IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA SUB – REGISTRY)

AT MBEYA

CRIMINAL APPEAL No. 130 OF 2023

(*Originating from the District Court of Mbeya, Criminal Case No. 63 of 2023 before Hon. P.D. Ntumo, PRM dated 13.3.2023*)

JEBRASI JALUWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

11th December, 2023 & 26th February, 2024

POMO, J.

Before the District of Mbeya, the appellant was charged with rape contrary to section 130(1)(2)(e) of the Penal Code, Cap 16, Revised Edition 2022 (the PC). Subsequent to the trial, he was convicted and sentenced to serve 30 years jail imprisonment. Dissatisfied with the judgment, he now appeals before this court on the following grounds:

1. *The trial magistrate erred in both law and fact by convicting and sentencing the appellant without adequately considering that the prosecution failed to prove the case beyond a reasonable doubt.*

2. *The trial magistrate made a mistake in law and fact by sentencing the appellant without properly assessing the evidence provided by PW1.*
3. *The trial magistrate erred in law and fact by convicting the appellant without fully evaluating the testimony of PW2, particularly regarding who was with the appellant when he went to the appellant's house.*
4. *The trial magistrate made an error in law and fact by considering the evidence of PW3, the medical doctor who examined PW1, which involved using his fingers.*
5. *The trial magistrate erred in both law and fact by relying on exhibit P2, the caution statement tendered by PW4, which was obtained in violation of the law.*
6. *The trial magistrate failed to consider the appellant's defense adequately.*

In this appeal, the appellant is unrepresented, while the respondent Republic is represented by Ms. Julieth Katabaro, learned State Attorney.

The brief facts of the case are as follows: Between the 12.3.2022, and the 13.3.2022, at Ikuwa village, Mbeya rural District, Mbeya region, the appellant met a 13 years girl PW1 (name withheld to hide her identity) and took her to his residence where they spent two nights together. It was alleged that during these nights, the appellant forcibly removed PW1's clothing and engaged in sexual intercourse with her. PW1, a minor, was later located at the appellant's residence. She disclosed the events to

local authorities, leading to the appellant's arrest and subsequent arraignment in court on charges related to the incident.

In this appeal, the court ordered its disposal be through written submissions. On 30.10.2023, the appellant submitted his written submission. However, it is pertinent to highlight that the appellant's submissions were deemed lacking in depth, covering only four out of the six grounds of appeal initially raised.

Firstly, he argued that the prosecution failed to prove its case as per the law, contending that the evidence of the victim, PW1, was doubtful. He stated that PW1 testified before the trial court that on 12.3.2022 and 13.3.2023, was taken by him, and the following morning went to buy rice and sardines, which she cooked and gave to his relatives. The Appellant questioned why he would accompany PW1 to his house and for what purpose. He also wondered why the victim stayed at his place without attempting to escape, as she proved that she was free and not locked inside.

Secondly, the appellant argued that the evidence of PW2 was not clear, as he told the trial court that he reported to the village authority, but none of them corroborated his testimony. He further contended that

the trial court relied heavily on the testimony of the family members PW1 and PW2 in convicting the appellant, yet none of the documents pertaining to PW1's status as a student were presented in court.

Thirdly, he submitted that the evidence of Dr. Maulid Kenefa (PW3) was highly questionable and unreliable. He pointed out that during his examination, PW3 used his finger, which is also considered a blunt object. Additionally, he argued that PW3 failed to adequately clarify the use of modern instruments in examining the victim, PW1. The appellant contended that the absence of a hymen was not necessarily indicative of penetration, as stipulated in section 130(4) of the PC. This suggests that PW1 may not have been raped or penetrated by a male organ, contrary to the assertions made by PW3.

Lastly, he contended that the evidence of PW4, the police officer, lacks merit because it violated the law. He pointed out that the timing of recording the caution statement was not in accordance with legal procedures, as indicated by questions posed to PW4 on page 23 of the proceedings.

In reply to the appellant's written submission, Ms. Katabaro, learned State Attorney representing the respondent Republic, strongly supported

the trial court's conviction and the imposed sentence. He argued that the appellant's grounds of appeal lack merits.

