IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 114 OF 2022

(From the decision of Magistrate Court of HANANG' at KATESH Criminal in Case No. 34 of 2020)

JOSEPH MWANGU..... APPELLANT

VERSUS

THE D.P.P ..... RESPONDENT

JUDGMENT

04/10/2023 & 08/11/2023

GWAE, J

The District Court of Hanang' at Katesh (hereinafter the trial court) tried the appellant, Joseph Mwangu who stood charged with the offence of rape contrary to section 130 (1) and (2) (a) (e) and 131 (1) of the Penal Code, Cap 16, R. E, 2002.

The prosecution initially alleged that, on the 25th day of March 2020, at Simbay Village within Hanang' District in Manyara Region, the accused now appellant did have sexual intercourse with one "E" aged ten (10) years old. The appellant noticeably pleaded not guilty to the charge of the rape.

The factual evidence adduced by the prosecution side during trial, which led to the trial court's satisfaction that, the appellant's guilt was proved to the required principle in administration of criminal justice is as follows. The victim, PW3 (a standard two pupil) on the material date at about 14:00 hrs met the appellant who was not familiar to her at canyon (Korongoni). The appellant suddenly grabbed the victim and took her to the maize farm. He undressed the victim's clothes, took his penis and forcibly inserted it into the victim's vagina. Her mother who was around, raised an alarm. The appellant ran away and some people including one Felister, PW2, Stephano and Lohay ran after him up to the residential house of mama Josephat.

The appellant was apprehended while at the residence of the said mama Josephat. PW2 and other persons brought the appellant to Katesh police station for further legal action including investigation, which was conducted by a police officer, PW1 and the victim was medically examined by a medical practitioner, PW4.

When given an opportunity to defend, the appellant gave his sworn testimony and patently denied to have raped the victim. He stated that he went to Ombay Village from Singida Region to look for an employment and managed to be employed by one John. That, on the material date

when he was back from clearing weeds in the village farm and when drinking local brew he met a certain woman who wanted him to report at the village authority. He went on testifying that, the said woman took him to the Simbay village office for registration purposes but to his surprise he was accused of raping a girl allegedly wearing black coat and red cap. Challenging the evidence given by the prosecution side, the appellant stated that, the case was not proved beyond reasonable since PW2 failed to prove who raised the alarm. He added that, the victim failed to establish to the trial court of her rapist. The appellant further challenged the prosecution evidence by stating that, PW4 who conducted examination to the victim did so without having PF3 in place.

At its conclusion, the trial court found the appellant guilty of the offence raped. He was then sentenced to the term of thirty (30) years' imprisonment. Aggrieved by the trial court's conviction and sentence, the appellant is now before the court armed with the following grounds of appeal;

1. That, the trial court erred in law and fact when convicted and sentenced the appellant on a defective charge sheet
2. That, the trial court grossly erred in law and fact when convicted the appellant while it failed to comply with section

127 of the Tanzania Evidence Act, Cap 6, Revised Edition, 2019 (TEA)

3. That, the trial court below erred in law and fact when it convicted and sentenced the appellant while the material witness "Mama Josephat was not summoned
4. That, the prosecution case was loaded with contradictions, inconsistences and discrepancies
5. That, the trial court grossly erred in law and fact when it relied on PE1 (PF3) which was erroneously relied yet it was filled and findings posted in the absence of the victim
6. That, the trial court grossly erred in law and fact when it convicted and sentenced the appellant while the defence was not considered
7. That, the trial court grossly erred in law and fact when it convicted and sentenced the appellant while the case was not proved beyond reasonable doubt

Hearing of this appeal was orally conducted whereby the appellant appeared in person whilst Ms. Alice Mtenga, the learned state attorney represented the Republic, respondent. Supporting his appeal, **firstly,** the appellant complained that, there is a difference pertaining the victim's age appearing in the charge and victim's oral evidence. According to him, the variance ought to have been rectified by an amendment of the charge sheet. **Secondly**, there was non-compliance of section 127 of the CPA, as the victim was not asked simplified questions to test her intelligence.

He then urged this court to refer to the case of **John Mkorongo James vs. Republic**, Criminal Appeal No. 498 of 2020 (unreported). In our instant case, he referred to at page 10-11, stating that there is no where there was inquiry was conducted.

Thirdly, the appellant alleged that the prosecution evidence is questionable due to its failure to summon a vital witness called Mama Josephat alleged to be the owner of the house where he was arrested. According to him, failure to call such witness leaves a lot to be desired. The appellant further argued that, PW2, Fillister, could not be able to run after him successfully.

