IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 4771 OF 2024

(Originating from Criminal Case No. 55 of 2023 in the District Court of Njombe at Njombe)

ABDUL ZAWADI SANGA @ UFUNUO----------APPELLANT

VERSUS

REPUBLIC---------- RESPONDENT

JUDGEMENT

Date of Last Order: 13/05/2024

Date of Judgment: 07/06/2024

A. E. Mwipopo, J.

Abdul Zawadi Sanga @ Ufunuo, the appellant, was charged and convicted of rape offence contrary to sections 130 (1), 2 (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2022, and unnatural offence contrary to sections 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2022. It was alleged that on the 17th day of June, 2023, at Kivavi Street, in Makambako Township, within the District and Region of Njombe, the appellant unlawfully had carnal knowledge of the victim (her name is concealed), a girl of fifteen

(15) years old. He also had carnal knowledge of the victim against the order of nature. The prosecution paraded eight (8) witnesses and tendered two (2) exhibits to prove the case. The trial court found that a prima facie case was made against the appellant and he was afforded the right to defend himself. The appellant testified on oath in his defence without calling another witness or tendering any exhibit.

The evidence adduced by prosecution witnesses briefly reveals that the victim (PW1) is a girl aged 15 years old, a Form II student at Deo Sanga Secondary School. PW1 was residing at Kivavi Street in Makambako Township with Godfrey Mhinza (her father) and Neema Mhapu (her aunt). On the 17th day of June, 2023, around 02:00 hours, two people came to the house and asked for their bicycle which they gave to PW1's father. PW1 knew one of the people by face as the street vendor (machinga). She told them her father was absent and they entered inside to prove. One of the people went outside and one remained inside. The person who remained inside took PW1 inside her room, covered her mouth with bedcover, slapped her, undressed her and himself, and inserted his penis into her vagina. Thereafter, he turned her and inserted his penis into her anus. After a while, the person slept and PW1 went out of the house, locked the door from

outside, and went to Mama Aaron, the neighbour, to report the incident. She told Mama Aaron (PW4) and Baba Aaron that she was raped.

PW1, PW4 and Baba Aaron went to report the incident to the ten-cell leader (PW5). The police were informed about the incident and they visited the crime scene. The police opened the door of the house PW1 resides, entered inside and found the appellant sleeping in the bed in the victim's room. The appellant was arrested by a police officer (PW7) and taken to Makambako Police Station. At the police station, WP 9910 DC Debora (PW8) recorded the cautioned statement of the appellant (exhibit P2) from 05:00 hours to 06:05 hours. The appellant confessed to committing the offence in his cautioned statement. This was the end of the prosecution's case.

The trial court found prima facie case was made against the appellant and gave him the right to defend himself. The appellant defended himself under oath without calling another witness or tendering any exhibit in his defence. He said in his evidence that there was family conflict over the ownership of his late parents' estates. Some houses were sold by his uncle Ayub and he (the appellant) was denied any share. The appellant's young brother Goodson Zawadi Sanga decided to give up. The appellant's aunt called the police who arrested the appellant. The appellant said he was

forced to sign a paper at the police station. His aunt told him that they were doing so because he was claiming his inheritance. The appellant said on the 23rd day of June 2023, he was told by his aunt at the police station to write a letter disclaiming the inheritance, but he denied it. On 13th July, 2023, he was arraigned in court. He said the case was fabricated.

The trial court found the case was proved against the appellant and convicted him. The court sentenced the appellant to serve twenty-nine years and seven months for the first count, and life imprisonment for the second count. It also ordered the appellant to pay compensation to the victim to the tune of Tshs. 1,000,000/=.