Ms. Katabaro, in response to grounds one, two, and three in the petition of the appeal, which have been argued together with ground one and two of the appellant's written submission, submitted that the prosecution was able to prove the case on the said count beyond a reasonable doubt, as required by the law. She explained that the prosecution called four witnesses who were able to establish the elements of the offence charged against the appellant before the court. He further explained that it is clear that the appellant was being charged with statutory rape, as the victim before the trial court was 13 years old and a student at Mshene school.

She emphasized that, according to the offence charged, the law required the elements of the offence to be established by the prosecution's case are such as penetration, age, and consent. Regarding the age of the victim, she pointed out that PW2, the father of PW1, stated on page 13 of the proceedings that the victim was one of his three children and that she was born in October 2009. She further submitted that it is a legal principle that in sexual offences, any person including parents, relatives, or medical practitioners can prove the age of the victim during the trial. To support her argument, she referenced the case of **Andrea**

Bulali Vs. Republic, Criminal Appeal No. 95 of 2020 High Court at Arusha (Unreported).

In the context of penetration, Mr. Katabaro averred that section 130(4) of the PC stipulates that one of the elements to be proven in an offence of rape is penetration. Therefore, for the offence of rape to be proven, it is necessary to establish that there was penetration. In support of this, he cited the case of **Godi Kasenegala Vs. Republic,** Criminal Appeal No. 10 of 2008 CAT at Iringa (unreported).

In the present case, Ms. Katabaro referred to pages 11 and 12 of the trial court proceedings, where PW1 testified that the appellant inserted his penis into her genitalia on the first day she spent the night at the appellant's place, resulting in pain and bleeding. Additionally, she testified that the next day, the appellant forced her to strip off her clothes and engaged in sexual intercourse with her.

Furthermore, Ms. Katabaro asserted that the evidence of PW1 was corroborated by the medical doctor who examined the victim to determine if she had been raped. The doctor's examination revealed that the victim had no hymen. According to PW3, Ms. Katabaro explained, the absence of a hymen indicates that the victim had been penetrated.

She further submitted that in order to prove the offence of rape, consent is one of the essential elements. However, in statutory rape cases involving a minor, a child under the age of 18, whether with or without consent, constitutes an offence of statutory rape. She emphasized that according to PW1, she stated that on the first and second day she spent with the appellant, she was forced to strip off her clothes, and the appellant inserted his penis into her. Additionally, pointed out that on 24.3.2022, the appellant's statement was taken, where he admitted to having had sexual intercourse with the 13-years-old girl who is a student, and such a statement was not disputed. He asserted that the failure to object to the caution statement amounts to admission of the document's content. To support his submission, he referenced the case of **Salimu Mohamed @ Mndia Vs. Republic,** Criminal Appeal No. 321 of 2021 CAT at Dodoma (unreported).

Ms. Katabaro continued by stating that the evidence of PW1 was clear: she met the appellant on the way and went together with him to his house, where she spent two nights and was raped. She emphasized that PW1 was also introduced to his relatives and cooked food for them. He argued that the best evidence is that of the victim, citing the case of **Suleman Makumba Vs. Republic** [2006] TLR 379.

Referring to section 143 of the Tanzania Evidence Act, Cap 6, Revised Edition 2022, Ms. Katabaro highlighted that there is no requirement for a specific number of witnesses to prove any fact. Therefore, she argued, the failure to call the local village authority as a witness does not prejudice the appellant's rights, as the witnesses called upon by the prosecution were material witnesses to prove the elements of the offence of rape. She referred to the case of **Mosi s/o Chacha Vs. Republic**, Criminal Appeal No. 508 of 2019 CAT at Musoma (unreported).

In response to ground four of the appeal, which has been argued together with ground three in the appellant's written submission, challenging the trial court's reliance on the evidence of the medical practitioner as doubtful and unreliable, Ms. Katabaro countered that there is no doubt that fingers can be determined as blunt objects. However, according to the testimony of PW3, when she examined the victim on 28.3.2022, she was required to assess the victim's private parts to determine if there was penetration. She argued that the medical report revealed that the victim had no hymen, which was confirmed by inserting a finger to ascertain if there was evidence of penetration or not.

