IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF MANYARA)

AT BABATI

CRIMINAL APPEAL NO. 69 OF 2023

(ORIGINATING FROM CRIMINAL CASE NO 02 OF 2022 BEFORE KITETO DISTRICT COURT AT KIBAYA)

JACKSON NAIKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of Last Order: 18.10.2023

Date of Judgement:17.11.2023

JUDGEMENT

MAGOIGA, J.

The appellant, **JACKSON NAIKO** was arraigned in the District of Kiteto at Kibaya (trial court) for one offence of incent 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 on 11th day of January, 2022 at about 00:03hrs at Ndaleta village within Kiteto district in Manyara region, did have sexual intercourse with her daughter, one, AJS -(pseudo name to be referred herein as **'PW1' or 'victim')** a pupil of Ndaleta Primary School aged 15 years. The appellant denied the charge against him.

Having heard the case on merit, the trial Senior Resident Magistrate found the appellant guilty, convicted and sentenced him to serve 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 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 and unproved charge as per the law;*
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 the appellant 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. Roida Kisinga, learned State Attorney.

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

Arguing ground number one, 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 analyze 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,** prosecution witnesses contradicted themselves on the date subject of charge sheet, which the alleged offence was committed and insisted that this goes to the roots of the matter; **two**, PW1 told the court that she was raped on 3.1.2022, a date different to the date alleged in the charge sheet; **three,** PW2 testified that she arrived at Ndaleta on 06.01.2022 and on a third day, the victim was raped which is on 09.01.2022, a date quite different from date in the charge sheet; **four,** PW4 and PW5 altogether testified that the date the victim was raped was 06.01.2022, quite a distinct date

from the charge sheet as evidenced at pages 36 and 39 respectively of the typed proceedings; **five,** PW6 told the court that he received the victim on 11.01.2022 but testified that the appellant started raping the girls immediately their mother separated with the father; and **six,** PW2 told the court that the appellant has been doing rape and is the reason the senior wife decided to desert the appellant.

According to Mr. Mniko, of all prosecution witnesses, it was only PW3 who testified that the victim was raped on 11.01.2022 as evidenced at page 26 of the typed proceedings. Further, Mr. Mniko argued that PW2 and PW6 testimonies on when rape started differs materially and raises serious doubts which he prayed that they be resolved in favour of the appellant. It was Mr. Mniko view that, if PW2's testimony is believed, it leaves a lot to be desired that a biological mother of the victims could remain silent without reporting the incidence of incest, if true.

Based on the pointed doubts, Mr. Mniko argued that, it is clear and no doubt that, the Republic utterly failed to prove its case because the trial court failed to analyze evidence on record because the date the offence was alleged to have been committed in the charge sheet was subject to be proved but was not proved at all.

Mr. Mniko did not end there but went on arguing that, had the learned trial Magistrate took a great care in analyzing evidence, she would have

arrived at different conclusion. The learned advocate attacked the evidence of PW7's report and oral testimony that it was contradicting in itself that the victim had been raped twice with no evidence and that when he inserted his finger, the victim felt pain. Also, another notable contradiction, according to Mr. Mniko, PW7 wrote in exhibit P1 that the victim had no hymen and in his oral testimony testified that the hymen was not intact; this, according to Mr. Mniko, created serious doubts if at all the victim was raped. Further, the learned advocate queried that, if the victim was, indeed, raped by the appellant on 11.01.2022, but PW7, who examined the victim on the same date utterly failed to observe any discharge from the vagina of the victim without any explanation why no discharge. This is another doubt that, if it could have been considered, the trial court would have arrived at different conclusion altogether, pointed out Mr. Mniko. Therefore, Mr. Mniko concluded that, PW7's report and his oral testimony was so confusing that it leaves a lot to be desired. It was the view of Mr. Mniko that this incidence of 11.01.2022 which initiated the whole saga against the appellant, when examined very carefully leave a lot to be desired. The learned advocate in support of his stance referred this court to the case of **Hamis Khalfan Dauda Vs. Republic, Criminal Appeal No.231 of 2009 CAT (DSM) (unreported)** in which the Court of Appeal held that great caution and

reliability of the witnesses need to be gauged with serious analysis of evidence on record in rape cases.