The appellant was aggrieved with the decision of the trial court and appealed to this court. The petition of appeal filed by the appellant raised ten (10) grounds of appeal as provided hereunder:-

1. *That, the trial court erred in law and fact by convicting and sentencing the appellant relying on the cautioned statement which was recorded contrary to the law.*
2. *That, the trial court erred in law and fact by convicting and sentencing the appellant for acting on the uncorroborated evidence of PW1 and PW2 as to the time they left home and her whereabouts on the material date.*

3. *That, the trial court erred in law by convicting and sentencing the appellant relying on the age of the victim which was not proved beyond a reasonable doubt.*
4. *That, the trial court erred in law and fact by holding that the evidence of PW6 (medical practitioner) was credible and proved penetration without considering that such evidence was not reliable as it was given without oath. The evidence did not prove the second count which its sentence was very excessive.*
5. *That, the trial court erred in law and fact by convicting and sentencing the appellant without proof that the victim was a student.*
6. *That, the trial court misdirected itself in applying the best evidence principle while the victim fabricated the story which was contradictory to what she narrated at the police station.*
7. *That, the trial court erred in law and fact by convicting and sentencing the appellant without considering his testimony that he didn't know the victim and where she resided.*
8. *That, the trial court erred in law and fact for convicting and sentencing the appellant by holding that the prosecution evidence proved the case without considering there was a contradiction between PW1 and PW2 on when they went to the victim's home and how they left.*
9. *That, the trial court erred in law and fact for convicting and sentencing the appellant without considering that the neighbour mentioned by the victim was not brought to testify as a witness.*

10. That, the prosecution side failed to prove the case against the appellant beyond reasonable doubt.

On the hearing date, the appellant was present in person without representation, whereas the respondent was represented by Ms. Muzna Mfinanga, State Attorney. The Court invited both parties to make their submissions.

The appellant prayed for all of his grounds of appeal to be considered by this court and the court to allow his appeal. Submitting regarding the 1st ground of appeal, the appellant said he was arrested on the 10th day of June, 2023, at his aunt's house (nyumbani kwa mama mdogo). On 13th June, 2023, the police officer brought a statement and he refused to sign it. He was forced to sign those papers containing statements that his auntie came with. He was taken to court on 13th July, 2023. He was informed in court that he has a case of armed robbery and rape. He did not sign the statement willingly and he does not know its content.

The appellant said regarding the second ground that PW2 was his girlfriend and their relationship ended. She used to work at his shop. Mama Aaron who the victim claimed to report the incident to did not come to testify. They brought PW2 instead who was his former girlfriend. PW2 was not

mentioned by the victim in her evidence. The prosecution failed to bring Egino Sanga who was together with Mama Aaron when the victim went to their house to report about the incident. Thus, there is no reason provided for failure to bring as witness Mama and Baba Aaron.

Submitting on another ground of appeal, the appellant said the Doctor did not take oath before his testimony. He testified without an oath. In his testimony, the doctor said he did not find the victim to be penetrated. The doctor's evidence has to be expunged from the record and it did not support the presence of penetration. The appellant said the case was fabricated following the conflict over ownership of the estates of my late father. They want to take all the properties. They are selling those properties. The appellant prayed for the court to consider all grounds of appeal and allow it. He insisted that he did not commit any of the offences.

In her reply, Ms. Muzna Mfinanga opposed the appeal. She said on the 1st ground of appeal that the appellant was supposed to raise the issue that the cautioned statement was not properly recorded at the time of admission. When the statement was tendered by the prosecution witness the appellant did not object. He said the statement was not against him. Objecting to the tendering of the cautioned statement at this moment is

an afterthought as it was held in the case of **Tabu Sita vs. Republic**, Criminal Appeal No. 297 of 2019, Court of Appeal of Tanzania at Shinyanga (unreported), on page 15 and 16. The Court of Appeal said the cautioned statement has to be objected to at its tendering and not in cross-examination, defence case or appeal. The appellant was supposed to object to the tendering of the cautioned statement. Thus, the ground has no merits.

The counsel submitted jointly on the 2nd and 8th grounds of appeal that the evidence of PW1 and PW2 was contradictory. She said the appellant claimed that they did not say who the victim's aunt is, where the house where the victim resides is, and what time the appellant left. PW2 said he was at Kipagamo to sell stones. Early in the morning around 04:00 hours, he was informed that his daughter (the victim) was raped. PW1 evidence shows that the appellant and the person in his company visited their house and asked where her father was. The victim told them her father was absent and they entered inside the house to see if she was telling the truth. There is a contradiction in their evidence. PW1 said the incident occurred at night in the wake of 17th June, 2023. After the incident, PW1 said around 03:00 hours she was taken to hospital. PW2

evidence shows he was not at the crime scene and he did not see the appellant committing the offence. PW3 testified that they went to the house of the victim with the appellant. The victim told them that her father was absent and the bicycle they were looking for was not there. PW3 said he left the appellant near the victim's house and he went back to his home. This evidence supports the victim's evidence that the appellant and PW3 went to their home asking for a bicycle. She told them that her father was not there. The appellant and PW3 left but the appellant returned, raped and sodomized her. There is no contradiction at all. The grounds have no merits.

