IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 87179 OF 2023

(Originating from Criminal Case No 71 of 2022 before District Court of Singida)

JUMA SAID MRISHO@IGWE..... APPELLANT

VERSUS

THE REPUBLC ..... RESPONDENT

Date of last order: 07/03/2024

Date of Judgment: 20/03/2024

LONGOPA, J.:-

This is an appeal against conviction and sentence to thirty (30) years imprisonment for offence of rape contrary to Section 130(1), (2) (e) and 131(1) of the Penal Code, Cap 16 R.E. 2022. It is alleged that on 5th July 2022 at Ng'aida area, Kisaki Ward, Mungumaji Division within the District and Region of Singida did have a sexual intercourse with one Bahati D/O Issa Athumani a girl of 17 years.

The appellant denied the charges levelled against him thus compelling the prosecution to summon five (5) witnesses of the prosecution and three (3) exhibits were tendered and admitted to prove the offence.

The appellant being dissatisfied with the conviction and sentence, appealed to this Court challenging the whole decision of the trial Court. The appellant preferred six grounds of appeal as follows:

> *1. That, the prosecution failed to discharge the burden of proof in the standard required by the law that prosecution side in criminal cases has to prove beyond reasonable doubt.*
> *2. That, there was a contradiction between the statement of the victim as the victim said she arrived at home after she gained strength and found both her mother and brother sitting while the judgment provides that she arrived at home at 2200 hours and found her mother sleeping till she knocked the door.*
> *3. That, the trial court relied on expert evidence without proving to whether the sperms ordour belonged to the accused person (Forensic expert was highly needed to prove the allegation).*
> *4. That, the accused person was not interrogated hence he was denied with the right of calling for relative, friend, advocate or justice of peace.*

5. That, there is a contradiction between the statement of PW 5 was sworn and told the trial Court that she has not seen accused's phone while the statements recorded at the police station provided to the contrary.

6. That, PW 5 the investigator told the court that she was not present at the time when the accused was taken his statement and there was no justice of peace because it was late. This is an injustice in the administration of criminal justice.

7. That, I hereby ask the High Court to quash both conviction and sentence and set me at liberty.

On 07/03/2024, the parties appeared before me for oral submission on the appeal. The appellant fended for himself while the respondent was represented by Ms. Neema Taji, learned State Attorney.

When the appellant was given opportunity to submit he prayed to adopt the grounds of appeal contained in the petition of appeal to form part of his submission. To begin with the appellant stated categorically that there was no any statement of the appellant recorded at the police station. The investigation officer (PW 5) did not tender any cautioned statement of the appellant.

The appellant argued that there were clothes of the victim with blood stains though the same were not tendered as exhibits in the proceedings

before the Court. The appellant argued that such being the situation it is unlikely that such offence did occur.

Also, the appellant argued that case was heard unprocedurally as it stated with Hon. U.S. Swallo, Principal Resident Magistrate then the same was finalised before Hon. R.A. Oguda, Principal Resident Magistrate. The latter Magistrate in compliance with provision of Section 214 of the Criminal Procedure Act, Cap 20 R.E. 2022 asked the appellant if the hearing should start afresh or otherwise and the appellant opted the same to start afresh. The complaint is that evidence tendered before Hon Swallo is the one appearing on record. As such, justice was not done to the appellant for the evidence recorded by the previous Magistrate relied on the decision.

Moreover, the appellant complained that he was not availed opportunity to defend himself before the trial Court. This is because he was not given that opportunity to defend himself after the prosecution had concluded its case. He lamented that the trial magistrate denied him the right to defend himself.

Another complaint was regarding the failure to bring to court of the arresting officer to substantiate the arrest. There was a failure to bring to court the local leadership from the vicinity where the appellant lived brings a lot of doubt that alleged offence has not occurred at all. At this juncture, the appellant prayed for the appeal to be allowed.

On the other hand, the respondent objected the appeal and urged this Court to uphold the decision both conviction and sentence of the District Court of Singida. The respondent reiterated that regarding the legal issues raised by the appellant on the change of the Magistrate is well covered by Section 214 of the Criminal Procedure Code, Cap 20 R.E. 2022. This was fully complied with by the trial Court as the hearing of the case started afresh on the request of the appellant. This is reflected on page 13 of the proceedings.

Further, about the right to defend oneself, it is submitted that pages 30 to 32 of the proceedings indicates that after the prima facie case was established, the appellant was afforded opportunity to defend himself in compliance with section 231 of the Criminal Procedure Act, Cap 20 R.E. 2022. It was on 18/8/2023 when the appellant upon being fully informed about his rights he stated that he would bring three witnesses apart from himself testifying on affirmation. On 18/8/2023 the appellant was not in court and the hearing of the defence case was adjourned. For the next three consecutive hearing dates the appellant was not ready to proceed. on 01/09/2023, the appellant stated explicitly that he would not defend by testifying before the Court.

It was reiterated that the provisions Section 231 (3) of the Criminal Procedure Act, Cap 20 R.E. 2022 directs the Court to proceed when the accused person fails to defend oneself upon being afforded opportunity thus the Court is empowered to record that accused failed to defend

himself. In the circumstances of this matter, the appellant refused to defend himself upon being afforded all opportunities severally. Thus, the respondent urged this Court to find out that this ground also lacks merits and deserved to be dismissed.

In response to the first ground on the proof of the case beyond reasonable doubt, it is true that the prosecution is duty bound to prove the case as per Section 110 of the Evidence Act, Cap 6 R.E. 2019. The prosecution summoned a total of five witnesses to establish the offence against the appellant.

It was reiterated that PW 1 was the victim who proved by the identification of the accused by naming him properly and pointing at him in Court. The victim stated that the appellant is one who penetrated her vagina by undressing her before penetrating her. It was the evidence of the victim that the appellant ejaculated on her vagina. It was evidence of PW 1 that she was attacked to the extent of becoming unconscious. It was PW 1's evidence that upon gaining strength, PW 1 went home and immediately report the incidence. It is obvious that there was penetration of the vagina of the victim without her consent.

According to the respondent, this evidence is supported by PW 4 who is the medical doctor who examined the victim. PW 4 stated that she found bruises on the victim's neck, flammed eyes and the pants were having reddish stains and her vagina was indicating that it had sperm ordour. PF 3

was admitted as Exhibit P. 3 as appears on pages 26 to 27 of the proceedings.

It was further submitted that PW 3 who is victim's mother also testified that the age of the victim. PW 3 stated that the victim was born on 18/7/2005 thus she was 18 years old at the time of adducing evidence. There was an affidavit of PW 3 in lieu of the birth certificate as Exhibit P 2 at page 21 of the proceedings.

Moreover, the victim being a schoolgirl, the prosecution called PW 2 a Form Three class teacher at Mfumbu Secondary School. PW 2 tendered the School Attendance Register that was admitted as Exhibit P1 as appears in page 20 of the proceedings.

Finally, the Investigation officer testified as PW 5 to support the arrest of the appellant. All these witnesses proved the case beyond reasonable doubts. It was prayed that this ground on failure to establish the offence beyond reasonable doubts be dismissed for lack of merits.

On the second ground on contradiction of PW 1 and PW 3, it was submitted that there is no such alleged contradiction. On page 18 of the proceedings indicates that PW 1 arrived home at around 2200hours and she knocked the door as her mother was asleep. This is what is reflected on page 2 of the judgment. It was submitted that this ground also lacks merits. It deserves to be dismissed for being unmeritorious.

On the third ground where the appellant is challenging the expert evidence, it was submitted that the Court did not rely only and solely on the PW 4 testimony. The Court applied the totality of prosecution evidence to convict. The available evidence indicates that apart from PF 3 and oral evidence of PW 4 is sufficient to warrant conviction. The evidence of the victim and oral evidence of PW 4 support each other. This ground of appeal also lacks merits thus it should be dismissed.

The 4th and 6th grounds of appeal were jointly argued regarding injustices due to absence of cautioned statement. It was argued that given there was no cautioned statement tendered as evidence in Court, there was no need to call a friend, relative or justice of peace. There is nothing to complain as the Court did not rely on admission of the appellant. The same should be dismissed for bring unwarranted complaint on part of the appellant.

On 5th ground of appeal on failure to bring some important witnesses, it is submitted that section 143 of the Evidence Act, Cap 6 R.E. 2019 does not require a specific number of witnesses. This is not fatal not to bring a witness who the prosecution does not consider important. These grounds of appeal lack merits thus the same should be dismissed for lack of tangible reasons. The respondent reiterated that the decision of the District Court was correct decision, thus the same should be upheld as it presents a strict compliance to the legal requirements on criminal cases.

In a brief rejoinder, the appellant stated that evidence of the medical doctor has not proved that it is the appellant who penetrated the victim. The Government Chemist was supposed to verify that sperms alleged to have been found on the vagina of the victim were belonging to the appellant.

It was reiterated that evidence of the investigation officer indicated that a phone was recovered from the scene of crime. It was required to be tendered in Court. However, it was not tendered thus failure to produce it makes occurrence of the offence more improbable that the same happened.

The evidence of the victim's mother is that she knows me but, in the proceedings, it is not so. Also, the teacher did not prove that offence of rape was committed against the student victim.

It was the appellant's argument that there is no documentary evidence tendered regarding any statements made at the police station. This should be reviewed by this Court to ensure justice is done. The appellant prayed that this Court be pleased to acquit the appellant as he denies the responsibility for the offence.

Having heard the submissions from both parties, it is now my turn to examine the grounds of appeal raised. I shall start the analysis of the grounds of appeal on alleged injustice in administration of criminal justice.

It is pegged on alleged denial of the right to call a friend, relative or lawyer of appellant's choice or justice of peace on one hand and failure to take the appellant to the justice of peace.

From the outset, this set of grounds is devoid of merits. The reason is simple. The available evidence on record does not refer to any cautioned statement that would essentially require observance of the complained aspects. First, there was neither a cautioned statement nor confession made by the appellant at the police station. Second, the judgment of the trial court does not at any point referring to any statement of the appellant made at police station or before a justice of peace to form part of the evidence.

The appellant is not lamenting that on arrest he was denied the right to communicate with a relative, friend, or lawyer of his choice but that he was afforded the right to call any of them during the time of recording of his statement. As there is no evidence of any statement of the appellant being recorded, he cannot be heard complaining that he was not afforded opportunity to call a close relative, friend or lawyer or to record the same before a justice of peace.

There are two instances where the question of involving a lawyer, relative or friend of the accused. First, is when the police officer investigating a case intends to interrogate the accused. Second, where the accused requests to be availed facilities communicate with his relative,

friend or lawyer. This is covered by section 53(c) (ii) and 54 of the Criminal Procedure Act, Cap 20 R.E. 2022. None of the circumstances exists in the case at hand.

It is my settled view that the complaint by the appellant on that he was not afforded right to call a relative, friend or a lawyer is unwarranted. I shall dismiss the 4th and 6th grounds of appeal for being destitute of merits.

The second set of grounds of appeal relates to the contradiction of the prosecution evidence. There are two pointed contradictions. First, timing of arrival back home of the victim and state of her mother on arrival of victim. Second, contradiction on the appellant's mobile phone recovered at the scene of crime. It is alleged that evidence of PW 1 testified that she found her mother and brother at the sitting while the judgment indicates that the victim found her mother sleeping thus, she knocked the door.

I have thoroughly perused both the judgment and proceedings on this aspect, I am satisfied that that judgment tallies with the evidence as found in the proceedings. At page 18 of the proceedings, the PW 1 stated that she arrived home around 22:00 hours and knocked the door as her mother was sleeping and she opened the door. That is the content of the judgment of trial court at page 2.

On the second limb regarding evidence of PW 5 in cross examination stated to have not seen any mobile phone of the appellant. PW 5 stated

categorically that she did not interrogate the appellant. That is evidently reflected on page 4 of the judgment. At no point in time have PW 5 stated on record that appellant's mobile phone was retrieved from the scene of crime and that it was in custody of the police.

Perusal of record of the trial court both judgment and proceedings are in concurrence with each other. In fact, judgment is a lucid reflection of summarised evidence with analysis of the same. There is nothing contradictory in respect of these two limbs of alleged contradictory evidence. I shall proceed to dismiss the 2nd and 5th grounds of appeal for lack of merits.

The third category of grounds is challenging the expert evidence of the medical doctor that there was a need for a forensic expert to verify that sperm ordour belonged to the appellant. According to the appellant, it was wrong for the trial court to rely on the evidence of the PW 4 who was a medical practitioner without corroboration that sperms found on the victim were his.

To address this aspect, it is important to state about three aspects. First, the role of expert opinion in criminal cases. Second, the evidential value of expert opinion and reliance by the court on the expert opinion. Third, effect of admission of expert opinion in trials.

It should be noted that medical report is one of the types of expert evidence that law recognises. Section 240 of the Criminal Procedure Act, Cap 20 R.E. 2019 provides that:

> *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.*

That being the case, a report made by medical practitioner may be admitted in court to establish particular facts of the case. In the instant appeal, PF. 3 that was signed by PW 4 who attended and examined the victim on 06/07/2022 after the alleged rape incident happened on 05/07/2022 was admitted without any objection from the appellant.

In the case of **Daudi Anthony Mzuka vs Republic** (Criminal Appeal 297 of 2021) [2023] TZCA 165 (30 March 2023) (TANZLII), at pages 18-19 the Court of Appeal restated circumstances where the trial court would rely on expert opinion. It stated that:

> *It is trite that the evidence of an expert is not conclusive rather a non- binding opinion which can only be acted upon the court being satisfied that it was beyond circumspection. This Court and its predecessor have pronounced themselves in various decisions on the non-binding nature of evidence of experts including medics like*

PW3 in this appeal where it is found that there are good reasons for doing so. See for instance: ***Hilda Abel v. Republic*** *[1993] T.L.R 246 and* ***Nyinge Suwata v. Republic*** *[1959] EA 974, to mention just a few. It is no wonder that, in* ***Selemani Makumba v. Republic*** *(supra), the Court was emphatic that a medical report may help to show that there was sexual intercourse but cannot prove that there was rape stressing that, true evidence of rape has to come from the victim.*

From this decision, the expert opinion is not conclusive on its own. It must corroborate other evidence. It is only relied upon by the court satisfaction that such evidence is correct and presents a clear opinion of a particular state of the events as perceived by that relevant professional.

In the case of **Kidai Magembe vs Republic** (Criminal Appeal 228 of 2021) [2022] TZCA 346 (13 June 2022) (TANZLII), the Court of Appeal observed that:

An expert is not to find facts but to express his opinion on the basis of assumed facts. It is based on the above-cited authority that we do not expect PW7 to have conjectured that nothing else could have been inserted into the victim's private parts other than a man's manhood. To that end, we do not entertain any doubts whatsoever that the findings

by the medical expert witness proved that the offence stated in the charge had been committed against PW6 as penetration which is one of the ingredients of the offence of rape was proved beyond reasonable doubt.

In the instant appeal, PW 4 testified to have examined victim generally on physical appearance, and laboratory test were conducted. It was PW 4's evidence that she scratches on victim's neck, her eyes were flamed, her labia were swollen, her virginity was destroyed and there were whitish dirty with sperm ordour at the victim's vagina. Also, high vagina swab test revealed spermatozoa presence thus the doctor decided to give her post explosure prophylaxis. In cross examination by the appellant, PW 4 stated that after examination of the victim she identified bruises and inflammation and that such inflammation was due to sexual intercourse. PW 4 concluded that a report is normally prepared on what have been seen.

It is my settled view that evidence of PW 4 is credible and reliable to establish that there was penetration of the victim's vagina. That is the only role PW 4 had about her evidence. It was not her duty to go a step further to conclude that it is the appellant who penetrated the victim. That would amount of turning the expert opinion an eyewitness which is not the case as she stated by PW 4 that was not at the scene of crime.

I concur with the findings of the trial court magistrate that PW 4's evidence corroborated the evidence of the victim that there was penetration of her vagina by the appellant. It is lucid that explanation by PW 4 cemented the evidence on record that penetration of victim's vagina existed. PW 4 informed the trial court that he has four years working experience ad she attained her bachelor's degree in medicine from Bugando University and she demonstrated about her duties including to examine, treat sick people and to adduce expert opinions in court on patients she has attended where a need arises.

In cross- examination, PW 4 gave lucid and straight answers to all issues intended to challenge her evidence. She ably demonstrated her understanding of evidence she adduced in Court. PW 4's competence was not challenged at all. As such, it is certain PW 4 is reliable and credible witness. This was reiterated in the case of **Abdallah Athumani vs Republic** (Criminal Appeal No. 669 of 2020) [2023] TZCA 139 (23 March 2023) (TANZLII), where the Court of Appeal, at pages 12-13 stated:

> *Having examined the record, we uphold Ms. Luzungana's submission that* ***PW5 fully explained his medical credentials.*** *He testified that he had been in active practice of his profession for thirty-five years and indicated in Exhibit P4 that at the material time he held the designation of Principal Assistant Medical Officer (PAMO).* ***It is significant that he was not cross examined on***

his qualifications, implying that no attempt was made to rebut the presumption as to his competence.

In concluding this part, I must state that once all the procedures for tendering documentary evidence as demonstrated in relevant case laws such evidence forms part of the evidence on record. In the case of **Erneo Kidilo & Another vs Republic** (Criminal Appeal 206 of 2017) [2019] TZCA 253 (21 August 2019) (TANZLII), at pp.11-12, the Court of Appeal noted that:

> *Contents of these exhibits carry detailed facts which affect ingredients of the counts preferred against these appellants. The obligation to read out the facts contained in the tendered exhibits goes a long way to fully appraise the accused concerned all of facts that are locked in the exhibits. This appraisal in light of full knowledge of facts in exhibits will enable the accused person to either accept the facts therein as true, or even reject them.*

At this juncture, I am certain that this ground od appeal has been analysed sufficiently to warrant its disposal. The 3rd ground of appeal lacks merits thus it is hereby dismissed for lack of cogent reasons.

The last ground of appeal is the appellant's challenge that the prosecution has not proved the case within the standard required of proof beyond reasonable doubt. To address this ground, it is crucial to analyse the ingredients of the offence, the weighing of evidence of both sides - prosecution and defence, and proof of age.

The first aspect on this part is ingredients of the offence. The appellant stood charged of rape contrary to Section 130(1), (2) (e) and 131(1) of the Penal Code, Cap 16 R.E. 2022. Essentially, the ingredients are mainly two. First, there should be sexual intercourse between the accused/appellant and victim without her consent. Second, the victim was aged below eighteen years.

In the case of **Kambarage Mayala vs Republic** (Criminal Appeal No. 208 of 2020) [2023] TZCA 17944 (13 December 2023) (TANZLII), at page 9 the Court of Appeal observed lucidly that:

> *This provision creates an offence now famously referred to as statutory rape. What are required to be proved are two facts: One, that the accused had sexual intercourse with a girl, with or without her consent. The sexual intercourse is proved by penetration of her vagina, even a slight penetration is sufficient to constitute sexual intercourse. Two, it must be proved that, the girl is under 18 years of age and that, if she is 15 or more years of age, it must be shown that she is not his wife.*

It is incumbent upon the prosecution to establish existence of both elements of the offence. From the above decision, age of the victim is important to be established. In the instant appeal, PW 1 and PW 2 evidence is to the effect that the victim was 17 years old when the incident of rape happened. Both victim and her mother (PW 2) affirmed that victim was born on 18/07/2005 and PW 2 tendered affidavit in lieu of the birth certificate as Exhibit P.2.

The testimonies of the duo indicate that the victim had not attained the age of 18 years old at the time of the ordeal. In the case of **Daudi Anthony Mzuka vs Republic** (Criminal Appeal 297 of 2021) [2023] TZCA 165 (30 March 2023) (TANZLII), at page 13, the Court of Appeal observed that:

> *It is trite law that the victim's age can be proved through a parent, guardian, school teacher, birth certificate or the victim herself (see **Issaya Renatus v. Republic**, Criminal Appeal No. 54 of 2015 (unreported). In this case, the victim's father (PW2) testified as such that PW1 was 8 years old. At any rate, it was not suggested that PW1 was above the age of 18 years in which case consent would have been necessary.*

This evidence was also corroborated by evidence of PW 2 who was the victim's class teacher at the time of alleged offence. This witness

tendered Attendance Register indicating that the victim was a school girl at Mufumbu Secondary School.

In respect of element of consent, it is clear from the evidence of PW 1 that on 05/07/2022 at 18:00 hours the appellant grabbed and dragged the victim to the bush, undressed her tight and underwear, then removed his trouser and inserted his penis into victim's vagina. It was PW 1's evidence that she was raped, blood came out and the appellant ejaculated his sperms on the victim's vagina. At the same time the appellant was beating the victim causing her lose consciousness. It was until later at around 22:00 hours when the victim regained strength. She returned home and narrated the ordeal to her mother (PW 3) who immediately checked on the victim and took her to police station. The victim named the appellant one Juma Said Mrisho as the assailant.

In cross examination by the appellant, the victim she reiterated that it is the appellant who sexually molested and abused her by forcing her to have sex without her consent. PW 1 testified that it was her first time to have sexual intercourse and it was by force through rape. At that night the victim took the family and neighbours to the scene of crime.

This evidence of the victim is lucid and straightforward that victim's vagina was penetrated. PW 4 corroborate this evidence by testifying that she examined PW 4 and the findings revealed that victim's labia were swollen, her virginity was destroyed and there were whitish dirty with

sperm ordour at the victim's vagina. Also, high vagina swab test revealed spermatozoa presence. All these concluded that the victim's vagina was penetrated through sexual intercourse.

Indeed, the evidence of PW 1 has established with credibility that it is the appellant who penetrated her vagina by force. PW 1 demonstrated that it was around 18:00 hours when the appellant grabbed her by force to the bush where he forced to have sexual intercourse with her without her consent. PW 1 stated further that she knew the appellant prior to incident day as she used to see him regularly at the centre near their place.

In the case of **Anthony Tito vs Republic** (Criminal Appeal No. 605 of 2021) [2024] TZCA 45 (16 February 2024) (TANZLII), at pages 13-14, the Court of Appeal stated that:

> *In the case at hand, the trial court believed PW1 as the witness of truth and relied on her evidence to find the appellant's conviction. That finding was upheld by the first appellate Court. It found that whereas the age of the victim was proved by her birth certificate, her evidence that she was raped by the appellant was credible and therefore, proved the offence beyond reasonable doubt. Indeed, as observed by the two courts below, the best evidence in sexual offences is that of the victim. Such evidence of the victim alone may be acted upon without*

corroboration once the court is satisfied that the same is credible.

The totality of the evidence of PW 1, PW 2, PW 3, PW 4 and PW 5 have effect of proving that an offence of rape was committed by the appellant. The case against the appellant was proved beyond all reasonable doubt as required by the law. Evidence of the prosecution is consistent and complements each other. It is credible and reliable as the appellant did not manage to shake it during cross examination of the witnesses.

Such evidence is in line with the decision in **Hezron Ndone vs Republic** (Criminal Appeal No. 263 of 2021) [2024] TZCA 15 (6 February 2024) (TANZLII), the burden and standard of proof was restated. At page 12, the Court of Appeal reiterated that:

It is momentous to state that, in our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution. This is a universal standard in all criminal trials and the burden never shifts to the accused. As such, it is incumbent on the trial court to direct its mind to the evidence produced by the prosecution in order to establish if the case is made out against an accused person. This principle equally applies to an appellate court which sits to determine a criminal appeal in that regard.

In respect of what amount to reasonable doubt, the Court at page 13 stated that:

> *The term beyond reasonable doubt is not statutorily defined but case laws have defined it, in the case of* ***Magendo Paul & Another v. Republic*** *(1993) T.L.R. 219 the Court held that: For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed.*

Having perused and analysed all the evidence on record, I am of the settled view that the prosecution managed to prove their case against the appellant beyond all reasonable doubts. The evidence is watertight to warrant nothing else but conviction of the appellant as doer of the unlawfully carnally knowing the victim against her will. The first ground of appeal collapses for being devoid of merits.

During the oral submission of the grounds of appeal, the appellant raised two aspects on procedurally irregularities that might have impacts on the appeal at hand. These relate to change of the trial magistrate and the alleged denial of the trial court to afford right to defence to the appellant.

On the right to defend himself, the record reveals that the trial court availed all opportunities to the appellant to defend himself upon ruling of

the prima facie case against the appellant. As submitted by the respondent, pages 30 to 32 of the proceedings indicate that the appellant was afforded opportunity to defend himself in compliance with section 231 of the Criminal Procedure Act, Cap 20 R.E. 2022. It was on 18/8/2023 when the appellant upon being fully informed about his rights he stated that he would bring three witnesses apart from himself testifying on affirmation. On 28/8/2023 the appellant was in court and the hearing of the defence case was adjourned as appellant stated that he was not ready to defend on that material date. The case was adjourned on account of appellant's statement he was not ready to proceed to defend oneself. On 01/09/2023, the appellant stated explicitly that he would not defend by testifying before the Court.

