the village office. This is contrary to the law and directive of the Chief Justice. The justice of peace did not ask all questions provided in the guidelines. In the case of **Jackson Protaz vs. Republic**, Criminal Appeal No. 385 of 2020, Court of Appeal of Tanzania at Bukoba, (unreported) at page 10 to 12 it was held that failure to adhere to the Chief Justice Guidelines in recording extra judicial statement makes the statement invalid.

As to the 8th ground of appeal, the counsel said that the appellant's defense was not considered. The appellant called 3 witnesses in his defense, but the trial Court did not consider their evidence in the judgment. The trial Court was supposed to consider defense case and

exhibits. It could not have arrived to the decision it made if it has considered defense case. The counsel supported his position by citing the case of **Leonard Mwanashoka vs. Republic**, Criminal Appeal no. 226 of 2014 Court of Appeal of Tanzania at Bukoba, (unreported), where it was held in page 6 of the judgment that failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong conclusion or inferences resulting in miscarriages of justice.

Regarding the 6th ground of appeal, he said that the trial court relied on the PF3 (exhibit P4) to support the victims evidence that she was penetrated. The evidence on exhibit P4 is very general that the victim has no hymen, the vagina is widened and it was penetrated by a blunt object. This evidence is not sufficient proof of penetration. The incident was said to be committed on 10/01/2023 and the medical examination was conducted on 12/01/2023. There is possibility of someone else to have penetrated the victim and not the appellant. There is evidence in record that on 11/01/2023 the victim slept to someone known as Baraka. This is found in the victims answer when she was cross examined by the appellant.

As to the 7th ground of appeal, Mr. Brighton Kaguo said the appellant was charged for statutory rape. The prosecution was supposed to prove without doubt that the victim was penetrated and she was aged bellow 18 years at the time of incident. The best evidence in rape offences is that of the victim as it was held in the case of **Selemani Makumba vs. Republic (2006) TLR 379**. The counsel went on to say that the victim never named the appellant at earliest possible time and failed to say in her evidence what the appellant did to her. It was in cross examination when she said she had sex with the appellant. The victim's statement was general and does not prove penetration. In support of his argument, Mr. Kaguo cited the case of **Godi Kasenegala vs. Republic**, Criminal Appeal No. 10 of 2008, Court of Appeal of Tanzania at Iringa, (unreported), where the Court of Appeal held in page 15 of the judgment that the prosecution and the court have to ensure the witnesses gives the relevant evidence which proves the offence.

In the last ground of appeal,the counsel for appellant submitted that the court convicted and sentenced the appellant on the defective charge. The particulars of the offence have joined three separate offence in a single count. It shows that the appellant on 08/11/2022, 09/11/2022 and

10/01/2023 at Igwachanya village within Wanging'ombe District in Iringa Region the appellant raped the victim who is the girl aged 17 years. The Criminal Procedure Act provides in section 133 (2) that where more than one offence is charged in the charge a description of each offence shall be set out on separate count. The defective in incurably and could not be cured. This was the end of appellant's submission.

In her reply, Ms. Veneranda Masai supported the appeal on one ground that there was contradiction on the prosecution case and the case was not proved without doubt. PW1 (victim) did not prove that she was penetrated by the appellant and the date when the incident occurred. PW1 testified that she was with the appellant on 09/01/2023 and 10/01/2023, and PW2 saw them on 11/01/2023. On her side, PW2 said she saw the appellant with the victim on 10/01/2023 in the guest house. It means the testimony of PW1 and PW2 has contradiction as to when PW2 saw them. PW1 never said that the appellant penetrated her as she said the appellant was sleeping with her. The medical doctor (PW5) examined the victim on 12/01/2023. There is no reason for delay to go to hospital for examination provided in the record. The prosecution evidence failed to prove there was penetration. PW1 did not say that she was penetrated by the appellant and

PW5's evidence raises doubt to prosecution case on the reasons for victim's delay to go to hospital for examination. The best evidence in rape cases is that of the victim. However, the court has to satisfy itself on the credibility of the victim. To support her argument she cited the case of **Mohamed Sais. Vs. Republic**, Criminal Appeal No. 145 of 2017, Court of Appeal of Tanzania at Iringa on page 14.

As to the admissibility of cautioned and extra judicial statement, the State Attorney said the same has a lot to be desired. PW3 tendered the cautioned statement of the appellant. The appellant objected the tendering of cautioned statement, but the Trial court admitted the cautioned statement as prosecution exhibit without providing the reason for its admission. PW2 said that the appellant was arrested on 10/01/2023 and his statement was recorded on 11/01/2023. It is not clear what was done when from the time the appellant was arrested to the time his statement was recorded a day later. The statement was recorded out of four hours provided by the law. In the cautioned statement, the appellant was warned for the offence of having sexual intercourse with a student while the appellant was charged for rape offence. The recording of the cautioned

statement was wrong. He was warned for one offence and was charged for another different offence.

On the extra judicial statement, the counsel for the respondent said that the justice of peace recorded the statement (PW4) without following Chief Justice Circular. In the case of **Robinson Mwanjisi vs. Republic (2003) TLR 216,** the Court of Appeal held that before tendering the document the witnesses tendering it must introduce the evidence to be tendering and not to say everything about the document. PW4 in this case testified about the content of Extra Judicial statement before tendering it. This is contrary to the law. The cautioned statement and Extra Judicial statement were wrongly admitted and this court has to expunge them from the record. She added that the record also shows that PF3 (exhibit P3) was not read over after its admission. For that reason, Exhibit P3 has to be expunged from the record. After expunging exhibit P2, P3 and P4, the remaining prosecution evidence is testimony of PW1, PW2, PW3, PW4 and PW5 which is full of doubts due to contradictions. The evidence is not sufficient to prove the offence.