Mr. Mniko, therefore, concluded that not only the date it is alleged the offence was committed was not proved, but even, rape was not proved at all in this appeal.

On the second ground of appeal, Mr. Mniko argued that the evidence of the appellant was not considered at all. In support of this, Mr. Mniko pointed out that at page 14 of the trial court's typed judgement, the learned trial Magistrate recorded and considered extraneous matters which were not testified by the appellant. The reasoning of the learned trial Magistrate that the case was framed by senior wife were extraneous matter but were what was considered and rejected the appellant's defence. According to Mniko, the appellant's defense, showed that there was hidden conflict between PW2 and the appellant as testified by the appellant. To show that PW2 is behind this false accusation for her own motive, is the fact that, she testified that the wives of the appellant, including the biological mother of the victim, knew of the rape incidents and that is the reason she deserted the appellant without reporting them to the authorities.

The learned advocate for the appellant argued and concluded that had the learned trial Senior Magistrate considered all these, she could have

arrived at different conclusion and as such invited this court to find merit in this ground and proceed to allow the appeal on this ground as well.

On the 3rd and 4th grounds argued jointly was the arguments of Mr. Mniko that looking at the trial proceedings, there were so many serious irregularities. The irregularities, according to Mr. Mniko, are failure comply with section 230(3) of the **Criminal Procedure Act, [Cap 20 R.E 2019]** as seen at pages 27, 41,58 and 61 for failure to read the substance of the evidence to witnesses.

On the totality of the above reasons, Mr. Mniko invited this court to allow the appeal and set the appellant free.

In response, Ms. Kisinga, learned Attorney told the court that on their part as Republic serious oppose this appeal and support conviction and sentence meted out against the appellant. On the dates, as argued by Mr. Mniko, Ms. Kisinga replied that it is true, there were variance on dates but was quick to point out that PW1 was referring to three different incidents to wit: first one was at the shamba; the second one, was on 03.11.2022 and the last one subject of this appeal was on 11.01.2022. According to the learned Attorney, the date as stated in the charge sheet was proved by PW1 who told the court that she was raped on 11.01.2022 as such no variance between the testimony of PW1 and the charge sheet as alleged and argued by the learned advocate for the appellant.

Replying on the testimonies of PW2, PW3, PW4 and PW5 in respect of the date of rape, the learned Attorney for the respondent argued that it is true there were variances between the date of rape as testified by prosecution witnesses but was quick to point out and argued that, much as no prejudice was occasioned to the appellant, then, that alone cannot negate the fact that the victim was examined on 11.01.2022 and found raped as per testimony of PW7.

As to the argument that no raped was proved at all, Ms. Kisinga argued in reply that the doctor (PW7) noted that there were bruises and when he inserted the finger the victim felt pain. According to the learned Attorney, these two observations by PW7 were enough to prove rape was done by the appellant.

The learned Attorney went on replying that the variance in dates by prosecution witnesses did not prejudice the appellant because he knew the date charged was 11.01.2022. According to learned Attorney, PW2 saw the appellant raping which amount to read-handed in the circumstances of this appeal. Much as the appellant did not dispute to be at home on that material night and did not cross examine PW2 and most of the prosecution witnesses, then, their testimonies are nothing but truth. In support of this stance, the learned Attorney referred this court to the case of **Khalfan Rajab Mohamed Vs. Republic, Criminal Appeal No.**

281 of 2020 CAT (DSM) (unreported) in which it was held that variance in dates did not prejudice the appellant as was aware of the date stated in the charge sheet.

As to exhibit P1 (PF3) dated 11.01.2022, the learned Attorney was brief to the point that she did not see any contradiction as argued by the learned advocate for the appellant because the doctor (PW7) corroborated the evidence of PW1. It was the view of the learned Attorney that, variance between the testimony of prosecution witnesses did not go to the roots of the matter. According to the learned Attorney, in sexual offences, the best evidence comes from the victim and much as PW1 testified that she was raped on 11.01.2022 as in the charge sheet, then, the offence of rape was proved.

