IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 63 OF 2022

(C/F Criminal Case No. 38 of 2022 (R. R. Futakamba, SRM) in the District Court of Rombo at Rombo)

SWITBERT DEONIZI…….……..…… APPELLANT

VERSUS

REPUBLIC…….…… RESPONDENT

JUDGEMENT

Date of Last Order: 17.10.2023
Date of Judgment: 29.11.2023

MONGELLA, J.

The appellant herein was arraigned before the district court of Rombo at Rombo in Criminal Case No. 38 of 2022 for the offence of Rape contrary to **section 130 (1), (2) (e) and 131 of the Penal Code** [Cap 16 RE 2019]. The particulars of the offence were to the effect that the on 01.03.2022 at 08:00hrs at Shimbi Masho village within Rombo district in Kilimanjaro region, the appellant had carnal knowledge of a girl aged 16 years (the victim or PW1, hereinafter).

The appellant denied the charge against him and so the case proceeded to trial. The prosecution called 5 witnesses: PW1, the victim; PW2, Georgina Wenslaus Kavishe; PW3, Amalia Stanslaus Mramba; PW4, WP 3175 D/SGT Selestina and PW5, Elizabeth John

Shayo. In defense, testified as DW1 and furnished one witness, Regina Desderi Shayo, DW2.

The prosecution evidence was to the effect that: The victim's mother was married to the appellant's brother. The appellant thus became an uncle to the victim. In December 2021, while at Karagwe, the appellant asked the victim's parents to allow him to take the victim to his home in Rombo so that she could help with house chores. As they began their journey to Rombo, they took a break at Kayanga where the vehicle stopped. They were to rest for the journey to begin the next day. The appellant took her to a guest house whereby he purposely wanted to book a single room for both of them. However, the victim refused. She was given her own room, but the same had a malfunctioning lock.

At 02:00hrs, the appellant entered her room took off her clothes and forced his male organ into her female organ warning her that if she screamed he would kill her. She still screamed, but no one came to her aid. After he was done, the appellant slept in the room until 06:00hrs. In the morning, they left for Rombo and arrived at Shimbi area at 12:00hrs. Upon arrival, the appellant's son showed the victim the room she would be staying. The appellant entered the room and again forced her into having sexual intercourse with him. She screamed for help, but no one came to her aid. Later, the appellant's wife (DW2) came home, but she was afraid of telling her what had transpired as she seemed so serious.

On 01.03.2022 at 08:00hrs while at home doing chores, the appellant and his wife had left. At 10:00hrs, the appellant came back to the house and asked if she had fed the hares and washed the kids to which she responded affirmatively. He then told her to get inside, but she refused. The appellant took his son to his room and told her that the child was crying and that she should come and take the child. When she went into his room, he closed the door and again raped her.

The victim finally decided to report the matter to PW2. She entered PW2's house crying telling her that she was tired of being raped by the appellant. PW2 called PW3, the Village executive Officer (VEO), who could not come on that day. PW2 also called DW2 and left her to talk with the victim. On the next day, PW3 arrived at PW2's home and called for the victim who told her that she had been raped on her way to Rombo and the one that raped her was the appellant. PW3 called the police whereby the appellant was arrested and sent to Mkuu Police station. The next day, on 03.03.2022 at 09:00hrs the victim was sent to Huruma Hospital and examined by PW5 who filled a PF3 after examining her. PW5 noted that the victim's female organ was wide and she was not a virgin. She concluded that victim might have been penetrated by a blunt object. PW4 was handed the file on 06.11.2022 whereby the appellant was already in custody. She interrogated the appellant who denied the offence. She collected evidence and drafted the charge.

In defence, the appellant testified that he was arrested on 03.03.2022 at 18hrs and taken to Mkuu Police station whereby he was told he had raped the victim. That, he stayed in custody until 07.03.2022 when he was arraigned on court. He faulted the prosecution for failure to summon his wife as its witness since the victim stated that she was made aware of the incident. He also faulted the police for failure to inspect his house as a crime scene. He averred that the victim wanted to go back home and so she corroborated with other witnesses to make up the case so that he could be arrested. He said that, PW1 was already supposed to leave on 04.03.2022.

