IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF MANYARA)

AT BABATI

CRIMINAL APPEAL NO. 71 OF 2023

(Originating from Criminal Case No. 09 of 2022 before Kiteto District court at Kibaya)

JACKSON NAIKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of Last Order: 17.10.2023

Date of Judgement:10.11.2023

JUDGEMENT

MAGOIGA, J.

The appellant, **JACKSON NAIKO** was arraigned in the District of Kiteto at Kibaya (trial court) for one offence of incest by male contrary to section 158 (1) (a) of the **Penal Code, [Cap 16 R.E.2019].**

It was alleged in the charge sheet that the appellant between 2019 and 2021 at Ndaleta village within Kiteto district in Manyara region, did have sexual intercourse with her daughter, one, **NJZ** -(pseudo name to be referred herein as **'PW1' or 'victim')** a pupil of Ndaleta Primary School aged 15 years.

Having heard the case on merit, the learned trial Senior Resident Magistrate found the appellant guilty, convicted and sentenced him to

serve custodial term of 30 years imprisonment and an order to pay compensation of Tshs.1,000,000/- to the victim.

Aggrieved by conviction, custodial sentence and order of compensation, the appellant preferred this appeal to this court faulting the learned trial Senior Resident Magistrate armed with four grounds of appeal, couched in the following language, namely:-

1. *That the trial court erred in law and fact by failure to evaluate properly the evidence tendered before it by the respondent during trial of the matter at hand thus convicted the appellant on contradictory evidence;*
2. *That the trial court erred in law and fact by failure to consider the evidence tendered before it by the appellant;*
3. *That the trial court erred in law and fact by convicting the appellant based on the proceedings which were marred with irregularities contrary to laws governing criminal proceedings;*
4. *That the trial court erred in law and fact by failure to consider the law while determining the matter at hand.*

On the strength of the above grounds of appeal, the appellant prayed that this court be pleased to allow the appeal, quash conviction, set aside custodial sentence and compensation order and set him free.

When this appeal was called on for hearing, the appellant was enjoying the legal services of Mr. Joseph Mwita Mniko, learned advocate, whereas the respondent, Republic, was enjoying the legal services of Ms. Ester Malima, learned State Attorney.

Arguing the appeal, Mr. Mniko told the court that he will argue grounds numbers 1 and 2 jointly and grounds numbers 3 and 4 jointly.

Arguing grounds of appeal number one and two jointly, Mr. Mniko, learned advocate for the appellant told the court that the learned trial Senior Resident Magistrate erred in law and fact for failure to evaluate evidence as such arrived at wrong conclusion by convicting and sentencing the appellant. According to Mr. Mniko, the prosecution evidence was full of contradictions in many ways. The contradictions, Mr. Mniko pointed out were; **one,** the charged sheet subject of this appeal says the victim was raped in 2019 and 2021 but the victim-PW1 testified that was raped in 2018 at page 10 of the typed proceedings and at page 11 mentioned the second rape was in 2019 but no mention of 2021. Looking at PW1 testimony, according to Mr. Mniko, is at variance and different from what the charge sheet is all about. Mr. Mniko argued that the judgement of the trial court refers to 11th January 2022 a date not in the charge sheet but was the date the learned trial Magistrate convicted the appellant to have committed the offence.

Further, it was Mr. Mniko's arguments that the defence of the appellant showed that there has been conflicts between the appellant and his senior wife who is behind all these to make sure that the appellant is imprisoned for life and get his properties. Mr. Mniko argued that this is fabricated case by senior wife who is the mother of the victims and the appellant's defence is loud on this conflict.

In this appeal, Mr. Mniko pointed out that the junior wife-DW2 at page 46 testified of the conflict but the learned trial Magistrate talked of the aunty but who never testified in this case. In this regard, Mr. Mniko pointed out that what was considered by the learned Magistrate in convicting the appellant was extraneous matters as evidenced at page 11 of the typed judgement. All these point to one conclusion, that the case for prosecution was not proved because of the serious contradictions noted. Mr. Mniko insisted that DW2 at pages 46-47 of the typed proceedings testified that she has never witnessed rape.

More so, Mr. Mniko argued that this kind of offences are easily to be accused and at times very difficult to defend. In support of that stance, the learned advocate referred this court to the case of **Hussein Idd Msuya Vs. Republic, Criminal Appeal No. 10 of 2021 HC (Morogoro) (unreported)** in which it was held that at often times, family conflicts have been associated to this kind of offences because they

attract long imprisonment. Further, the learned advocate for the appellant referred this court to another case of **Justine Kakuru Kashushura @ jOhn Laizer Vs. Republic, Criminal Appeal No.175 of 2010 (Unreported)** in which it was held that where evidence is at variance with the charge the trial is vitiated. On the same parity argued that the charge and evidence are at variance and as such the whole trial was vitiated.