In the 3rd and 5th grounds of appeal, PW2 testified that the victim was born on 13th June, 2008, as seen in the original record of the trial court. The typed proceedings show the victim was born on 13th June, 2003. The same is a typing error. The evidence is sufficient to prove that the victim was aged 15 years and she is a Form II student at Deo Sanga Secondary School. Thus, the appellant knew the victim's age and school. The grounds have no merits.

Responding to the 4th grounds of appeal, the counsel said on page 16 of the typed proceedings. However, in the original record, PW6's

particulars were recorded and he took an oath before his evidence was recorded. Thus, PW6's evidence was recorded under oath. The PF3 tendered by PW6 recorded that there were bruises and blood from the victim's vagina wall and anus. PW6 found faces mixed with blood in the victim's anus. The PF3 was read over to the court after its admission. The appellant understood the evidence and he was not prejudiced. The 4th ground of appeal has no merits and the court should dismiss it.

The respondent's submission on the 6th ground of appeal is that the trial court convicted the appellant relying on the victim's testimony and not the victim's statement at the police as alleged by the appellant. The appellant failed to cross-examine the victim about her statement at the police station and the victim's statement at the police station is not part of the record. It could not be said if there is a contradiction between the victim's evidence and what she stated at the police station. Failure to cross-examine the evidence of the victim is the same as admitting it as it was held in the case of **Christopher Marwa Mturu vs. Republic**, Criminal Appeal No. 561 of 2019, Court of Appeal of Tanzania at Shinyanga, (unreported), at page 15. The ground has no merits.

Turning to the 7th ground of appeal, the counsel for the respondent said the victim testified she knew the appellant. The appellant and another person went to their home and the appellant committed the incident. PW1, PW4 and PW7 testified that they found the appellant sleeping in the room of the victim at the PW2's house. The appellant did not oppose this evidence. The trial magistrate evaluated the whole evidence in the record. The appellant's defence was an afterthought and he failed to cross-examine witnesses on such an important aspect of his defence. Failure to cross-examine witnesses on crucial points of evidence is the same as admission. The grounds have no merits.

Replying to the 9th ground of appeal, the counsel for the respondent said that PW1 (victim) testified that she told Mama Aaron after the incident and they went together to the ten-cell leader. Thereafter, they went together to the victim's house when they found the appellant sleeping in the victim's room. Mama Aroni testified as PW4. There was no need to call the husband of PW4 as a witness since his evidence was similar to that of PW4. Thus, the ground has no merits.

The state attorney said on the last ground of appeal that the prosecution proved the rape offence against the appellant without a doubt.

The evidence of PW2 proved the age of the victim to be 15 years. Penetration in the vagina and anus was proved by the victim (PW1). She said the appellant penetrated his penis into her vagina and anus. PW1 evidence proved that it was the appellant who penetrated her. The evidence of PW1 is supported by the testimony of, PW4, PW5 and PW7. PW4, PW5 and PW7 found the appellant sleeping in the room of the victim. Their evidence was not opposed by the appellant. The appellant in the 4th ground of appeal said the punishment for the 1st count was excessive. But, the trial court sentenced the appellant to serve 29 years and 7 months in the 1st count of rape contrary to section 131(1) of the Penal Code which provides that the minimum sentence for rape is 30 years. She prays for the trial court to impose the proper sentence on the appellant.

In his rejoinder, the appellant said he failed to ask questions to the witnesses as he informed the court that he did not commit the offence. He decided to stay quiet as he knew nothing about the incident.

From the submissions, the court is invited to determine whether this appeal has merits.