The appellant admitted to have gone to Karagwe in December 202. He said that DW2 had asked the victim's mother to have the victim work for her as a house maid. That, the victim's mother agreed and she handed over the victim to him. He said that they began the journey to Rombo at 01:45hrs the same day and did not sleep on any guest house. That, Kayanga was a just a small distance from Karagwe worth T.shs. 1,500/- fare. That they arrived in Moshi at 10:00hrs then at Rombo at 12:00hrs and his wife arrived home at 14:00hrs.

DW2 testified that she lived with the appellant from 2020 to 2022 when he was arrested by two militia men and PW3, for reasons not disclosed. She was later informed by PW3 that the appellant was suspected of rape. That, PW3 also left with the victim and the next day her clothes and due payments were collected by PW3, who

also told her that the victim was pregnant. After a month, while at Dodoma, she received a call informing her that the victim had gone back to her home and she was allowed to stay with PW3, but she later left PW3's home and used to visit her until around June, 2022.

DW2 further stated that the victim was brought to her home in January 2022 from Bukoba. She did not know her parents, but talked to her mother through the phone. That, at first, when PW1 came to her house she did not work, but when told she will be taken back home, she denied going back home. That, she also wanted to go back home, but asked her to stay and just two days afterwards, she claimed she was raped. DW2 believed the victim lied on the incident so she would be allowed to go back to her village.

After considering the evidence from both parties, the trial court found the appellant guilty, convicted and sentenced him to serve 30 years in jail. Aggrieved, the appellant has preferred this appeal on the following grounds:

1. *That, the learned trial Magistrate erred in both law and fact by convicting and sentenced the appellant with an offence which was not proved to the hilt.* (sic)

2. *That, the learned trial Magistrate grossly erred to misdirected herself in law and in fact for failure to consider*

the guiding principle on the nature, value and application of collaborative evidence, hence she relied on the evidence of a single witness which its dangerous to convict an accused on such evidence. (sic)

3. *That, the learned trial Magistrate grossly erred in the law and fact by convicting and sentenced the appellant without considering the defense of the appellant nor assigned for rejecting it, as long as it is a general principal of law that, where the determination of the rights or obligation of a person is involved, a decision maker must give reasons for his decision.* (sic)

4. *That, the learned trial Magistrate erred in law and fact by failing to presided the case in camera as directed on section 186 (3) of the criminal procedure Act Cap 20 R.E 2019 instead the trial court presided on open court which is against the law and rights which minimize the appellant's freedom to cross-examination to the prosecution witnesses.* (sic)

5. *That, the learned trial Magistrate misdirected herself in crediting the evidence of PW1 whose evidence was absolutely immaterial and was full of doubts.*

6. *That, the learned presiding Magistrate failed to find that there is contradictory, discrepancies, inconsistency and unreliable evidence tendered by the prosecution side.*

In his submission, the appellant only dealt with the 1st and 3rd grounds of appeal. On the first ground, he claimed that the charge was not proved to the hilt. He averred that there was variance between the charge and the prosecution evidence. That, while the charge read that the incident took place on 01.03.2022, PW1 testified that she was raped more than once on diverse dates since December 2021.

The appellant averred that the evidence ought to be compatible with the charge laid before the accused for the offence to be proved. He cemented his argument by citing the case of **Abel Masikiti vs. Republic** (Criminal Appeal 24 of 2015) [2015] TZCA 219 TANZLII. He contended further that the charge was lacking for failure to indicate the exact period the alleged offence took place. That, the failure to amend the charge rendered the evidence on record incompatible with the charge and thus the case against him was not proved.

As to the 3rd ground, he averred that the trial magistrate only dealt with the evidence of the prosecution on its own, but paid no regard to the defence case, which was contrary to the law. He supported his assertion with the case of **Hussein Idd and Another vs. Republic** [1986] TLR 166. He added that the failure to consider defence case

vitiates the conviction. In support of his argument, he referred the case of **Moses Mayanja @ Msoke vs. Republic** (Criminal Appeal 56 of 2009) [2012] TZCA 70 TANZLII. BELIEVEING that he is entitled to the benefit of doubt, he asked this court to allow the appeal for the same having merit.

In reply, Mr. Kajembe jointly addressed the 1st, 5th and 6th grounds of appeal. He averred that the offence of rape requires the prosecution to prove one element which is penetration and penetration however slight constitutes rape. He cemented his argument with the case of **Esau Samuel vs. Republic**, Criminal Appeal No. 227 of 2021.

