IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MOSHI

AT MOSHI

DC. CRIMINAL APPEAL NO. 38913 OF 2023

(Appeal from the Judgment of the District Court of Rombo at Mkuu dated 14th November, 2023 in Criminal Case No. 52 of 2023 before Hon. N.J. Nassari-PRM)

GASPER ALBERT ASENGA..... APPELLANT

VERSUS

THE REPUBLIC:.....RESPONDENT

JUDGMENT

9th April & 2nd May 2024.

A.P. KILIMI, J.:

In the District Court of Rombo, the appellant namely Gasper Albert Asenga herein was charged and convicted with the offence of rape contrary to section 130(1) and (2)(e) read together with section 131(1) of the Penal Code Cap 16 R.E 2022. The particulars of this charged offence were that; on diverse dates between June 2022 and February 2023 at Kwa Jose Mengwe Chini area within Rombo District in Kilimanjaro Region did have carnal knowledge of one victim "PW2" a girl aged 12 years old.

After a full trial the appellant was found guilty of rape, convicted and sentenced to 30 years imprisonment but also to pay Tshs. 500,000/= to a victim as a compensation.

Briefly what transpires at a trial court leading to a conviction of the appellant was that; the victim "PW2" (name withheld to conceal heridentity), a primary school girl aged 12 years old, testified that on June 2022 when she was on the way back home, she met the appellant " DW1" who held her hand and told her to go with him to a dilapidated house at kwa jose area in Mengwe chini. Thereat DW1 undresses his trouser and told her to undress too and took his manhood and inserted in her vagina. PW2 testified further that on the same month of June 2022 DW1 appellant repeated that evil act at the same place. PW2 stated further that in the year 2023, DW1 raped her four times in the same place whereby three times he was inserting his penis to her anus, and in one time he inserted to her vagina and threatened her not to report anywhere as he would beat her.

The prosecution evidence further revealed that on 28th February 2023 at 17:00 hours the mother of the victim one Eveta Simon Kiwango (PW1) gave money to PW2 to go kwa jose area to buy milk. PW2 who was with other three came back running and told PW1 that the appellant (DW1) was

giving them money and telling them to undress so that they could have sexual intercourse. When PW1 continue to question PW2, she was told that on June 2022, DW1 did have sexual intercourse with her twice and that on 2023 he had sexual intercourse with her four times.

PW1 reported the incidence to a hamlet chairman and on 26th March 2023, DW1 arranged to meet with the victim again where she then informed her father one Josephat Peter Lyakurwa (PW3) who arranged the militia and later DW1 was then arrested by trap plotted. He was taken into police custody and PW2 was given a PF3 and went to Huruma hospital. According to Dr. Samwel Joseph Kisaka (PW5) the victim was examined by Dr. Denis who found that the victim had no bruises in her womanhood and that she was not a virgin, PW5 tendered a PF3 which was marked as exhibit PE1.

In his defence the appellant herein Gasper Albert Asenga (DW1) at a trial court testified that he was wondering why he was arrested at his home around 22:00 Hrs when he was with his family as he did not know the offence which he was being arrested for. Later at a police station he was told that, he was charged with the offence of rape, he denied committing the offence. He denied knowing the victim who said she was raped six times while the

officer told him that she was raped three times and the doctor said she was not a virgin.

The trial Court found the case to have been proved beyond reasonable doubt and proceeded to convict the appellant and sentenced as said above. Being aggrieved with a conviction, sentence and order to compensate the victim, the appellant herein filed his memorandum of appeal in this court marshalling the following grounds;

1. That, the learned trial magistrate erred in law and fact by convicting and sentenced the appellant with an offence which was not proved to the hilt.
2. That, the learned trial Magistrate grossly erred to misdirect herself in law and fact for failure to consider the guiding principle on the nature, value and application of collaborative evidence, hence she relied on the evidence of a single witness which it is dangerous to convict an accused on such evidence.
3. That, the learned trial Magistrate grossly erred in the law and fact by convicting and sentenced the appellant without considering the defence of the appellant nor assigned for rejecting it as long as it is a general principle of law that, where the determination of the rights or obligation of a person is involved, a decision maker must give reasons for his decision.
4. That, the learned trial Magistrate erred in law and fact by failing to preside the case in camera as directed on section 186(3)of the Criminal Procedure Act Cap 20 R.E 2019 instead the trial court presided on open court which is against the law and rights which minimize the appellant's freedom to cross-examination to the prosecution witnesses.
5. That, the learned trial Magistrate misdirected herself in crediting the evidence of PW2 whose evidence was absolute immaterial and was full of doubts.

