

UNITED REPUBLIC OF TANZANIA
JUDICIARY
HIGH COURT OF TANZANIA
BUKOBA SUB REGISTRY
AT BUKOBA
CRIMINAL APPEAL NO. 69 OF 2023

(Originating from Criminal Case 183 of 2023 of Muleba District Court)

EGIDIUS GIDION APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

Date of last Order: 21/02/2024

Date of Judgment: 05/03/2024

BEFORE: G.P. MALATA, J

The appellant **Egidius Gidion** was charged and convicted by the District Court of Muleba at Muleba with the offence of rape Contrary to section 130 (1) and (2) of the Penal Code Cap. 16 R.E 2022.

A brief account of the evidence which led to the conviction of the appellant is that, on 17th day of October, 2022 at Kimeya Centre, Nkomero Village within Muleba District in Kagera Region did unlawfully have sexual intercourse with one "DD" a girl aged 16 years old.

Having accepted the prosecution version to be true the trial court convicted the appellant and sentenced to a thirty (30) years imprisonment. The appellant aggrieved by conviction and sentenced by the trial court preferred the present appeal. The appellant raised six (6) grounds of appeal, these are;

1. That, the trial magistrate erred in law and fact to convict and sentence the appellant by relying on a defective charge sheet.
2. That, the judgment premising the conviction and sentence the appellant is void for failure to comply to the statutory requirements of section 312 (2) of the Criminal Procedure Act Cap. 20 R.E 2019 which did not specify the section of the Penal Code or other law under which the appellant is conviction and the punishment to which he is sentenced.
3. That, the trial court did wrong to reach his decision by relying on contradictory and unsatisfactory evidence adduced by PW1, PW2, PW3 and PW4.
4. That, the evidence of PW4 was fabricated due to the delay file the PF3 as the incident alleged to be committed on 17th October, 2022 while the victim examined on 15th November, 2022. Thus, exhibit must be expunged from the records.

5. That, the trial court erred in law and fact to convict and sentence the appellant in absence of important prosecution witness who did not ant the trial court to testify.
6. That, the case against the appellant was not proved beyond a reasonable doubt.

On the hearing date, the appellant appeared unrepresented whereas the respondent Republic had a service of Ms. Matilda Assey and Ms. Alice Mutungi learned State Attorneys.

In support of the appeal, the appellant made his aggressive submission on why the trial Magistrate misdirected of evidentially and legally.

To start with, the Republic was in support of the appeal. Ms. Alice Mutungi, learned State Attorney submitted that; one, there exists contradictions on evidence between PW1, PW2, PW3 and PW4. PW1 testified that, he was called him and informed that his daughter was raped, he also mentioned the date of incidence that is 17/10/2022. PW2 testified that, the appellant was found raping the victim, PW3 testified that he was present at the scene of crime but named one Philipine Damian as the rapist different from those named by the victim.

Further, there is a variance on the dates of occurrence of incidence that is 15/10/2022 and 17/10/2022 as date of occurrence.

Additionally, she submitted that PF3 was not read to the appellant after admission to enable the accused understand its contents. This was in contravention of the law as stated in the case of **Robison Mwanjisi and Other Vs. Republic** (2003) TLR 218.

Addressing on the ground five, Ms. Alice agreed that, the important witness was not called to testify as such, watered down the prosecution case. She referred this court to the case of **Charles Ngelejae Jojo Noni and Other Vs. Republic**, Criminal Appeal NO. 366/2021 at page 13.

As to the last ground of appeal, Ms. Alice submitted that, it is the duty of the prosecution to side to prove case beyond reasonable doubt, however based on the afore stated evidence on record, it is clear that, the case was not proven to the standard required in criminal cases.

It is on those grounds the Republic was in support of the appeal.

The appellant submitted similarly and making some few additions thereto.

Having carefully considered the circumstances of this case, whereby prosecution side supports the appeal. This court has gone read the record and noted similar fatal errors which prejudiced the appellant's rights. It is on record that and as pointed by the parties to this case that; **one**, there is a contraction on the evidence by the prosecution side. Where the testimonies by witnesses contain

inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter. The above position was settled by the court of appeal in the case of **Mohamed Said Matula V Republic** 1995 TLR3. The prosecution witnesses were caught not reliable for adducing contradicting evidence which was fatal to the case and went on touching the root of the case. As such, the witnesses were caught by the principles stated in the case of **Goodluck Kyando v. R** [2006] TLR 363 it was stated that: -

"It's a trite law that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness"

The court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter. (See: **Mohamed Said Matula v Republic** [1995] TLR3). The learned authors of Sarkar, The Law of Evidence 16th edition, 2007, have this to say at page 48 –

"Normal discrepancies in evidence are those which are due to normal errors of observation; normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material

discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do."

Two, PF3 was admitted as an exhibit but not read to the accused to know its contents. This document carried important information establishing offence of rape but did not pass the fundamental stage of being read to the accused. This was in contravention of the principles stated in the case of **Robison Mwanjisi and Other Vs. Republic** and **three**, key witnesses were not called for reasons known to the prosecution side. This was in contravention of the principles stated in the case of **Charles Ngelejae Jojo Noni and Other Vs. Republic**,

From the foregoing observation and findings, I am inclined to agree with Ms. Alice Mutungi learned State Attorney and appellant that, the trial court erroneously convicted and sentenced the appellant based on wrongly gathered and insufficient evidence as reasoned herein above. This leads to the conclusion that, the case was not proven beyond reasonable doubt.

In the event, I allow the appeal, quash conviction and set aside the sentence. Further, I order for immediate release of the appellant from prison unless he is lawfully held.

IT IS SO ORDERED.

DATE at BUKOBA this 5th March, 2024.



G. P. MALATA

JUDGE

05/03/2024

JUDGMENT delivered at BUKOBA this 5th March, 2024.



G.P. MALATA

JUDGE

05/03/2024

