IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

DC. CRIMINAL APPEAL NO. 145 OF 2023

DEOGRATIUS BRENDAN NDEWINGIA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Temeke at Temeke)

(A.H. Mbadjo, RM)

Dated 18th day of May 2023

In

Criminal Case No. 78 of 2022

JUDGMENT

20/09/2023 & 28/03/2024

NKWABI, J.:

The appellant is currently serving a sentence of 30 years imprisonment for rape offence which is contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2022]. The allegations which were mounted against the appellant were that on different dates between 21st July 2021 and 26th August 2021 the appellant had carnal knowledge of F.H.J. a girl aged 15 years. The incidents of rape, were allegedly, happened at Buza Abiola area which is situated within Temeke District that is located in Dar-es Salaam region.

Right after the hearing the evidence of both parties, the trial court found that the charge was proved beyond reasonable doubt. It convicted the appellant with the offence so charged and sentenced him as intimated above.

The evidence from the prosecution that grounded conviction is that, the mother of the victim became suspicious of the close friendship between the appellant and her daughter. Upon asking them each one said the appellant was teaching the victim of the offence school subjects. On the fateful date, PW.1, the mother of the victim, was phoned and informed that the victim was at the home of the appellant. She went to the house after enlisting the company of police officers. They found them inside the room without clothes. PW.1 had to give them space to wear clothes. The appellant was arrested and sent to the police station. PW.3, the victim of the offence confirmed, to have had sexual relationship with the appellant who would take his penis and enter it into her vagina. She added that on 26/08/2021 is when they were caught at the home of the appellant. She also testified that in July 2021 she was aged 16 years.

The appellant vigorously disputed not only to have raped the victim of the offence but also to know her. He also testified that as semen were not seen in the vagina of the victim, then that proves grudges with the family

of the victim. He was supported in that evidence by DW.2, Victoria, who claimed she used to live with the accused who, at the time she testified, was married to Hawa Mussa. In cross-examination however, admitted she could not know everything the appellant does because she used to attend university and thereafter was employed. The trial court did not buy the defence, it dismissed it.

Annoyed by the decision of the trial court, the appellant has come to this Court with a handful of grounds of appeal, which include additional ones, faulting the trial court's decision as hereunder:

1. That the learned trial magistrate erred in law and fact by failure to properly evaluate and analyze evidence of PW.1 and PW.3 which lacked corroboration to sufficiently prove the apprehension of the appellant.
2. That the learned trial magistrate erred in law and fact by holding appellant's conviction whereby prosecution side had failed to prove the case beyond reasonable doubts as required by the law.
3. That, the trial court erred in law and fact in holding the appellant's conviction based on the evidence of PW.1 and PW.3 which was contradictory, unreliable, incredible and with material

inconsistencies hence rendering their story to be highly improbable against the appellant.

4. That the trial magistrate grossly erred in holding the appellant's conviction without considering that the case for the prosecution was poorly investigated and prosecuted by failure to parade the guest house attendant from Kwa Mama Kibonge who was a material witness for the prosecution.
5. That, the learned trial magistrate erred in law by convicting the appellant based on the evidence of PW.3 who failed to establish penetration on the incident alleged to have taken place on 26/08/2021.
6. That, the learned trial magistrate grossly misdirected herself in law by sustaining the appellant's conviction based on the incredible oral evidence of PW.5 who did not properly establish the credential/qualification to ascertain that one who filled in a PF.3 (Dr. Rich) was a professional doctor hence rendering the exhibit PF.3 valueless.
7. That the learned trial magistrate erred in law and fact by ignoring the appellant's defence hence resulted to unfair decision.

At the time of lodging the petition of appeal, the appellant was desirous of arguing the appeal by way of written submissions. The same was reiterated by his advocate who prayed as such. The respondent concurred; thus, I ordered the appeal be disposed of by way of written submissions. The appellant has his written submission in chief and rejoinder submission drawn and filed by Mr. Ashirafu Muhidini, learned counsel, while the respondent was represented by Ms. Christine Joas, learned State Attorney. I owe gratitude to the learned counsel for both parties for their weighty submissions.

In this appeal, I am thrilled to follow the arrangement of submission embraced by the counsel for the appellant. The counsel for the appellant kick started addressing the Court on the first ground of appeal as per the petition of appeal and the 2nd ground in the additional grounds of appeal which he submitted together.

On those grounds of appeal, Mr. Muhidini maintained that the respondent had the duty to prove beyond reasonable doubt that the appellant on 26/08/2021 was arrested by the police officers of Makangarawe while he was with PW.3 as there was no direct evidence to sufficiently prove that fact consequently, they left doubt whether the rape offence was committed as alleged. He justified the complaint by failure of summoning

the police officers who accompanied PW.1 to the alleged scene of crime and arrest the appellant to corroborate the evidence of PW.1 and PW.3. Additionally, the prosecution failed to summon the guest house attendant from Kwa Mama Kibonge who was a material witness of the prosecution.

Mr. Muhidini did not simulate to be unaware of section 143 of the Evidence Act to not require a specific number of witnesses to prove a fact but pointed out that the prosecution is at liberty to summon any number of witnesses they think are material which however is not absolute citing **Bashiri John v. Republic,** Criminal Appeal No. 486 of 2016 where a court may draw adverse inference for failure to bring a material witness without assigning good reasons. So was the case of **Charles Kassim @ Kitobe v. Republic,** Criminal Appeal No. 546 of 2021. To him failure to bring the guest attendant meant that the case was not properly investigated.

He further stated that the appellant defended himself to have been arrested by young men and not police officers. Those witnesses would clear the contradictions in PW.1 and PW.3 testimonies. The prosecution knew that had they called those witnesses would have testified contrary to their interests.

In reply submission, the respondent remarked that the applicability of section 143 of the Evidence Act is subject to the position of the law on the duty of a party to bring witnesses whose appearance for testimony is significant and that failure of which attracts adverse inference. The respondent cited **Adel Muhammed ei Dabbah v. Attorney General for Palestine** [1994] A.C. 156 delivered by the Privy Council where it stated that:

> *"It must be taken as established that the prosecution enjoys discretion whether to call any witness they require to attend, but that discretion is not unfettered. The first principle which limits that discretion is that it must be exercised to promote a fair."*

The respondent too referred me to the case of **Azizi Abdallah v. Republic** [1991] T.L.R. 71 (CAT) where it was held that:

> *"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with transaction in question are able to testify material facts. If such witnesses are within reach but not called without sufficient reason being shown the court may draw an inference adverse to the prosecution."*

It is added that failure to call the arresting officers does not mean that the appellant did not commit the offence. I am urged to find corroboration in the testimony of PW.4 the investigator over the testimony of PW.1. It is also explained that the arresting officers would not give significant testimony. In rape cases the prosecutrix's testimony is the best evidence, it was maintained. Finally, I was asked to dismiss the grounds of appeal.

In rejoinder submission, the counsel for the appellant insisted that the guest house attendant and the arresting police offers ought to be brought to testify as material witnesses.

I have considered the divergent opinions of learned counsel of both parties. I do not accept the claim that failure to call the guest attendant and the police officers entitles this Court to draw an adverse inference. After all, drawing an adverse inference is discretionary to the court which has to be exercised judiciously, that is, with sufficient reasons. I do not see any sufficient reason. It is trite law that the prosecution is not obliged to bring all the witnesses they listed. See **R. v. Gokaldas Kanji & Another** (1949) EACA 116.

> *"No obligation rests upon the prosecution to call every witness whose name appears on the back of the*

information and although it is the duty of the crown to see that every such witness attends the trial so that any not called by the prosecution are available to the defence nevertheless it is a matter in the discretion of the prosecution to tender such witnesses for cross-examination by the defence and not one that can be claimed by the defence as of right."

If that is the position of the law it cannot be that every time a witness is not called by any party that party should be thrashed what is known as adverse inference. I do not see any ground for this court to accord an adverse inference against the prosecution for choosing not to call the guest attendant and the arresting officers. See also **Kikuyu Mondi v. Republic,** Criminal Appeal No. 99 of 1991 (Unreported) (CAT). (MWANZA) where it was underscored that:

"This court has an occasion to talk at some considerable length on the issue of making adverse inference in Aziz Abdala v. Republic. We do not deem it necessary to restate what we said there, but it will suffice for the moment to repeat that the inference "is only a permissible one."

I now consider the 2nd ground of appeal together with the 1st ground of appeal as per the sequence adopted by the counsel of the appellant. It is argued by the counsel for the appellant that the evidence of PW.1 and PW.3 contain a number of contradictions and inconsistencies. The counsel for the appellant appears to suggest that since PW.1 provided details on the dates while PW.3 did not give. Further the details about given the PF.3 and going for check-up at Yombo Vituka then they contradicted each other. He cited the case of **Karim Sadrun @ Mohamed v. Republic,** Criminal Appeal No. 321 A of 2009. He added that the contradictions create doubt on whether PW.3 was raped.

The respondent responded to the ground number 2 in the petition together with the 1st, 2nd, 3rd and 4th grounds in the additional ground of appeal. Apart from referring me to the case of **Hassan Bacho Nassoro v. Republic,** Criminal Appeal No. 15 of 2020, CAT, the respondent cited also **Mathayo Ngalya @ Shabani v. Republic,** Criminal Appeal No. 170 of 2006, CAT where it was stated that:

> *"For the offence of rape, it is utmost importance the evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the*

prosecution and the court to ensure that the witnesses give the relevant evidence which proves the offence. ...The essence of the offence of rape is penetration of the male organ into the vagina."

It is explained that the testimony of PW.3 is credible and unshakable by the defence and proved the four ingredients of rape offence as stated in **Hassan's** case (supra) and the offender being the appellant. That evidence is corroborated by medical evidence as the victim had a missing hymen. It is pressed that I find that grounds of appeal have no any merit.

Making a rejoinder submission, the counsel for the appellant insisted that if PW.1 and PW.3 had testified properly, such evidence would have not provided the missing link in the above contradictions. He stressed, the appellant ought to have been given the benefit of doubt. He made reference to **Karim's** case (supra).

I have passionately considered the submissions of both parties and the evidence in record. I am certain that the contradictions and inconsistences outlined by the counsel for the appellant are minor and do not go to the root of the matter. The evidence clearly shows that appellant was arrested while in his room where PW.3, the victim, was in the room. PW.3 confirmed she had sex with the appellant and that it was not the only day

she had sex with him. The appellant had allured her to assist her on the financial problems of her family that caused her to miss some classes on the ground of having no money for fare. I am well guided by **Mukami Wankyo v. Republic** [1990] T.L.R. 46 (CAT) where it was stated that:

> *"If the contradictions are severed from the central story and the confessions contain nothing but the truth they can safely be relied upon to convict the appellant as per the case of Tuwamoi v. Uganda [1967] E.A. 84."*

Next, I turn to consider the 3rd ground of appeal where the appellant lamented that penetration was not proved. It is elaborated that the victim, PW.3 merely said that they met on 26/08/2021 and did sex again. It is added that the PF.3 did not advance the evidence of PW.3 any further. Mr. Muhidini stressed, the charge of rape cannot stand without penetration being proved. He cited the case of **Mathayo Ngalya @ Shabani v. Republic**, Criminal Appeal No. 170 of 2006 among other cases in which it was stated that:

> *"For the offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the*

prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence."

It is added that the evidence of PW.3 and PW.5 did not prove penetration.

In response to that ground of appeal the counsel for the respondent stated that the evidence of PW.3 proved penetration and it is corroborated by the PF3. It is urged I find this ground of appeal without merit.

In rejoinder submission, the appellant's counsel stressed that PW.3 did not explain that the appellant's penis penetrated into her vagina.

This ground of appeal will not detain me much. This is because PW.3 testified at page 31 of the typed proceedings that:

"We did sex. He took his part and entered into my vagina. It is his penis, ..."

The 3rd ground of appeal is therefore without merit. It fails.

On the 4th ground of appeal found in the additional grounds of appeal, it was submitted in chief that PW.5 was called to fill the gaps and tried to explain that Dr. Rich by his position was a clinical officer contrary to the Medical, Dental and Allied Health Professionals Act No. 11 of 2017. Since the evidence of PW.3 and PW.1 was in material discrepancies, then the charge is not proved.

In reply submission, the counsel for the respondent maintained that charge was proved to the hilt with medical doctor revealing that there was no hymen found as the victim was no more virgin.

In rejoinder submission, the counsel for the appellant, Mr. Muhidini, claimed that the 4th ground of appeal was not objected by the respondent. He prayed that the ground of appeal be allowed.

It is trite law that, where a PF.3 is not tendered that does not mean that the offence is not proved, see the case of **DPP v. Shida Manyama @ Seleman Mabuka,** Criminal Appeal No. 288 of 2012, CAT (unreported) where it was stated that:

> *"It must always be kept in mind that an expert is not a witness of fact and as such his evidence is really of an advisory character ... His real function is to put before the court all the materials together with reasons which induced him to reach that conclusion. It is from this date, material reason, etc that the court though not an expert may form its own judgment."*

My above position is further supported by **Agness Liundi v. Republic** [1980] T.L.R. 46 CAT where it stated that:

"The court is not bound to accept medical testimony if there is good reason for not doing so. At the end of the day, it remains the duty of the trial court to make a finding and in so doing, it is incumbent upon it to look at and assess, the totality of the evidence before it including that of medical experts."

One could as well wish to have reference to **Magina Kubilu @ John v The Republic,** Criminal Appeal No. 564 of 2016, CAT (unreported) where it was stressed that:

"However, the foregoing notwithstanding, as rightly submitted by Ms. Tuka, the contents of the PF3 were eloquently covered by the oral testimony of Dr. Luganga Vedasto who prepared it. We agree that the testimony of PW3 sufficiently proved the evidence that would otherwise have been found in PF3. As we observed at p. 20 of the typed judgment in ***Masalu Kayeye*** *(supra), relying on our previous unreported decision in* ***Edward Nzabuga v. Republic,*** *Criminal Appeal No. 136 of 2008, an expert opinion cannot override oral evidence of a person who witnessed the incident and physically*

examined a victim. We added that penetration can be proved orally by the victim and other witnesses; without an expert opinion or oral evidence by experts."

I hold that the 4th ground of appeal, is, as explained above, wanting in merits. It goes down swinging.

On the 5th ground of appeal in the supplementary petition of appeal, the counsel of the appellant contended that the appellant, in his testimony, disputed to have any relationship with PW.3 and PW.3 never went to his house even once. He was corroborated by DW.2. That they have grudges between the parties. Those should be considered with the doubtful evidence of the prosecution. He prayed the appeal be allowed.

The respondent stated, in reply submission, that the defence of the appellant was analyzed and found to hold no water. The appellant was arrested immediately after committing the offence while he was still with the victim.

In rejoinder submission, the counsel for the appellant stated that the reply has no merit. The trial magistrate summarized the evidence of the appellant but did not evaluate the same. She dismissed the defence

without assigning reasons. He added the error led to a miscarriage of justice. He prayed the ground of appeal be allowed.

I have considered the defence of the appellant, in which he claimed that he used to live with his relative in the room and the rented house has seven tenants, denied the victim went to his house. Further it was stated that, if he raped the girl, his sperms would be found in the victim's vagina.

With due respect to the counsel for the appellant, I disagree with his arguments on the basis of the decision of the Court of Appeal of Tanzania in **Jafari Musa v. DPP,** Criminal Appeal No. 234 of 2019**,** CAT (unreported) it was stated that:

> *"We have considered this ground and the arguments thereon. We wish to begin by appreciating that, in the past, failure to consider a defence case used to be fatal irregularity. However, with the wake of progressive jurisprudence brought by case law, the position has changed. The position as it is now, where the defence has not been considered by the courts below, this Court is entitled to step into the shoes of the first appellate court to consider the defence case and come up with its own conclusion."*

The appellant did not explain the alleged grudges with the PW.3's family, the onus of proof the complaint levelled by the counsel of the appellant shifted to the appellant as stated in **Sarkar on Evidence in India, Pakistan, Bangladesh, Burma & Ceylon,** 14th Edition 1993 at P. 1338 thus:

> *"An essential distinction between the burden of proof and onus of proof is that the burden of proof never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence."*

The position of the law as stated in **Sarkar's** excerpt above is adopted in the case of **Hatibu Gandhi v. Republic** [1996] T.L.R. 12 where the Court of Appeal of Tanzania required the defence of the appellants to have cogency in order to water down the strong case of the prosecution.

I do not see how that house having seven tenants would have prevented the offence being committed. The alleged bad blood was not explained by the appellant, but merely mentioned. The fact that he was staying with a relative in the rented room too could not prevent the offence to be committed. I find that the defence of the appellant was an inelegant attempt to evade the hands of justice. I too reject it as was rejected by the trial magistrate.

In the final analysis, the appeal is found to be devoid of merits. It is dismissed in entirety. The decision, that are the conviction and sentence meted out against the appellant, by the trial court is upheld.

It is so ordered.

DATED at **KIGOMA** this 28th day of March 2024.

J. F. NKWABI

JUDGE