IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 134 OF 2023

(Arising from the decision of the District Court of Kigamboni at Kigamboni in Criminal Case No. 42 of2022)

GERALD WILLIAM@MICHAEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

8th May & 10th June 2024

MWANGA, J.

In the District Court of Kigamboni at Kigamboni, the appellant, **GERALD WILLIAM@MICHAEL**, was charged and convicted of the offense of Rape Contrary to sections 130 (1) (2) (e) and 131 (e) of the Penal Code [Cap. 16 R.E 2019], currently [R.E 2022]. The particulars of the offense against the appellant were that on the 26th day of April, 2022 at Vijibweni area within Kigamboni District in Dar es Salaam Region, the appellant had carnal knowledge of a girl aged 16 years old (whose name is

withheld) and for these proceedings shall be referred to as the victim. Briefly, the victim was a minor school girl aged 16 years, and the Appellant was an adult of 28 years of age. It appeared that the appellant picked up the victim at their home with a motorbike, famously known as "bodaboda," on 26th April 2022 at 12.00hrs. The victim quietly left through the window of her shared bedroom. The appellant grabbed her to his house, confined her in the room during the night, and sexually assaulted her by inserting his penis wearing a condom in her vagina. When she became uncomfortable, the appellant freed and returned her home only at 5:00 am, and she passed through the window.

The appellant was arraigned in court and charged accordingly. Subsequently, he pleaded not guilty. Medical evidence in exhibit PE3 showed that there was no discharge nor penetration of blunt or sharp objects to the vagina or anus of either specimen. The doctor, who was examined as a prosecution witness, also stated that the victim came to the hospital after she had showered. She had neither vaginal fluids nor a vagina bruise. He could not express any opinion as to whether a rape had been committed or not.

The appellant argued before the trial Court that he had nothing to do with the allegations. Instead, the complainant tried to extort Tshs. 400,000/= from him, the refusal of which led to his prosecution.

After the conclusion of the trial, the trial court rejected his defense and considered it an afterthought. Further to that, the trial court highlighted that: **one,** it is not bound by the evidence of the expert witness (medical report), which did not support the prosecution case. **Two,** there was no question of identification as the appellant was not a stranger to the victim. **Three,** the testimony of PW1 collaborated with the statement of PW2 that the victim left the house with the appellant at midnight.

Subsequently, based on the evidence adduced, the appellant was convicted and sentenced to 30 years' imprisonment. Both conviction and sentence aggrieved him, hence this appeal in which he fronted five grounds of appeal followed by three additional grounds going thus;

1. *The learned trial magistrate erred in law and facts to convict the appellant for the offense of rape without considering ample evidence from the medical doctor PW3 which proved that there was no evidence of penetration into the vagina of the victim PW2.*

2. *The learned trial magistrate erred in law and fact in believing PW2's highly improbable and implausible evidence, which was also materially contradicted by the medical doctor's evidence.*
3. *The learned trial magistrate erred in law and fact by placing reliance upon the evidence of PW1 and PW2, which was contradictory and inconsistent with the evidence of PW3 and PW4 on when the alleged incident was reported at the police station and PW2 taken to the hospital for medical examination.*
4. *The learned trial magistrate erred in law and fact by rejecting and ignoring the uncontested appellant's defense evidence, which cast reasonable doubt on the prosecution case.*
5. *The learned trial magistrate erred in law by convicting the appellant in a prosecution case that was not proved beyond reasonable doubt.*

Additional grounds of appeal.

1. *The learned trial magistrate erred in law and fact in failing to draw an inference adverse to the prosecution for failing to trace and call the key witness to testify in court.*

2. *The learned trial magistrate erred in law and facts in convicting the appellant in a case where the prosecution did not establish the appellants; apprehension in connection with the case at hand.*
3. *The learned trial magistrate erred in law and fact in failing to observe, determine, and consider that the prosecution did not give any explanation for the delay in reporting the alleged offense to the police station and taking PW2 (the Victim) to the Hospital for medical examination.*

In regard to the above, the appellant is requesting that this court quash the conviction and set aside the sentence.

The appeal hearing was a written submission in which the appellant appeared in person while Mr. Cathbert Mbilinyi, SA represented the respondent. In his submission, the appellant preferred to argue the grounds of appeal conjointly serve for the additional grounds, which he argued separately, and the respondent answered the same as such.

In his fifth ground of appeal, the appellant contends that the learned trial magistrate erred in law to convict the appellant in a prosecution case that was not proved beyond reasonable doubt. He pointed out that it was not proved beyond reasonable doubt that the appellant was the actual

rapist, as asserted by the victim. He referred to page 12 of the typed proceedings, arguing that if the victim did not remember the appellant's house, then who directed/showed the alleged PW2's assailant? No identification parade was conducted so that the victim could identify the assailant and prove her narration. He contended that the victim is a confessed liar as when asked about where she was coming from on page 13, she replied that she was coming from the toilet until she was whipped. He added that since the victim told lies to her parents, she should not be believed as the evidence is incredible and reliable. To bolster his point, he cited the cases of **Ahmed Said Vs. R,** Criminal Appeal No. 291 of 2015 (CAT-Unreported) and **Bahati Makeja Vs. R**, Criminal Appeal No. 118 of 2006 (CAT-Unreported) and **Mathias Timothy Vs. R**, (1984) TLR 86 (HC). Moreover, he said that the testimony of PW2 failed to pass a test of truthfulness. He argued that if this evidence is deleted, the rest of the prosecution evidence alone cannot ground the conviction. In this, he cited the case of **Godi Kasengela VR,** Criminal Appeal No. 10 of 2008 (CAT-Unreported)-

In response, Mr. Mbilinyi submitted that the prosecution proved their case against the appellant beyond reasonable doubt, which is the standard

the law requires. He contended that the offense facing the accused was statutory rape. Thus, the prosecution was duty-bound to prove all the ingredients forming the offense charged.

He went on to submit that, to prove that the appellant committed the offense, PW2 who was affirmed and testified on her age, has narrated her evidence to the effect that she was sleeping with her young sister on the night of the incident. Her boyfriend, the appellant, came by her window and called her out. Where she went out through a window and left for the appellant's house, where she states they undressed, and the appellant inserted his penis in her vagina, and they made love. He further noted that, back home, her young sister and her parents noticed her absence as she was nowhere inside the house or in the toilet. Having finished their affair, the appellant returned her to her home, where she entered through the window and went back to bed. He submitted that PW2 further narrated that her mother went and asked her where she was, and she stated she was in the toilet. According to him, the relationship between PW1 and PW2 is the mother-daughter relationship, which anyone born and raised in our society can relate to when it comes to when a child has made a mistake. He had the view that PW2 mentioned the toilet as she knew well what

would follow if she had said she was outside the house making love with the appellant. He contended that PW2's credibility or reliability should not be measured as that of an adult. Instead, all circumstances in which a child of her age would conduct himself or himself in such scenarios should be considered. He insisted that PW2 is entitled to belief. Her credibility should not be misinterpreted, as the appellant suggests. He believed that the appellant had not cast any reasonable doubt to prove that her evidence was unreliable or not credible. We thus pray this court finds her evidence is worth believing.

Concerning identification, he believed that the appellant was positively known and identified by PW2 as the two had previous encounters with PW2's cousin, ZAITUN, who first introduced them. She has been to his shop, and they have spoken on the phone and met casually before their first love encounter, which led to the appellant's arrest. He added that PW2 mentioned him at the earliest opportunity possible and maintained her statement until the day she testified in court. His prayer was that the appellant's assertion that he was not identified be dismissed.

In a short rejoinder submission, the appellant countered the assertion that the credibility of PW2 as a child should not be taken or considered as

that of an adult in that line the fact that PW2 decided PW1 on her where about (toilet) at the material time should be taken lightly. Further, PW2 knew the appellant well before the incident since they were connected with one Zaituni, PW2's cousin PW2 mentioned the appellant at the earliest stage; hence, nothing on the appellant's side cast doubt on the testimony of the PW2.