6. That, the learned presiding Magistrate failed to find that there is contradictory, discrepancies, inconsistency and unreliable evidence tendered by the prosecution side.
7. That, the trial Magistrate erred in basing on PF3 which tendered illegal as exhibit PE1.
8. That, the convicting trial Magistrate erred in law for basing on the evidence of PW5 as sole conviction while this witness was never examined the victim.
9. That, the trial magistrate denied the appellant right of being supplied with the case proceedings which narrowing the chances of explanation.

When the matter came before me for hearing, the appellant enjoyed the service of Mr. Patrick Paul the learned advocate whereby the Respondent was represented by Ms. Imelda Mushi, learned state attorney.

Starting with the first and sixth grounds of appeal which were submitted jointly, Mr. Paul submitted that, it was the duty for prosecution to prove the offence beyond reasonable doubts as failure to prove the case the accused shall be set free and at liberty. To support his point, he cited the decision of **Mapunda and Another vs. Republic 2006 TLR 395** and **Tumaniel vs. Aiso S/O Isai** (1969) HCD No. 32.

The learned advocate submitted further that, one Esta who was named by PW1, PW2 and PW3 that she was with the victim on the day she was raped was never called to tell her side of the story and no reasons was

assigned thereto. The counsel added that it was incumbent for the prosecution to call material witness within reach as it was stated in the decision of **Azizi Abdalah vs. Republic** (1991) TLR 71. By not doing so he submitted that an adverse inference should be drawn for failure to call such witness. To buttress his point, he cited the decisions of **Stephano Shabi vs Republic** [2020] TZHC 167 (TANZLII) and **Abubakari Msafiri vs Republic** [2021] TZCA 611 (TANZLII) at page 22 and 23.

Though not raised as one of the grounds of appeal, Mr. Paul submitted that the victim age was not determined as the birth certificate were never tendered nor admitted in the trial court. He argued further that, the evidence of PW1 (the mother) of the victim was doubtful as she testified that the victim was born on 30/4/2009 meaning that she was 14 years old when she testified on June, 2023.

In respect to exhibit PE1 (PF3) tendered, the counsel argued that, after admission of it was not read to the accused contrary to the law and prayed such exhibit be expunged from court records as it did not prove the offence of rape to be committed, did not show that the victim had and did sexual intercourse with the accused person, did not show a forceful penetration as it only showed that the victim was not a virgin. He stated that at page 6 of

the trial court proceedings, the court failed to state how the exhibit PE1 corroborated the evidence of PW1, PW3 and PW4. To cement his points he referred to decisions of **MT 7479 Sgt Benjamin vs. Republic** (1992) TLR 121 and **Julist Robert Mwaipopo and 2 other vs. Republic** [2005] TZCA 27 (TANZLII).

The counsel for appellant then for 2nd,5th and 8th grounds argued them together, that the trial court failed to evaluate evidence of the victim (PW2) which was doubtful as she testified to be threatened and to have been raped several times by the accused but never reported such acts to an investigator. He further stated that the victim PW2 testified to have lost her virginity in 2017 but failed to state if it was the accused who removed her virginity. The learned advocate added that PW3 (the father of the victim) evidence was not to be believed because he testified that he went to report the incident to Hamlet Chairman while PW1 and PW2 testimony said was PW1 who reported the incident. He further submitted that it was PW3 who stated that DW1 was arrested with the victim contrary to what the victim (PW2) testified. He stated further that the court relied on the hearsay evidence as the witnesses' evidence were a told story and not a direct testimony.

Submitting for the 3rd ground the learned advocate submitted that the trial court failed to consider the accused (DW1) evidence as it only summarized the evidence without analyzing the accused evidence which is a serious misdirection leading to a conviction which was unsafe. To support his point, the counsel referred the case of **Hussein Idd vs. Republic** (1986) TLR 283. Arguing for the 4th ground, the learned counsel only stated that the trial court proceedings were not in camera and it affected the accused person by putting him in a position for not putting a good defence. Finally, for 9th ground the counsel stated that DW1 was not supplied with the copies of proceedings timely hence denied his rights and thus opined the proceedings of the lower court be supplied earlier. He referred to a decision of **Abiola Mohamed @ Simba vs Republic** [2021] TZCA 632 (TANZLII) at page 22 when citing the case **People vs. Benson,** 6 Cal 221 (1856). The counsel then argued the appeal be allowed by quashing the trial court decision and conviction.