On that note, the learned advocate for the appellant invited this court to re-evaluate evidence and come out with its own conclusion that, rape was not proved and allow the appeal by setting the appellant free.

Arguing the 3rd and 4th grounds jointly, Mr. Mniko told the court that the trial court was wrong to convict the appellant based on proceedings which were marred with irregularities contrary to law. According to Mr. Mniko, the irregularities noted are that at page 43 of the typed proceedings section 231 of the CPA was not complied with for failure to address the accused person on the substance of the charged sheet before entering defence. Nowhere the record shows the accused was told of his rights and that this is enough to nullify the proceedings. Also was that at pages 15, 31,36, 41, and 47 of the typed proceedings all shows that section 210 (3) of the CPA was not complied with and as such vitiated the whole trial.

With that note, the learned advocate for the appellant prayed, and in strong but humble words, urged this court to allow this appeal by setting aside conviction, sentence and compensation order and set the appellant free.

In response, Ms. Malima, learned Attorney told the court that on their part, the Republic, serious oppose this appeal and support conviction, custodial sentences and compensation order meted out against the appellant. Replying to grounds one and two argued jointly, Ms. Malima, learned Attorney argued that the trial Magistrate at pages 3-4 of the typed judgement evaluated evidence, which evaluation runs through to pages 10-14 of the typed judgement, so equated the arguments by Mr. Mniko that do not reflect the truth of the matter at all.

As to the contradictions noted pointed out by learned advocate for the appellant, was the reply by the learned Attorney that, were just a typing errors because during preliminary hearing the dates mentioned are the years 2019 and 2021 as in the charged sheet. According to the learned Attorney, at page 11-12 of the typed proceedings, the year mentioned is 2019 which is in the charge sheet. On the year 2018 appearing at pages 4 of the typed proceedings, Ms. Malima replied that it was minor variance which does not affect the prosecution case at all. In support of her arguments, the learned Attorney referred this court to the case of

Ridhiwani Nassoro Gendo Vs. Republic, Criminal Appeal No. 201 of 2018 CAT (DSM) (Unreported) in which it was held that since the appellant was caught red-handed at the scene of crime, it cannot affect the minor discrepancies.

On the same token, the learned Attorney argued that the period between 2019 to 2022 when the matter was reported, is long period of time for victim to confuse and says 2018 instead of 2019. According to Ms. Malima, at page 5 of the typed proceedings, the victim testified to have been raped 5 times and hymen was not intact. Not only that but PW2 at page 30 of the typed proceedings testified to witness sex between the victim and the appellant. This piece of evidence, according to Ms. Malima, was not controverted nor was PW2 cross examined on what she testified. Failure to cross examined, according to Ms. Malima, amounts to admission of truth of the testimony of being seen doing sex with the victim. The learned Attorney referred this court to find the effect of failure to cross examined at page 21 of judgement in **Ridhiwani case (supra).**

With the above piece of evidence, Ms. Malima told the court that the case for prosecution was proved because penetration was done by the appellant as testified by PW1 and PW2 and proved by PW4.

Further in reply, Ms. Malima argued that at pages 12-13 of the typed judgement the trial Magistrate gave reasons why he did not trust the

defense witnesses and the issue of being framed was well rejected because nowhere the senior wife featured in the fracas at issue here. The framing, if any, was to come from the aunty who reported all incidences. Ms. Malima continue replying that defense witnesses were well considered at page 12 of the typed judgement.

On that note, the learned Attorney invited this court to find and hold that the case for prosecution was proved beyond reasonable doubt as the appellant never talked anything to do with years and proceed to dismiss the 1st and 2nd grounds of appeal for want of merits.

On the 3rd and 4th grounds of appeal, Ms. Malima argued in reply that sections 210 and 231 of the CPA were complied with by the trial Magistrate by writing that sections 210 and 231 complied with and is the reason the accused at page 43 of the typed proceedings replied how he will defend himself. As to section 210 of the CPA was complied with and the learned advocate's arguments are baseless because was fully complied with. In support of the above arguments, the learned Attorney referred this court to the case of **Samwel Sylvester Vs. Republic, Criminal Appeal No. 36 of 2023 HC (Manyara) (Unreported)** quoting the Court of Appeal decisions which shows that even if were not strictly complied with is not fatal if the accused replied to the explanation was found not fatal.