Regarding the fourth ground, the appellant complained that the trial court wrongly convicted him relying on the contradictory evidence on who exactly raised an alarm. He cemented that, PW1 when he cross-examined her, she replied that her mother was at home on the material date and time and the same time she said that she did not tell her mother of the offence He also questioned the contradictions of evidence on the time of occurrence as testified by the Victim and that of doctor.

Lastly, the appellant complained on the documentary evidence, PE1 in that, PW4 was supposed to receive the victim together with PF3 and that the trial court did not roperly assess his defence. Basing on the

reasons above, the appellant prayed his appeal be allowed as the charge against me was not proved to the required standard taking into account none of the victim's parents had entered appearance for testimonial purposes.

Resisting the appellant's appeal, Ms. Mtenga submitted that, complained contradictions relating to the testimony of victim are baseless as the victim meant specific area and not a village. She also urged that the alleged contradiction on the victim's age is unfounded since it was established that, the victim was blew 10 years old. Hence, a statutory rape since she must be below 18 years.

She went on submitting on the complained non-compliance with provisions of section 127 of the TEA by stating that the trial court complied with the requirement of the law since the victim of the tender age is supposed to promise to tell the truth and that is what she did. She added that an omission to indicate not to "tell lies" is not fatal irregularity. She then cited the decision of the Court of Appeal in **Mohamed Juma vs. Republic** Criminal Appeal No. 434 of 2020 and **Kastuli vs. Republic**, Criminal Appeal No. 414 of 2020 (both unreported). Ms. Mtenga went on arguing that, the case of **John** cited by the appellant is distinguishable

since in the former case the victim did not promise to tell the truth nor was he asked simplified and pertinent questions.

It was further the oral submission of the learned counsel for the respondent that failure to summon mama Josephat is not fatal since in her opinion, the testimony of the unsummoned witness was replaced by that of PW2 who thoroughly explained how alarm respondents arrested the appellant.

Regarding the appellant's complaint on the absence of PF3, it was the argument by Ms. Mtenga that it is not the requirement of the law since issuance of PF3 is dependent on the environment, place, or availability of a police station.

Lastly, the learned counsel also submitted that, the appellant's complaint on difference on time of the occurrence of the incidence is curable in law.

The appellant's rejoinder is brief and it is to the effect that, the victim's mother was also a material witness as was the case for the said Mama Josephat. He finally prayed this court to step into shoes of the trial court in analysis of the evidence adduced before the trial court.

Having outlined the grounds of appeal as well as oral submissions made by the parties, I am now duty destined to determine the grounds of appeal as argued.

> *In the 1st ground, that, the trial court both erred in law and fact when convicted and sentenced the appellant on a defective charge sheet*

Examining the charge and evidence on record, it is revealed that the offence of rape to the victim was committed on 25th March 2020 at Simbay Village within Hanang' District. I am alive of the principle of law that, a variance or discrepancy as to date of occurrence of the criminal incident (s) may lead to a vitiation of the trial court's decisions if it is found going to the root. It therefore follows that, once the variance is noted during preliminary or trial the same ought to be rectified by way of an amendment by virtue of section 234 of the CPA. Nevertheless, if even the same would be noted yet the same might have been cured under section 234 (3) of CPA. In **Damian Ruhele vs. Republic,** Criminal Appeal No. 501 of 2007 (unreported), the Court of Appeal had these to say;

> "*The complaint in the second ground has merit in the sense that it is true that the charge sheet reflected that the date of incident was 23/4/2002 whereas in the evidence of PW1 it was stated that the incident took place on 23/3/2002. However, as was correctly submitted by Mr. Hilla, this was probably a slip of the pen. At any rate,*

the variance in dates was curable under section 234 (3) of the Act."

However, in our present matter case, this court is satisfied that there is no variance to be apprehended by the court. Thus, the complaint that, the evidence and charge are at variance is unfounded. The 1st ground lacks merit, it is thus dismissed.

In the 2nd ground; that, the trial court grossly erred in law and fact when convicted the appellant while it failed to comply with section 127 of the Tanzania Evidence Act, Cap 6, Revised Edition, 2019 (TEA).

It is requirement of law that before taking the testimony of a witness of tender age, the court trying a criminal charge must ensure that such witness is asked some pertinent questions. The essence being to ascertain his or her possession of special intelligence in order to be in a better position to know if he or she can give a sworn testimony or affirmed one. Alternatively, the child of tender age may guarantee the trial court that, he or she will tell the court the truth and not lies. This requirement is provided under section 127 (2) of TEA as argued by the parties. I am aware of the substantive justice needs to be occasioned by our courts in favour of the children of tender age while giving evidence, in every circumstances. In this present matter, it is revealed that the victim was asked as to promise to tell the truth, the thing, which he did. However,

the trial court omitted the other side of the requirement of the law that, she would not tell lies as depicted in page 9 of the typed proceedings. This omission is considered by the learned state attorney to be minor. However, I am not convinced if it is so since the victim ought to know that, she is under obligation not only tell the truth but also not to tell lies unless the victim's credibility is closely assessed by the trial court as required under section 127 (6) of TEA. (See also the decision of the Court of Appeal delivered on May 2022 in **Wambura Kiginga vs. Republic,** Criminal Appeal No. 301 of 2018 (unreported). Hence, the 2nd ground of appeal is partly allowed.

> *In the 3rd ground, that, the trial court below erred in law and fact when it convicted and sentenced the appellant while the material witness "Mama Josephat was not summoned.*

According to the trial court record, it is as complained and conceded by the appellant and Ms. Mtenga respectively that, the said Mama Josephat was not summoned for testimonial purposes. It is trite principle that, the prosecution side is not legally bound to bring all the witnesses during trial. However, under special circumstances depending on the facts of each case, failure to call a vital witness without sufficient reason being shown by the prosecution may justify a trial court to drawn an adverse

inference. (See **Aziz Abdalla vs. Republic** [1991] TLR 71, the Court of Appeal held inter alia;

> *"The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

In our instant criminal matter, the said mama Josephat was the owner of the house to which the appellant is alleged to have gone when escaping from being arrested. However, her testimony would not be more credible than that of PW2 who said to have heard the alarm and upon going thereto, she met the appellant while running and heading to the house of Mama Josephat. More so, it must be noted that, the said Mama Josephat did not witness the unlawful sexual intercourse nor was she said to have seen the appellant raping the victim save that the appellant went to her residence. I am therefore, of the view as that of the learned state attorney that the expected evidence of the said mama Josephat is conveniently replaced by that PW2.

Nevertheless, the appellant orally lamented that, the prosecution evidence is shakable since it failed to bring any victim's parent to testify in that regard. I am of the view that, though there is no law requiring appearance and giving of evidence by parent (s) in the sexual offences, yet it was necessary for one of the victim's parents particularly her mother whom is deemed to be a looming person in terms of the nature of the offence. She was certainly in a better position to ascertain whether her daughter was raped or not. Since it is said that it was the victim's mother who heard the alarm from her daughter and the one who is said to have subsequently raised an alarm leading to the alarm response by PW2. The victim's mother is also said to have went to Simbay village office and Katesh Police station. Therefore, she was expected to have initially and physically examined her child and since she is said to have raised an alarm, she was therefore a material witness unlike mama Josephat as explained earlier.

> *As to 4th ground on that, the prosecution case was loaded with contradictions, inconsistences and discrepancies*

I should not be curtailed on the complained discrepancy on time of the incidence though it is evidently clear that, the PW4, doctor testified that he attended the victim on the material date at 13:00 hrs whereas the

victim testified that the incidence occurred on the material date at 14:00 hrs. Nevertheless, PW4 when cross-examined stated that it was between 13:00 hrs and 14: 00 hrs hrs. The difference was therefore more apparent than real (See the precedent in **Mohammed Shah s/o Lal Shah v. Republic** (1939) 6 EACA 97. That being the position, the appellant's complaint in this regard is baseless.

However, I am in agreement with the appellant's argument that it is not clear if the victim's mother was the one who raised the alarm or the one who found the appellant raping the victim. I am of that view simply because the victim's testimony in that, respect is too contradictory to enable the court safely hold that it was the victim's mother who initially heard the victim screaming. The victim's evidence in the regard ought to be credible ad worth of belief. For clarity parts of her testimony is reproduced herein under;

Ex-in chief

> *"My mother made an alarm and the accused ran away. My mother, we went to Simbay office then we went to Katesh Police*

XX by accused

"I do not know your name; I did not know you before, people found you raping me. I did not tell my mother that you raped me."