Conclusively, Ms. Katabaro argued that the appeal has no merit and it should be dismissed.

After reviewing the lower court record, the petition of appeal, and the written submissions, this court believes that the following issues are central to this appeal:

1. Whether the evidence presented by the prosecution was sufficient to establish the guilt of the appellant beyond a reasonable doubt.
2. Whether the witnesses called by the prosecution were credible and their testimonies reliable.
3. Whether the failure to call some witnesses, as argued by the appellant, has any bearing on the outcome of the case.

I should begin by stressing the fundamental principle of law that the burden of proof in criminal trials lies squarely on the shoulders of the prosecution and it never shifts, the standard being proof beyond all reasonable doubt. This principle is well-established in legal precedent, as evidenced by the case of **Mohamed Saidi Mtula v. Republic** [1995] T.L.R. 3. Additionally, it is pertinent to underscore that the accused's defense needs only raising a reasonable doubt in the eyes of the court and no more, as was so held in the case of **Joseph John Makune v. The Republic** [1986] T.L.R. 44 at page 49.

In the instant case, considering the proceedings of the trial court and the issues I have just raised, I will begin with the second issue: were

the prosecution witnesses credible witnesses? In this case, PW1 is the sole witness who alleges to have been raped by the appellant. While the trial magistrate deemed the evidence of PW1 to be believable, persuasive, and consistent, upon thorough examination, I do not find her evidence credible at all. Had the record been perused properly, I am confident that the trial court could have arrived at a different decision. I will explain further.

According to PW1's testimony on pages 11 and 12 of the tiral proceedings, she testified that she was at the appellant's house where she had sexual intercourse with him on 12.3.2022 and 13.3.2022. She further claimed that on the next day, she was taken to the village office where she met her father and uncle. However, PW2, the father of PW1, testified differently. He stated that on 17.3.2023, he heard that PW1 was seen at Ikuka and found in the house of the appellant.

This creates a discrepancy in the timeline, as the period between 13.3.2022 and 17.3.2022 does not align with PW1's claim of being with the appellant. The contradictory testimonies raise doubts about the accuracy of PW1's account. Additionally, even if PW1 was with the appellant on the dates mentioned, there is no evidence to suggest that she was in captivity, as she claimed to be free to move, cook, and meet

the relatives of the appellant. This raises further doubts about the reliability of her testimony.

Furthermore, while PW3, the medical doctor, stated that there was penetration due to the lack of virginity, it is important to note that PW1 was found on 17.3.2023 and taken to the hospital on 28.3.2023. This delay of 11 days from when she was found and 15 days from the time PW1 claims to have been with the appellant, raises questions. It is unclear why she was not taken to the hospital immediately if she was indeed found with the appellant. These inconsistencies cast doubt on the credibility of PW1's testimony. Additionally, at page 17 of the trial proceedings, PW3 stated that PW1 came to the hospital accompanied by her mother and was informed that PW1 was found after a week. PW3 further mentioned that a week had passed when she examined PW1, which was on 28.3.2023. Based on this timeline, it can be inferred that the offence allegedly occurred on 21.3.2023. This contradicts PW1's testimony regarding the dates of the alleged incidents with the appellant on 12.3.2022 and 13.3.2022. The inconsistency in the timeline further undermines the credibility of PW1's account of events.

In the case of **Dikson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 CAT at Mbeya (unreported), the court emphasized the distinction between minor contradictions and

material contradictions. That, material contradictions are those that are abnormal and unexpected of a normal person, and they have the potential to significantly undermine the credibility of a party's case. While minor contradictions and discrepancies may not substantially affect the credibility of a party's case, material contradictions do.

In the present case, the contradiction highlighted regarding the timeline of events directly affects the credibility of the main prosecution witness, PW1. This contradiction goes to the heart of the case and raises doubts about the reliability of PW1's testimony. Therefore, it can be concluded that the material contradiction in this case significantly undermines the credibility of PW1.