He contended that the prosecution has a duty to ensure that witnesses give a clear narration of evidence which proves the offence rather than providing a general statement alleging that rape was committed. Mr. Kajembe was of the view that PW1 clearly gave a narration of how the appellant raped her more than two times on diverse dates. He challenged the appellant for not cross examining the victim on relevant facts concerning her evidence on penetration. He had the stance that failure to cross examine certain matters implies acceptance of the fact alleged, a position he supported with the decision in **Nyerere Nyague vs. Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 TANZLII. He supported the trial court decision averring that the trial court correctly analyzed the evidence of PW1 in its judgement and thus

correctly answered the issue of penetration and whether it was the appellant who raped the victim.

Mr. Kajembe further argued that since the victim was under age the prosecution met the requirement under the law in proving the age of the victim. He also challenged the appellant for failure to challenge the evidence on the age of the victim during cross examination.

As to the claim of variance between the charge and the prosecution evidence, he contended that the charge states that the incident took place on 01.03.2022 and the victim, PW1, proved that the incident took place on the said day and that she had been raped multiple times. He contended that the best evidence in sexual offences is that of the victim as held in **Nyamasheki Malima @ Mengi vs. Republic** (Criminal Appeal 177 of 2020) [2022] TZCA 326 TANZLII. He further argued that PW1 did mention the second incident to be on 01.03.2022 and her evidence was corroborated by PW2 and PW3, hence no variance between the charge and evidence.

As to the 3rd ground, Mr. Kajembe submitted that the trial court did comply with **section 312 of the Criminal Procedure Act** [Cap 20 RE 2022] as its judgement contained points of determination, reasons for the decision and the decision itself. He contended that the trial court did frame issues for determination and the court answered the same in affirmative and used case laws, laws and the evidence

on record to arrive to its decision. He was convinced that the evidence was well analysed by the trial court.

On the 2nd ground, he averred that the trial court evaluated the evidence of all prosecution witnesses and accorded more weight to the evidence of PW1 and convicted the appellant basing on the principle that the true evidence of rape comes from the victim and in case of a girl who is a minor, then proof of penetration suffices to prove rape. He had the stance that the trial court, having heard and assessed the credibility and demeanor of PW1 was entitled to draw a conclusion on whether to believe or not to believe PW1 as provided under **section 127 (6) of the Evidence Act**. He was convinced that such principle on best evidence was correctly applied by the trial court.

Addressing the 4th ground, Mr. Kajembe while admitting that it was true that the case was not conducted in camera as required under **section 186 (3) of the Criminal Procedure Act**, he challenged the appellant's claim on the ground that the appellant was not prejudiced. He argued so saying that the appellant was not denied the right to fair trial and the procedural irregularity does not vitiate the trial. He challenged the appellant for not protesting against the act or raising the concern during his defence.

Further, he argued that the provision was meant to safeguard the personal integrity, security and liberty of the victims who will testify before the court and not the accused. On those bases, he had the

stance that the failure to observe the requirement does not vitiate the proceedings since the appellant was not prejudiced. In support of his stance, he cited the case of **Mashaka Marwa vs. Republic** (Criminal Appeal 138 of 2018) [2022] TZCA 416 TANZLII. Mr. Kajembe finalized his submission by praying for the appeal to be dismissed for the conviction and sentence of the trial court to be upheld.

Upon reading the appellant's written submission, I have noted that he only argued on the 1st and 3rd grounds of appeal. The rest of the grounds were impliedly abandoned because the appellant never stated to adopt the memorandum of appeal in his submission. In that respect, I shall only address the argued grounds of appeal despite the fact that the learned state attorney replied on them all.

On the 1st ground, the appellant challenged the trial court for convicting and sentencing him on the offence of rape while the charge was not proved beyond reasonable doubt. In his submission, the challenge is based on the assertion that there was variance between the charge and the prosecution witnesses' testimonies on the date the offence was allegedly committed. That, while the charge mentions 01.03.2022, the victim (PW1) testified to have been raped by him on several occasions. To start with and for ease of reference, I wish to reproduce hereunder, the contents of the charge. The same goes:

STATEMENT OF OFFENCE

RAPE c/s 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R. E. 2019]

PARTICULARS OF THE OFFENCE

SWITBERT s/o DEONIZI on 01st day of March, 2022 at 08:00hrs at Shimbi Masho Village within Rombo District in Kilimanjaro Region did have carnal knowledge with one XX, a girl of 16yrs old.