In the totality of the above reasons, the learned Attorney in strong term invited this court to find this appeal devoid of any useful merits and proceed to dismiss it in its entirety.

In rejoinder, Mr. Mniko argued that discrepancies noted are not minor but goes to the root of the charged sheet. As to the years, in the charge sheet refers to 2019 and 2021 but in the preliminary hearing it was referred as 2019- 2021 and the judgement says 11.01.2022. All these, according to Mr. Mniko, are not minor but serious contradictions and not even typing errors but goes to the root of the charged sheet that was facing the appellant and cannot be ignored in the circumstances of this appeal.

As to PW2, Mr. Mniko rejoined that at page 30 para 2, PW1 and PW2's testimonies are full of contradictions because at page 11 of the typed proceedings, PW1 said it was night but PW2 said was cooking at day time. PW1 said was sleeping but PW2 says they were cooking. All these noted contradictions were to be resolved in favour of the appellant, insisted Mr. Mniko.

On failure to cross examined PW2, it was the reply of the learned advocate for appellant that, PW2 was cross examined as evidenced at page 31 of the typed proceedings where she said she did not report because he threatened to kill her. So, it was further rejoinder that the argument that PW2 was not cross examined is not true and the case cited on effect of

failure to cross examined is distinguishable in the circumstances of this appeal.

As to the evidence of DW1 and DW2 at pages 12 and 13 of the typed judgement, the evidence of PW1 and all other witnesses nowhere it was testified that aunty reported the matter was extraneous matter which was raised by the trial Magistrate but not supported by the trial proceedings and are matter that were considered to convict the appellant.

In rejoinder as to sections not complied with, it was brief reply of the advocate for appellant that is clear as to what is to be done. Therefore, non-compliance is open and can be seen which vitiates the entire trial.

On that note, the learned advocate for the appellant reiterated his ealier prayers.

This marked the end of hearing of this hotly contested appeal.

Admittedly, this is first appeal, and being so, it is trite law in our jurisdiction that the first appellate court is duty enjoined to consider the evidence in the form of re-hearing by evaluating the entire evidence in an objective manner (given the first ground of appeal) and draw its own finding of fact whether the judgement of the trial court ought to be upheld. This guidance and inescapable duty of this court as first appellate court has been repeatedly insisted by the Court of Appeal in a number of decisions. See the cases of **Okeno Vs. R [1972] EA 34, Kaimu Said**

Vs. the Republic, Criminal Appeal No.391 of 2019, CAT (Mtwara) (unreported), Sabas Kuziriwa Vs. The Republic, Criminal Appeal No.40 of 2019, CAT (Mbeya) (unreported) and Nurdin Iddi Ndemule Vs. the Republic, Criminal Appeal No.410 of 2018 CAT (DSM) (unreported).

In this appeal, the main complaint in the first and second grounds of appeal by the appellant was failure by trial Magistrate to properly evaluate evidence on record and failure to consider the appellant's evidence as such arrived at wrong conclusion by convicting the appellant on the contradictory evidence.

What I gather in these two grounds argued jointly is that the trial court in its judgement did not comply with the provisions of section 312 (1) of the CPA. The said provision for easy of reference provides as follows:

> ***"Section 321(1) Every judgement under the provision of section 311, shall, except as other wise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintended of the presiding judge or magistrate, in language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision."***(Emphasis mine).

The import of the above quoted provision was considered in the case of **Amir Mohamed V. Republic [1994] TLR 138**, and the Court of Appeal had this to say:

> ***"Every Judge or Magistrate has got his or her own style of composing a judgement, and what vitally matters is the essential ingredients shall be there, and these includes critical analysis of evidence by both prosecution and defence."*** (Emphasis mine).

Further guidance on how to evaluate evidence, in particular, defence evidence was amply given by the Court of Appeal in the case of **Leonard Mwanashoka Vs. Republic, Criminal Appeal No.226 of 2014 (unreported)** in which the Court of Appeal insisted and clearly articulated what is meant by considering defence in the following language:

> ***"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*** (Emphasis).

From the foregoing discussions and guidance on evaluation as explained by Court of Appeal authorities cited, it is my considered opinion that, evaluation of evidence at the end of trials is inescapable and primary legal duty of all trial courts as well as assessing the demeanor of the witnesses which can only be interfered on appeal where not done or where done, but the trial court misapprehended the substance of the evidence on record. It is at this point, points for determination are to be clear in the judgement and it involves separating chaff from the grain as held above. Guided by the above stance, I will now deal with the grounds raised and argued jointly.

Having carefully heard the competing arguments in respect of the first and second grounds of appeal, I think, the first issues for consideration is whether the prosecution evidence was contradictory and as such the charge against the appellant was not proved. The competing arguments was on this point are on two folds: **firstly,** the effect of variance between dates and years by prosecution witnesses and the dates and years in the charge sheet the alleged offence was committed; **secondly,** whether contradictions by prosecution witnesses went to the root of the matter and as such rape/incest not proved, and, **thirdly,** whether the trial court objectively evaluated evidence on record and appellant's evidence was considered or not and its effect to the prosecution case. I will start with

the testimony of **PW1 (or victim or NJZ)** and **PW2** as against the charge sheet on contradictions.

Having considered time elapsed to when the report of alleged rape was reported, then, this appeal is akin to stand or fail on account these PW1 and PW2 who are very key and material witnesses in this appeal. I will deal with the first and second complaint together because are intertwined. PW1 testimony was that she had been raped 5 times: the first one, started in 2018 in the farm; second one, in 2019 at night; third one, at farm at night, fourth one, in 2019 at night at home; and, the fifth one, with no date at home with two versions that; **one,** by PW2 that when cooking was ongoing at around 8.00 pm, and, **two,** by PW1 it was after eating when they retired to sleep as usual as in former alleged rapes, the appellant followed her from where they sleep and drug her into living room where he raped her.

The charged sheet says rape was done twice in 2019 and 2021.

Therefore, according to PW1, she was raped twice in 2019 but all were done at night as evidenced at pages 11-12. But PW2, the sister to PW1, in the 2019 at page 30 talks of raping that was done not in the night but when she was cooking. This piece of evidence materially differs with that of PW1 who says that rape was done at night after taking dinner and retire for sleep, the appellant followed her and drugged her to rape.

Truly, the evidence of PW1 and PW2, if looked at critically is not without contradictions. They differ materially as to when the alleged rape, if any, was done. If I were to believe PW1 it was at night when they were sleeping, then, the evidence of PW2 contradicts that of PW1 on the alleged rape that it was done when she was cooking. Therefore, when the evidence of PW1 and PW2 as said earlier is put together, is that their evidence does not prove beyond reasonable doubt that the alleged rape as charged was actually done as stated in the charged sheet. Both PW1 and PW2 talks nothing on the year 2021.

In this appeal, none of the two witnesses (PW1 and PW2) testified of the alleged incest/rape done on 2021, the subject of charge sheet. I am made to believe that the charge sheet was prepared on the strength of the complaint by PW1 at police, but none of the witnesses talked of any rape that was done in 2021. This is other than that the offence of rape/incest was not proved because the prosecution had duty to prove the charge that rape/incest was done in 2019 and 2021. Failure to mention the said year is to be resolved in favour of the appellant that the complainant under oath had never been raped at such year. This cements the argument that rape was not proved at all in this appeal. In my own considered opinion, the Republic, was duty bound to prove the allegations in the charge sheet that rape was done as stated in the charge in 2019

and 2021 so as support conviction. In situation like this one, where there are variance or uncertainty in dates and years as it was in this case, one would expect the Republic to amend the charge under the provisions of section 234 of the Criminal Procedure Act, [Cap 20 R.E.2019]. Unfortunately, this was not done. And its effect, in my considered opinion, is that the charge was not proved and the contradictions noted above goes to the roots of the matter. Had the learned trial Magistrate critically evaluated the evidence before her, she would definitely arrive at different decision as I do hereby find that with the noted contradictions, the offence of incest was not proved at all.

Therefore, arguments by the learned Attorney that, contradictions, if any, were minor do not convince me otherwise. I reject them. Also, the arguments by the learned Attorney that dates are inoffensive and cited the case of **Ridhiwani Nassoro Gendo (supra),** with due respect to the learned Attorney, the circumstances of this appeal, differ in many respect to this case for a number of reasons; **one,** in the Ridhiwani case, the appellant was caught readyhanded sodomizing the victim, while in this case no such readyhanded rape/incest was proved, **two**, discrepancies as noted above are material and not normal that a person who is alleged to have been raped can move the police machinery to charge the accused to have been raped her in 2021 and forget to state so while under oath

but orchestrate old incidences. This leaves a lot to be desired. So even the issue of lapse of time could, if true, applies to the old incidences but not the latest rape of 2021. On the totality of the above reasons, the case cited by the learned Attorney is distinguishable.

The only date in this appeal, I can agree with the learned Attorney that was inoffensive and was due to typing errors is the date in the first page of the judgement that the offence was committed on 11.01.2022. Having seen the other evidence on record there are other supporting evidence that in this appeal, the alleged years of rape was 2019 and 2021 and not 11.01.2022. Since so far no prejudice was raised and proved, the date in the judgement was inoffensive.