As to the failure to observe any discharge, Ms. Kisinga argued in reply that discharge could not be observed because of lapse of time as she was examined at 15:50 hrs while the act was done at 00:03 hrs.

On that note and reasons, Ms. Kisinga urged this court to find no merits in the first ground and proceed to dismiss it for want of merits.

As to the second ground on failure to consider the defence but considered extraneous matter in convicting the appellant, the learned Attorney, readily conceded to this ground but was quick to ask this court, being first appellate court, to step in the shoes of the trial court and re-evaluate the

evidence including that of the appellant and give appropriate measure (without mentioning what are those appropriate measures).

On the 3rd and 4th grounds of appeal argued jointly, it was the reply by the learned Attorney that the same are without any iota of merits because the right of the accused person when a charge is rectified is to read to him the rectified charge and ask him to plea thereto, which was done contrary to what was argued, so, according to her, section 234(1) of the CPA was complied with.

As to section 210 (3) of the CPA was the reply of the learned Attorney that same was complied with and referred this court to the case of **Samwel Sylvester Vs. Republic, Criminal Appeal No.36 of 2023 HC (MANYARA) (unreported)** in which it was held that once the court writes that the said section was complied with is enough.

It was the argument of Ms. Kisinga that, without prejudice to the above, if the court finds that the sections were not complied with the court should as well find that no prejudiced was caused, so, same can be cured under section 388 of the CPA.

In the final and for the counter arguments, Ms. Kisinga urged this court to find this appeal without any useful merits and proceeds to dismiss it in its entirety.

In rejoinder, Mr. Mniko argued that the contradictions noted and admitted are fundamental and goes to the roots of the charge sheet. According to Mr. Mniko, three different witnesses who alleged to be in the scene of crime comes with three different dates is not a minor nor due to elapse of time because the case was recent one. As to the case of **Khalfan Rajab Mohamed Vs. Republic (supra),** the learned advocate argued that is distinguishable because the problem was with one date while in this case the problem is with three different dates which are 09.01.2022, 6.01.2022 and 11.01.2022 and years were 2021, 2022, and 2023 all alleged the offence was committed. According to the learned advocate for the appellant, the appellant was prejudiced and could not make a defense because each witness had his date as to when the offence was committed. On exhibit P1, Mr. Mniko insisted that nothing of importance was done to prove rape. PW1 in one hand says no hymen, and on the other hand says not intact meaning it is there but is loose.

As to the argument that the best evidence in rape cases comes from the victim, Mr. Mniko agrees with that position but was quick to point out that that is not the only consideration in rape cases but the evidence has to be looked as a whole.

As to the last ground, the learned advocate for the appellant reiterated his earlier submissions.

In the final, the learned advocate for the appellant reiterated his earlier prayers for allowing this appeal by quashing conviction and set aside the sentence meted out against the appellant and set him free.

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 ground by the appellant is failure by trial magistrate to evaluate evidence on record and as such arrived at wrong conclusion by convicting the appellant on the contradictory evidence and unproved charge.

Guided by the above stance, I will now deal with each ground raised and argued separately, and, where argued jointly, deal with it in the same manner.

Having carefully heard the competing arguments in respect of the first ground 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 three folds; **firstly,** variance between dates and years the alleged offence was committed by prosecution witnesses; **secondly,** rape was not proved, and, **thirdly,** contradictions by prosecution witnesses. I will start with the testimony of PW2 (**LEOKADIA JOHN)** and that of the PW3 (**TAUSI YASIN**) who were as the record shows, instrumental in instigating and setting the law in motion leading to the uncovering the alleged rape (incent by male). After close scrutiny of the evidence of these two grown up adults, I entertain no doubt that PW2 story leave a lot to be desired, if I were to believe her in this appeal, in particular, that **"even the other woman left because of his behavior"** (referring to the biological mother of the victim and the behavior of raping) which in essence was hearsay because PW1 do not state the source of such information and she didn't testify to have talked to the senior wife of the appellant but PW3 who did not say so. Further, if I were to believe, PW2 again, she saw the