A charge is the foundation of a criminal trial and its purpose is to inform the accused person on the offence and the magnitude of the same so that he can properly enter his or her defence. This was well emphasized in **Thabit Bakari vs. Republic** (Criminal Appeal 73 of 2019) [2021] TZCA 259 TANZLII, in which it was stated:

> "Undoubtedly, a charge sheet is a basis of a criminal trial. Its purpose among others being to inform the accused person the nature and magnitude of the charge facing him to enable him/her to prepare his/her defence. In criminal charges, the prosecution side has the duty to prove the charge against an accused person beyond reasonable doubt and this burden never shifts."

In the case of ***Paschal Aplonal v. The Republic*** (Criminal Appeal No. 403 of 2016) [2019] TZCA 617 TANZLII, the Court of Appeal ruled that, discrepancies between the charge and the witnesses' testimonies regarding the time of commission of the offence is not so fatal. This in my view, however, has to be decided in accordance with the

merits of each case whereby the court has to weigh the evidence on record and decide on whether the discrepancy renders the charge unproved or whether the discrepancy prejudice the accused.

From the evidence of PW1, the victim, it appears that there were several, three to be exact, incidents of rape by the appellant against her. However, as evident in the charge, the prosecution decided to charge the incident of 01.03.2022. In my view considered view, the fact that the witness (PW1) additionally testified on other incidences, not included in the charge, does not render the charge defective. Since the prosecution singled out the incident of 01.03.2022, it had the duty to prove commission of the offence on that specific charged date. Upon scrutinizing the prosecution evidence, I am of the settled view that the prosecution discharged its duty. With regard to the incident of 01.03.2022, the victim testified as to how she underwent the ordeal in the hands of the appellant. Specifically, she stated:

> "On 01/03/2022 it was at 08hrs I was at home doing my cores, accused wife went job and the accused also left. At about 10hrs the accused came back he asked if I already feed the hares (sungura) I told him yes; he asked if I washed the kids I told him yes, he told me go inside I denied. He took his boy son to his room, he has two kids, a boy and a girl the girl was at school, there he told me the kid is crying come and took him; I entered the room, it was in his room he closed the door; he told

> me to sleep on his bed I denied he pushed me and took off his clothes (pants) and took off mine he raped me by putting his penis in my vagina, up and down; like three minutes he left me asking me to go bathroom (wahi uoge) I did saw the mucus again, I decided to go to neighbours house and told her what happened to me, she told me to go back home, I did later the neighbor brought VEO to her house told me to go and tell VEO everything. VEO asked me what happened I told him everything from Kanyanya to Rombo. VEO went police and reported in the evening the police came and arrested the accused …" (sic)

In accordance with her testimony, it was on this particular date and incident when she decided to spill the beans to their neighbour. Her testimony is in fact corroborated by PW2, the neighbour whom the victim reported the incident to and also by PW3, the VEO. The law is settled that the true and best evidence in rape cases comes from the victim so long as the court finds the victim's evidence credible. See: **Selemani Makumba vs. Republic**, (2006) TLR 386; **Alfeo Valentino vs. Republic**, Criminal Appeal, No. 92 of 2006 (CAT, unreported) and **Shimirimana Isaya and Another vs. Republic**, Criminal Appeal, No. 459 of 2002 (CAT, unreported).

Further, the law is settled that every witness is entitled to credence unless there are cogent reasons not to believe the witness. These could be such as where there are contradictions or inconsistencies in the witness' testimony or where the testimony rendered is so

implausible to believe the offence was really committed. See: **Daniel Malogo Makasi & 2 Others vs. The Republic** (Consolidated Criminal Appeals No. 346 of 2021) [2022] TZCA 230 TANZLII. In assessing the evidence of the victim, PW1, I find nothing to fault her credibility. Her testimony was so clear and unshaken as to the incident of 01.03.2022, which the prosecution opted to charge the appellant against. Even on cross examination, her credibility was not shaken.