In reply as regard to the first ground, Ms. Imelda Mushi, State Attorney stated that the trial court was correct to rely on the testimony of the victim as PW2 testified herself hence it was not necessary to bring Esta as a witness as the best witness was the victim herself. She referred to a decision

of **Seleman Makumba vs republic.** She also referred to section 143 of Evidence Act Cap. 6 " TEA" that the prosecution is not bound with number of witness.

In respect to a birth Certificate, she admitted that it was not tendered but submitted that despite of not doing so, the offence of rape was proved beyond reasonable doubts as the evidence of PW1 the victim mother proved the offence. In respect to a PF3 that it was not read, the counsel replied that the PF3 was read after admission as evidenced on page 21 of the trial court proceedings. The state attorney in regard to the 4th ground she stated that the offence was proved as the best evidence was from the victim herself.

In reply to a 3rd ground the counsel submitted that the appellant did not provide sufficient evidence that he did not commit the offence. As to a 4th ground that the proceedings were conducted in open court, the learned state attorney conceded with the appellant that the proceedings on the prosecution evidence were conducted in chamber as reflected on page 23 of the trial court proceedings and that on a defence side it was conducted in open court and leaving it to the court to decide.

In respect to a 6th ground, she replied that the only contradiction on evidence was that of PW3 who testified that he reported the matter to the Hamlet chairman which differ with that of victim and PW1, the learned state attorney opined that it was a normal error due to lapse of time and in respect to those discrepancies she referred to a case of **Sharifa Mohamed vs. Republic** Criminal Appeal 251 of 2018 at page 77. In respect to virginity, the counsel stated that it is true the victim was found not virgin but in her testimony for the offence committed to her, she testified she was raped by the appellant.

In his brief rejoinder Mr. Patrick Paul, submitted that in respect to calling the witness called Esta despite the requirement of section 143 of TEA, he advised the court to consider the decision of **Abiola Mohamed** (supra) at page 22 to 23 last paragraph as the victim evidence left doubts as it was decided in the case of **Abubakari Msafiri** (supra) at page 22. In respect to age contradiction, he added that in statutory rape the issue of age is very crucial and must be proved to remove any doubt.

Having considered the rival submissions of the learned counsel, together with the trial court recorded proceedings and I must be guided that

this being the first appeal court has a duty to re-evaluate the evidence adduced before the trial court for the purpose of being able to determine the grounds of appeal hereinabove. (See the cases of **Yasin Ramadhani Chang'a vs. Republic** [1999] TLR 481 and **Deemay Daat & 2 Others vs Republic** [2005] TLR 132. In **Deemay Daat & 2 Others** (supra) it was held that;

> *" an appellate court is entitled to look into the evidence adduced before the trial court and make its own finding where there is misdirection and non-direction or the lower court misapprehended the substance, nature and quality of the evidence."*

For convenient purpose I wish to start with 4th ground of appeal which states that the magistrate failed to preside the case in camera contrary to what section 186(3) of the Criminal Procedure Act(supra) provides and minimized the appellant's freedom to cross-examine the prosecution witnesses.

In determining the above raised ground of appeal I have revisited the said section 186(3) of the CPA which provides that;

> "*Notwithstanding the provisions of any other law,* ***the evidence of all persons in all trials involving sexual offences shall be received by the court in camera****, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical profession.*
>
> [Emphasis added]

From the quoted section indeed evidence involving sexual offences are to be conducted in camera without public interference. But, the requirement procedure of the above quoted provision was interpreted by the court in **Mario Athanas Sipeng'a vs Republic** [2014] TZCA 300 (TANZLII) when referred its earlier case of **Herman Henjewele vs Republic**, Criminal Appeal No. 164 of 2005 (unreported) and observed that an obligation is

imposed on trial courts to sit in camera. It does not, however, mean that all proceedings held in open court are a nullity merely for having been so conducted unless it could be shown that a miscarriage of justice occurred;

In my considered view and upon perusing the trial court proceedings, I have noted all prosecution case was conducted in camera. It was only defence case when went on open court, nonetheless, since the appellant never protested the proceedings not to be in camera neither did he convinced this honourable court on how such proceeding at a trial court curtailed his rights to cross examine the prosecution witnesses as I have noted that the appellant at page 11, 14,15, 19 and 22 of the trial court proceedings, he was given the right to cross examine the prosecution witnesses where he exercised such rights.

