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

CRIMINAL APPEAL NO. 59 OF 2022

(*Appeal from the decision of District Court of Moshi at Moshi dated 27th March 2019 in Criminal Case 626 of 2017)*

FRANK WILBARD NYAKI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

17th October & 5th December, 2023

A.P.KILIMI, J.:

The appellant Frank Wilbard Nyaki was arraigned at the District Court of Moshi for two counts namely; first, rape contrary to section 130(1) (2) (a) and 131 and second count for unnatural offence contrary to section 154 (1) (a) of the Penal Code Cap. 16 R.E.2002 as a second count. The particulars of the charge at the trial alleged that on unknown date of November, 2017 at Uru Mrawi area within District of Moshi in Kilimanjaro region the appellant committed the offences to one AE (in pseudonym to protect her dignity) without her consent. The appellant pleaded not guilty at the above charge.

To prove their case the prosecution paraded three (3) witnesses and one (1) exhibit. The facts gave rise to this appeal albeit in brief were to the

effect that; the victim (PW3) knew the appellant by his name and she told the trial court that the appellant had raped her and also had sexual intercourse with her against the order of nature. Explaining the ordeal, the victim testified that on the fateful day she was home alone when the appellant who had a knife went and threatened her. He then held her mouth, undressed her and inserted his penis in her vagina and her anus. The following day when she went to church, she informed her pastor about what the appellant did to her. She was later taken to hospital where PW2 examined her and stated that the victim had no bruises, her hymen not intact and that her rectal sphincter muscles were loose. The findings of the medical examination were recorded in the PF3 which was tendered and admitted in court as exhibit P1.

In the defence case featured by DW1 Frank Wilbard Nyaki denied the allegation and contended that he was just at his home attending his sick father. He further contended that the victim's sisters are known for their bad behavior of letting men inside their house.

The trial court upon hearing the totality of the evidence adduced before it was satisfied that the offences charged had been proved. It proceeded to

convict and sentenced him to thirty years imprisonment for each count and the sentences were to run concurrently.

Aggrieved the appellant preferred the present appeal with five (5) grounds as follows; -

1. That the trial court grossly erred in law when convicted and sentenced the appellant relying on evidence of PW3 witness who was mentally unsound/ retarded without taking serious precaution governed by the law before recording and relying on that evidence.
2. That the trial court grossly erred in law and in fact when convicted and sentenced the appellant while adding some extraneous matters in her judgment which are not backed up by the evidence on record. (i.e the incident date id 5th November 2017).
3. That the trial court grossly erred in law and in fact when convicted and sentenced the appellant relying on improbable, implausible and contradictory accounts of prosecution evidence.
4. That the trial court grossly erred in law and in fact when totally failed to consider the appellant defence of alibi.
5. That the trial court grossly erred in law and in fact when believed the prosecution account on a charge which was not proved to the required standard that is beyond reasonable doubt.

On 3rd October, 2023 when the appeal was set for the hearing, the appellant appeared in person and unrepresented while Ms. Wanda Msafiri, learned State Attorney appeared for the respondent/Republic. The appellant

prayed to submit his written submission in support of his appeal and Ms. Wanda Msafiri prayed for time to go through the appellant's submission and respond orally.

On the first ground of appeal the appellant has faulted the trial court for relying entirely on evidence of PW3 who is the victim of the offence without caution despite the fact that the witness was said to be of unsound mind. Elaborating further the appellant submitted that the state attorney had informed the trial court that PW3 was of unsound mind but misdirected the court that the same witness was capable of giving rational answers on the questions put to her and the trial court accepted and agreed with the state attorney. It was the appellant's submission that this was a misdirection done by the trial court as there was no examination recorded in court's proceedings showing that the witness was examined to ascertain whether she could testify. It was the appellant's view that in absence of the examination done to PW3 by the trial court, it is unavoidable to hold that this particular witness had been couched to say what she testified in court against him.

Submitting further on another ground the appellant stated that the trial court had failed to note that the prosecution evidence was loaded with

improbable and implausible accounts hence was supposed to be approached with great caution. He submitted that this was so due to the reason that PW1 in her account had stated that she was the one who went to the police station together with the victim and narrated everything to the police on behalf of the victim instead of letting PW3 explain herself. It was the appellant's submission that such testimony raises reasonable doubts on PW3's evidence.

Furthering his submission with respect to the second ground of appeal the appellant stated that the trial court had erred in law and in fact by adding some extraneous matters in the judgment which were not backed up by the evidence on record. Explaining the point, the appellant submitted that when composing the judgment at page 9 the court recorded that, "…according to the prosecution's case the incidence took place on 4th November 2017." The appellant submitted that the above extract in the trial court's judgment was not at all supported by either prosecution witness or the charge sheet which was laid on appellant's door. Hence it was his submission that this was a speculative idea from the learned trial magistrate against the appellant due to the reason that she believed PW3's testimony as a wholesale truth. Citing the case of **Abiola Mohamed @Simba vs. Republic**, Criminal Appeal No

291 Of 2017, the appellant submitted that relating the cited case with the present one the trial magistrate had without any thorough analysis believed and accepted the PW3's and other prosecution's witnesses evidence as true and reliable despite the same being wholly incredible and unreliable. In the end the appellant pleaded this court to find that the prosecution case had not been proved beyond reasonable doubt against the appellant and allow the appeal by quashing the conviction and set aside the sentence.

Responding to the grounds of appeal filed by the appellant, Ms. Wanda Msafiri submitted with respect to the first ground of appeal by referring to section 127 of the Evidence Act, CAP 6 R.E 2019 and said that the law under this provision provides as to who may testify as a witness. She went on submitting that according to the typed proceedings at page 20, the trial court did examine the witness to test her mental capacity and was of the view that she was capable of giving rational answers. She thus argued that this ground lacks merit.

With respect to second ground regarding extraneous matters in respect to the date, the learned state attorney submitted by referring to page 13 of the typed proceedings and said that the said date was mentioned by PW1, Priscila Nyaki when she was being cross examined by the accused. It

was her submission therefore that it was not extraneous matter and that this ground also had no merit and should be dismissed.

Ms. Msafiri consolidated ground three and five and submitted that the prosecution had proved their case beyond reasonable doubt. She submitted that the ingredients to be proved were consent, penetration, and whether appellant was the one who committed the offence. On the issue of penetration, she submitted that PW2 did examine the victim and found that she was not a virgin and sphincter muscles were loose. That PF3 was also tendered and was not objected by the appellant. She supported her submission with the case of **Selemani Makumba vs. Republic** and also referred to the provision of Section 127(6) of the **Evidence Act, CAP 6 R.E 2019**. On the issue of consent, she referred to page 20 of the typed trial court proceedings and submitted that the victim had explained how the offence was committed, that she was held by her neck and failed to scream. For that the learned state attorney submitted that the ingredient of absence of consent was proved. Submitting further on the issue of who did the act Ms. Msafiri submitted that evidence of the victim proved to the court who did the act by pointing a finger.

Finally with respect to the fourth ground of appeal, which was regarding the defence of alibi, Ms. Msafiri submitted by referring to page 9 of the trial court Judgment and said that the court had explained as to why the defence of Alibi was not considered. Based on what she submitted she prayed for the appeal to be dismissed.

I have given due consideration to the grounds of appeal and the submission made by both sides. The issue for determination of this appeal would be whether there is merit in the grounds of appeal. Having gone through the record of the trial court, it is vividly clear from the decision made that it was based on the evidence of the victim that is PW3. This case being that of sexual offence, the principle is that, "True evidence of rape has to come from the victim." This was well explained in the case of **Selemani Makumba vs. Republic**, Criminal Appeal No. 94 of 1999 [2006] TZCA 96. Based on this principle the trial court in this case was right to have relied on the testimony PW3 being the victim of the offence. The question is whether PW3 was a competent witness considering the fact that she was of unsound mind. The law is clear on this subject as provided for under section 127 (1) and (5) of the Evidence Act, CAP 6 R.E.2019 which states;

> *"127 (1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."*

It is further explained under subsection five that;

> *"127(5) A person of unsound mind shall, unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them, be competent to testify."*

Guided by the above two provisions of the law it is quite clear that every person is a competent witness including a person of unsound mind provided that the court is convinced that he is capable of understanding the questions put to him or of giving rational answers to those questions.