appellant doing sex with the victim, an act interpreted by the learned Attorney, that it amounts that the appellant was caught red-handed (*inflagrante delicto*) doing sex while running outside. This piece of evidence has to be considered, in my opinion and for the interest of justice, with the evidence of PW7 who testified to have examined the victim on that very day but the contents of exhibit P1 speak volumes. The contents of exhibit P1, no doubt shows that PW7 filled exhibit P1 based on the explanation of the victim and no examination was done for the following reasons: **one,** the victim being a child under age the disputed examination was done without any presence of the guardian, community work or any parent or any police as it can been seen as required under item (iv) of part two of exhibit P1. **Two,** having carefully considered the evidence of PW1, PW2 and PW3 in whole but none explained why, and if I were to believe them, PW7 observed that the vagina of PW1 had no discharge or smear, or semen or blood stains, if at all PW1 was raped as PW2 and PW3 wanted to be believed but, in the following day found with no any discharge or traces save for mild bruises. This doubt seriously goes to the root of the charge that was facing the appellant. Not only that but in exhibit P1, Part IV which is on **'sexual assaulted cases'** requires, among others, the doctor to examine and take any specimen of smears from the victim, but in this case PW7 noted **NIL.** This is against the

evidence of PW1, if I were to believe her, that the appellant made sex with her in the first day on 3rd January, 2022 and he finished without any problem. PW1 said after being raped she went back and sleep with her sisters while PW2 and testified that they went out and stayed there till morning. Another big and serious contradiction by PW1 and PW2 which cannot be ignored.

Furthermore, PW7 did not take the history of the alleged rape, if any, but was moved by the nature of complaint and instead of following the details of the PF3 (exhibit P1). This was another indication that the examination done by PW7 was highly doubtful and shallow to establish rape as alleged because PW7 noted why in such recent rape there was no discharged nor smear, blood nor sperms was noted and what actually happened. This was very vital in proving that actually rape was done but is missing in exhibit P1. The mere filing that mild bruises were noted but still leave a lot to be desired, why no any traces of any discharge in the form of sperms, blood, smear etc. Not only that but PW1 was examined in the absence of any guardian contrary to what was testified by PW6 that, PW7 examined her presence as evidenced in exhibit P1 but exhibit P1 shows examination, if any, was done in absence of the guardian, mother or near relative for minor like PW1.

The testimony of PW3 was hearsay because she never witnessed rape and her testimony that, she was afraid to report is just but an afterthought on her part. The argument by Ms. Kisinga, learned State Attorney, that contradictions, if any, were minor sound good but cannot convince this court otherwise in the circumstances of this appeal.

The above noted contradictions, in my considered opinion, are not minor but are, as correctly argued by the learned advocate for the appellant, serious and goes to the root of the matter and lead to one conclusion that rape subject of this appeal was not proved given the time taken and the examination done could reveal more traces than what was orchestrated by PW1, PW2 PW3 PW4, PW5, PW6 and PW7. but was not at all supported by the contents of exhibit P1.

This takes me to the aspect of variance in dates when the offence was committed. There is no dispute that the charge sheet stated that the offence was committed on 11th January, 2022 at 00:03 night. But PW2, if her evidence was to be believed, she testified that she arrived on 6th January, 2022 and rape was committed after three days this cannot be ignored as mere lapse of time as argued by the learned Attorney. PW3's evidence in this case was completely hearsay on what happened on that night. PW4 and PW5 talked of a quite different date from that of 06.01.2022. This has tasked my mind a great deal, whether rape was

actually done on 11.01.2022 or on 09.01.2022? The learned Attorney referred this court to the case of **Halfan Rajabu Mohamed Vs. Republic (supra)** in which the Court of Appeal quoted the case of **Osward Mokiwa @Sudi Vs. Republic, Criminal Appeal No. 190 of 2014 (Unreported)** in which it was held that:

> ***"We are satisfied that the error on the charged sheet was inoffensive; it neither prejudice the appellant nor occasioned any injustice to him. Our view is particularly based on two factors: firstly, that the appellant did not raise any alibi or similar defence whose effect depended so much on the exactness of the alleged on the charge as being the date when the offence was occurred. And secondly, that the appellant fully focused his defense on what the prosecution witnesses alleged to have occurred on 2nd November, 2008 at the crime scene ..."***

While Mr. Mniko on the other hand pointed out that, the facts in the case of **Mohamed (supra)** are different because there was only one date which was in disputed, but in this appeal, there were more than three dates and two years which in any way the accused was prejudiced and he could not even know how to defend himself because every witness had

her own date as to when the offence was committed, hence, distinguishable.

I have carefully considered this issue very carefully and I am mindful of the doctrine of precedents that I am bound to follow the decisions of the higher Court (in this case the Court of Appeal of Tanzania), unless I have reasons to differ. I have as well considered the circumstances of the **Mohamed's case** seriously and I found myself constrained to agree with Mr. Mniko that, indeed, the circumstances of this appeal are different from the case cited. I will explain. **One,** while in the **MOHAMED case** the appellant had confessed to have committed the offence and his cautioned statement admitted without any objection, but in this case no such confession was admitted. **Two,** while in the case cited the victim testimony was uncontroverted, but in this case as shown above prosecution witnesses' testimonies were full of contradictions as to when the offence was committed. **Three,** while I agree that, in this appeal no *alibi* was raised but with the dates differing as to when the offence was committed, in my considered opinion, it prejudiced the appellant because he could not defend against the date in the charge sheet or in the testimony of witnesses which were more than one, hence prejudiced. With due respect to the learned Attorney, the appellant in this case was prejudiced as correctly argued by the learned advocate, Mr. Mniko. **Four,**

much as rape was not proved beyond reasonable doubt as seen above, the evidence of PW1 was not corroborated by PW7 who examined her on that very day.

Another issue raised and argued by the learned Attorney on this point was that the appellant did not cross examine PW2 and PW3, so their stories should be believed wholesome even in serious offence like this one which attracts heavy punishment. Mr. Mniko had different view that failure to cross examine do not by itself prove the case for the prosecution.

This point will not detain this court's much time because section 147 (1) of the **Tanzania Evidence Act, [Cap 6 R.E.2019]** is clear on what should be done after the examination in chief is finished. For easy of reference, the said provision provides:

"Section 147(1) Witnesses shall first be examined-in-chief, then (if the other adverse party so desires) cross examined, then, (if the party calling them so desire) re-examined."

Guided by the literal wording of the above provisions which has no ambiguity, the issue of cross examination and re-examination, in my considered opinion, is optional and failure to cross examine or re-examine do not take that the accused has admitted the offence charged or prosecution have proved their cases. The prosecution in criminal cases, with due respect to the learned Attorney, have unchanging duty to prove

beyond reasonable doubt the charges against the accused person unless where he/she confesses to the offence charged with. Further guided by that stance, If I were to take that, the arguments by the learned Attorney whole, it amounts to say, if one does not cross examine, then, he/she is considered to have admitted the offence and likewise when a witness for defense is not cross examined by the prosecution, then, has disproved the prosecution case. This is not what the Court of Appeal meant in most cases nor did the parliament intended that when enacted the provisions of section 147 of **Tanzania Evidence Act.** That line of argument, therefore, cannot have a day in the circumstances of this appeal. The issue on cross examination or failure to cross-examine was expounded by Court of Appeal in the case of **Reni International Company Limited Vs. Geita Goldmining Limited, Civil Appeal No. 453 of 2019,** in which quoting the case of **Jacob Mayani Vs. Republic [2020] TLR 397** held that the appellant's obligation to prove was not relieved by the failure to cross examine by respondent and that in the case of **Jacob Mayani's case** (supra) it was the appellant's admission which was not controverted through cross examination and not the witnesses' evidence which when not cross examined do not amount to admission as the trial court still had to analyze the said evidence and relate it with other pieces before concluding.