The appellant in his submission considered the ground of appeal No. 1 to 4 and prayed for the court to consider all grounds of appeal. For that

reason, I will consider each of the grounds of appeal in the petition of appeal. On the issue that the appellant's cautioned statement was recorded contrary to the law which is the first ground of appeal, the appellant said he was forced to sign the cautioned statement brought by her aunt at the police station. He signed it without knowing its content. In response, the counsel for the respondent said the appellant was supposed to raise the issue that the cautioned statement was not properly recorded at the time of admission. When the statement was tendered by the prosecution witness the appellant did not object.

As it was stated by the counsel for the respondent, the objection to the cautioned statement has to be raised at the time of tendering and not in cross-examination, defence or on appeal. In the case of **Tabu Sita vs. Republic**, (supra), the court of appeal said the cautioned statement has to be objected to at its tendering and not in cross-examination, defence case or in appeal. In **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010, Court of Appeal of Tanzania at Arusha, (unreported), it was held that:-

> *"As we understand, the relevant law regarding admission of accused confession under this head is this: First, a confession or statement will be presumed to have been voluntarily made until objection to it is*

made by the defence on the ground, either that it was not voluntarily made or not made at all (See also Seiemani Hassani vs. Re[ublic Cr. Appeal No. 364/2008 (unreported); Secondly, if an accused intends to object to the admissibility of a statement or confession, he must do so before it is admitted, and not during cross-examination or defence See: Shihoze Seni vs. R, (1992) TLR 330); Juma Kaulule vs. R, Cr. Appeal No. 281/2006 (unreported); Thirdly, In the absence of any objection to the admission of the statement when the prosecution sought it to have admitted, the trial court cannot hold a trial within a trial or inquiry suo motu to test its voluntariness. (See also Stephen Jason & Another vs. R, Cr. Appeal No. 79/1999 (unreported)); Fourthly, if the objection is made at the right time, the trial court must stop everything and proceed to conduct a trial within a trial (in a Trial with assessors) or inquiry, into the voluntariness or otherwise of the alleged confession before the confession is admitted in evidence. See also Twaha Ally & 5 Others vs. R Cr. Appeal No. 78/2004 (unreported). "

Where the accused at his trial repudiates or retracts his confession or maintains that it was not voluntary, then before it may be admitted, the court must conduct a trial within trial or inquiry to decide upon the evidence on both sides whether it should be admissible. The position was stated by the Court of Appeal in **Annes Allen vs. The DPP**, Criminal Appeal No. 173 of 2007, Court of Appeal at Arusha, (unreported). The remedy for the omission is to expunge the statement from the record.

When PW8 was tendering the appellant's cautioned statement during the trial, the appellant said he had no objection and the statement was not against him. PW8 did not summarize the content of the appellant's cautioned statement before tendering it. Since the appellant said that the statement was not against him, it is obvious he was retracting its content. The trial court was supposed to conduct an inquiry (trial within a trial) to ascertain its voluntariness as per section 27 (1) of the Evidence Act, Cap. 6 R.E. 2022. Failure to conduct an inquiry makes the caution statement invalid. Thus, I expunge the appellant's cautioned statement (exhibit P2) from the record.

In the 2nd and 8th grounds of appeal, the appellant is complaining that there are contradictions in the evidence of PW1 and PW2 on PW2's whereabouts during the incident. In her response, the state attorney said that there is no contradiction in the evidence of PW1 and PW2. She added that there was no contradiction in the evidence of PW1 and PW3.

It is a settled law that where there are contradictions or inconsistencies in the case, the court must determine if they are minor or go to the root of the case. See. **Mohamed Said Matula vs. Republic [1995] TLR3**, and **Sylvester Stephano vs. Republic**, Criminal Appeal No. 527 of 2016, Court of Appeal of Tanzania at Arusha, (unreported), on page 11. Not every

discrepancy in the prosecution case will cause the prosecution case to flop. Only where the gist of the evidence is in contradiction that the prosecution case will be dismantled.

PW1 (the victim) said in her testimony that she was sleeping on the material date and her father was absent. The appellant and another person came and asked for their bicycle they gave to PW1's father. The victim's father (PW2) said that he travelled to Kipagamo to send stones to the customer when around 04:00 hours he received information that his daughter (PW1) was raped. PW2 said nothing about the time PW1 was taken to the hospital for examination. There is no contradiction whatsoever between the evidence of PW1 and PW2.

In his evidence, PW3 said that they went to PW2 to claim his bicycle. PW2 was absent and they found his daughter who told them the bicycle was not there. They entered inside to see if she was telling the truth. After not finding the bicycle, they went out. PW3 and the appellant went on their separate walk outside PW2's house. PW3 evidence contradicts that of PW1. PW1 said after the appellant entered the house he closed her mouth with a bed sheet, took her inside her bedroom and raped her. But, the contradiction is minor and does not go to the gist of the case. PW3 said he did not know

if the appellant returned inside PW2's house or not after they separated on their way home outside PW2's house. The discrepancies did not corrode their evidence. The gist of PW1 is that the appellant came with PW3 and raped her, but during the rape incident, PW3 was not present. The contradiction does not shake the prosecution's evidence. This Court in **Evarist Kachembeho & Others vs. Republic [1978] LRT n.70** observed that:-

> "*Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story.*"

Due to normal errors of observation, errors in memory due to lapse of time, or mental disposition such as shock and horror at the time the incident occurred, invariably, contradictions and discrepancies occur in the testimonies of the witnesses during trials. Contradictions, discrepancies or inconsistencies which do not affect the case for the prosecution, cannot be a ground upon which the evidence can be discounted, and they do not affect the credibility of the witnesses as it was held in **Dickson Elia Nsamba Shapwata and Another vs. Republic**, Criminal Appeal 92 of 2007, Court of Appeal of Tanzania at Mbeya, (unreported). See also. **Emmanuel Lyabonga vs. Republic**, Criminal Appeal No. 257 of 2019, Court of Appeal of Tanzania at Iringa, (unreported). Thus, the grounds have no merits.

In the 3rd and 5th grounds of appeal, the appellant is claiming that there is no evidence proving the age of the victim (PW1) and there is no proof that the victim was a student. In contention, the counsel for the respondent said the evidence of PW2 proved the age of the victim that she is aged 15 years as seen in the original handwritten record of the trial court, and PW1 proved she is a student.

As it was stated by the counsel for the respondent, there is a difference in the evidence of PW2 on the date of birth of the victim between the typed proceedings and handwritten proceedings of the trial court. In the typed proceedings, it shows that PW2 said the victim (PW1) was born the on 13th day of June, 2003. This makes the victim to be 20 years old at the time of the incident. But, the handwritten proceedings of the trial court show that PW2 said in his testimony that the victim (PW1) was born on the 13th day of June, 2008, making the victim to be 15 years old during the incident. There was a typing error in the typed proceedings, but the appellant was not prejudiced as he was present in court when PW2 was testifying. Also, PW1 testified that she is 15 years old. The evidence of PW1 and PW2 proved that the victim was aged 15 years when the offence was committed. Further, PW1's evidence proved she is a Form II

student at Deo Sanga Secondary School. After all, the charges facing the appellant were not of impregnating a school girl which requires the proof that the victim is a school girl. Thus, the grounds of appeal are devoid of merits.

The issue of typing error also happened on the fourth ground of appeal where the appellant claimed that PW6 (medical practitioner) testified without oath. The typed proceedings on page 16 show that PW6 testified without oath. However, in the original handwritten proceedings, PW6 (Mwakapanda Juma Mmongwa) affirmed before he testified. Thus, the ground has no merits.

In the sixth ground of appeal, the appellant is faulting the trial court for applying the best evidence principle while the victim fabricated the story which was contradictory to what she narrated at the police station. In contention, Ms. Muzna Mfinanga said that the victim's statement was not part of the record and the trial court did not rely on the victim's statement recorded at the police station.

I agree with the counsel for the respondent that the record is silent on PW1's witness statement recorded at the police station. The appellant did not cross-examine the victim during her testimony about her statement

recorded at the police station or tender the said statement as his exhibit. Failure to cross-examine the evidence of the victim is the same as admitting the evidence as was held in the cited case of **Christopher Marwa Mturu vs. Republic**, (supra). In the absence of the evidence, the court is not in a position to evaluate if the said PW1's statement recorded at the police station contradicted her testimony in court. Thus, the ground has no merits.

