IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 540/590 OF 2020

KENNEDY MAHUVE @ MAJALIWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mongella, J.)

dated the 7th day of September, 2021

in

Criminal Appeal No. 160 of 2020

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JUDGMENT OF THE COURT

21st February, 2023 & 6th February, 2024

MASHAKA, J.A.:

Keneddy Mahuve @Majaliwa, the appellant was convicted by the Resident Magistrates' Court of Mbeya of two counts; to wit, rape contrary to sections 130(1) (2) (e) and 131(1) of the Penal Code, [Cap 16 R.E. 2019] and impregnating a school girl contrary to section 60 A (3) of the Education Act [Cap 353 R.E 2002]. The appellant was convicted and sentenced to 30 years imprisonment for each count. Aggrieved by the decision, he

unsuccessfully appealed to the High Court of Tanzania sitting at Mbeya in respect of the first count and in the second count was successful against the conviction and sentence. Thus, this second appeal. Still protesting his innocence, the appellant is before the Court.

The appellant pleaded not guilty to both counts. Having denied the charge, the appellant was put on a full trial. To prove the charge, the prosecution paraded a total of five (5) witnesses and tendered three documentary exhibits. The appellant testified and relied upon Willbert Majaliwa Mahuve (DW2) and Marcius Majaliwa Mahuve (DW3) in his defence case.

The background to this appeal is founded on the account of five prosecution witnesses as follows; The victim, NBM @ NBM a student of Mwakibete Secondary School was living with her uncle Clemency Mwakajila (PW2) her guardian, after the death of both her parents. To conceal her identity, she will be referred to as the victim who testified as PW1. The name of the victim is concealed and hereafter referred to as the victim o Her birth date according to the clinic card (exhibit P1) was 08/06/2001. In March 2017, PW1 was at home, the appellant called her and together they went to Nzovwe river, where he seduced her but refused his advances and returned

home. Though she had refused the advances by the appellant, after two days, he called her again, she agreed to meet him and they went together to the same place. The appellant seduced her again insisting that they become lovers, PW1 refused. The appellant forced and pulled her in the bushes, removed her under pants and skirt, he removed his boxer shorts and trouser and inserted his male organ into her private parts. After two days the appellant called her again, they went to the same place, he removed her clothes, had sexual intercourse and PW1 returned home. This act continued without any complaints. PW1 advised the appellant to find a better place to have sexual intercourse as the place they were using to perform the forbidden act was risky.

The appellant and PW1 were neighbours. After two weeks, he asked her again and she went to the house he was residing, into his room and had sexual intercourse. This went on until April 2019, that was the last time PW1 went to the appellant's room and had sexual intercourse. PW1 was 16 years old when she started having sexual intercourse with the appellant.

According to the clinic card in the name of Nelly Boniface (PW1) which was admitted in evidence as exhibit P1, (PW2) testified that PW1 was born on 08/06/2001. The evidence of Dr. Stella Moses (PW5) was that Dr. Sifa

Mbajo, a fellow doctor who was attending further studies had examined PW1 on 16/08/2019 and found that she was five months pregnant, and obviously her hymen was not intact. A PF3 was admitted in evidence as exhibit P3.

After the arrest of the appellant, WP 1003 DC Asteria (PW4) interrogated and recorded his cautioned statement which was admitted in evidence as exhibit P2.

In his defence, the appellant denied the charge against him, raising a defence of *alibi* that since 2018 he has been living in Morogoro. He disassociated with the commission of the crime though admitting that he knew PW1 as his neighbour. He called two defence witnesses DW2 and DW3. The appellant has been staying with DW2 since October, 2019 and was informed of the appellant's arrest in September, 2019 and arraignment for impregnating a school girl. DW3 testified that in November, 2018 the appellant left Mbeya and went to Morogoro. DW3 testified on similar facts regarding the arrest of the appellant.

After trial, the trial court found both two counts were proved beyond reasonable doubt, convicted and sentenced the appellant to serve a jail term as stated earlier. He unsuccessfully appealed to the High Court as alluded to earlier and has preferred this appeal.

The appellant raises four grounds of complaint challenging the decision of the High Court paraphrased as follows; **one**, the first appellate court erred by upholding the conviction and sentence despite the defectiveness of the charge; **two**, the first appellate judge erred in holding that the prosecution proved the offence of rape against the appellant beyond reasonable doubt; **three**, that failure of the victim to name the suspect at the earliest possible opportunity was fatal; and **four**, deciding the appeal basing on extraneous matter not supported by the record.

During hearing the appellant was present represented by Mr. Kamru Habibu Msonde and Mr. Jackson Ngonyani, both learned advocates, while Mr. Deusdedit Rwegira, learned Senior State Attorney and Ms. Rosemary Mgenyi, learned State Attorney, represented the respondent Republic.

When called up to amplify the grounds of appeal, Mr. Msonde proposed to argue grounds two and three conjointly that the charge was not proved beyond reasonable doubt. He submitted that the appellant was charged with statutory rape under sections 132(1) (2) (e) and 131 (1) of the Penal Code. He argued that two essential ingredients are to be established by the prosecution specifically the age of the victim to be under 18 years and penetration. It was his contention that the prosecution failed to prove the

age of the PW1 because exhibit P3 stated she was 18 years of age when examined by a doctor. He further argued that as age could also be proved by a guardian, PW2 testified that PW1 was aged 19 years according to exhibit P1 for her birth date was 08/06/2001. Mr. Msonde described exhibit P1 to bear the name of PW1 and name of father was Francis which was deleted to read Bonifasi Mwakuyusa different from the name reflected on the charge which reads NBM @ NBM. He argued further that there was no explanation by the prosecution on the difference of the names of PW1 who identified herself as NBM which is the name reflected on the charge. He argued that there cannot be a conviction for an offence of rape unless there is sufficient evidence of proof that at the commission of the rape, the age of the victim was below 18 years. He bolstered his arguments with the cases of **Ally Rashid v. Republic**, Criminal Appeal No.15 of 2016, **Rwekaza Bernado v. Republic**, Criminal Appeal No. 477 of 2016 and **George Claud Kasanda v. DPP**, Criminal Appeal No. 376 of 2017 (all unreported).

Mr. Msonde argues that since proof of age of the victim is one of the essential ingredients to prove rape, if lacking, the doubt be resolved for the benefit of the appellant. He implored the Court to consider that the charge

was not proved as there are serious doubts as to the age of the victim PW1 and the evidence on record.

Arguing ground one that the charge was defective, Mr. Msonde submitted that this complaint was raised before the first appellate court on the time when rape was committed whereas the second count was found defective. He argued further that the charge reads the rape was committed between March, 2017 and April, 2019 therefore the age of the victim of 16 years could not remain the same for two years. He argued that in terms of section 132 of the CPA, the charge failed to show correct particulars as it stated that the victim remained with the same age, hence it prejudiced the appellant and it should have been given the same treatment as the second count.

On ground four, he argues that the first appellate judge decided the appeal basing on extraneous matters which were not supported by the evidence referring us to page 85 of the record of appeal. He argued that any conviction in a criminal trial must be based on the evidence adduced before the trial court and it is not advisable to put forward any theory not canvassed during the evidence or the counsel's speech as such matters were

inconsistent and not supported by the evidence as held in the case of **Okethi Okale and Others v. Republic** [1965] EA 555, he submitted.

In conclusion, Mr. Msonde implored the Court to grant the appeal and set the appellant free.

In reply, Mr. Rwegira strongly resisted the appeal taking the same path as argued by Mr. Msonde. On grounds two and three conjointly which centered on the failure of the prosecution to prove the age of the victim, he agreed that the age of a victim is an essential ingredient which was proved by the prosecution as stated in the particulars of offence. On the dates, he argued that by then PW1 was 16 years when she started having sexual intercourse with the appellant distinguishing present case with **Ally Rashid v. Republic** (supra) and corroborated by PW2 who testified that PW1 was 16 years of age in 2017. He further argued that proof of age of a victim can come from the victim, a parent or guardian and birth certificate, whereas in the appeal a clinic card exhibit P1 was relied upon by the prosecution to prove the age. It was his contention that the issue of age was not an issue before the two lower courts. On the authenticity of exhibit P1, he implored the Court to consider the evidence of PW2 who stated that the date of birth of PW1 was 08/06/2001. When the Court probed for his opinion on the

difference of names on the charge of PW1's father and as seen on exhibit P1, he submitted that the 'aka' denotes same person using the names but was unyielding that there was no such name of Mwakyusa on exhibit P1.

Addressing ground one, Mr. Rwegira argued that the charge was properly drafted complying with the mandatory requirements of section 132 of the CPA, that the particulars of offence related to the rape offence were adequately provided for and the age of the victim was 16 years. He submitted that even if the particulars stating between March, 2017 and April, 2019 brought an ambiguity, it was cured by the evidence adduced by the prosecution reinforcing the stance held by the Court in **Ally Rashid v. Republic** (supra).

Mr. Rwegira submitted on ground four that the art of judgment writing is guided by section 312 of the CPA. Referring us to page 85 of the record of appeal, he argued that the first appellate court did not introduce extraneous matters in its judgment as claimed by Mr. Msonde, distinguishing it with the cited case of **Okethi Okale and Others v. Republic** (supra). It was his contention that the issues which were raised by the first appellate court were not new and it was the first appellate judge's reasoning on the complaints raised by the appellant.

On ground one, our determination is whether the charge was properly drafted in compliance with section 132 of the CPA. The provision stipulates:

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

The charge preferred by the prosecution and the appellant entered a plea of not guilty reads as follows:

> *"STATEMENT OF OFFENCE*
>
> *RAPE CONTRARY to Sections 130(1) (2) (e) and section 131 (1) of the Penal Code [Cap 16 R.E. 2002]*
>
> *PARTICULARS OF OFFENCE*
>
> *KENEDY S/O MAHUVE @ MAJALIWA on diverse dates between March, 2017 and April, 2019 at Ilomba Area within the City and Region of Mbeya, had carnal knowledge of NELLY D/O BONIPHACE MWAKAJILA @NELLY BOAZ MWAKAJILA a girl of sixteen (16) years old."*

The arguments made by learned counsel for the appellant is that rape being a statutory offence, two crucial facts have to be proved; penetration and age of the victim. The wording on diverse dates between March, 2017 and April, 2019 as well as the PF3 exhibit P3 when PW1 was examined showed that she was 18 years old. Further, PW2 guardian of PW1 stated the birth date 08/06/2001 and the clinic card exhibit P1 shows PW1 was 19 years of age.