Therefore, in my view the appellant failed to demonstrate or show how the proceedings not being in camera affected his defence. Thus, I am settled there is no evidence of miscarriage of justice occasioned to any party. Consequently, I hold this ground lacks merit and it is dismissed.

In respect to ground number 7 of appeal that the trial magistrate erred in considering a PF3 which was illegally tendered as exhibit PE1. As rightly

argued by the appellant learned counsel that the PF3 do not primarily show or name a culprit who committed the offence rather the PF3 report aims to show what was done to the victim and to what extent. In regard to the point that the PF3 after admission was not read to the appellant, I had time to crosscheck the trial court proceedings which at page 21 the same was complied, as PW5 prayed to tender the said PF3 where the accused did not object, and for purpose of reference I reproduce as hereunder;

> **"Court:** *The PF3 is admitted as exhibit PE1. And read over loudly before this court.."*

From the above extract of the trial court judgement, it shows that the PF3 after admission was read to the accused, hence the ground that such exhibit PE1 was never read after admission and was legally tendered had no merits and the same is hereby dismissed.

In respect to claim of contradiction of the age of the victim establishing statutory rape, since the appellant at a trial court was charged with the offence of statutory rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code(supra) which states that;

> "*130(1) It is an offence for a male person to rape a girl or a woman.*
>
> *(2)* ***A male person commits the offence of rape if he has sexual intercourse with a girl or a woman*** *under the circumstances falling under any of the following description:*
>
> *(e)* ***With or without her consent when she is under eighteen years of age****, unless the woman is his wife who is fifteen or more years of age and is not separated from the man*"
>
> [Emphasis is added]

From the excerpt above, it is clear the issue of age to be under 18 years or if is below is not the wife of somebody must be cleared. The issue now is whether the victim was under the age of below 18 so as to be termed as a statutory rape. The prosecution evidence of PW1 the mother of the victim said PW2 was 13 years old as she was born in the year 2009. The trial court proceedings were conducted in the year 2023, from such evidence it shows that the victim was under the age of 18 years as the issue of age was proved by her parents' being the victim mother, even if the victim was 14 years or 13 years, still she was under 18 years, the same cannot affect the justice of this case. Thus, this claims has no merit and dismissed.

Another claim by the appellant is failure to consider the defence of the accused person as propounded in ground no.3. I conceded with the counsel for the appellant that failure to consider defence is a serious misdirection and conviction is unsafe. But I have considered the trial court judgment at page 7, I am of the view the said duty was done by the learned Principal Resident Magistrate, where she said although appellant denied to commit this offence but he has not provided sufficient evidence to shake the strong evidence provided by the prosecution side. In that regard this ground also fail forthwith.

In respect to the other remaining four grounds, which in my view fall under the domain of one issue which cut across, and this is none other than whether the case against the appellant was proved beyond reasonable doubts.

I wish to start with the 2nd ground that the trial Court magistrate erred her conviction basing on a single witness who was the victim without relying on collaborative evidence. In his submission the appellant advocate stated that the victim in her testimonies mentioned one Esta to be with her when she was raped and that Esta was not called as a material witness leading to a wrongful conviction of the appellant.

I am aware, that it is not the number of witnesses which ground a conviction. But it is the credibility of the witness or witnesses and the weight

of the evidence which anchor a conviction. (See cases of **Joseph Athanas vs Republic** Criminal Appeal no. 284 of 2007 (CAT at Arusha), **Rajabu Yusuf vs Republic** Criminal Appeal no. 457 of 2005 (CAT) and **Speratus Theonest Alex vs Republic** Criminal Appeal no. 135 of 2008 (CAT) (Both unreported), in **Speratus Theonest Alex** the court observed that ;

> *" ...the obligation to produce witnesses irrespective of consideration of their number .. the evidence has to be weighed and not counted"*

In view of the above, the next point to be considered is whether the evidence of the victim PW2 was very credible thus need not any evidence to corroborate. I am mindful the appellant was charged with sexual offence which in principle the best evidence comes from the victim. See for instance, **Magai Manyama vs Republic,** Criminal Appeal No. 198 of 2014 and **John Martin @ Marwa vs Republic,** Criminal Appeal No. 22 of 2008 (all unreported).

