IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 143 OF 2022
(Originating from the District Court of Arusha, Criminal Case No. 127 of 2021)

SALIM HASHIM ..... APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

17th & 28th April 2023

Masara, J.

The Appellant herein has preferred this appeal in the quest to have his conviction and sentence imposed by the District Court of Arusha (hereinafter the trial court), reversed. In the trial court, the Appellant stood charged with the offence of Rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code Cap. 16 [R.E 2019] (hereinafter Cap. 16). He was convicted and sentenced to life imprisonment.

Aggrieved by both the conviction and sentence, the Appellant has preferred this appeal on the following grounds:

a) *That, the trial court proceedings are tainted with gross incurable procedural irregularities which render the whole decision thereof null and void;*

b) *That, the prosecution did not prove the case beyond reasonable doubt against the Appellant herein; and*

c) *That, the trial court erred both in law and in fact in convicting and sentencing the Appellant basing on weak evidence, that is, the prosecution did not lay a foundation on issues of visual identification and identification parade.*

To appreciate the basis of the grounds of appeal hereinabove stated, I will outline the evidence, albeit briefly, leading to the trial court's impugned decision. Ramla or Tresures Rodgers (PW4), the mother of the victim, testified that on 24/10/2021 she was at home with the victim, nick named as PD (PW2), and PW2's aunt, Amina Rafael. That she went to fetch water and later at around 10.30 am, she went to her shop, cleaned the same and returned home for breakfast. Later, she went back to the shop where she stayed until around 02.40 pm. She came back home and decided to bath the victim. In the course of washing her private parts, the victim cried. PW4 took her inside the room, lay her on bed and inspected her vagina where she found blood and bruises. She asked the victim what had happened to her. In the course of interrogating her, the Appellant passed outside their house as they were co-tenants. When the victim saw him, she was distressed. She told her mother that her father beat her at her back.

PW4 then called her husband (PW1) and narrated to him the ordeal. The victim slept and woke up at 06:00pm. PW4 again asked the victim to take her to where she was injured, whereas the victim took her at the Appellant's door and pointed in his room. PW4 informed their landlord about the incident. She later went to the Police Station where she was issued with a PF3. She took the victim to Kaloleni Health Centre where they were referred to Mt. Meru Hospital. They were admitted at Mt. Meru Hospital. On the following day, PW4 was informed that her daughter was bleeding in the vagina. She was subjected to medical examination.

Another witness was Justine Manumbu (PW3) who testified that on 24/10/2021, while in his official duties at Mt. Meru Hospital, he received the victim accompanied with her mother. PW3 conducted a medical examination and laboratory test where he noted that the victim's vagina was penetration by a blunt object. He further found out that there were bruises in the vagina and lacerate to the intuits. He filled in the PF3 the next day, which was admitted as exhibit P1. According to PW3, the victim's hymen was found intact.

In her evidence, the victim accounted that it was kakaa (pointing at the Appellant) who injured her in her private parts in the afternoon. She named him as Salim. Another witness for the prosecution was David John Sambale (PW1), the victim's father. He stated that on 24/10/2021 around 04:00pm, while doing exercises at Aghakhan football grounds, he was phoned by PW4 who informed him that there was a problem at home. PW1 rushed home where PW4 narrated to him that when she was bathing the victim, she found blood in her vagina. She also informed him that the victim was playing outside under her aunt's care. That she saw the victim coming from the room of a young boy who was their co-tenant. They went to the police station and later to the hospital, where PW2 was attended and admitted. PW1 went back home where he found the Appellant talking to his wife's uncle. He asked the Appellant if the victim entered his room whereas the Appellant admitted that she entered but he did not rape her. PW1 took the Appellant to the police station for investigation.

On his part, the Appellant (DW1) denied to have raped the victim. He accounted that on the material day, he stayed at his house until 02:00pm when his twin brother and a colleague paid him a visit. The three of them left and headed to his twin's house, where they cooked and ate. DW1

returned to his room at 06:40pm and that at around 07:00pm he was arrested by a group of people who beat him and took him to the Central Police. He stayed at the police until his parents arrived to bail him out.

His evidence was augmented by that of Baraka Jackson (DW2), who stated that on 24/10/2021 at around 03:00pm, while in the company of the Appellant's twin (Selemani Hashim), they paid a visit to the Appellant. After some time, the three went to Selemani's house where they cooked and ate. That at around 12:40pm, each one of them left to their respective houses. On the next day, they did not see the Appellant only to be informed by his landlord that the Appellant was arrested. They informed the Appellant's brother who made a follow up of the Appellant's whereabouts.

As pointed out earlier on, after hearing evidence from both sides, the trial magistrate was satisfied that the charge against the Appellant was proved to the hilt. The Appellant was convicted and sentenced as above stated.

At the hearing of the appeal, the Appellant was represented by Mr John Shirima, learned advocate, while the Respondent Republic was represented by Ms Akisa Mhando, learned State Attorney. Hearing of the appeal proceeded through filing of written submissions.

The issue for determination is whether this appeal is merited; that is, whether the prosecution proved the charge against the Appellant beyond reasonable doubts as required by law. To answer this question, I will consider the submissions made by counsel for the parties and the records of the trial court.

In the first ground of appeal, the Appellant challenges the proceedings of the trial court for violating section 127(2) of the Evidence Act while receiving the evidence of the victim (PW2). According to the trial court record, the trial magistrate before recording the evidence of PW2, put up some questions in a bid to know whether the victim knew the nature of oath. The following is what transpired in the trial court on 12/05/2022:

> "...***PROSECUTION CASE PROCEEDS***
>
> ***PW2: What is your name?***
>
> *My name is Princes Patricia*
>
> ***How old are you?***
>
> *I am three years old*
>
> ***Are you studying?***
>
> *Yes, at class three*
>
> ***Which school are you?***
>
> *I am in form four*
>
> ***Which religion are you?***

I am Christian

Where are you worship (sic)?

I am going to church with my father.

Court: *I have examined the witness and found out that she is not capable to understand the meaning of oath therefore she did not swear.* ***But promise to tell the truth.*** *"*(Emphasis added)

It was Mr Shirima's submission that section 127(2) of the Evidence Act, Cap. 6 [R.E 2019] was violated. According to the Appellant's counsel, PW2 being a child of tender age, did not promise to tell the truth, which is fatal. He relied on the Court of Appeal decision in **Mohamed Said vs Republic, Criminal Appeal No. 145 of 2017** (unreported) to bolster his contention.

On her side, Ms Mhando did not agree with what was submitted by counsel for the Appellant. In her view section 127(2) of the Evidence Act was complied with because, having found that the victim did not know the nature of oath, the trial magistrate concluded that PW2 promised to tell the truth and proceeded to receive her evidence without oath or affirmation. The words by the trial magistrate in the learned State Attorney's view are sufficient to conclude that PW2 was aware of the duty of telling the truth and not lies. To reinforce her argument, Ms Mhando relied on the decision

in **Shani Chamwela Suleiman vs Republic, Criminal Appeal No. 481 of 2021** (unreported).

For easy of reference, section 127(2) of the Evidence Act which governs the manner of receiving evidence of a witness of tender age provides:

> *"A child of tender age may give evidence without taking an oath or making an affirmation* ***but shall before giving evidence, promise to tell the truth to the court and not to tell lies.***" (Emphasis added)"

Going by the above excerpt of the law, the trial magistrate after putting up questions to PW2 and procuring responses, she was convinced that the victim did not understand the nature of oath. She proceeded to receive her evidence without oath, presupposing that she had promised to tell the truth. However, I do not see anything in the explicit responses recorded suggesting that the child witness (the victim) promised to tell the truth and not lies. The inference that the witness promised to tell the truth and not lies appear to be the trial magistrate's own conclusion. Strict interpretation of the cited provision, requires that if the child witness does not understand the nature of oath, he or she may give evidence without oath or affirmation but subject to a promise to tell the truth and not lies. Such promise cannot be presumed, it must come from the witness's own words and the same must be reflected

in the record. This position was reaffirmed by the Court of Appeal in the case of **Yusuph Molo vs Republic, Criminal Appeal No. 343 of 2017** (unreported) where it was stated:

> *"**It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution's case** ... if there was no such undertaking, obviously the provisions of section 127(2) of the Evidence Act (as amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It was a fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value."* (Emphasis added)

There being no explicit words from the witness that she promised to tell the truth, it cannot be said that the evidence of PW2 was received in compliance with section 127(2) of the Evidence Act. This was a fatal infraction, rendering the witness's testimony nought of evidential value. I find merits in this ground and proceed to discard the testimony of PW2.

Having discarded the evidence of the victim, the question is whether the remaining evidence is capable of sustaining the Appellant's conviction. This leads me to assess the remaining grounds of appeal, which generally hinge on the analysis and evaluation of evidence tendered at the trial.

According to Mr Shirima, in addition to the procedural irregularities, the evidence at trial did not prove the guilty of his client. He accounted that PW4 did not tell the exact date and time when the rape incidence took place. That when cross examined by the Appellant, PW4 stated that she was not sure if the Appellant raped her daughter and she was not sure of the exact time when her daughter was raped. He also faulted the trial court record especially the preliminary hearing where it was stated that the victim was raped while playing with her fellow children when she met the Appellant, who undressed her clothes as well as his, and inserted his penis in the victim's vagina.

Mr Shirima further averred that the trial magistrate cosmetically summarized the Appellant's evidence without analysing it in relation to the prosecution evidence. He intimated that the defence evidence was not considered, which is a clear violation of section 235(1) of the Criminal Procedure Act, Cap. 20 [R.E 2022]. He relied on the decision of **Kaimu Said vs Republic, Criminal Appeal No. 391 of 2019** (unreported), which held that it was a misdirection on the part of the trial court to deal with the prosecution evidence in isolation of the defence. Mr Shirima also urged this Court to consider that the Prosecution evidence was full of material contradictions

rendering such evidence unworthy of belief. The contradictions cited related to the age of the victim, the identification of the rapist and the circumstances prior and after the alleged rape incidence.

It was Mr Shirima's further contention that the prosecution failed to summon key witnesses such as Amina Rafael, who was allegedly taking care of the victim. Ha also faulted the prosecution for failure to summon the landlord and the police investigator. That, failure to summon such material and key witnesses entitles the court to draw an adverse inference against the prosecution. His assertion was backed up by the decision in **Pascal Mwinuka vs Republic, Criminal Appeal No. 258 of 2019** (unreported).

On the other hand, the learned State Attorney was of the view that the Prosecution evidence was water tight. She premised her submission by the cherished principle that the true evidence of rape comes from the victim as amply explained in **Godi Kasenegala vs Republic, Criminal Appeal No, 10 of 2008** and **Seleman Makumba vs Republic, Criminal Appeal No. 94 of 1999** (both unreported). As the evidence of the victim has been discarded, I will not dwell further on her submissions on this front. Suffices to add that, Ms Mhando also relied on the PF3 tendered by PW3. To her, the

PF3 proved that there was penetration and bruises as illustrated by PW3 who examined the victim.

On the failure by the Prosecution to call key witnesses, Ms Mhando urged the Court to ignore such assertion as, according to section 143 of the Evidence Act, no specific number of witnesses is required to prove a particular fact. She maintained that what is required is not the number of witnesses but the weight placed on the evidence adduced. That, if the Appellant found out that the said Amina Rafael, the landlord and the police authority were key witness, he ought to have summoned them to testify on his behalf.

I have re-examined the evidence and is in agreement with the Appellant that the evidence against him fell short of the standards required in criminal cases. **One,** the Appellant's identification as pointed out by Mr Shirima was not watertight. According to PW4, after she had bathed the victim, the Appellant passed outside their house, but despite being asked who ravished her, still PW2 did not mention the Appellant as the perpetrator. On the contrary, she mentioned her father as the person who beat her at her back. That was at about 2:40pm. Then it is said that the victim slept until 06:00pm

when she woke up and pointed at the Appellant's door. It is trite law that the ability of the victim to name the suspect at the earliest possible opportunity is an assurance of the witness's reliability unlike delay or failure to do so. That position was reaffirmed in the case of **Marwa Wangiti Mwita and Another vs Republic [2002] TLR 39** where the Court succinctly stated as follows:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability; in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

In the case at hand, PW2 did not name the Appellant as the perpetrator as soon as she was asked by PW4. She mentioned her father as the person who beat her at the back. The Appellant, according to PW4, was pointed out at about 06:00pm, when the victim woke up. Also, there is no record whether the victim knew the Appellant before, taking into account that even her father (PW1) stated that he did not know the name of the Appellant as he got to know him at the police station. The above state of affairs sufficiently leads to a conclusion that the Appellant's identification by the victim was doubtful.

Two, there were glaring contradictions and inconsistencies in the evidence of the prosecution witnesses. As submitted by Mr Shirima, the age of the victim was not certain. In their testimonial accounts, while PW1 and PW3 stated that the victim was three years old; PW4, the victim's mother stated that the victim's age was two years. This contradiction may have no bearing in the overall consequence of the case, but coupled with other inconsistencies, it is indicative that the prosecution may not have been telling the truth. PW1 also testified that he was informed by his wife (PW4) that she saw the victim coming from the room of a young boy who was their fellow tenant. Such piece of evidence contradicts the evidence adduced by PW4, who stated that it was the victim who pointed at the Appellant's door and room, and later identified the Appellant as the perpetrator. There is another piece of evidence tending to contradict PW4's own evidence. PW4 was recorded to have said that she went to the shop with her two daughters and stayed there up to 02:40pm when she returned home. It was not made plausible whether the victim is among those daughters who went to the shop with their mother or not. The above pointed out contradictions and inconsistencies, cast doubts on the prosecution evidence as they go to the root of the matter.

In the case of **Mohamed Matula vs Republic, (1995) TLR 3** which was referred to in **Moshi Hamisi Kapwacha vs Republic, Criminal Appeal No. 143 of 2015** (unreported), the Court considered among other issues, contradictions and inconsistencies in the prosecution evidence and the duty of the trial court to address the same. Particularly, the Court held:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."*

The contradictions and inconsistencies above highlighted are not minor in my view. They go to the root of the matter. Unfortunately, the trial court blindly determined the case without noting the contradictions and trying to resolve them. The result is to throw more doubts into the prosecution case in favour of that of the Appellant. See: **Shabani Mpunzu@ Elisha Mpunzu vs Republic, Criminal Appeal No. 12 of 2002** and **Michael Godwin & Another vs Republic, Criminal Appeal No. 66 of 2002** (both unreported).

Lastly, I find merits on the submission made regarding the way the trial magistrate dealt with the defence evidence. The defence evidence was not

wholly evaluated. That notwithstanding, the available evidence cannot marshal the conviction against the Appellant. Some pieces of the prosecution evidence raise some eyebrows. For example, PW4's evidence that she bathed the victim at 02:40pm, whereas she noted that she was bleeding in her private parts and had bruises and she was crying. But PW4 was content to let the victim sleep until 06:00pm! One may wonder, how could PW4 let the victim, who was bleeding in her vagina and had visible bruises, to sleep for all those hours without bothering to know the cause of the bleeding? Why didn't she take her to the hospital instantly having noted the blood and bruises? The answer to these questions leaves a lot to be desired.

From the foregoing, and having expunged the evidence of PW2, the remaining evidence falls short to sustain the conviction against the Appellant. It has been held time and again that the best evidence in sexual offences must come from the victim, consistent with the dictates of section 127(6) of the Evidence Act and the authorities referred to me, including **Selemani Makumba vs Republic** (supra). Taking into account the apparent contradictions and inconsistencies in the prosecution evidence and the fact that the Appellant's identification was shaky, such evidence could not be relied upon to mount a conviction against the Appellant. The prosecution

evidence was weak. Thus, it is the finding of this Court that the case against the Appellant was not proved beyond reasonable doubts in consonance with the holding in **Jonas Nkize vs Republic [1992] TLR 213**.

Given the above discussion and analysis, the appeal has merits. It is allowed in its entirety. The Appellant's conviction is hereby quashed and the sentence against him set aside. The Appellant is to be released from prison forthwith, unless he is held for some other lawful cause.

Y. B. Masara

JUDGE

28th April, 2023