I wish also to note that there was another discrepancy between the charge and the testimony of PW1 as to the exact time the offence was committed on 01.03.2022. While the charge stated that it was committed at 08:00hours, PW1 stated that it was committed at around 10hours. This discrepancy is also minor and has no effect on the prosecution case. My finding is fortified by a Court of Appeal decision in the case of **Abasi Makono vs. The Republic** (Criminal Appeal No. 537 of 2016) [2019] TZCA 572. In consideration of the provisions of **section 234 (3) of the Criminal Procedure Act**, the Court held:

> "We are in agreement with both parties that 19:00hours and 20:00hours were mentioned in the charge and the witnesses respectively as being the time of the incident. As correctly argued by the learned Senior State Attorney, we find this to be a minor and immaterial variance. As to the variance between the charge and evidence regarding the time of the commission of the offence, section 234 (3) of the CPA provides thus:
>
> > (3) Variance between the charge and the evidence adduced in support of it

> with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."

In the above case the Court also referred to its previous decision in **Emmanuel Josephat vs. Republic** (Criminal Appeal No. 323 of 2016) [2018] TZCA 207, in which it treated the discrepancy between the time stated in the charge and that adduced by the witnesses to be immaterial. With this observation, I find the appellant's argument on variance of the charge and prosecution evidence regarding the time of commission of the offence lacking merit.

With regard to the 3rd ground of appeal, the appellant lamented that the trial court never considered his defence evidence. In his view, the omission vitiates the trial court decision. To the contrary, however, this being the first appellate court, it has the duty to re-evaluate and re-consider the evidence on record and come out with its own findings. See: **Mkaima Mabagala vs. The Republic** (Criminal Appeal No. 267 of 2006) [2011] TZCA 181 TANZLII. In that respect, I shall examine and consider the defence evidence and decide on whether the same planted reasonable doubts in the prosecution case.

In his defence, the appellant basically denied committing the offence. He claimed to know nothing about the incident as he just

found himself being arrested and later to be told that he had committed rape against the victim. He had the stance that the offence was fabricated against him as the victim, whom she took from her parents in Bukoba to come do house chores in his house, wanted to leave to go back home and was to leave on 04.03.2022. He also challenged the prosecution for not furnishing his wife to testify in its favour.

Basically, the appellant's evidence does not cast any doubt on the prosecution case. His general denial on committing the offence does not shake the prosecution case in any way. When asked by the prosecution about his whereabouts on the date of the incident, he never denied being at home at the material day and time. He as well never stated where he was at that particular time, what he stated is that he did not recall where he was at that particular time. I find this being implausible considering the fact that the appellant knew that he was faced with a serious offence. In addition, the failure to state where he was at that particular date and time, renders the victim's testimony unshaken.

The claim by the appellant that his wife was never called to testify has no legal base as well. The law does not compel presentation of a specific number of witnesses in proving a fact. What is considered is the relevance of the witnesses presented by the prosecution in proving the alleged facts. See: **section 143 of the Evidence Act, Cap 6 R.E. 2022** and the case of ***Siaba Mswaki vs. The Republic*** (Criminal Appeal No. 401 of 2019) [2021] TZCA 562 TANZLII. The

appellant's defence on calling his wife as a prosecution witness, could hold water if he had shown how material such witness was and how the prosecution case was ruined for non-calling of such witness. See: **Aziz Abdalah vs. Republic** [1991] TLR 71; and **Hemed Said vs. Mohamed Mbilu** [1983] TLR 113. Besides, the appellant called his wife to testify in his favour.

The said wife testified as DW2. She testified on how the appellant was arrested for the offence of rape and on the victim leaving her house after the incident. About the incident, DW2 did not give any evidence to exonerate the appellant from liability. When asked about the incident, she first stated that she did not know if he ever did that. That, she asked the victim and the victim told her she was raped by her husband. She said that nobody told her about the incident and she never asked the appellant about it.

Then, DW2 went on to testify on probabilities saying that it is possible the victim decided to lie on being raped after she was told she would be taken back home to the village. DW2 claimed to have stayed for long time with her husband and knowing him, he could not commit such act. Then she testified that due to his work as an entrepreneur, the appellant can be at home in her absence whereby he would stay with the victim (house girl) and her 2 years old child. She admitted to have known the issue of rape before the appellant was arrested.

As the testimony of DW2 goes, I reiterate my position that she did not testify anything tangible to exonerate the appellant from liability. In fact, she admitted being told by the victim that the appellant raped her, but she took no action, not even questioning the appellant about the allegation to get the truth.

In consideration of my observation hereinabove, I find that that the prosecution successfully proved its charge against the appellant, beyond reasonable doubt. I find nothing to fault the conviction and sentence by the trial court. In the event, the appeal is dismissed for lack of merit.

Dated and delivered at Moshi on this 29th day of November, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA