IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MOROGORO SUB-REGISTRY[

AT MOROGORO

CRIMINAL APPEAL NO. 39073 OF 2023

(Arising from the decision of Kilombero District Court in Criminal Case No. 174 of 2020 before Hon. B. L. Saning'o, RM dated 18th February 2021)

EMMANUEL MALUFINA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

26/03/2024 & 29/04/2024

KINYAKA, J.:

At the District Court of Kilombero at Ifakara, hereinafter "the trial court", the appellant stood charged with an offence of rape contrary to section 130(1) and (2) and section 131(1) of the Penal Code, Cap. 16 R.E. 2019. It was alleged before the trial court that on 13th May 2019 at or about 20:00 hours at Tanganyika Msagati within Kilombero District in Morogoro Region, the appellant had sexual intercourse with SG, a girl aged 14 years.

On 18th February 2021, the trial court convicted the appellant of the offence of rape and sentenced him to serve 30 years imprisonment in jail. Aggrieved

by the decision of the trial court, the appellant preferred to this Court five ground appeal as reproduced below:-

1. That the trial magistrate erred in law and fact by convicting the appellant basing on contradictory evidence of prosecution side contradicting the requirements of the law that "it is the duty of prosecution to prove the case beyond reasonable doubt". Your Honour this case leaves a lot of doubts as to the conviction of the appellant. A mere knowledge that the appellant and victim are neighbours does not suffice conviction as more evidence was need so as to identify the appellant;
2. That there existed procedural irregularities that prompted to unfair end of justice. Since it is alleged that the matter took place during night, identification parade was very important to satisfy the court that the appellant was the actual offender but the same was not conducted and this led to mistaken identification;
3. That PW1 informed the court that when she was taken to Tanganyika Masagati dispensary and later to the hospital, it was discovered that there was only bruises in her vagina. But the evidence of PW4 Dr. Gabriel Nalaila is to the effect that the victim was examined on 10/05/2019 while the charge against the appellant states that the incidence took place on 13th May 2019 at or about 20:00 hrs. Your Honour you can easily find

that the victim and other prosecution witnesses were couched to speak lies only to warrant conviction to innocent appellant. The Honourable trial magistrate misdirected her mind finding herself convicting the appellant;

4. That PW3 one Boniface Yustin testified as the acting VEO for the time being and explained to have taken Extra Judicial Statements for the accused and victim as well. But the same statements were not tendered before the court during the trial. You Honour, such witness is not competent in the sense that her evidence is hearsay as she was informed by other people and secondly, she failed to tender the written statements taken by her. Non-production of such relevant documents renders the whole story be false; and
5. That there existed errors on face of records that what was stated by the victim are not displayed in the proceedings and judgement. Victim informed the court, and earlier on her father, that she was raped three days before the appellant was arrested that was 10th May 2019 but her father remained silent until 13th May 2019. Such statements are not reflected in the judgement and consequently, affected the appellant. Your Honour, PW4, an expert, informed the court on page 17 of the proceedings that "the examination shows she was raped on 12/05/2019, examination was done on 15/05/2019". The charge sheet alleges that

the incidence took place on 13th May 2019. All these tells that the appellant is not the person who raped the victim rather the victim upon fear just mentioned the appellant because we are neighbours.

At the hearing of the appeal, the appellant appeared in person and unrepresented and the respondent enjoyed representation of Mr. Josberth Kitale, learned State Attorney.

The appellant adopted his grounds of appeal as forming part of his submissions and prayed the Court to determine the appeal in his favour by setting him free.

Mr. Kitale, learned state attorney began his submissions by informing the Court that it was not correct for the public prosecutor to tender in evidence Exhibit PF3 as reflected on page 15 of the proceedings. He reasoned that the public prosecutor was not the witness in the case and could not be cross-examined by the accused person. He contended that it denied the accused person the right to be heard on the admission of the evidence and prayed for the expunction of Exhibit PE1 from the record as held by the Court of Appeal in the case of **Seleman Moses Sotel @ White v. R., Criminal Appeal No. 385 of 2018**, on page 12 and 13 of the decision.

He submitted that section 34B of the Evidence Act, Cap. 6 R.E. 2022, hereinafter, "the Evidence Act" was improperly applied and invoked by the

trial court. He argued that section 34B of the Evidence Act allow the prosecution to tender and use in court witness statement given at the police during investigation in case where the witness is not found. He argued further that the act of the prosecution to call PW4 as reflected on page 14, one Gabriel Nalaila to testify in court on behalf of the medical doctor who examined the victim, was incorrect and contrary to section 240(3) of Criminal Procedure Act, Cap. 20 R.E. 2022, hereinafter, "the CPA" which require an accused person to require the summoning of the person who made the report to be made available for cross examination. He contended that the accused person was not addressed of his rights under section 240 (3) of the CPA relying on the decision of the Court of Appeal in the case of **Majumba Benjamin v. R., Criminal Appeal No. 454 of 2022** on page 10, 2nd paragraph which held that a misapplication of section 34B of the Evidence Act is a serious anomaly.

