IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB - REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 2246 OF 2024

SAID SADICK SAID ..... APPELLANT.

VERSUS

THE REPUBLIC

JUDGMENT

ffth April & Iff May 2024*

MKWIZU, J

The appellant was convicted of raping 8 years old girl child at Mpiji - Mheza area within Kibaha District in Coast Region on unknown dates between January to September 2023 contrary to section 130 (1) (2) (e) and section 131 (3) of the Penal Code Cap 16 R.E 2022 and subsequently sentenced to 30 years imprisonment. He is aggrieved and has paraded three grounds of appeal challenging the trial court's decision for ***(j) misdirected itself in convicting the appellant on evidence by the PW4 without medical evidence., (ii) not observing that the rules of procedure in arresting the appellant were not complied with, and (Hi) for believing that the prosecution has proved their case beyond reasonable doubt***

Mr Kurubone, learned advocate was in court representing the appellant while the respondent /republic had the services of Gloria Simpassa State Attorney.

Submitting on the first ground Mr. Kurubone faults the medical Doctor's (PW4)

for telling the court that he had 26 years of experience while he graduated in 2010 at Lugalo University, issuing a medical report on 11/9/2023 two days after the examination of the victim without reasonable explanation and which is not descriptive of the extent of the pain of the victim after the alleged rape, whether there were bruises enough to prove rape, breakage of the hymen, or any other fracture.

He also challenged the evidence for lacking specimens collected from the accused for comparison with the what was found in the victims vigina and further that PW4's evidence is too general on what exactly had penetrated the victim's vigina . According to PW4's evidence, He said, a blunt object like banana or a penis might have penetrated the victim, so it was not certain whether it was a penis that had penetrated the victim's vigina or not and this witness, PW4 did not interrogate the victim to determine when and how the incident was committed.

Demonstrating some of the contradictions in the prosecution evidence, the appellant's counsel said, the victim said she was raped in April 2023, while PW1 mentioned August 2023 and the examination by PW4 was done on 9/9/2023 five months from the date mentioned by the victim and a month from the date of incident disclosed by the victim's mother. He relied on the case of **Mtasingwa Gasper v R,** Criminal Appeal No 50/2021, where the test done three days after the alleged rape was disregarded.

He went further to submit that according to PW4 the victim had pains during examination while PW2, the victim herself said she was raped in April 2023, and therefore, nothing, like pain could have been experienced by the victim.

According to Pwl, the offence was revealed to her after she had detected a stool on the victim's anus when she was bathing her. But the examination done said nothing about the alleged stool and how the said stool is related to the alleged rape.PW2 was also not sure if he was raped until the Doctor told her.

Arguing on the second ground, the appellant counsel said, the appellant was arrested without an arrest warrant, irrespective of the fact that the circumstances of his arrest are not covered by section 14 of the CPA Cap 20 RE 2022 and informed of his accusations five days after his arrest contrary to section 23 of TEA.

He on the last ground, challenged the prosecution evidence for being contradictory as to the date of incident and the manner the incident was reported. His contention was that while the victims mention April as the date of the incident, PW1 says the incident was committed on 8th August and the trial court's decision left the contradiction unresolved.

Raising doubt on the manner in which the incident was disclosed, the appellant counsel said, the victim disclosed the rape incident after he was subjected to

torture when he was found with stool so many days after the alleged rape raising doubt to its reliability because, under torture, the child of eight years old could say anything. He maintained that poof on the reliability of the statement given under torture in this case was unavoidable.

Submitting how the appellant was identified, the appellant counsel said, the accused was named by the victim as Muuza maziwa and this came after he was beaten, the fact that was relied in convicting the appellant without any further identification. He blamed the prosecution for not calling the street authority leaders, who were present when the victim was identifying the scene of crime to PW3.

Another contradiction pinpointed is on how the victim was taken to the hospital. Referring the court to pages 7, 9, and 16 of the trial court's proceedings, the appellant counsel said, the Doctor said the victim and Pwl had the PF3 with them but PW1 and PW2 said they went to the Hospital, checked, and were then referred to go for the PF3. He implored the court to find the prosecution case unproved.