It follows therefore that the law has given the test for competency of a witness through these provisions that is the ability to understand the questions asked and give rational answers to the same. Therefore, based on this provision of the law it means whenever the court is faced with a witness who is of unsound mind, it has a duty of making an enquiry as to the

competency of that particular witness by testing her to see whether she can understand the questions put before her and able to give rational answers as the law requires.

In the present case the appellant has criticized the trial court for believing the state attorney who informed the court that the witness who was of unsound mind was capable of giving rational answers to questions put to her without conducting any examination. The appellant argued that the proceedings were silent as it was not recorded anywhere that the witness was examined to ascertain her competency to testify as required by the law. For that reason, he contended that it would be unavoidable to hold that the witness was couched to say what she testified.

In my interpretation of the wording of section 127(5) of the evidence Act quoted above, it imports a process, albeit a simple one, to test the competence of a person of unsound mind who is called as witness to test his/her intelligence in order to know whether he/she has sufficient knowledge of remembering exactly what happen against him or her. In the instant case, for ease of reference, I reproduce what transpired in the trial court before recording the evidence of PW3, a witness of unsound mind, which is found on page 20 of the trial court record;

> *"Mr. Mwinuka - State attorney: Our witness is of unsound mind but she is capable of giving answers and understand the questions put to her.*
>
> *Court: I have briefly examined the witness and observed her in the witness stand, she understands questions put to her and capable of giving rational answers hence competent to testify and she is hereby sworn and states as follows"*

In my view of the above, the issue is whether what transpired at the trial court as above complied with the provisions of section 127(5) of the Evidence Act.

Having examined the trial court proceedings above, the trial court ruled that the victim understands questions put to her and capable of giving rational answers hence competent to testify and proceeded to swear her. However, in my opinion, I think the trial court simply made a finding that the witness was competent without showing in its record how it reached about the said finding. It is my considered view according to the above law, the court must satisfy itself that the witness is not prevented by her condition

from understanding the questions put to her and giving rational answers. This could only be established by the trial court through putting on record the questions which the witness was asked when the court verifying her competency and reliability.

In my view, I think the rationale to show question and answers asked albeit in brief is necessary because the same could has enabled this court or any other party interested to know that the questions asked were geared at establishing the intelligence of the witness and actually from her answers she had sufficient intelligence of reception of her evidence. But contrary to what happened at the trial court as shown above, is the mere conclusion of the trial magistrate without showing what transpired to reach the said conclusion. In that regard this court has failed to gauge whether the trial court met the requirement of the law above. In that regard, I am settled that the trial court faulted by not making an enquiry as required by the law before receiving evidence of the victim (PW3) who was said to be of unsound mind.

Having endeavored to establish the above, it is therefore my considered opinion the mental status of the victim and especially the competency and reliability of her evidence within the lines of section 127 (5) of the evidence Act was not put clear by the trial court to ensure the trial

against the appellant was fair. Failure to do that has left doubts on the competency of the victim to testify against the offence charged. (See **Fadhili Makanga vs. Republic** [2020] TZCA 270 TANZLII.), and I am settled the said omission is fatal which renders the evidence of the victim valueless, and the consequence for such evidence is to expunge it from the record. Consequently, which I do forthwith.

After expunging the evidence of PW3 from the record, the underlying issue to be determined is whether the remaining evidence is sufficient to prove the case against the appellant and thus support his conviction and sentence

I have considered the remaining evidence of the three remaining prosecution witnesses, I find the remaining evidence would not be sufficient to prove the charge against the appellant. As already pointed out earlier the best evidence in rape cases is that of the victim and the trial court relied on it. Now without evidence from the victim the remaining evidence is not enough to establish the guilt of the appellant.

In the circumstance, having discussed as above, I see no reason to discuss the remaining grounds of appeal as this first ground is enough to dispose the entire appeal.

In the final analysis and all considered, I find the appeal meritorious and proceed to allow it by quashing conviction and setting aside the decision of the trial court. It is hereby ordered, the appellant to be released from custody forthwith unless lawfully held for other reasons.

It is so ordered.

DATED at **MOSHI** this day of 5th December 2023.

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

X

JUDGE
Signed by: A. P. KILIMI