He submitted that the remaining evidence of the victim, PW1 was sufficient to establish the offence of rape against the appellant. He relied on decisions in the cases of **Christopher Marwa Nturu v. R., Criminal Appeal No. 561 of 2019**, CAT, **Bwanga Rajab v. R, Criminal Appeal No. 87 of 2018**, CAT, and **Kiule Ernest @ Mnzava v. R., Criminal Appeal No. 60 of 2021**, HCT on page 7, 8 and 9 where the HC referred to the decision of

the CAT in the case of **Mohamed Makupa v. R., Criminal Appeal No. 2 of 2008** and **Julius John Shaban v. R., Criminal Appeal No. 53 of 2012**, CAT, and **Saul Sosoma v. R., Criminal Appeal No. 31 of 2006, CAT** where it was held that the evidence of the medical doctor is not the only evidence to prove the offence of rape, and that another evidence can establish commission of the offence of rape.

Mr. Kitale submitted that in the present case, the evidence of PW1 who testified on page 7 of the typed proceedings established the offence of rape where she testified that on 13/05/2029 at 8:00 am, she was coming from the house of Yuditha where he met the appellant who was working at a machine; that the appellant took her hand and pulled her to the cassava farm, pulled off her skirt and tight, pulled off his trouser and boxer and inserted his penis into her vagina, the act which took more than 30 minutes. Mr. Kitale recalled PW1's testimony that when she reached home, she informed her brother who also informed her father, whereas on 14/05/2019, they went to Tanganyika dispensary and that the appellant was arrested on 14/05/2019 and thereafter handed over to the police on the same day. He submitted that although the appellant denied to have raped PW1, the evidence establish that the appellant raped the victim. He argued that in sexual offenses, rape is normally committed in hiding places so the only

persons who know the incident is the victim and the accused person. He referred the Court to the holding of the Court of Appeal that the best evidence in sexual offences is that of the victim as held in case of **Godi Kasenegala v. R., Criminal Appeal No. 10 of 2008**. He submitted that the prosecution proved the offence through the evidence of PW1. He urged the Court to revisit section 127(6) of the Evidence Act which provides that sexual offences can be proved without corroborating evidence.

Opposing the 1st and 2nd grounds of appeal, he submitted that the victim properly identified the appellant as she knew him for long time where the appellant was working at the machine nearby the victim's home where he used to fetch water at the victim's home. Mr. Kitale contended that immediately after the incident, the victim informed her brother of the rape committed to her by Emmanuel Malufina, the appellant. Counsel submitted that there was no need to conduct identification parade because the appellant was well known to the victim referring to the decision of the Court of Appeal in the case of **Majaliwa Gervas v. R., Criminal Appeal No. 608 of 2020**, CAT, on page 13 where it referred to the case of **Doriki Kagusa v. R., Criminal Appeal No. 174 of 2004**, in which it was held that if the victim knew the accused before the incident, it is superfluous and waste of resources to conduct identification parade.

Regarding the 3rd ground, Mr. Kitale submitted that as he prayed to expunge the evidence of PW3 and Exhibit P1, he did not see the essence of submitting on the same.

Against the 4th ground relating to the extra judicial statement undertaken by PW3, he submitted that he did not see anywhere in the proceedings that the appellant made extra judicial statement. He contended that what PW3 testified was that he took the appellant's and the victim's statements and not extra judicial statements. He argued that PW3 was a competent witness as per the provisions of section 127(1) of the Evidence Act.

On the 5th ground, Mr. Kitale conceded that contradictions amongst/between the witnesses especially when there are more than one as a normal thing relying on the case of **DPP v. Daniel Wasonga, Criminal Appeal No. 64 of 2018**, where the Court of Appeal held that contradictions by or between witnesses is something which cannot be avoided in a particular case. He submitted that in **Dickson Elia Nsamba Shapwata & Another v. R., Criminal Appeal No. 92 of 2007**, the Court held on page 7 that while normal discrepancies do not corrode the credibility of parties' case, material discrepancies do. On the basis of the said case, Mr. Kitale submitted that the contradictions that the appellant spoke about do not arise because PW1 testified to have been raped on 13/05/2019 at

8:00 pm, and the incident was reported to her father on the same day and on 14/05/2019, the appellant and the victim were sent to WEO who wrote a letter to the police and when they arrived at the police, the victim was given PF3 for medical examination. He contended that this is what is reflected in the proceedings and what actually happened. He argued that in different decisions, the Court of Appeal held that what is reflected in the proceedings is what actually happened and cannot be easily impeached as in the case of **Idd Salum @Fred v. R., Criminal Appeal No. 192 of 2018**, on page 7 which was referred by the High Court in the case of **Oscar John Bosco @ Jacob and Another v. R., Criminal Appeal No. 140 of 2018**. He prayed to the Court to find that what was recorded in the proceedings were actually what transpired in the trial court at the hearing of the case.

He further submitted that in proving the offence against the appellant, the prosecution was required to prove two ingredients of the offence, namely, that the accused had sexual intercourse with a girl with or without her consent and that there was penetration, and that the girl was under 18 years of age, as held in the case of **Kambarage Mayala v. R., Criminal Appeal No. 208 of 2020**, CAT on page 9. He contended that on the ingredient of penetration, the victim testified that the appellant inserted his

penis on her vagina and had sexual intercourse with her. He contended further that the victim proved that she was 14 years old and was a primary school student which was not contested by the appellant. He prayed the Court to presume that the girl was 14 years old under section 122 of the Evidence Act relying on the decision of the Court of Appeal in the case of **Wilson Elisa @Kiungai v. R., Criminal Appeal No. 449 of 2018**, on page 8. He prayed for the dismissal of the appeal for lack of merit.

In his rejoinder, the appellant prayed to the Court to make analysis of the case, his grounds of appeal and find the appeal meritorious as he did not commit the offence.

On conclusion of the parties' submissions in respect of the appellant's grounds of appeal, I am now enjoined to determine whether the trial court's conviction and sentence against the appellant was incorrect both at fact and law. In so doing, I shall first determine the cogency of the respondent's contention that Exhibit P1 and the evidence of PW4 were improperly received and should be expunged. The appellant, being a lay person had nothing to submit on this point.

It is true that on page 15 of the proceedings, the public prosecutor prayed to tender PF3 in evidence under section 34B of the Evidence Act based on the reason that the medical doctor who attended the victim was not easily

reachable. The trial court granted the prayer but did not admit the same in evidence. The contents of PF3 procured at Mlimba dispensary were explained by PW4, Gabriel Nalaila, a medical doctor at St. Francis Referral Hospital. The record reveal on page 16 through to 17 of the typed proceedings that at the end of PW4's testimony, the public prosecutor, for the second time, prayed to the trial court to admit the medical report as an exhibit if there was no objection. The appellant did not object to the admission of the medical report. Consequently, the trial court admitted the PF3 in evidence as Exhibit P1.

Section 34B (1) (a) require that in the circumstance where all reasonable steps have been taken to procure the attendance of a witness who would testify in court and is not found, a written or electronic statement by that person who is, or may be, a witness shall be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence. Although the medical doctor who examined the witness was not found as intimated by the public prosecutor, the public prosecutor was not an appropriate person to tender the PF3 as he could not be a witness who could be cross examined on the document by the accused person. The prosecutor could not be both the witness and the prosecutor at the same time. Section 34B provides:-

34B (1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written or electronic statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written or electronic statement may only be admissible under this section-

(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend.

I fully subscribe to the decision in the case of **Seleman Moses Sotel @ White** (supra) where the Court of Appeal referred to its previous decision in the case of **Thomas Ernest Msungu @ Nyoka Mkenya v. R., Criminal Appeal No. 78 of 2012** (unreported) held:-

"a prosecutor cannot assume the role of a prosecutor and witness as the same time. With respect, that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation in

terms of section 98(1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined."

In the instant matter, not only it was incorrect for the public prosecutor to produce the PF3 in evidence, but also the trial court erred when it proceeded to admit the medical report in evidence without informing the appellant of his right to require the summoning of the medical doctor who made the report for examination or to make him available for cross-examination as mandatorily required by section 240 of the CPA. The Section provides:

"240(1) In any trial before a subordinate court, any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be receivable in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing the same held the office or had the qualifications which he possessed to hold or to have when he signed it.