It is our considered view that the charge of rape was properly drafted as the offence was alleged to have occurred between March 2017 when she was 16 years old. Our concern is why did PW1 remain silent and not inform his guardian or teacher or any other person in the community for two years plus. We will address this when addressing ground two of appeal.

In our determination of ground four whether the first appellate judge erred in introducing and basing her decision on extraneous matters not supported by the evidence, we find it pertinent to revisit the law. Section 312 (1) of the CPA stipulates the contents of a judgment: -

> *"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the*

personal direction and superintendence of the presiding judge or magistrate in the language of the court and ***shall contain the point or points for determination, the decision thereon and the reasons for the decision****, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."*

We gleaned at page 85 of the record of appeal and the considered view of first appellate judge was: -

"As I said, each case has to be considered in accordance with its own circumstances. As explained by PW1, the two were in a love relationship for a long time, that is, two years. In the premises, in my considered view, one cannot expect the victim to report that she is being raped. I believe the victim was not even aware that she was being raped in accordance with the law. It is the pregnancy that led her into spilling the beans. The two could probably still be in the relationship if the victim did not get pregnant. In my settled opinion, PW1 was a credible witness."

From the excerpt, it is required for the presiding judge to ensure that a judgment contains the point or points for determination, the decision

thereon and the reasons for the decision. Every judge has an art and style of writing in reasoning and reaching a decision. A proper judgment contains the points for determination, the decision and the reasons for the decision which we find have been adequately observed and made by the first appellate judge. We say so because it was her reasoning and opinion that PW1 was a credible witness basing on PW1 testimony at page 11 of the record stating:

> *"On unknown date of March 2017, I was at home when Kennedy Mahuve accused called me. He went with me at Nzovwe river and started to seduce me, but I refused and went back home. After two days he called me again. We went at the same place. He insisted we become lovers. I again refused. He used force and pulled me to the bushes. He removed my underpants and skirt, ten he removed his boxer and trouser, letter (sic) he sexually assaulted me by inserting his male organ into my private parts. I went back home. After two days, he called and sent me there, he removed my clothes and had carnal knowledge with him.... After a week he asks me again. We went to the same river.....I told him we find another place for sexual intercourse as it was risky to have intercourse there. After two week she*

asked me again. This time I went at his house as we are neighbors. I went inside his room. He removed my clothes I had carnal knowledge. He later used to send me to go to the market to back (sic) salad for him.... We last had sexual intercourse in April 2019 in the noon hours. He came and called me from home so to go to his house as he was my lover. ... I started a love relationship with him in March 2017 by then I was having 16 years."

The reasoning was based on the testimony PW1. We hold that the first appellate judge did not introduce extraneous matters and ground four is dismissed.

Moving to ground two that the prosecution did not prove the rape offence beyond reasonable doubt.

Having carefully examined the entire evidence on record, there is no doubt that the prosecution case was laden with inconsistencies. We shall now demonstrate why we are saying so.

The law on inconsistences is well-established that in evaluating discrepancies or contradictions and omissions, the court should not pick pieces of sentences and consider them in isolation from the rest of other pieces of evidence. It is settled law that a contradiction can only be

considered as material if they go to the root of the case. See **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 (unreported).

On the other hand, we are mindful of the settled law that the best evidence in sexual offences comes from the victim as stated in **Selemani Makumba v. Republic** [2006] T.L.R. 379 and several other decisions of this Court. However, we hasten to emphasize that, the said position equally depends on the credibility of the respective witness on the facts of the incident and the connection of the accused to the offence. It is glaring from the record that it took two years for the victim to report the fateful incident and arraignment of the Appellant. The prosecution did not provide evidence explaining the cause of delay by PW1 to report to either her guardian or elders or any member of the community or school. It is settled that delayed reporting weakened the credibility of the evidence of the victims. In **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R. 39, the Court underscored that, the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. The delay by PW1 in reporting the incidents of rape in this appeal

incidents of rape in this appeal until she got pregnant dented her credibility and reliability of the evidence to prove the charged offence. Thus, the two lower courts wrongly acted on the incredible testimony of PW1 to convict the appellant.

Given that the charge was not proved beyond reasonable doubt, the appeal is merited. We allow the appeal, quash the judgment of the High Court and set aside the sentence imposed on the appellant. We order the appellant's immediate release if he is not being held in custody for some other lawful cause.

DATED at **DAR ES SALAAM** this 31st day of January, 2024.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of February, 2024 in the presence of the Applicant vide video link from High Court Mbeya and George Ngwembe, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL