THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO.50 OF 2022

(Originating from the District Court of Mvomero in Criminal Case No. 53 of 2021)

PAULO FRANCIS JUMA@BOMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 08/11/2022

Judgement date on: 18/11/2022

NGWEMBE, J.

Paulo Francis Juma @ Bomba of more than sixty (62) years old is in this court challenging the conviction and sentence meted by the trial of Morogoro District Court. That he was convicted and sentenced to 30 years imprisonment for the offence of rape contrary to sections 130 (1) & (2) (e) and section 131 (3) of the Penal Code [Cap 16 R.E. 2019].

A charge of rape preferred against the appellant comprised particulars that, on 09/05/2022 at Mlali Village, Mlali ward within Mvomero district in Morogoro region, the appellant had carnal knowledge with a girl of 8 years old, whose name herein is withheld, to preserve her future integrity and rested to the society.

The undisputed background of this appeal comprises the fact that, the appellant, whose age is 62 years old, is acquainted and related to the victim's mother one Leila Nestory because he is a cousin to her husband. Also, they live in a neighbouring homestead and in the same street at Mlali. It is alleged that on 09/05/2021, the victim, along with three other children went to the appellant's home for the purpose of assisting him on the work of extracting maize kernel. The children were given some money for the assistance they offered for that day. After returning home, the victim was suspected to have been raped.

The appellant was allegedly named by the victim to have raped her, hence was arrested and presented at Mzumbe Police Station, where he was interrogated and denied the offence though admitted to have been with the children at his home on the fateful date and that he gave them some money, including the victim whom he gave her one thousand shillings (Tshs. 1000/=). The trial court after trial proceeded to convict him and sentenced him to the statutory rape of thirty (30) years imprisonment.

Believing he was innocent, appropriately filed before this court a total of seven (7) grounds of appeal which may be summarized into four as follows: -

1) The trial court did not consider the appellant's rights infringed by arresting officers who arrested him on 09/05/2021 and brought him to court on 06/07/2021.
2) Exhibit PE1 (PF3) was improperly admitted.
3) The trial court did not consider defence evidence.
4) The offence was not proved beyond reasonable doubt.

On the date when this appeal was heard, the appellant did not procure any legal services from learned advocate, while the Republic was represented by Ms. Jamilah Mziray learned State Attorney. On the hearing of this matter, the appellant was at Ukonga prison while the Court was at Morogoro, thus through Video Conferencing. Having appeared in person, he just offered a lumpsum lamentation that he never had such sexual intercourse with the victim, a girl of seven (7) years old, while he is more than 62 years old. While his voice indicated confusion and not knowing what happened until he is imprison, he only prayed for this court to consider his grounds of appeal and let him free.

As this court noted before, that the appellant's grounds of appeal are intertwined, others were just like lamentations accompanied with arguments over the same issue. I find useful to paraphrase those arguments as appeared in the Petition of appeal.

On the first ground, he explained that, by arresting him and delay to bring him to court within 24 hours rule of detention and his arraignment rights were altogether infringed. On the second ground, it was the appellant's argument that as the expert witness did not state when the incident (of rape) took place, it could be long time ago without relation to the incident having happened recently.

On the fourth ground, of whether the offence was proved beyond reasonable doubt, he pointed out some questions and doubts which for a better consideration I will put them as they are, he asked: -

i) If the appellant threatened to kill the victim after rape as the victim (PW2) states, what stopped her from revealing the incident after leaving the crime scene?

ii) Where specifically and when (time) on the date the incident of rape happened?

iii) The trial court did not explain as to why the other victim mentioned by PW2 was not brought to court to adduce their evidences for corroboration?

With those observations, he concluded that, the trial magistrate erred to convict him without corroborative evidence and no watertight evidence was adduced as per the standard required of proof beyond reasonable doubt.

In turn, the learned State Attorney Ms. Jamila Mziray strongly resisted the appeal while supporting the conviction and sentence meted by the trial court. Referring to page 10 and 26 of the proceedings, she submitted that PW2 proved that, the appellant raped her and he threatened the victim during that act. The medical doctor proved that the victim had no hymen, but she admitted that PF3 was improperly tendered in court during trial. However, she quickly added that even without PF3, the evidence of the medical doctor would corroborate the evidences of the victim and constitute conviction and sentence.

In regard to failure to call the other victims to corroborate each other, the learned State Attorney found no merit in such argument. Her observation is that PW4 corroborated the evidence of the victim and the evidence of PW4 may stand alone. Referred this court to section 143 of

the Evidence Act, that numbers of witnesses are immaterial and even one witness may suffice to prove the offence. Rightly added that in law it is not necessary that every evidence must be corroborated. The offence was proved beyond reasonable doubt. The age of the victim was proved to be 8 years old (page 6 of the proceeding), penetration was also proved by the victim herself (page 10) and PW5 proved that the victim had no hymen.

She proceeded to discard ground one which is related to arrest and detention as irrelevant to the case of rape. Further argued that the trial court considered well the defence. Referred this court to page 7 and 8 of the judgment, that the complaint lacks merit. Having strongly opposed the appeal as above, Ms. Mziray prayed this court to dismiss the appeal and prayed this court to uphold the conviction and sentence meted by the trial court.

Being mindful on the fact that this is a first appellate court, I find important to make references to some legal principles providing duties of the first appellate court. Usually, the first appellate court has a legal duty to exhaustively re-evaluate the evidence recorded by the trial court. Generally, this principle draws its history from year 1876 and expounded further through the English Courts in **Watt Vs. Thomas (1947) 1 All ER 582** among others. Later same was applied in our jurisdiction through this court in the early criminal decisions of **Daudi Mwabusila Vs. John Mwakfwila [1967] HCD 59** and **R. Vs. Makuzi Zaidi and Another [1969] HCD 249** where in particular **Lord Georges, CJ,** held *inter alia:* -

"As in all appeals it is the duty of the court to weigh the evidence and draw its own conclusions, though it should

always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect ... It must be borne in mind, however, that the appellate court in exercising its jurisdiction to review evidence and determine whether the conclusions of the trial judge should stand should do so with caution. Where it is clear that the trial judge has plainly gone wrong and had failed to appreciate the weight or bearing of circumstances admitted or proved the appellate court should not hesitate to interfere"

This is what has been followed in our jurisdiction and stands as a guiding map to all first appellate courts. Other cases which had similar pronouncement in the cases of **Salum Mbando Vs. R, [1993] T.L.R. 170**; **Kulwa Kabizi Paulo Sindano Balele & Suleiman Mlela Vs. R, [1994] T.L.R. 210**; **Deemay Daati and two others Vs. R, [2005] T.L.R. 132;** and **Bonifas Fidelis @ Abel Vs. R, [2015] T.L.R. 156 [CA].** In the latter case, the Court of Appeal, exemplified the above duty as follows: -

"Our duty in this first appeal is to re-evaluate the evidence relating to the ingredients constituting the offence of attempted murder in order to arrive at our own answer to the question whether these ingredients were proved beyond reasonable doubt as against the appellant"

Guided by the above, this court will re-evaluate the evidence of both sides as recorded by the trial court. Out of that evaluation and considering grounds of appeal raised by the appellant, make its conclusion on whether

the offence against the appellant was proved beyond reasonable doubt. However, due to the fact that ground one and two are on mixed law and fact, I will consider them first before going into re-evaluation.

The first ground is that the trial court did not consider the appellant's rights infringed by arresting officers who arrested him on 09/05/2021 and brought him to court on 06/07/2021. Ms. Mziray submitted that the ground was irrelevant. But considering that ground, it raises a complaint on prejudices against the appellant by the investigation machinery. That ground even if is little but calls for consideration by this court. It is part of criminal justice that delay by the prosecution and investigation to bring the culprit to justice, affects the ends of justice. This court in the case of **DPP Vs. Mienda [1978] L.R.T No. 64** stated that, justice should not be defeated on account of the inefficiency of Police, Prosecutor or the court.

But in this case, the delay complained of by the appellant, though may justify blames on the investigators and prosecutors, it would not affect the weight of evidence and the trial magistrate would have no avenue to discuss about it had he considered the same. Though our justice system requires expedited process unleashed from all unnecessary inconveniences and delays as above pointed, I will dismiss this ground for having no merit.

Coming to ground two which challenges admission of exhibit PE1 (PF3), this court found that when PW5 was testifying, the Prosecutor prayed to tender PF3 as exhibit, instead of the witness himself and consequently, it was admitted after the appellant had no objection. This was improper and it has been sternly discouraged by this court and the Court of Appeal. Some of the cases wherein the court ruled against are

Thomas Ernest Msungu & Nyoka Mkenya Vs. R, [2013] T.L.R. 557, **Juma Idd @ Dude Vs. R, Criminal Appeal 558 of 2020** and **Athumani Almas Rajabu Vs. R, Criminal Appeal 416 of 2019, (CAT at Dsm).** In **Thomas Ernest Msungu & Nyoka Mkenya's** the Court of Appeal held: -

> *"Under the general scheme of the Criminal Procedure Act Cap 20 RE 2002 (the Act) particularly sections 95, 96, 97, 98 and 99 thereof, it is evident that the key duty of a prosecutor is to prosecute. A prosecutor cannot assume the role of a prosecutor and a Witness at the same time. In tendering the report, the prosecutor was actually assuming the role of a witness. 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 198 (1) of the Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined on the report"*

The above case is similar to the case of **Msanif Ramadhan Msanif Vs. Director of Public Prosecutions, Criminal Appeal No. 454 of 2019 CAT at Zanzibar** where in absence of any witness in court, the prosecutor prayed and tendered exhibit. The prosecutor instead of leading the witness who should have prayed to tender the exhibit, erroneously prayed to tender the exhibit though the witness proceeded thereafter. In most cases, I have observed despite the difference, courts expunged the exhibits. The case of **Juma Idd @Dude Vs. R, Criminal Appeal No. 558 of 2020, CAT at Dodoma** and **Sospeter Charles Vs. R, Criminal Appeal No. 555 of 2016, (CAT).**

Being allegiant to the principles above, I will therefore expunge exhibit P1. On the other hand, I accept Ms. Mziray's observation that the testimony of PW5 will remain. The same along with the other limb of this ground will be subjected to test in the course of dealing with other grounds of appeal.

To resolve the third ground, which contended that the trial court did not consider the defence evidence and having in mind the rule that, failure to consider the defence case makes the conviction fatal. I have revisited the trial court's proceeding and judgment with a view to underscore the essence of this complaint. The defence evidence given by the appellant himself and two other witnesses in support was summarized by the trial court at pages 5, 6, 7 and 8. There is a legal difference between disbelieving the defence evidence and failure to consider it.

In this appeal, it is settled in my mind that the defence evidence was squarely considered, only that the trial magistrate, found no reasonable doubt was raised and thus believed the prosecution. The learned State Attorney invited this court to dismiss this ground. On the basis of the above observation, I dismiss this ground for lack of merits.

In ground four of whether the offence was proved beyond reasonable doubt. In this ground I will re - evaluate the evidence and test the trial court's judgment.

PW1 Lela Nestory, the victim's mother, stated that when the victim, returned home complained of headache and stomach ailment. When PW4 Gladness Santos, her other daughter was bathing the victim, she complained of pains in her private parts. PW1 examined the victim's private

parts and found that they were torn in the language of the witness 'sehemu za siri zilikuwa zimechakaa'. When asked her, she answered that she did nothing. It was after what seems to be prolonged questioning, that about 30 minutes later, she revealed that *Babu Bomba* (the appellant) took her to his sitting room, asked her to strip her under pants and inserted his penis in her vagina. Lela says, the victim stated that the appellant raped her three times. In raping the appellant, threatened the victim that if she discloses about it, he will not be giving her some money.

The victim herself, testifying as PW2, gave her account that, the appellant had carnal knowledge five times and normally gives her money, Tsh. 1000. They usually met outside the appellant's house or inside when the appellant's wife is absent. During rape the appellant threated to kill her if she shouts. I quote part of her testimony: -

> *"This Babu Bomba 'alinifanya matusi' He normally meets me 'kule chini kwake nje ya nyumba' he did matusi to me five times. He did it inside his house and there outside. When Babu bomba did that to me, Bibi normally is away to the farm or to the market. Alikuwa ananilamba huku (private parts). He then took mdudu wake akaniingiza huku (private parts). His mdudu is from his trouser; He puts me down on my back and he inserts his mdudu. I was feeling pain but he told me if I shout, he will kill me. After he has done, he normally gives me money buku (Tsh. 1000) he was doing to me and Lucy. I was normally the first to be done by this Babu Bomba followed by Lucy"*

PW4 stated that after the work of extracting maize grain, kupukuchua mahindi in her language, the appellant left with the victim to the local bar to buy banana. When PW1 called them for breakfast, PW4 went home but the victim did not. Later PW4 returned to the appellant to take her money for the work and was given Tsh. 600 and the victim given Tsh. 1000. PW4 left back home again leaving the victim with Babu Bomba (the appellant). The victim came back home late with new exercise books and pencils and Tsh. 500, PW4 asked her who gave her the things and the money, the victim said it was the appellant. It was after this answer when PW1 called the victim inside and started to interrogate her, suggesting that this is what sparked suspicion. PW4 states that she, with PW1 checked the victim and found that the victim's private parts were damaged.

PW5 testified that on 10/05/2021 around 12:00hrs the victim estimated to be 8 years old was brought by her mother, alleging she has been raped past 24 hours. Upon examination he found that the vaginal walls had no fresh bruises, but blackish marks of old bruises which have recovered already and she had no hymen (virginity).

The appellant defended that the victim and other children were at his home extracting maize grain on 08/05/2021. After the work he paid them. On 09/05/2021 the hamlet chairman told him that he was required at the Police where he went and found PW1 with the victim. The police informed him he was suspected of raping the victim the previous day. One Police Woman examined the victim and said she was ok.

DW2 and DW3 Hamisi Nyagalu and Ally Shaban Wanyamamle who were Village and Hamlet chairman respectively, just testified to the effect

that they received a letter from the police to be served upon the appellant which had the accusation of raping the victim, the offence which they had no information of the offence in their administrative authority.

The relevant question is whether by the evidence above the offence of rape was established beyond reasonable doubt. The law requires the prosecution to prove the offence beyond reasonable doubt, which means to lead the evidence before the court up to the standard that the court when looks at the material evidence, it finds only a remote possibility of him not being guilty. It was so held in the case of **Magendo Paul & Another v. R, [1993] T.L.R 220** in another case of **Nathaniel Alphonce Mapunda and another Vs. R, [2006] T.L.R. 395,** the Court of Appeal on burden of proof held: -

> *"As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of Mohamed Said Matula v. R. (2) this Court reiterated the principle by stating that in a criminal charge the burden of proof is always on the prosecution. And the proof has to be beyond reasonable doubt. There must be credible evidence linking the appellants with the offence committed".*

The offence against the appellant is created under section 130 (1) of the **Penal Code,** whose ingredients are provided for under section 130 (2)(e) of the Act: -

> ***"Section 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 circumstances falling under any of the following descriptions:
(a) – (d) NA
(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."

The offence of rape under section 130 (1)(2)(e) of **the Penal Code** is termed as *statutory rape*, which in the case of **George Claud Kasanda Vs. The DPP, Criminal Appeal No. 376 of 2017, (CAT at Mbeya),** the Court of Appeal explained that: -

"In essence that provision creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that; it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent"

As above, herein are ingredients which were important to prove by the prosecution; **one** – carnal knowledge (penis penetration) to a girl (the victim) and consent is immaterial; **two** – age of the victim being below 18 years; **three** (For the purpose of section 131 (3)) that the girl is of the age below ten years; and **lastly** the identity of the person who raped the victim, in this appeal is the appellant.

To start with, I have no doubt that the victim was of 8 years old as stated by her mother (PW1) and under the circumstance, section 127 of **The Evidence Act** was practically applicable. The trial magistrate despite the uncertainty of the exact age of the victim observed and took the age mentioned by the parent (PW1) as correct. The inference was also

accepted in **Issaya Renatus Vs. R, Criminal Appeal No. 542 of 2015** and **George Claud Kasanda** among many other cases.

The next question is whether the victim was raped on 09/05/2021. The prosecution evidence generally proved that; the victim had no hymen. Knowing that a girl child of that age cannot in anyway be naturally sexually active. That alone strongly suggests that the victim was actually raped. This suggestion can also be extracted from PW5's evidence, that apart from having no hymen (virginity) the victim had some old bruises, which have recovered already. Those bruises through the methodology the expert witness applied, the victim's vagina was penetrated by a blunt object, which may as well be a man's penis. However, the observation by PW5 does not clearly suggest that the victim was raped on 09/05/2021.

The imminent question of when and who raped the victim to constitute conviction seem not to be answered by the prosecution's evidence. Though I understand the learned State Attorney wished this court to believe as the trial court did, that the appellant is the one who raped the victim on 09/05/2021, unfortunate the available evidences do not suggest the same.

In my analysis of the evidence referred above, I have observed the following: - the coherence of events on the date of alleged rape was not clear as between PW1, PW2 and PW4. The same is full of material contradictions which raises a number of serious unanswered questions. PW1 stated that, the victim told her that the appellant raped her three times, while the victim herself (PW2) said it was five times. PW1 says that the victim said the appellant threatened her that he will not be giving her

money if she disclosed the rape incident, but the victim before the court did not state such threat, instead she stated that, the appellant threatened that if she screamed, he would kill her. It seems the appellant did not threaten the victim against disclosing the rape. While PW1 stated that the victim when came back home complained of headache and stomach pain also when being bathed by PW4 she complained of pain in her private part as the result she examined her, PW4 stated that, it was after she returned home with exercise books, pencil and Tshs. 500 saying she has been given by Babu Bomba, that is when her mother (PW1) suspected. Again, the victim herself did not mention anything about exercise books, but testified that when she was being bathed by PW1 she was feeling pain, then PW1 asked her to tell what she had done, threatening to take her to police. After that threat she told PW1 that Babu Bomba had done her *'matusi'* (sexual intercourse).

Above all, I have observed that the victim's testimony was vague and much general. She did not tell exactly what happened on the date mentioned in the charge, even did not correlate with what PW4 testified, who was also at the appellant's place.

Recollecting from the respondent's evidence, the theme was that a child of 8 years old was raped by an old man of 60 years old, she had her private parts (Vagina) torn, but she walked home freely, no one noticed any difficulties on her until she lamented when bathing or after suspecting her having money. This court's mind has been exercised significantly imminent questions that sprang from the prosecution's case. Where were the other children when the appellant was raping the victim and Lucy in sequence? Would it be possible under the circumstance for the appellant to

rape the victim be it at the sitting room or inside his bedroom or around the house compound when the other children were around without them noticing what went on? No explanation is given.

The other doubts; why the victim did not report the matter to anyone for all the time if really the appellant used to rape her several times as herself told the trial court? If the victim was actually raped by the appellant on the said date, why did PW5, the Medical Doctor found her to have no fresh bruises while also having no hymen? How did it happen that PW1 and PW4 examined the victim by looking and found her private parts torn apart while the Woman Police who examined her thereafter found the victim well and ok? If actually Lucy was among the children who were equally raped, why PW1 and PW4 never mentioned her? Assuming that what the victim testified occurred on the 09/05/2021, why was Lucy not called to court for testimony and basically why the appellant was not charged for the same offence to Lucy?

I have considered the learned State Attorney's submission that PW4 corroborated the evidence of the victim. And that corroboration is not a legal requirement and that number of witnesses is immaterial in proving a fact, this I agree. However, I am not moved by such argument in respect of the above questions. First, PW4 would not stand on the position of Lucy, who is alleged to have gone through the same victimization by the appellant. Also, the circumstance in this case does not suggest the issue of mere corroboration, but rather of failure to call important witness like Lucy, whose effect in law is adverse inference on part of the prosecution. See **Aziz Abdalla Vs. R, [1991] T.L.R 71; Peter Kirumi Vs. R, Criminal Appeal No. 25 of 2016, (CAT at Arusha); Boniface Kuandakira**

Tarimo Vs. R, Criminal Appeal 351 of 2008, (CAT at Arusha); and Esther Aman Vs. R, [2020] 2 T.L.R. 248. In **Azizi Abdalla's** case it was held: -

> *"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 the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution"*

The same spirit was repeated in the case of **Boniface Kuandakira Tarimo Vs. R,** where the Court settled thus: -

> *"It is thus now settled law that, where a witness who is in a better position to explain some missing links in a party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one"*

In respect of the failure to summon the said child, who was with the victim and herself being a victim, strong reasons ought to be disclosed, unfortunate same is missing. This case raises more suspicion on why the trial court did not draw adverse inference on this point alone.

Equally important is on failure of the victim to report the matter as per the case of **Peter Kirumi's case,** taken together with the swarm of doubts flying over the prosecution's case, would lead the trial court to a verdict that would acquit the appellant.

Repeatedly, the offence of rape and other sexual related offences in our jurisdiction are among the most serious offences, which attract heavy punishment of life imprisonment but not less than thirty (30) years imprisonment. In fact, imprisonment of thirty years to an old citizen of above sixty (60) years old is equal to pronouncement of life imprisonment. I have had persuasion from the Indian Supreme Court's decision in **Mousam Singha Roy and Others Vs. State of West Bengal (2003) 12 SCC 377**, on the old principle of law that the more serious the offence, the stricter standard of proof. The proof of rape in that sense must be watertight leaving only remote doubt, otherwise even common social conflicts may turn into rape offences, simply because they attract long imprisonment sentence. Due to that danger, this court will stand firm to demand stricter evidences leaving no reasonable doubt.

Despite the charge being of a serious offence, the burden of proof does not seem to have been taken seriously by the respondent. For the reasons so stated, I find the prosecution failed to establish and prove the offence beyond reasonable doubt.

While I am approaching to the conclusion, I have noted equally an impropriety which I will not dwell with it, but I want to draw the attention of the prosecution as well. Usually, the law is clear like a brightest day light that age of the victim separates the severity of punishment. A victim below the age of 10 years, when proved the accused has only one sentence, which is life imprisonment. However, the victim of above ten years its punishment is from the minimum of thirty years imprisonment. In respect to this appeal, had the conviction be sustained, the proper sentence was to be life imprisonment instead of thirty years.

In totality and for the reasons so stated, I proceed to allow this appeal entirely. The conviction of the appellant is accordingly quashed and the sentence of thirty years imprisonment is set aside. The appellant be immediately released from prison, unless otherwise lawfully held.

Order accordingly.

Dated at Morogoro this 18th day of November, 2022

P. J. NGWEMBE

JUDGE

18/11/2022

Court: Judgement delivered at Morogoro in Chambers on this 18th day of November, 2022 in the presence of the Appellant and Ms. Jamila Mziray State Attorney for the Respondent.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

18/11/2022