IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 80 OF 2022

(Appeal from the decision in Criminal Case No. 9 of 2020 of the District Court of Temeke at Temeke (Ndossy, RM) dated 1st of March, 2022.)

RAMADHAN YUSUPH ASBATU @ ZUNGU ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

4th, & 25th July, 2022

ISMAIL, J.

The appellant, a convict of a rape offence, allegedly committed on 25th June, 2020, at Mbagala Kijichi area. The victim of the offence is a girl, then aged 15 years, and a form three student. She featured in the trial proceedings as PW1.

Brief factual background is to the effect that, on the fateful day, PW1 set a rendezvous with her boyfriend. The latter told her to go to a liquor shop operated by his aunt. The shop is called Kibeta. On arrival, the boyfriend bought PW1 two bottles of Savanna beer and a plate of chips. Subsequently, the duo retreated for a sexual indulgence. When they were

done, the boyfriend stepped out and told the victim to wait for him as she was enjoying her beer. At between 9.00 pm and 10.00 pm, the appellant surfaced and enquired about what kept PW1 at the bar. The latter replied that she was waiting for her boyfriend. The enquiry turned into a pleasant conversation that lasted a little longer. They were then informed that the bar they were sitting in was about to close. It is at that point in time that the appellant offered to give her an accommodation in her room.

On arrival in the room, the appellant offered to sleep on the floor to allow PW1 occupy the bed. PW1 woke up to a shock the following morning. She realized that she had been raped. The appellant who was beside her on the bed, owned up and attributed his misbehavior to a satan and apologized. After this, PW1 bathed after which the appellant took her to a commuter bus stop from which she left for her home. Along the way, PW1 met Zubeda, her friend, with whom she left for Kariakoo. PW1 narrated the ordeal to Zubeda and why she feared the worst if she went back home. It is at that point in time that Zubeda offered to take her to her Mtongani home where they stayed together for three months. During her three-month stay, PW1 continued to date her boyfriend, meeting him on Saturdays of every week.

When she finally got home, PW2, her mother, enquired about her long absence and what befell her. She narrated her ordeal with the appellant.

Enraged at what had happened, PW2 reported the matter to police who issued a PF3 that allowed PW1 to be medically examined. She was found to have been infected with HIV and that she was pregnant. After this revelation, a swoop began, leading to the apprehension of the appellant and subsequent arraignment in court. Three witnesses testified for the prosecution, against one for the defence.

In his defence testimony, the appellant admitted that he knew PW1 and met her once, when she and her boyfriend Gody visited his salon and left together. He recalled that after three days, a police officer, disguising as a person who owns a salon called and requested to meet him at Mtongani area. When they met, the appellant was put under restraint. He denied the alleged involvement in the rape incident.

At the conclusion of the trial proceedings, the trial magistrate formed the opinion that the appellant had a culpable role in the incident she was accused of. The magistrate convicted him of rape, contrary to section 130 (1) (2) (e) of the Penal Code, Cap. 16 R.E. 2019. He was sentenced to imprisonment for 30 years.

The conviction and sentence have left the appellant incensed, hence his decision to institute the instant appeal. Four grounds of appeal have been raised, and are reproduced as hereunder:

1. *That the trial court erred in law and in fact to convict the appellant believing on incredible, unreliable, improbable and contradictory evidence of the victim (PW1).*

2. *That the trial court erred in law and in fact to convict the appellant without considering that the evidence on record and flow of events does (sic) not connect the appellant with the crime.*

3. *That the trial court erred in law and in fact to convict the appellant without considering the defence of the appellant that raised reasonable doubts to the case.*
4. *That the trial court erred in law and in fact to convict the appellant in the prosecution case that was not proved beyond reasonable doubt.*

When the matter came up for hearing, the appellant appeared and defended himself as the respondent enjoyed the able services of Ms. Nura Manja, learned State Attorney.

Not unexpected, the appellant urged the Court to consider his grounds of appeal without any additional submission in their support. He prayed that his appeal be allowed.

Ms. Manja's submission began by supporting the impugned decision, both on conviction and sentence imposed. With respect to ground one, her submission is that the testimony of PW1 was clear on how she met the appellant, took her to his house in which the incident occurred. Learned

counsel submitted that, after the act, the appellant apologized. Ms. Manja further contended that the appellant did not sufficiently prove that he did not do what he was accused of. She cited the decision in ***Selemani Makumba v. Republic*** [2006] TLR 379 and held that it was the testimony of PW1 which sufficiently proved the matter and serve it as the basis for conviction. Learned attorney argued that the testimony of PW2 and PW3 fortified what was testified by PW1.

Moving on to ground two, the respondent submitted that the totality of the prosecution's testimony singled out the appellant as the culprit who perpetrated the incident.

With regards to ground three of the appeal, the contention by the respondent is that pages 6 to 8 of the impugned judgment clearly show that the defence testimony was considered. Ms. Manja submitted that the appellant has not disputed that he took the victim to his house and that he had sexual intercourse with her. She argued that the appellant's silence on the issue meant that he did not dispute the allegation, and that the trial court was right to convict him.

Regarding ground four, Ms. Manja's assertion is that PW1's testimony did enough to prove the charge. She argued that what PW2 and PW3 did was to corroborate and confirm that the victim had been penetrated. She

contended that the defence evidence was weak and did not displace the prosecution's evidence.

On the failure to report the incident three months after the incident, Ms. Manja submitted that this was due to the fact that the victim went to live with Zubeda for all that long. She admitted, however, that the silence was long and raised a few eyebrows. She opted to leave that to the Court.

From the one sided submission, the question is whether the appeal presents any meritorious position.

For reasons that will be apparent in the course of this decision, I will confine my analysis to ground one of the appeal, and I will dispose it of together with the point raised by the Court. This is with respect to the delay in reporting the incident.

Ground one raises an argument that punches holes in the prosecution's testimony, terming it incredible, unreliable, improbable and contradictory. The testimony referred here is that of PW1, the victim. By saying so, the appellant is insinuating that PW1 was not a credible witness, contrary to the view held by the trial court. The latter premised its conviction on that evidence.

As I cast an eye on the testimony of PW1, I need to restate the trite position, which is to the effect that matters relating to credibility of a witness

are the domain of the trial court, and an appeal court would only interfere with if circumstances compel. This position was highlighted by the Court of Appeal of Tanzania in ***Bakiri Saidi Mahuru v. Republic***, CAT-Criminal Appeal No. 107 of 2012 (unreported). It was held:

> *"The trial Court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which case for a reassessment of credibility. (See also: **Jacob Tibi Funga v. R** (1982) TLR 125; **Antonio Das Caldeira v. Frederick August Gray** (1936) 1 ALL ER 540."*

The foregoing position operates in tandem with another equally important proposition that each witness is entitled to his credence. In ***Goodluck Kyando v. Republic*** [2006] TLR 363 it was held:

> *"…. it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

In the instant case, the most coveted evidence of PW1 have a cloud hanging above it. The said cloud is manifested in a number of ways as follows:

1. That there is no evidence that the rape incident that it was the appellant who raped PW1. This is in view of the fact that the incident occurred while PW1 was asleep and was intoxicated and unconscious or unable to see what was happening. It is difficult to state with any degree of certainty that the rape incident was perpetrated by the appellant. Finding the appellant sleeping in the same bed with the victim would not be and was not enough. This is one instance which cannot justify invoking of the ***Selemani Makumba case*** (supra); and
2. The contention that the appellant owned up and apologized is the prosecution's side of the story which has since been denied by the appellant. This story would not be given credence by the mere fact that the appellant's defence did not discount the story.

It should be noted that the testimony of the victim may be the basis for conviction, as stated in ***Selemani Makumba*** (supra), many other decisions and in section 127 (7) of the Evidence Act, Cap. 6 R.E. 2019, if the victim is a witness of truth. For ease of reference, the said provision stipulates as follows:

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years*

or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be the victim of the sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

A similar question featured in the case ***Athumani Hassan v. Republic***, CAT-Criminal Appeal No. 292 of 2017 (unreported). Unable to condone what was considered to be a credibility deficit in the victim's testimony, the Court of Appeal of Tanzania held as follows:

"Our doubt is further coupled by the fact that PW1 did not inform anyone that she was raped by the appellant for the entire three months until when she was found pregnant. This again raise questions on her credibility. In totality of the above, we find merit on the ground of appeal relating to the credibility of PW1."

The foregoing position mirrors the Court's own position accentuated in ***Manyinyi Gabriel @ Gerisa v. Republic***, CAT-Criminal Appeal No. 594 of 2017 (unreported). The upper Bench gave the following invaluable guidance:

> *"This Court has consistently held that naming a suspect at the earliest opportunity lends credence to the witness whereas the contrary renders the evidence of that witness highly suspect and unreliable. (See* ***Marwa Wangiti Mwita and Another v. R****., [2002] T.L.R. 39 and Joseph Mkumbwa & Another v. R., Criminal Appeal No. 94 of 2007 (unreported)."*

Nothing conveys any sense of satisfaction that the conduct of PW1 on the date of the incident and subsequent thereto lent any credence to her testimony. His factual account raises more questions than answers, especially on whether the alleged sexual encounter with the appellant, if any, was not consensual (though in statutory rape consent would not matter). No reason has been given for not sharing this information with anybody for a whopping three months, only to wait to be probed by her mother.

I subscribe to the appellant's contention and hold that circumstances of this case are such doubts that were raised rendered the prosecution case not proved beyond reasonable doubt, and I have no reason not to settle these doubts in the appellant's favour.

It is my conclusion that the appellant's conviction was based on the testimony which was lacking in credibility and reliability on which a conviction would be grounded. Consequently, on ground one alone, I allow the appeal.

The trial court's conviction and sentence are hereby quashed and set aside, and the appellant is forthwith set free, unless held on some other lawful grounds.

It is so ordered.

DATED at **DAR ES SALAAM** this 25th day of July, 2022.

M.K. ISMAIL

JUDGE