The counsel for the appellant did not have rejoinder submission.

After hearing the lengthy submissions from both parties, the Court is called upon to determine whether the appeal has merits.

I have decided to determine the eighth ground of appeal as the same may dispose of the case. In the eighth ground of appeal, the appellant stated that he was convicted based on defective charge. Submitting on the ground, the counsel for the appellant said that the particulars of the offence have joined three separate offences in one count contrary to section 133 (2) of The Criminal Procedure Code, Cap 20 R.E 2022. The defect is incurable. The counsel for the respondent in her submission in support of the appeal did not say anything on the eight ground of appeal.

I agree with Mr. Kaguo that where it is alleged that an accused has committed series of offences in the same transaction, each constitutes a separate offence and ought to be charged as a separate count. The position is in accordance with section 133 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2022, which reads as follows:-

> *"133 (2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."*

In our case, the charge sheet appears to have joined several rape offences in the single count. The charge appears as follows hereunder:-

" ***IN THE DISTRICT COURT OF WANGING'OMBE***

AT WANGING'OMBE

CRIMINAL CASE NO. 01 OF 2023

REPUBLIC

VERSUS

JEREMIA S/O KILUMILE

STATEMENT OF OFFENCE

RAPE: Contrary to sections 130 (1), (2) (e) and 131 of the Penal Code [Cap. 16 R.E. 2022]

PARTICULARS OF OFFENCE

"JEREMIA S/O KILUMILE on 08th November 2022, 09th November 2022, and 10th January 2023 at Igwachanya within Wanging'ombe District in Njombe Region has carnal knowledge with A D/O K aged 17 years old knowing it is against the law.

Dated at Wanging'ombe this 13th day of January, 2023

Signed

PUBLIC PROSECUTOR"

The particulars of the offence in the above cited charge shows that the victim had sexual intercourse with the appellant on 08th November 2022, 9th November 2022 and 10th January 2023. Each of these three dates the appellant is said to have sexual intercourse with the victim is a separate offence. In terms of the provisions of section 133 (2) of the Criminal Procedure Act, each date of incident constituted a separate offence and ought to have been charged as a separate count. In the case of **Mayala Njigailele vs. Republic**, Criminal Appeal No. 490 of 2015, Court of Appeal at Tabora, (unreported), it was held at page 7 of the judgment that:-

> *"So long as the offences were of similar character, each offence is required to have a separate paragraph which in legal parlance is called Count"*

In the case at hand, the particulars of the offence shows that the victim had sexual intercourse with the appellant on three separate dates. Those three separate dates alleged the appellant had carnal knowledge of the victim were on one count and not on separate counts. The effects when the charge is defective is the proceedings, judgment and orders become a nullity. In **Mathayo Kingu vs. Republic**, Criminal Appeal No. 589 of 2015, Court of Appeal of Tanzania at Dodoma (unreported), it was

held that the charge sheet is the foundation of any criminal case. As the charge is foundation of the criminal case, failure of the prosecution in this case to properly prepare charge against the accused with a proper offence, section of law and particulars, leaves doubts as to whether the accused was availed with the right to know the contents and particulars of his charge.

The requirement that charge must provide the particulars necessary to give information about the case to the accused person is in accordance with section 132 (2) of the Criminal Procedure Act. The requirement was underscored by the Court of Appeal in **Francis Paul vs. Republic**, Criminal Appeal No. 251 of 2017, Court of Appeal of Tanzania at Arusha, (unreported), where it was held that:-

> *"We are alive to the legal requirement stipulated under section 132 of the CPA that the charge should disclose the essential elements of the offence so as to enable the accused to know the nature of the offence he is going to face and hence martial his defence accordingly."*

From the above cited case, the particulars of the offence must disclose essential facts of the offence and any specific requirements of the law in order to give the appellant a fair trial and to enabling him to prepare his defence. The same was not done in this case.

Moreover, the evidence adduce by the victim (PW1) was in contradiction with the particulars of the offence. PW1 testified that on unknown date of November, 2022, she did had sexual intercourse with the appellant. She said further that during two days she was not sleeping at home she was with the appellant and on 11.01.2023, PW2 found her with the appellant. The evidence does not tally at all with the particulars of the offence in the charge which shows that on 08/11/2022. 09/11/2022 and 10/01/2023 the appellant had known carnally the victim (PW1). There is variation between the particulars in the charge and the evidence adduced by prosecution witnesses especially PW1 (victim). There is no evidence to prove that on the mentioned dates in the charge the appellant did have sexual intercourse with the victim. Thus, the eighth ground of appeal alone dispose of the case. For that reason, I won't determine the remaining grounds of appeal.

Therefore, I find that the appeal has merits and the appeal is allowed. The conviction and the sentence imposed by the trial District Court to the appellant is hereby quashed and set aside. The appellant namely Jeremia Kilumile is released from prison forthwith otherwise held for other lawful cause. It is so ordered accordingly.

A.E. MWIPOPO

JUDGE

22/09/2023