(3) Where a report referred to in this section is received in evidence the court may, if it thinks fit, and shall, if so requested by the accused person or his advocate, summon and examine or make available for cross-examination the person who made the report; ***and the court shall inform the accused person of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.*** [Emphasis added]

Based on the above provision, I agree with Mr. Kitale that in producing Exhibit P1, the trial court improperly applied and invoked section 34B of the Evidence Act. In the case of **Majumba Benjamin** (supra), the Court of Appeal held on page 10 of the decision that:-

> *"With respect, we agree with Mr. Mkonyi, first, that what PW2 did was to testify in the place of the medical practitioner who examined PW1 and secondly, that s. 34B of the Evidence Act was misapplied because, the witness was not called to tender the statement of the intended witness, that is; the medical practitioner who examined PW1 and prepared the medical report (Exhibit P1). On that serious anomaly therefore, we hereby expunge that Exhibit from the record....."*

Guided by the above authority, I hereby expunge Exhibit P1 from the record. But I wouldn't end there. As intimated above, the record of the trial court does not reveal that the appellant was informed of his right to require the medical doctor who made the report to be summoned for examination or cross examination. The omission by the trial court denied the appellant of his constitutional right of a fair hearing especially in this case where the trial court heavily relied on the evidence of PW4 whose evidence was on the contents of the medical report admitted in evidence as Exhibit P1. [See

second paragraph of page 12 and first paragraph of page 13 of the judgement of the trial court].

It was held in the case of **David Mushi v. Abdallah Msham Kitwanga, Civil Appeal 286 of 2016** (unreported) that it is a cardinal principle of law that where a judicial decision is reached in violation of the right to a fair hearing, such decision is rendered a nullity and cannot be left to stand. In that case, on page 18 through to 19 of its judgment the Court of Appeal referred to its decision in the case **Abbas Sherally and Another v. Abdul S.H.M. Fazalboy, Civil Application No. 33 of 2002** which held:-

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.*** *" [Emphasis added].*

From what I have endeavored to analyze above, I am satisfied that the appellant's right to be heard was violated by the trial court with a consequence that the proceedings and the resultant conviction and sentence against the appellant are nullified.

Based on the conditions set out in the case of **Fatehali Manji v. Republic (1966) E.A 343,** I am now enjoined to determine whether an order for retrial will or will not enable the prosecution side to fill gaps in its case at the trial.

I have dispassionately gone through the prosecution evidence. My evaluation of the same has revealed some shortcomings which in my view might be used to rebuild the prosecution case if an order for re-trial is made. However, before pointing out the alleged shortcomings, it is worthy to note that I agree with Mr. Kitale that the appellant's complaint that the extra judicial statements were not tendered in court has no basis as there was no extra judicial statements at the first place. Fortified by the holding of the Court of Appeal in the case of **Doriki Kagusa** (supra), I also agree with Mr. Kitale that the identification parade was not necessary and would have been a wastage of the resources especially in the circumstances of the present matter where the victim knew the appellant well before the incident. That evidence was corroborated by the testimony of the DW1, the appellant, in the last paragraph of page 22 of the proceedings that he normally saw the victim as the place that she lived was not far from his home. I further agree with the respondent and the decision of the Court of Appeal in the case of

Idd Salum @Fred (supra) that what is reflected in the proceedings is what actually happened at the trial and cannot be easily impeached.

Reverting to the shortcoming in the prosecution case at the trial court, my starting point will be the contradictions in the testimony of prosecution witnesses. To begin with, I agree with Mr. Kitale that contradiction amongst witnesses especially when there are more than one, is a normal thing and cannot be avoided. However, I find the contradictions between the evidence of PW4 on one hand and that of PW1, PW2 and PW3 on the other, material. PW4 testified as reflected on page 16 and 17 of the proceedings that the examination showed that the appellant was raped on 12th May 2019 and that the examination was conducted on 15th May 2019.

Again, the evidence of PW4 was that when examined on 15th May 2019, there was whitish material found in the victim's vagina which proved penetration. However, the evidence of PW1, the victim, on page 8 first paragraph is that the examination showed that there were no bruises. Again, on page 8 of the proceedings, when cross examined by the appellant, PW1 testified that at Mlimba hospital where she was examined on 15th May 2019, no sperms were found as she had already taken bath.

PW1 further testified as reflected on page 9 of the proceedings when cross examined by the appellant that the appellant raped her twice on 12th May

2019 and 13th May 2019. PW1 testified further that when she was raped by the appellant for the first time, she informed her parents who warned the appellant and promised to take action if he repeats to rape the victim. However, PW2, the father of the victim, testified during cross examination on page 11 of the proceedings that he neither knew how many times his daughter was raped nor received information that the appellant raped his daughter previously before the incident that happened on 13th May 2019.