He argued that the argument of the respondent is without merit because there is no law, be it statutory or case law, which directs that in questioning the credibility of a witness, the standard of measuring the credibility of the witness of tender age shall not be the same of that of the adult witness. To bolster his position, he cited the case of **Patrick S/o Sang V. R,** Criminal Appeal No 213 of 2008 (Unreported), where it was stated that:-

> ***"The good reasons for not believing a witness may induce the fact that the witness has given improbable evidence he/she has demonstrated a manifest intention or desire to lie, another witness has materially contradicted the evidence or witnesses, the evidence is laden, with embellishments than facts the witness has exhibited or achieve certain ends."***

He contended that the respondent did not dispute that Pw2 lied to her mother, Pw1, about the fact that Pw2 was in the toilet, which Pw2 knew to be untrue. To him, in applying what Pw2 did to the guidelines stated in the above case, it is undisputed that Pw2 had demonstrated manifest intention to lie, hence casting doubt on her credibility.

While citing the case of **Marwa Wangiti Mwita and another V. R (2002) T.L.R 39 on the importance of naming a suspect at the earliest opportunity, he contended that in the instant appeal, the earliest stage was that time when** PW2 decided to lie to PW1 on her where about. He was insistent that it was the first time PW2 departed the company with the culprit and PW1 was the first person to meet PW2; thus, PW2 was supposed to mention the appellant at that time for it to be said that the appellant was mentioned at the earliest moment. He contended that PW2 decided to lie to PW1 instead of mentioning the appellant.

According to him, the trial court was, therefore, supposed to put the normality into inquiry, considering that no explanation was adduced to that effect. Based on what he submitted above, he was insistent that the prosecution did not prove their case to the standard required in criminal

law.

I have examined the contending submission by the parties in light of this ground with the weight it deserves and the lower Court records I have inquisitively perused. In essence, the appellants contend that the case was not proven to the hilt, based on four points; thus, a conviction is based on evidence of PW2, whose evidence was improbable, implausible, and material contradicted and contradicted the evidence of PW1, PW3 and PW4, and failure by the court to consider PW3's evidence/doctor. Garnering from the records, it is an uncontroverted fact to this court that the appellant was charged with the offense of raping a 16-year-old schoolgirl contrary to, among others, section 130 (1), (2) (e) of the Penal code, which states that,

> ***"130 (2) A male person commits the offense of rape if he has sexual intercourse with a girl or a woman under the circumstances falling under any of the following descriptions:***
> ***(e) with or without her consent when she is under eighteen unless the woman is his wife who is fifteen or more years of age and is not separated from the man".***

In essence, for the prosecution to secure a conviction in this category of rape, they have to prove that the victim was a child under 18 years of age and that she was carnally known by the appellant. There are plenty of cases supporting the above stance, such as the case of **Robert Andondile Komba vs. DPP**, Criminal Appeal No. 465 of 2017, **George Claud Kasanda vs. DPP** Criminal Appeal No 376 of 2017 CAT at Mbeya, **Isaya Renatus vs. Republic,** Criminal Appeal No. 542 0f 2015, CAT at Bukoba (Unreported) and **Jackson David @ Linus vs Republic**, Criminal appeal No. 284 of 2019 CAT at Bukoba (Unreported) and **Rutoyo Richard vs R**, Criminal Appeal No. 144 of 2017.

In the instance appeal, it is not disputed that when the victim was raped, she was 16 years of age, as evidenced by Pw1 and Pw2; there is also a birth certificate of the victim (P1) tendered to that effect; thus, the first ingredient was cordially proved.

Regarding the question as to whether the appellant carnally knew her, the case of **Selemani Makumba v. Republic** [2006] TLR 379 expresses clearly that, in sexual offenses, the victim's evidence is the best. However, it is worth noting that the position in Selemani Makumba is to be taken with consideration of other essential points like the credibility of the

prosecution witness, reliability of their evidence, and circumstances of the prosecution case in point. This position was enunciated in the case of **Pascal Yoya Maganga Vs. Republic**, Criminal Appeal No. 248 of 2017, and the case of **Mohamed Said Matula Vs. R** [1995] T.L.R. 3. In the latter case, the court had this to say;

> "We are aware that in our jurisdiction, *it is settled law that the* ***best evidence of sexual offense comes from the victim****…….. However, we wish to* ***emphasize the need to subject the evidence of such victims to scrutiny for courts to be satisfied that what they state contains nothing but the truth***." (Emphasis added).

In the present appeal, the evidence of the victim (PW2) is that on 26/04/2022 at midnight, the appellant went into their home and called her, where the victim passed through the window and met the appellant. It was the victim's further evidence that she went to the appellant's home, and the appellant inserted his penis into her vagina; they made love using a condom, and it was her first-time making love. She narrated further that she returned home at 5 am and passed through the same window entering her room. Being questioned by her mother as to her whereabouts, she was

reluctant to reveal that she was at the appellant's house until she was canned six strokes. According to her, her father took her to the Vijibweni Police station in the morning, where they were provided with PF3, and she went to the hospital for examination. She was asked how many times she had sexual intercourse, and she responded once. Looking at this evidence compared to that of PW1 victims, it is apparent that the victim is not a truthful witness.

The reasons I so hold are not farfetched; firstly, according to PW1, the victim told his father that it was not the first time she slept at the appellant's house, and it was not the first time she had made love to the accused. In her testimony, she said it was her first time to go to the appellant's house and the first time to make love with the appellant; however, during re-examination, the victim changed his stance and explained that it was not the first time to go to the appellant's home. Secondly, it is questionable as to why the victim was reluctant to reveal the ordeal to her parents, while there was no evidence as to whether the appellant threatened her not to do so. The assertion by Mr. Mbilinyi that the court should consider all circumstances that a child of the victim's age would conduct himself or himself like in such scenarios is unfounded as for

a child like a victim would never pass through the window to her lover and, if forced would report the immoral act as earliest as possible. Therefore, subjecting Pw2's evidence to scrutiny will reveal that she was giving improbable evidence, a fact that eroded her credibility. See the case of **Beda Philipo vs Republic**, Criminal Appeal No. 114 of 2009 (Unreported) on page 16.

Another contradiction is in her testimony that she was taken to the hospital the following day while, according to PW3 (the doctor), he examined the victim on 29/04/2022, and it was his finding that the victim had neither vaginal fluids nor vaginal bruises; thus, there was no evidence of rape.

One would ask, if it was the first time for the victim to have sex, and she was taken to the hospital on the morning of the incident, why would the findings of the doctor be like that? Further, why would PW3 testify that he examined the victim on 29/04/2022? All these doubts dent prosecution evidence and raise some doubt as to whether the appellant raped the victim. Observing all these inconsistencies, the trial court had a duty to address them and see whether the same goes to the root of the matter, as

stated in the case of **Moshi Hamisi Kapwacha v. Republic**, Criminal Appeal No. 143 of 2015 (unreported), where the Court of Appeal held:

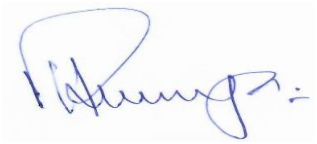
> "***Where the testimonies by witnesses contain inconsistencies and contradictions, the court must address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."***

In my profound view, the inconsistencies between the victim PW2, PW1, and PW3 go to the root of the matter as it is uncertain as to whether the appellant raped the victim. All these untied loose ends must be resolved in the appellant's favor.

In short, the appellant's guilt was not proved beyond reasonable doubt; thus, there was no evidence that the appellant's conviction could be grounded validly. Since these grounds dispose of the appeal, I find no reason to consider the remaining grounds.

In the end, I allow the appeal. The Conviction is at this moment quashed, and the sentence set aside. The appellant shall be released if not lawfully held for another cause.

It is so ordered accordingly.



H. R. MWANGA

JUDGE

10/06/2024