The appellant faulted the trial court in his seventh ground of appeal for failure to consider his testimony that he did not know the victim and where she resides. In response, the state attorney said the trial magistrate evaluated the whole evidence in the record. The appellant's defence was an afterthought and he failed to cross-examine witnesses on such aspect of his defence.

As it was claimed by the appellant, the trial court did not consider appellant's defence in the judgment. In his defence, the appellant said the case was fabricated because of a conflict with his uncle and aunt over the inheritance of his parents' estates. He said that he was arrested on the 10th June, 2023, by PW7 during the family meeting regarding the inheritance. He stayed in a police lockup for three days before he was

released. He was arrested later on and was forced to sign the statement brought by his aunt at the police station. He was forced by his aunt and police to write a letter disclaiming the estates of his late parents. On the 23rd of July, 2023 he was arraigned in court. The appellant denied knowing the victim and where she resides.

The appellant's evidence failed to raise any doubt in the prosecution's case. It is in the record from the evidence of PW1, PW4, PW5 and PW7 that the appellant was arrested at the crime scene. PW1 testified that after the incident, the appellant slept and she went out of the house and locked the door. She reported to PW4 and PW5, and they reported to the police. PW1, PW4, PW5 and PW7 went to the house and appellant was arrested inside the victim's room. The evidence proved without a doubt that the appellant was found at the crime scene. The appellant's defence failed to raise any doubt in the prosecution's case. The ground is devoid of merits.

In the last ground of appeal, the appellant claimed the prosecution failed to prove the case without doubts. The state attorney in contention said the case was proved against the appellant without a doubt.

The appellant was arraigned in court for the rape offence and unnatural offence of a girl under 18 years. In such circumstances, the prosecution was supposed to prove that there was the penetration of the victim's vagina and anus by a penis, the age of the victim was below 18 years, and it was the appellant who committed the crime. The evidence of PW1 proved that she was penetrated in her vagina and anus by a penis. PW1 evidence is supported by the evidence of PW6 and PF3 (exhibit P1). PW6 said he examined PW1 and his report (exhibit P1) shows the presence of bruises and blood in the vaginal wall and anus. Exhibit P1 shows that the victim was penetrated. The appellant was arrested sleeping inside the victim's room. The victim also identified the appellant whom she knew as a street vendor in their street. This evidence of PW1, PW3, PW4, PW5, PW6, PW7 and exhibit P1 proved the offences of rape and unnatural offence against the appellant without any doubt.

On the sentence imposed on the appellant, the appellant claimed in the fourth ground of appeal that the punishment for the 2nd count was excessive. In response, the counsel for the respondent said the appellant's sentence in the 1st count was lesser than the minimum provided by the law.

The trial court sentenced the appellant to serve 29 years and 7 months for the 1st count of rape offence, and life imprisonment for the second count for unnatural offence. The sentence imposed in the 1st count was contrary to section 131(1) of the Penal Code which provides that the minimum sentence for rape is 30 years. The trial court excluded 5 months when the appellant was in custody. But, what the trial magistrate was supposed to do was not to exclude the time spent in custody from the sentence especially where the law provides for the minimum sentence. Therefore, the sentence of 29 years and 7 months for the 1st count is quashed and replaced with the sentence of 30 years imprisonment to the appellant from the date of conviction. The order of the trial court that the appellant pay the victim Tshs. 1,000,000/= as compensation is upheld accordingly.

For the second count, section 154 (2) of the Penal Code, Cap. 16 R.E. 2022, provides that when the unnatural offence is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment. In this case, the victim was aged 15 years, hence she is under 18 years. Thus, the trial court properly sentenced the appellant to life imprisonment for the 2nd count.

Therefore, the appeal is dismissed for wants of merits and the sentence for the 1st count is enhanced. It is so ordered accordingly.

Dated at Iringa this 7th day of June, 2024.

A.E. MWIPOPO

JUDGE