Considering the above pieces of evidence adduced by the victim, I am therefore of the decided view that, the credibility of the victim's testimony is highly doubtful. It is so, since it is apparently not clear if her mother raised the alarm after she heard her daughter screaming for assistance or she found the appellant raping the victim. It is even worse, when the victim was cross-examined by the appellant, if she told her mother that she was raped, where she negatively replied. More so, the testimony of PW2 is silent on whether the victim's mother was the one who raised the alarm and whether she was among the persons allegedly chased the appellant up to the residence of the said Mama Josephat. In **Shabani Daud vs. Republic,** criminal Appeal No. 28 of 2000 (unreported), the Court of Appeal of Tanzania held among other things that;

"The credibility of a witness can also be determined in two ways; when assessing the coherence of the testimony of that witness, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused, In these two occasions the credibility of a witness can be

determined even by a second appellate court when examining the finding of the first appellate court."

Being guided by the above judicial decision, I have keenly examined the testimony given by the victim and observed the same is contradictory and thus doubtful.

In the 5th ground of appeal which reads; that, the trial court grossly erred in law and fact when it relied on PE1 (PF3) which was erroneously relied yet it was filled and findings posted in the absence of the victim

The appellant's complaint above in view lacks merit since there is no law, which call for medical practitioners to fill PF3s or Postmortem Reports in the presence of accused persons and on the same date. More so, there are dispensaries that are located where police stations are not available. Thus, it was not wrong for PW4 to conduct medical examination without PF3 when the victim was sent to him though in ordinary situation a victim of sexual offence or any other offence, which requires medical examination to supplement investigation, must go to hospitals with PF3s or any other responsible person has to go to hospitals with Postmortem Reports.

Regarding 6th ground; that, the trial court grossly erred in law and fact when it convicted and sentenced the appellant while the defence was not considered

Examining the evidence in its totality including the defence, I find there are lot to be desired. The appellant testified that the PW2 did not tell the court who raised an alarm, whether the victim's mother or any other person. Without directly connected evidence by the prosecution side from the scene of crime to the place where the appellant was apprehended, at residence of mama Josephat. It is doubtful or questionable if it was the appellant who raped the victim or any other person since the prosecution did not clearly establish the identification of the appellant. That is to say, the chain of identification of the rapist from the scene of crime to the place where the appellant was apprehended is seriously broken.

Since it clear that, the victim was not familiar equally, it is not clear if the victim also chased her rapist while accompanied by the PW2 and other such as Stephano and Lohay. It follows therefore, an identification parade was vitally important as was correctly emphasized in **Thadey Rajabu @ Kokomiti and 2 Others vs. Republic,** Criminal Appeal no. 58 of 2013 where the Court of Appeal sitting at Moshi stated inter alia that:

"The appellants also rightly complained that in the absence of an identification parade, the dock identification conducted on them had no evidential value."

In our instant criminal case, PW2 testified that she was ordered to arrest or stop the appellant who was running on the allegation that he raped a girl. However, her evidence, in my firm opinion, ought to have been corroborated by that of the victim's mother or any other person who started chasing him, if it was as adduced by the prosecution witness, PW2 so.

Lastly, on whether the charge against the appellant was proved to the required standard.

It is well known principle, in criminal trial, that the burden of proof always lies on the prosecution. In this regard, I would subscribe to the judicial decisions in **Jonas Nkize vs. Republic** (1992) TLR 213, **Republic. Vs. Kerstin Cameron** (2003) TLR 84) and **Ahmad Omary vs. Republic,** Criminal Appeal No.154 of 2005 (unreported). In line with the outlined shortfalls herein, I am unable to certainly and safely hold that the victim properly identified her rapist. The prosecution, in my view, ought to have cleared the doubts. Clearance of doubts to the appellant's guilt would be by bringing the victim's mother or any other person who would give corroborative evidence regarding the one who found the

culprit raping the victim. Furthermore, proof on whether the appellant was the one who was seen at the scene and the one who was being chased from the scene up to the residential house of the said mama Josephat was vital.

In the upshot, the appellant's appeal has merit. It is hereby allowed. I therefore respectively quash and set aside the trial court's conviction and sentence. The appellant is to be immediately released from the Prison forthwith unless incarcerated therein for any other lawful cause.

It is so ordered.

DATED at **ARUSHA** this 8th November 2023

MOHAMED R. GWAE
JUDGE

Court: Right of Appeal fully explained

MOHAMED R. GWAE
JUDGE
08/11/2023