It is settled that trial court afforded all the opportunities to the appellant to defend himself by informing him about his right to enter his defence and call any witnesses. Thus, the complaint that appellant was not afforded opportunity is extremely far from the truth. It is not true as the record indicates otherwise. First, the court informed him about the requirement to enter defence. Second, required him to state the mode of the defence whether on oath or affirmation or otherwise. Third, the appellant was given right to call any witnesses of his choice. Fourth, after several adjournments to allow the appellant to enter defence, he explicitly in lucid terms informed the trial court that he would not defend.

All these requirements are what a trial court is required to do in the circumstances of fair hearing. In the case of **Hassan Shabani @ Ugoya vs Republic** (Criminal Appeal 60 of 2022) [2022] TZCA 262 (11 May 2022) (TANZLII), the Court of Appeal, at page 10 stated that:

> *Therefore, according to the record, the trial court sufficiently explained the rights of defence to the appellant, that is why he informed the court that he would give his defence on oath and call witnesses on his behalf.*

The trial magistrate observed all the legal requirements of the law. It is the appellant himself in his own volition chose not to defend himself. This was in line with the decision in the case of **Nestory Simchimba vs Republic** (Criminal Appeal 454 of 2017) [2020] TZCA 155 (1 April 2020) (TANZLII), where the Court of Appeal noted that:

> *The right of an accused person to defend himself before his rights are determined is taken or an adverse action is taken by a court of law is a constitutional right as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977. To uphold that right in the conduct of criminal trials, section 231(1)(a)(b) of the CPA was enacted. No one else can wish away that right except the appellant himself by expressly opting out not to render his defence.*

As the appellant opted not to defend himself, he cannot be heard to complain about the choice not to defend. The trial Court could not have forced him to act differently. Appellant had nothing to defend on having realised that the truth revealed in evidence against the appellant. Lamentation of the denial of the right to defend himself has nothing of truthful nature within it.

On the other hand, complaint on the evidence recorded by the former trial magistrate does not have an iota of truth. It was the appellant option that the case should commence afresh after former trial magistrate was asked to recuse himself by the appellant. The evidence of the prosecution case commenced afresh in compliance with the provisions of section 214 of the Criminal Procedure Act, Cap 20 R.E. 2022 thus the complaint that evidence recorded by former trial magistrate is not tenable. It must be underscored at this juncture that change of trial magistrate and commence the case afresh does not bar the witnesses whose evidence was recorded by former trial magistrate to adduce evidence.

Commencing hearing afresh means the witnesses are recalled and tender their evidence as if they have not tendered the same before another magistrate before the change. The processes of examination of witnesses restarts and the witnesses are subjected to cross examination as always it the law requires.

In the case of **Stephano s/o Victor @ Mlelwa vs Republic** (Criminal Appeal 257 of 2021) [2023] TZCA 152 (29 March 2023) (TANZLII), the Court of Appeal at page 16 stated that:

> *Much as the reason for transfer was not explained to the appellant, given the peculiar circumstance of the present appeal, we are of the settled mind that the omission did hot prejudice the appellant since throughout the trial, he did not complain and neither did he state in the ground of appeal as to how he was prejudiced - see: the case of* ***Tumaini Jonas v. The Republic (supra).*** *More so, there is nothing to suggest that the successor magistrate assumed jurisdiction without a reason.*

In the circumstances of this case, the appellant has nothing to complain about. When the witnesses who had testified were recalled especially PW 1 the appellant was afforded all opportunity to cross examine the witness.

From this analysis, it is lucid that the prosecution established the offence of rape c/s 130(1), (2) (e) and 131(1) of the Penal Code, Cap 16 R.E. 2022 against the appellant beyond all reasonable doubt. In the circumstances, I am certainly convinced that this appeal lacks cogent reasons.

I shall proceed to dismiss the appeal in its entirety. The conviction and sentence entered by the trial court is hereby upheld for being correct decision that adhered to all the legal principles. The appeal stands dismissed.

It is so ordered.

DATED at **DODOMA** this 20th day of March 2024.

Longopa.

E.E. LONGOPA
JUDGE
20/03/2024.