Nonetheless, as rightly submitted by Mr. Patrick Paul, it is a trite law the need to subject the evidence of the victim to scrutiny in order for courts to be satisfied that what she testify is nothing but the truth is very significant.

In the words of the court in **Abiola Mohamed** (supra) at page 22, the court had this to say;

> *"The testimony of the victim of sexual offence should not be taken as gospel truth but has to pass the test of truthfulness. It is only through this litmus test that courts will ensure that only deserving offenders are kept behind bars and the innocent are set free."*

I have scanned the evidence of PW2, at page 13 of the trial court typed proceeding, she said the appellant raped her twice in June 2022, but later said in the year 2023 she was raped four times at February. But further on the same page was recorded saying it was on March 2023 when her mother sent her to buy milk, she was with her brother's child, and then appellant chase them, this is the incident caused her to disclose previous rape acts done by the appellant, after her mother asked her why she was running.

I have considered the above testimony, in my view are not coherent, even in time of incidents stated above, I think her evidence raise some questions on the probative value of her testimony. In my opinion those question could have cleared if evidence could have tendered to corroborate

which after all were available; For instance, in cross examination conducted to her at page 14 of the typed proceeding, she said, when she was raped Esther was witnessed on some days, but also she added that when she was lastly raped her brother's child witnessed and appellant run away.

In my view, I think the evidence of above-mentioned fellow children, if could have brought in court, could had settled the above questions by the principle of assessing credibility in relation to other evidence. This was the position in the case of **Shabani Daudi vs Republic,** Criminal Appeal No. 28 of 2000 (unreported), where the Court started to acknowledge that credibility of a witness is the monopoly of the trial court but limited that principle, in its *viva voce* the court stated as hereunder:-

> *"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways:* ***One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person.***

[Emphasis is mine]

In view of the above, I am settled the credibility of the victim whom the trial court used to enter conviction against the appellant remained shaken, thus being solely cannot suffice to prove the prosecution case to the standard required by the law.

Nonetheless, without prejudice of the above, despite of proving the age of the victim to established statutory rape as above, another essential ingredient ought to be proved as stipulated under section 130(2)(e) of the penal Code (supra) is whether sexual intercourse occurred between the victim and the appellant. According the evidence of PW5, a doctor who testified to have found no bruises on the victim's genital area and commented that the victim was not a virgin. However, the prosecution did not lead him as an expert to say anything about effect of found no bruises therein, I think some questions remained unanswered to that effect.

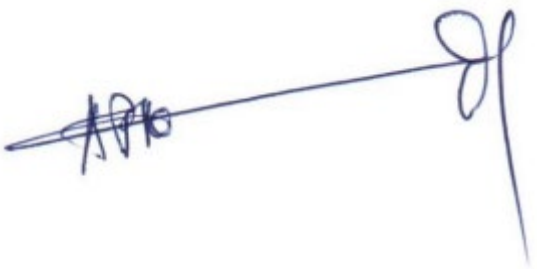
Furthermore, the testimony of PW2 suggests that, the rape committed to her was on diverse dates, she mentions even day of rape after the matter was reported by her mother; for instance, her mother said the matter was reported on 26th March 2023 and appellant was arrested. I have taking regard that the said report to her mother does not form event done

contemporaneously, or in close proximity with the days of rape which PW2 did not told anybody until the last day she was chased by the appellant and such offence was committed. I think that the issue was so material which deserve evidential clarification during trial. Remaining as it is leaves much to be desired if it was probable for the appellant to do so. It is therefore my conclusion that the conviction rested doubtful prosecution evidence which should not be left to stand.

In view of the foregoing deliberations, I am settled, the case against the appellant was not proved beyond reasonable doubt. The appeal is thus with merit and it is accordingly allowed. I consequently quash the judgment and conviction entered by the trial court and set aside the sentence and order awarded to the appellant forthwith. I order that the appellant be released from prison custody unless held there for some other lawful cause.

It is so ordered.

DATED at **MOSHI** this 02nd day of May, 2024.



A. P. KILIMI
JUDGE

Court: Judgment delivered today on 2nd day of May, 2024 in the presence of Mr. Patrick Paul for appellant and appellant also present in person. Respondent representative absent.

Sgd; **A. P. KILIMI**
JUDGE
02/05/2024

Court: Right of Appeal duly explained.

Sgd; A. P. KILIMI
JUDGE
02/05/2024..