IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO 93 OF 2023

(Originating From Criminal Case NO. 10 of 2023 in the Resident Magistrate Court of Songwe at Vwawa)

JOFREY S/O YANGSON MWASHITETE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

Date of hearing: 4/9/2023

Date of Judgment: 30/10/2023

Nongwa, J.

The appellant, at Resident Magistrate Court of Songwe at Vwawa was charged with three counts of rape contrary to section 130 (1) (2) (e) and section 131 (1) of the penal code (Cap 16 R.E 20219). It was alleged on the particulars of offence that appellant on 19th day of February, 2023 at Ipapa Village within Mbozi District in Songwe Region had unlawful sexual intercourse with **X**, **Y** and **Z,** girls aged 12, 13 and 12 years old respectively. (*Real names undisclosed to protect their identities*)

It was the evidence from prosecution side that on the material day **Z** (PW3), **X** (PW4) and **Y** (PW5), were at the farm with PW1 who later released them to go back home. On their way home, PW5 went for a short call at the appellant's farm, appellant saw them asked why they were polluting his farm, gave them some punishment before lavishing one after the other, then let them go home where they reported what had befallen them on their way home. The matter was reported to police, the victims were then taken to hospital for medical examination and they were all found to have been penetrated. They named the appellant to have been the perpetrator who upon being arraigned before the court. The appellant on his side denied the allegations. At the end of hearing the trial court found that the case was proved beyond reasonable doubt, the appellant was convicted and sentenced to serve 30 years' imprisonment for each count, the sentences were to run concurrently.

Dissatisfied with the decision, the appellant filed petition of appeal which contained 8 grounds of appeal as follows;

1. That, the trial magistrate grossly erred in law and facts by convicting and sentencing the appellant by relaying on mere evidence of victims as their evidence was not strong.

2. That, the trial Magistrate grossly erred in law and fact by convicting and sentencing the appellant relaying on evidence of PW3 and PW4, that when appellant knowing carnally to them it was at noon 12:00 while PW5 testified that it was about 10.00hrs morning.
3. That, the trial magistrate grossly erred in law and facts by convicting and sentencing the appellant believing the evidence of PW6 (medical doctor) through exhibit PI-3, PF3 which was not admitted properly.
4. That, the trial magistrate grossly erred in law and facts by convicting and sentencing the appellant and depending on the evidence of PW1 to PW7 without cautioned statement or extra judicial statement.
5. That, the trial magistrate grossly erred in law and facts by convicting and sentencing the appellant despite all contradiction and controversies on the evidence adduced by PW1, PW3 and PW4 about the incident, their evidence was not corroborating each other.
6. That, the trial magistrate grossly erred in law and facts by convicting and sentencing the appellant after failure to analyse properly evidence of PW1 and PW2.
7. That, the trial magistrate grossly erred in law and facts by convicting and sentencing the appellant believing on the evidence of PW3, PW4

and PW5 as they tell the court that they were pupils from primary school while there was neither teacher from the said school called to the court to testify to corroborate evidence of PW1 and PW2 nor any birth certificate tendered at court to prove age of victims.

8. That, the charge against the appellant was not proved beyond reasonable doubt and defence evidence by DW1, DW2, DW3 and DW4 was not considered.

During hearing the appellant was represented by learned counsel, Ms. Febby Cheyo while respondent was represented by Mr. Njoroyota State Attorney, the appeal was argued orally. The appellant's advocate, dropped 7th ground of appeal and argued the 1st, 4th and 8th grounds of appeal at once. Generally, Ms Cheyo submitted that the prosecution failed to prove their case beyond reasonable doubt, the evidence of all three victims has left a lot of doubts particular the circumstances the alleged offence was committed. All three-victim alleged that they were raped one after another but they did not say what others were doing at the time one was being raped, as per their age why they did raise alarm or run away. That these gaps were not filled and the defence evidence was not considered.

As to 2nd, 5th and 6th grounds, Ms. Cheyo submitted that, prosecution evidence has some contradictions or discrepancies that goes to the root of the case. The victims, PW3 and PW4 stated that on the material date at 12 hrs they were from the farm and met with the appellant while PW5 said it was in the morning around 10hrs, these contradictions prove that their evidence was not trust worth as they failed to say at what time the offence was committed. She also, attacked the evidence of girl **Z** (PW3) telling PW1 about the incidence while PW1 says was informed by girl **X** (PW4), also PW1 and PW2 says victims were sent to hospital on 19/2/2023 for medical examination but doctor who appeared in court said it was 20/2/2023 when he received victims and examine them and discovered that they were abused. That all these show that victims were not truthful, and for interest of justice, the court ought not to have considered that evidence. She referred the case of **Nyakuboga Bonifance vs Republic**, Criminal Appeal No. 434 of 2016, CAT Mwanza at page 5 and 6 on the credibility of witnesses.

On 3rd ground, she submitted that exhibit P 1-3 (medical reports) which were admitted during trial was not read after admission contrary to the law. She referred the case of **Robinson Mwanjisi and 3**

Others vs republic, 2003 TLR 48 and case of **Erneo Kidilo and Another vs Republic**, Criminal Appeal No 206 of 2007, CAT at Iringa at page 13.

On reply respondent advocate started with the last argument that exhibit P 1-3 was not read in court, he submitted that at page 16 of the proceedings exhibit was read. That the trial court considered the defence evidence at page 7 and court found evidence to be an afterthought.

On the issue of contradictions on part of victims and medical doctor, the State Attorney submitted that at page 5 and 6 shows that victim were sent to hospital on the following date so it was 20th and not 19th so the argument is baseless.

The State Attorney submitted further that, PW4 was among the victims and she told PW1 at the earliest stage and she named appellant as the one who raped them and when they were being raped one after another, they were all laid down facing up while naked. The argument that victims did not raise alarm also do not shake victims' credibility. The issue of time of commission of offence the contradiction does not go to the root of the case because it depends on victim capacity to remember.

The Attorney argued further that for sexual offences, the best evidence comes from the victim and victims in this case explained what happened to them without any contradictions and their testimony corroborated with evidence of PW6, he proved that victims were penetrated as such the case was proved beyond the reasonable doubt.

On her rejoinder, Ms. Cheyo reiterated her submission in chief.

I have carefully considered the court records, grounds of appeal and appellants' submissions. I find the appeal raises two issues of determination namely, **one;** whether the case was proved beyond the reasonable doubt at the trial court. Grounds No.1,2,4,5,6 and 8 and **two;** whether exhibits P1-3 were properly admitted by the trial court.

In my deliberation I will start with the 2nd issue of whether exhibits P1-3 were properly admitted at the trial court. In this issue, the appellant's counsel complained that contents of exhibit P1-3 were not read out during trial.

It is a settled position of law that exhibits must be read out after being admitted in court, in case of **Huang Qin and Another vs R, Criminal Appeal No. 173 of 2018,** the Court of Appeal stated that failure to read them in court is a fatal omission because it offends the principle of fair trial as the appellants could not have known the contents of the exhibits

tendered against them. Also in the case of **Robinson Mwanjisi and 3 Others v. Republic, [2003] T.L.R 218** the Court emphasized the requirement of reading over the document after it has been cleared for admission and actually admitted. But again, in the case of **Anania Clavery Beteia** (supra) it was stated that failure to read over the exhibits after being cleared for admission and admitted in evidence is wrong and prejudicial.

In this case at hand exhibit P1-3 was admitted as seen on typed proceedings from page 15-16 and exhibits were read loudly in court. Therefore, the 2nd issue is affirmatively answered in that exhibit P1-3 were properly admitted in evidence before the trial court, the 3rd ground lacks merit.

It is a settled position of law that in criminal case the burden of proof lies on the prosecution side and the standard of proof in criminal cases that is required by law is proof beyond reasonable doubt. The court of Appeal in Tanzania in the case of **Mohamed Haruna @ Mtupeni & Another v Republic**, Criminal Appeal No. 25 of 2007 (unreported) stated that in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be

convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.

Coming to the 1st issue of whether the case was proved beyond reasonable doubt at the trial court. In this case, appellant was charged with offence of rape contrary to section 130 (1) (2) (e) and section 131 (1) of penal code which is statutory rape, what was required to prove was penetration and age of the victim that is below 18 years and whether it was the appellant who raped **X, Y and Z,** being under 18 years old, consent is irrelevant. Section 130 (4) (a) of penal code, Cap 16 states that penetration however slight suffice to constitute the sexual intercourse necessary to the offence.

To prove the case prosecution called seven witnesses including victims (**Z** - PW3**, X** - PW4 and **Y -** PW5). They case stated clearly that on the material day when are on the way from the farm to home they met with appellant who found one of them (**Y**) easing herself within his farm, he asked them why they were polluting his farm, they apologized but appellant opted to punishing them by ordering them to peak stones and hold them while exercising *pushups* and take off their dresses and show him their body private parts before taking them to hidden area and raped them one after another. The accused person was well known to the

victims as Geoffrey or *baba Ronaldo.* That they are schooling with his son Ronald in the same school at Nampanje class V.

It is a settled position of law that the true and best evidence in rape cases come from the victim. (see **Selemani Makumba vs Republic**, TLR 2006). The evidence of victims was corroborated with evidence of PW6 (Doctor) who examined victims and found that the victims were penetrated.

Also, the age of victim can be proved by the victim, relative, parent, medical practitioner or were available by production of birth certificate. (See. **Isaya Renatus vs Republic**, Criminal Appeal No. 542 of 2016 at Tabora). In this case at hand, age of **X** (PW4) was proved by PW1 (mother of victim) that she was 12 years old, the age of **Y** (PW5) was proved by PW2 (her father) that she was 13 years old and age of **Z** (PW3) was proved by victim herself that she was 12 years old.

The appellant through his advocate complained that prosecution evidence has doubts as victims alleged that they were being raped one after another but they did not say what others were doing at the time one was being raped and why they didn't raise alarm. Going through proceedings, victims stated that when appellant was raping them, they were lying down facing upward and he threatened to kill them if they will make noise also neighbors were far from the scene.

The appellant's advocate also stated that prosecution evidence has some contradictions/discrepancies that goes to the root of the case. That PW3 and PW4 testified that on the material date at 12 hours they were from the farm then they meet with appellant while PW5 stated that it was morning around 10hrs, she said that this contradiction proves that their evidence was not truthful.

It is generally accepted that where an event occurs in the presence of several people, their testimony in court is susceptible to normal discrepancies. This is normal for, there are errors of observation, memory failures due to time lapse from the time the event occurred to the time of testifying or even panic and horror associated with the incident as it was observed in **Dickson Elia Nsamba Shapwata & another Vs. Republic**, Criminal Appeal No. 92 of 2007). It is for this reason that not every contradiction affects the prosecution case. Only material and relevant contradictions adversely affect the credence of the witnesses and hence cause the prosecution case to flop. In the case of **Said Ally Ismail Vs. R**, Criminal Appeal No. 249 of 2008, the court, categorically stated that;

"...not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."

Therefore, where there are inconsistences, the Court's duty is to consider them and determine whether they are minor not affecting the prosecution case or they go to the root of the matter. This was stated by the Court in the case of **Mohamed Said Matula Vs. R** [1995] TLR. 3 in the following words:

> *"Where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"*

Back to the case at hand, the contradictions raised by appellant is that time for the commission of the offence mentioned by victim are different, which is true however, I join with respondent counsel that it depends on victim capacity to remember. Apart from that 12 hrs a time victim was walking back from the farm, but it not the time victims met

with appellant and rape them, I find that it is minor contradiction which cannot go to the root of the case and it does not make the evidence of prosecution side untruthful or unreliable. The act was a shock to the victims to remember exactly each and every details considering their age and the fact that the appellant had started punishing them before finalizing with his evil act of rape.

I have considered the argument by the appellant's counsel that, PW3 testified to have told PW1 about the incident while PW1 testified to have been informed by PW4. I have gone through court proceedings, it is true that PW1 told the trial court that she was informed by PW4 about the incident but going through court record, I find that both PW3 and PW4 told the court that they informed PW1 about the incident, in my view I do not find that PW1 failure to state that she was also informed by both PW4 and PW3 about the incident can be considered as inconsistent.

The appellant's Counsel stated that PW1 and PW2 testified that victim were sent to hospital on 19/2/2023 for medical examination while Doctor who appeared in court said that it was 20/2/2023 when he received victims and examined them and discovered that they were abused. I have gone through court record, PW1 did not state the real date victims were sent to hospital for examination, PW2 during cross

examination stated that the victims were brought to hospital just the following date, this means that victims were sent at hospital on 20/2/2023 which was the next day of 19/2/2023 as stated by PW6 the Doctor who examined **X, Y** and **Z.**

The appellant on his defence stated that on 19/2/2023 during morning up to 14 hrs he was helping Sikujua Mwashitete farm work (DW4), the same was testified by DW4 that on 19/2/2023 appellant was helping him to cultivate. I find the defence evidence have no weight because appellant said that on the material day, he was helping DW4 farm work up to 14 hrs, this means that he did not spend the whole day on helping DW4 activities. As per evidence of PW1, victims arrived at home 17:00 hrs, in that regard I find that there was a chance of appellant to meet with victims from 14:00hrs to 17:00hrs. the accused defence was considered and the same did not raise any doubt on the prosecution evidence for the court to exonerated the appellant from the commission of this sinful act.

In this case prosecution side proved the case to the tilt as required by the law. I find no need to depart with finding of the trial court. I confirm both conviction and sentence of the trial court.

V.M. NONGWA
JUDGE
30/10/2023

DATED and DELIVERED at MBEYA this 30th October 2023 in presence of the appellant in person and Ms. Julieth Katabalo State Attorney for the respondent.

V.M. NONGWA
JUDGE
30/10/2023