The learned State attorney did oppose the appeal. Submitting on ground one, she said, the best evidence in rape cases comes from the victim. The proof of the medical Doctor is merely a collaboration of the victim's evidence. She cited t the case of **Selemani Makumba V R,** (2006) TLR 379 to bolster her argument.

Her contention was that the medical report is only essential to showing that there was sexual intercourse and not that there was rape. PW4's duty was only to prove penetration and not rape and the issue whether the blunt object is a banana, or a penis is answered by the case of **Makumba case.** She maintained that PW4's evidence cannot be shaken by miscalculation of the time he has being on the field which is purely a human error.

To her, the evidence shows that the victim was not aware of the specific month she was raped and that the issue was discovered by the mother in September 2023. This is why the analysis was done in September 2023, and this is why even the charge sheet could not come with a specific date.

The learned state attorney argued further that the identification of the accused was done straight away by the victim who she went further to recognize the accused during trial before the court by name showing that the appellant was not a stranger to her. He refuted the argument that the victim wasn't aware of the alleged rape because she managed to properly elaborate on how she was raped on pages 9 and 10 of the proceedings.

Respondent on the issues relating to the accused's arrest, the learned state attorney said, on page 19 of the proceedings, it is well elaborated that the arrest of the accused was effected after he was informed of his accusations. The arrest warrant issue was not at all raised and, therefore, cannot be raised at this stage.

On ground three she said, in rape cases, the prosecution is required to prove age, penetration, and that the accused is the perpetrator, and all three elements were properly established. The age in this case was proved by Pwl, who tendered the birth certificate of the victim, PW2 and PW4.Penetration was proved by the victim on page 10 of the proceedings where she said, ***the accused inserted his mdude in her sexual organ used for urination*** the evidence that was corroborated by PW4, the medical doctor who, on page 16 showed that a blunt object had penetrated the victims vigina and the accused was identified by PW2.

Responding to the highlighted contradictions, the State Attorney was emphatic that in this case, no specific date of the commission of the offence was mentioned. And nothing in relation to August was introduced in the records. The rape incident was only reported in September after the mother had found the victim with stool and after the victim had named the accused as a rapist.

On the visit made to the doctor, the learned state attorney said, the evidence shows that there were two visits to the doctor. The first visit was made to the doctor who advised the victim and her mother to go for the PF3.The doctor's testimony was on the second visit after the victim had collected the PF3.She concluded that the prosecution managed to prove the case beyond reasonable doubt.

The rejoinder submissions were a reiteration of the submissions in chief by the

appellant counsel.

I have examined the entire records and considered the submissions by the parties. In the second ground of appeal, the trial court is confronted for not considering that the appellant was not informed of his accusations during his arrest. In short, this ground is baseless because in his testimony, PW5 J. 5241 DC Mohamed, the arresting officer told the court at page 19 of the trial court's proceedings that he told the accused, now appellant, the nature of offence before he arrested him. The appellants cross examination had nothing essential to dismantle this vital evidence. The only question he asked him was whether he was arrested alone or else leaving the testimony intact.

The first ground challenges the trial court's decision for basing a conviction on PW4's evidence without a medical report in support thereof. This ground was drafted that:

> *That the learned Resident Magistrate grossly misdirected himself in fact and law by convicting the accused relying on evidence by PW4 without any medical report to support his evidence"*

This lamentation is also incorrect. In his judgment the trial magistrate did not rely on PW4's evidence alone. He in fact banked on the principle enunciated in **Selemani Makumba Versus Republic** Criminal Appeal No. 94 of 1999 (unreported), that the best evidence in rape cases must come from the victim if

an adult, and proof of penetration. He relied on the victim's story on how she first met the appellant, the manner she was raped and how the ordeal was ultimately disclosed to PW1, the victim's mother. The evidence by PW2, the mother and the doctor Pw4 were used as corroborative evidence only.

In any case, PW4, evidence was on how he attended the victim on 9/9/2023. He examined the victim who was feeling pain on her private part. He also noted signs of sexual assault and penetration caused by a blunt object and he filled a PF3 which was admitted as exhibit P2. As rightly stated by the learned State Attorney, the doctor's evidence was only to come from what he did to the victim and the results of the examination. His experience would not have changed anything after all the miscalculation of the period of his experience would not have affected his credibility for it is a human error and therefore not fatal.

The last grounds are on whether the prosecution case was proved beyond reasonable doubt. Normally, in criminal justice, prosecution is required to prove the offence beyond reasonable doubt. And this includes the commission of the offence itself and the involvement of the accused before the court in the alleged offence. As indicated in the introductory part of this decision, the appellant was indicted of raping a girl child, 8 years of age.

In its decision, the trial magistrate took into account the evidence by PW1, PW2 and the doctors observation in the PF3,the familiarity of the victim with the

accused/ now appellant, naming of the accused at an earlies possible time by the victim and that the defence had nothing substantial to dent the strong evidence by the prosecution. I entirely subscribe to the position taken by the trial magistrate. Going by the evidence on the record, the fact that the victim was raped is vivid from PW2's evidence. She was able though a child to explain how she met the accused and how the rape incident was committed. There is also no doubt from the prosecution evidence that the accused/ now appellant was a person well known to the victim. She mentioned him as Said, a milk seller. Affirming these facts during defence, the appellant positioned himself as a milk seller who was arrested in the process of selling milk. And during cross examination DW2, Aishel Boaz was categorical that ***"accused is selling milk, accused is working at our home keeping animat',*** I find no reason to doubt the evidence by PW2, (the victim) a star witness in this matter.

The appellant's contention in this ground is that the prosecution evidence is contradictory on the date of the commission of the offence, how rape was detected by Pwl, the victim's mother; whether the penetration effected by penis or banana, when the PF3 was obtained and how the appellant was identified. Before I go into the details of each of the pinpointed contradiction, I wish to restate the cardinal principle established by the law that, in all trials, normal contradictions or discrepancies occur in the testimonies of witnesses due to normal errors of observation; or errors in memory due to lapse of time or due to

mental disposition as explained in **Deus Josias Kilala v R,** Criminal Appeal No. 191 of 2018 (unreported) where the court said:

> *"... material contradiction or discrepancy is that which is not normal and not expected o fa normal person and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be characterized".*

See also: **Mohamed Saidi Matula v R** [1995] T.L.R 3, **Dickson Elia Nsamba Shapwata v R,** Criminal Appeal No. 92 of 2007, and **Alex Ndendya v R,**Criminal Appeal No. 207 of 2018 (both unreported).

The evidence of each of the prosecution in this case was independent of each other. Each one of them gave evidence of what he/she saw or experienced. PWl's evidence for instance was on what he observed from the victim on 9/9/2023. She found stool in the victim's clothes, on inquiry, she was notified of the offence and acting on the advice from her husband she took the victim to the hospital where she was again advised to go to the Police for PF3. She acted as advised before she returned the child to the hospital for the examination. This evidence was supported by PW2, the victim. Silence on how the stool found in the victims' clothes had a bearing on the alleged rape, is to me not material because the prosecution evidence was satisfactory on the age of the victim, penetration and involvement of the accused in the rape incident.

The date of the incident was as stated by the learned State Attorney not known

by the victim. She even confessed during cross examination that she was unable to remember the exact date of the incident and this fact was affirmed by PW3, the investigator that is why even the charge sheet was not specific on the date of the commission of the offence.

PW4's evidence is also not contradictory on the object that penetrated the victims vigina. The doctors evidence as stated by the learned State Attorney, was based on his observation that the penetration was caused by a blunt. The banana and penis were just mentioned as an example of the blunt object that could have caused the detected penetration. Being not an eyewitness of the alleged rape, the doctor was not at all expected to tell exactly what had penetrated the victim on the alleged event.

The facts on how and when the PF3 was obtained is also very clearly explained by the prosecution witnesses. According to PW1 and Pw2, they first went to the hospital without a PF3, where they were advised to go to the police. They went back to the police, issued with a PF3, and went back to the hospital. The appellants complaints here are also a misconception. The same conclusion also applies to the issue on how the accused was identified. As stated earlier, the accused was mentioned to PW1 by name and his common activity the fact which was affirmed by the defence counsel. The beating of the victim by her mother under the circumstances of this case did not at any rate lead to the giving of

incorrect details of the accused.

In fine, I find the prosecution case proved. The appellant's appeal is thus without merit. It is hereby dismissed in its entirety.

Order accordingly.

Dated at **Dar es Salaam,** this 10th May 2024

E.Y MKWIZU

JUDGE

10/5/2023