Reverting to the third issue regarding the failure to call the village leader and the ten-cell leader, if it has any bearing on this case. It's essential to be recognize that the number of witnesses is not determinative of an accused person's guilt, rather, the credibility and weight of the evidence are of paramount importance. A court may convict an accused person based on the testimony of a single credible witness, as long as their credibility, competence, and demeanor are convincing. Additionally, it is within the prosecution's discretion to choose which witnesses to call, as was so established in the case of **Tafifu Hassan @**

Gumbe vs. Republic, Criminal Appeal No. 436 of 2017 CAT at Shinyanga (Unreported).

However, it is important to note that each case must be evaluated based on its own circumstances. In this case, PW1's allegations against the appellant are solely relied upon for prosecution without any corroboration. Moreover, the circumstances surrounding PW1's claim of being taken to the village officer are unclear, as the identity of the individual who took her remains unknown. Additionally, PW2's testimony on page 13 indicates that PW1 was found in the appellant's home, but the specifics of who found her are also unknown.

In my considered view, the village authority witnesses could have provided valuable insight into the events in question. Their testimony could have potentially shed light on the circumstances surrounding PW1's presence at the appellant's home and her subsequent discovery. Thus, I consider these witnesses to be crucial in this case.

The legal position is clear that the failure to call a witness who is in a better position to explain crucial aspects of the prosecution's case may justify an adverse inference against the prosecution. Numerous decisions support this proposition, including **Boniface Kundakira Tarimo vs. Republic.**, Criminal Appeal No. 350 of 2008, **Issa Reji Mafita v. Republic**, Criminal Appeal No. 337 of 2020 CAT at Dodoma, and **Yohana**

Chibwingu v. Republic, Criminal Appeal No. 177 of 2015 CAT at Dodoma (all unreported). These cases demonstrate that when there are witnesses who could provide vital information to fill gaps in the prosecution's case, the failure to call them can lead to doubts about the prosecution's case and may result in a less favorable outcome for the prosecution case. Therefore, in the present case, the failure to call witnesses such as the village leader and the ten-cell leader, who could potentially provide relevant information about the circumstances of the alleged offence, indeed had consequences for the prosecution's case.

The weaknesses outlined above cast significant doubt on the prosecution's case, a circumstance that must be considered in favor of the appellant as mandated by legal principles. According to the law, any reasonable doubt must be resolved in favor of the accused. Given the inconsistencies and uncertainties in the prosecution's evidence, it is imperative to apply this principle in the appellant's favor. Therefore, based on the doubts raised regarding the credibility of the prosecution's case, it is appropriate for the court to rule in favor of the appellant.

Before concluding, I must address the reliance of the prosecution on the caution statement of the appellant, purportedly a confession. However, it is crucial to note that this statement was not obtained in accordance with the law. Section 50(1)(a) of the Criminal Procedure Act,

[Cap 20 R.E. 2022], stipulates a period of four hours commencing from the time when the suspect is taken under restraint in respect of the offence. According to the appellant's defense, he was searched at his place on 19.3.2022, and the following day he was taken to the police. However, exhibit PE2 indicates that his statement was taken on 24.3.2023. As such, it is evident that the caution statement was obtained outside the prescribed timeframe and is therefore invalid. Consequently, I expunge it from the record.

With due consideration to the issues raised in this appeal, particularly the failure of the prosecution to prove the case beyond a reasonable doubt, as detailed above, I am inclined to hold that the appellant should be acquitted of the offence charged. The weaknesses and inconsistencies in the prosecution's case significantly cast doubt on the guilt of the appellant.

That said, I allow the appeal and set aside the conviction and sentence. Further, I order the Appellant be released from custody with immediate effect unless held therein with other lawful cause.

It is so ordered

Right of Appeal explained to an aggrieved party

MUSA K. POMO
JUDGE
26/02/2024

Judgment delivered in chamber in present of the Appellant and Mr. George Ngwembe, State Attorney for the Respondent Republic

Sgd: J.T. LYIMO
DEPUTY REGISTRAR
26/02/2024