I find the above contradictions in the evidence of the prosecution witnesses went to the root of the prosecution case before the trial court and corrode their evidence. Discrepancies such as the date when rape was committed, the number of times that the appellant raped the victim that sought to establish the appellant's habitual character or as a habitual offender, proof of penetration in respect of sperms found in the victim's vagina, are not minor discrepancies as they go to the root of the criminal charge against the appellant. It was held by the Court of Appeal in the case of **Dickson Elia Nsamba Shapwata & Another** (supra) on page 7 that: -

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of statements. The court has to decide whether the inconsistences and contradictions are only minor, or*

whether they go to the root of the matter. (See: Mohamed Said Matula v. Republic [1995] TLR 3)."

Distinguishing between the normal discrepancies from the material ones, the Court of Appeal went on quoting with approval a passage from the learned authors of Sarkar, The Law of Evidence 16th edition, 2007, reproduced as below:-

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which the discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case, material discrepancies do."

In line with the authority above, I hold that the contradictions between the evidence of PW1 and PW2 on the previous rape not only cast doubt on the prosecution case, but also affect the evidential value of PW1 and her credibility. If PW1 had been raped on 12th May 2019, just a day before the second incident on 13th May 2019, and claimed to have informed her parents, how could it be possible that her father was unaware of the previous incident which happened just a day before the second incident?

Again, on page 7 of the proceedings, PW1 testified:

"....I was coming from the house of Yuditha. I passed in the machine in which the accused person was granting paddy. He saw me and he pushed me in the farm of cassava....."

On being cross examined by the appellant, PW1 testified on page 8 through to 9 of the proceedings:

"Nobody saw us when you pushed me in the bush of cassava. When you called me, you were already finished granting paddy you were going to look the football match to your fellows and the person who saw you just finished granting is known as Mama Livael Mngonda. I saw her but she didn't see me...You asked me in the afternoon why I didn't go to school, I told you it is not must to go to school; and you told me I will come later, and you raped me; you seduced me I refused because I was a student but you undressed my clothes by force and you raped me."

Reading the evidence reproduced above, it is unclear whether DW1 was pushed by the appellant immediately when she crossed the machine to the cassava farm. It is not clear how far the cassava farm to the machine is. If PW1 was immediately pushed by the appellant to the cassava farm, it raises doubt why Mama Livael Mngonda, who saw the appellant finishing grinding paddy, did not shout. PW1 testified that the appellant pushed him to cassava farm by force and covered her mouth while raping her. However, another piece of evidence of PW1 was that the appellant seduced her in the afternoon and promised to return later, and that the appellant seduced her where she

refused but he undressed her by force and raped her. There are doubts in the evidence of the PW1 such that when the appellant was pushing her to the cassava farm, and undressed her clothes, how would the appellant cover PW1's mouth that she could not shout? Again, after the appellant pushed her to the cassava farm, how could he continue seducing her while covering her mouth and when she refused, she undressed her by force and raped her?

The above doubts that feature in the evidence of PW1 diminishes the value of evidence of PW1, the victim. I therefore hold that it is not safe to rely on the evidence of the victim under section 127(6) of the Evidence Act to sustain conviction and sentence against the appellant.

Further, the evidence of PW3 which was also relied by the trial magistrate to convict the appellant found on page 13 of the proceedings was that the appellant admitted to have seduced the victim and had sexual intercourse with her. However, the statement was not tendered in court to prove the appellant's admission. I find the evidence of PW3 to the extent of appellant's admission of commission of the offence unreliable in absence of the admission statement.

From the above observations, I am satisfied that the prosecution evidence relied upon by the trial court to ground the appellant's conviction was weak

and doubtful to prove the charge of rape levelled against the appellant. The contradictions in the evidence of the prosecution witnesses and the unreliability and incredibility of the evidence of PW1 to whom the best evidence in rape cases is established, diminished the prosecution case against the appellant.

In the circumstance, I desist from ordering retrial in the circumstances where the prosecution failed to prove the offence of rape against the appellant beyond reasonable doubt. I find merit in the appeal and proceed to quash the trial court's conviction against the appellant, set aside the sentence and order his immediate release from prison, unless he is held therein for other lawful cause.

It is so ordered.

DATED at **MOROGORO** this 29th day of April 2024.

H. A. KINYAKA

JUDGE

29/04/2024

Court

Judgment delivered in the presence of **Ms. Edina Aloyce, learned state Attorney** for the Respondent and the Appellant who appeared in person.

F.Y. Mbelwa

DEPUTY REGISTRAR

29/04/2024

Right of Appeal explained to the parties.

F.Y. Mbelwa

DEPUTY REGISTRAR

29/04/2024

THE HIGH COURT OF TANZANIA
MOROGORO