The second consideration is whether the trial court objectively evaluated evidence on record and considered the defence evidence. On the face of the typed judgement in this appeal, one may say evaluation was done to both prosecution and defence evidence as argued by the learned Attorney, but looking closely, no evaluation was done at all. Critical analysis of evidence, in my considered opinion, is the most crucial but difficult and most challenging task to trial judges and magistrate. It is this tasking exercise in decision making, if objectively done by considering both sides evidence, that brings forth reasons for the decision and make the decision impartial.

I have carefully gone through the trial court's typed judgement, and have clearly noted that the trial Magistrate correctly summarized the evidence of both parties at page 3 through to page 9 but immediately thereafter, the learned trial Magistrate, instead of analyzing evidence by both sides jumped into answering issues based on one sided evidence and consequently gave reasons for her conclusions and proceeded on to convict the appellant. And in the course of giving reasons, in particular, in reasons five, denied the prosecution evidence as against the defence case.

On the face value of the fifth reason, it appears to be an evaluation of the defence evidence, but looking closely that is not an analysis intended and as guided by the Court of Appeal in the cases I have cited above as guidance. Had the learned trial Magistrate directed herself to her noble duty of evaluating both parties' evidence, she could have reached a different conclusion. But what I gathered in the typed judgement was conclusion that, prosecution have proved their case based on one sided consideration of evidence by the Republic. This was fatal and occasioned failure of justice in this case. Has the learned trial Magistrate done so, she could have found that the charge sheet as shown above was not proved at all because none of the witnesses proved any incest by male in 2019 and 2021 as preferred against the appellant. Also, the testimony of PW1

and PW2 which was considered straightforward but when looked critically was vague and full of contradictions as noted above. The argument that the appellant did not cross examine PW2 is not true as the record is clear that, PW2 at pages 31 of the typed proceedings was cross examined. Also, the argument that the appellant did not raise alibi, then, incest was proved, amounts, in my considered opinion, to shifting the burden of proof to the appellant in the circumstances of this appeal. Further, on noted discrepancies, PW1 did not meet the test of best evidence comes from the victim because of lack credibility and her version of the story was not collaborated by the PW2 but rather contradicted it.

The effect of failure to evaluate evidence was insisted in the case of **Jeremiah John and Four Others Vs. Republic, [1986] TLR 283** in which it was held that it is fatal and vitiate conviction.

From the foregoing discussions and guided by the above decision, I find the judgment in this appeal and resultant conviction are highly vitiated. Furthermore, as demonstrated above, the learned trial Magistrate failed to critically consider the defence case before giving reasons and subsequently convicted the appellant. In this appeal, as seen, the learned trial Senior Resident Magistrate quite correctly summarized the evidence for the both sides but I see no any evaluation done on defense case at all. Had the learned trial magistrate analyzed the prosecution evidence

along with defense evidence, she could have arrived at different decision altogether. What I found in the typed judgement at page 9 is one sided determination of issues by considering prosecution evidence alone and then followed by reasons for the conclusion. What is in page 12 of the typed judgement is not evaluation of evidence but reasons for the conclusion which was made at page 9. The learned trial Magistrate, with due respect to her, utterly failed to consider that the detailed evidence of PW1 did not prove the charge that she was raped in 2019 and 2021 as no account was given on this aspect as correctly argued by learned advocate for the appellant not considered at all. DW2 evidence was denied for reason of her age and silence but her other testimony that they have been taking care victim and taking them to school was not at all considered and more so that the senior wife is fixing the appellant in order to be jailed in for years and take his properties. The fact that this family had conflicts, which resulted into the senior wife deserting the appellant was not considered at all. It is not only that a person has to be instrumental to make it meaningful. The appellant was not even cross examined on this account.

Much as the above findings suffice to dispose of this appeal, as such I find it an academic exercise to discuss grounds number 3 and 4, which, though legal but becomes redundant in the circumstances of this appeal.

From the above discussions, therefore, the judgement, conviction and custodial sentence in this appeal are vitiated.

With the above findings, I am duty bound to reverse the trial court findings on reason that the conviction and sentence of the appellant was not safe at all. I, therefore, allow the appeal. I quash conviction and set aside the sentence and compensation order. And consequently, I order the immediate release of the appellant unless he is held for another lawful cause.

Order accordingly.

Dated at Babati this 10th day of November, 2023.

S.M. MAGOIGA
JUDGE
10/11/2023