Guided by the above stance, and much as the appellant denied the charge facing him, thus, his failure to cross examine any witness for the prosecution, cannot be said, amounts to admission of the offence and that evidence has to be taken blindly. In my respective opinion, if this line of argument is accepted will occasioned injustice in a number of ways like; in civil cases, will erode the principle of parties being bound by their pleadings, in criminal cases, will relieve the Republic from proving their case to the standard required in law and to the accused person will amount to taking him a mile to prove his innocence. That cannot be accepted and is rejected outright in this appeal.

Also was the argument by the learned Attorney that in this appeal, the best evidence in rape cases comes from the victim and referred this court to the case of **Halfan Mohamed (op cit)** to cement that the victim named the appellant as his rapist and as such incest was proved. On the other hand, Mr. Mniko counter argued that he has no problem with that principle, but urged this court to critically evaluate the evidence on record in its totality and find that the offence of rape was not proved despite the evidence of the victim. The learned advocate for the appellant referred this court to the case of ***Hamias Halfan Dauda Vs. Republic (ibid)*** in which the Court of Appeal was emphatic that despite the rule that the best evidence in sexual offences comes from the victim but such evidence

should not be accepted and believed wholesale. The reliability of such witnesses should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate otherwise the innocent victims.

I have considered the above guiding principles in rape cases like this one along with the evidence of PW2 who according to the record, is the engineer of all this along with the defence of the appellant and I have no doubt to find out that, had the trial magistrate considered the defence, she could have found that the motive behind all these is PW2 by her hidden agenda of farming. In her testimony she cunningly showed that the appellant is very bad person and that the mother of the victims deserted the appellant because of incest of her children but remained silent, including her own sister. This piece of evidence was not at all considered at all as it will be made apparent later in this judgement in the second ground of appeal argued separately.

In the totality of the above reasons and what I have endeavoured to re-evaluate above, the first ground of appeal is found merited in this appeal that the trial magistrate failed to evaluate evidence and as such convicted the appellant on glairing contradictory testimonies of prosecution witnesses, who failed to prove the charge of rape.

This takes me to the second ground that the learned trial Senior Resident Magistrate erred in law by failure to consider the evidence tendered by the appellant but instead considered other extraneous matters not the subject to the defence evidence. According to Mr. Mniko, the learned trial Senior Resident Magistrate, utterly failed to consider the defense evidence and as such the conviction and sentence of the appellant was prejudicial to the appellant. Ms. Kisinga learned State Attorney readily conceded to this ground that is merited and invited this court step into the shoes of the learned trial Senior Resident Magistrate this being a first appeal and make a proper finding against the evidence of the whole case. Obviously, the learned Attorney never pressed for an order of retrial in this appeal in the course of determining this ground, of course for obvious reason that is not a fit case for such gesture.

Having gone through the trial record and as rightly argued by learned advocate for the appellant Mr. Mniko and rightly conceded by the learned State Attorney Ms. Kisinga, the record of the trial court is loud and clear that the trial Magistrate rightly summarized the evidence for all parties but made no evaluation nor consideration to the defense evidence at all but in disguise of considering and rejecting the defence evidence introduced extraneous matters which were not subject of the appellant's

defence. In her reasoned judgement, and in particular at reasons number five had this to say:

"Fifth, the accused had told this court that this case was framed up due to his conflict with his former wife who is the victim's mother, but I have closely scrutinized the prosecution evidence and found that PW1 gave detailed evidence of how the accused have been raping her not only at home but even at the farm, and has been doing the same to her siblings ..."

Indeed, the whole reasoning given in rejection of the defence evidence which was rejected, had nothing to do with the defense evidence. The learned Attorney in the circumstances, urged this court to step into the shoes of the trial magistrate and consider the defence evidence and make a finding of its own. Mr. Mniko had the same view with suggestion that, I allow the appeal on this ground and set the appellant free.

The defence subject of this appeal by the appellant was simple and straightforward that:

> **"On that day I was at the farm, I was taken by three militia people, I was cleaning my farm, they had told me that I was needed at home. I asked them if there was a problem, one told me that there was money sent to me by my in-law from Dar es Salaam so as to find her a farm.**

I told them, I have already shown her the farm what is the real problem? They said they don't know more.

I got into the motor cycle and when we were near home, we met policeman, he stopped us, he asked me if I am Jackson Naiko? I said Yes. We went to the village office, I was put under arrest and locked down. I didn't know what the problem was. After two hours, I was given a paper and was told to sign, so I signed and later I was brought to Kibaya police station and then to court where I heard for the first time that am raping my children which is not true"

In this appeal, the record is clear that the trial magistrate in her typed judgement at page 11 immediately after summarizing the evidence of both sides, jumped into answering issues framed using one sided evidence without considering the defense evidence and concluded that the prosecution proved their case beyond reasonable doubt and introduced extraneous matters while considering the defense case. This was wrong and irregular and indeed occasioned miscarriage of justice to the appellant. Therefore, guided by the Court of Appeal decision in the case of **Kaimu Said Vs. The Republic, Criminal Appeal No. 391 of 2019, Mtwara(CAT) (unreported)** in which it was held that, failure to consider defense evidence vitiates conviction and render the trial a nullity against the appellant.

Guided by the above holding, the same consequences befall this appeal and I have no hesitation to hold that the trial and consequential conviction and sentence were vitiated in this appeal by this incurable omission and it was a serious misdirection on the part of the learned trial Senior Resident Magistrate, hence find merits in ground number two and allow it.

In this appeal, the defense of the appellant has tasked my mind a great deal and how did the militia people know of the money sent by PW2 to the appellant to look for a farm, which PW2 admitted her mission was to start farming which is the main activity of the appellant.

The trial record is clear that the appellant was not cross examined on this farming relationship with PW2 and when the testimony of PW2 is taken in whole it had effect of impeaching the involvement of PW2 in creating all that is facing the appellant and prosecution case that PW2 had a hidden motive in reporting the appellant while his two wives being aware but have never reported such serious incidences despite PW3 saying was afraid of doing so. In this appeal, I find the account of PW2 was unreliable witness with hidden interest to serve regarding the farming venture by the appellant. The reasons of threats, which are not eminent and continues at all the material time to PW3 are but doubtful and the act of PW2 trying to lie that even the biological mother of the victim knew about

rape incidents was another indication that PW2 was testifying to the bad character of the appellant which is inadmissible under the provisions of section 56 of the **Tanzania Evidence Act**. In other words, the testimony of PW2 if looked carefully shows had contact with the senior wife and brings the line with the defence evidence that the whole story is created to have him inn and take his farms and property. This was not considered at all.

That said and done, this was another reason this court find and hold that the case for the prosecution was not proved and as such the conviction and sentencing of the appellant was not justified in the circumstances of this appeal.

This is not a fit case to order retrial because it was not requested for and will give an opportunity for the Republic to fill in gaps.

The above two legal ground of appeal which are legally merited suffices to dispose of this appeal without necessarily going to the other though legal but remain redundant ground for it is procedural irregularities.

In view of what this court have tried to discuss above on what transpired in the trial court, I am duty bound to find that the conviction and sentence of the appellant was not safe because was made on failure of the learned trial Resident Magistrate to evaluate evidence on record, failure to consider defense evidence and as such occasioned miscarriage of justice.

That said and done I agree with the appellant that the charge of incest my male was not proved beyond reasonable doubt. Consequently, under the powers vested in me under the provisions of section 43(1) of the **Magistrates' Courts Act, [Cap 11 R. E. 2019]** doth hereby quash the conviction and set aside sentence and compensation order meted out against the appellant. The appellant is to be immediately released from prison unless held for another lawful cause.

Order accordingly.

Dated at Babati this 17th day of November, 2023.

S.M. MAGOIGA
JUDGE
17/11/2023