THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 17 OF 2023

GERODI SEVERINE WILLA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the District Court of Ludewa at Ludewa)

(Hon. M.F. Lukindo - RM)

dated the 25th day of November, 2019

in

Criminal Case No. 58 of 2018

JUDGMENT

Date of Last Order: 11/03/2024 &
Date of Judgment: 05/04/2024

S. M. Kalunde, J.:

The appellant in this appeal was arraigned before the District Court of Ludewa (henceforth "the trial court") with the offence of rape contrary to sections 130(1) and (2)(b) and 131(1) of **the Penal Code [Cap. 16 R.E. 2002]** now **[Cap. 16 R.E. 2022]**. The prosecution alleged that on the 25th day of June, 2016, at Lusapo - Lupande Village within Ludewa District in Njombe Region, the appellant had carnal knowledge of GYM (identity withheld in accordance with **CJ's Circular**

No. 2 of 2018). He denied the charged and full trial ensued. At the end of the trial, he was convicted and sentenced to thirty years imprisonment.

The persecution case was briefly that; on the 25th day of June, 2016, late at night, the victim (**Pw1**) heard a knock on the door. Upon opening the door, she saw the appellant standing outside the door. Apparently, she had not seen the appellant before the incident. With the door open, the appellant, allegedly, forced his way in and pulled the victim back inside the house. The victim raised an alarm but no one responded. Thereafter the appellant grabbed the victim and pushed her onto the bed. He then undressed her and himself and forced his way into her private parts. After finishing the heinous act, the appellant allegedly threatened the victim that he would kill her if she told anyone about the incident. Thereafter, they covered themselves in a blanket and slept together.

Later, after the appellant had fallen asleep, the victim sneaked outside the house, locked it from outside and rushed to her sister's house to notify her sisters' daughter about the incident. From her sister's house, they headed to Edward Joseph Mgeni (**Pw3**), the hamlet chairman to report the incident. Upon receipt of the information, the

chairman directed, Eliad Willa (**Pw2**), a local militia to go the victims house and arrest the appellant. The team headed back to the victims' house to arrest the appellant.

The story is further that, since the door had been locked from the outside, upon arrival at the house the victim opened the door. Pw2 and Pw3 proceeded to the victims' room and found the appellant sleeping on the victims' bed naked. They arrested and tied him with ropes. Whilst outside the victim's house Pw2 and Pw3 were joined by Maximillian Thomas Willa (**Pw4**). After his arrest, the appellant was taken to Mlangali Police Station.

At the police station, WP 110467 DC Anuciata (**Pw5**) was assigned to investigate the matter. She informed the trial court to have issued the victim with a Medical Examination Form (Police Form No. 3) and thereafter, she escorted the victim to Ludewa District Hospital for medical examination. The victim was examined by Charles Christopher Mburuma (**Pw6**), a doctor at Ludewa District Hospital. In his examination, Pw6 noticed bruises on the outer and inner parts of the victim private parts. Besides bruises, the doctor noticed blood flow and some slippery fluids coming out of the victims' private parts. His conclusion was that, the slippery fluids were sperms. Upon conclusion

of the examination, he prepared the Medical Examination Report (**Exhibit P1**) and handed it to the victim.

In his defence, the appellant denied the charges. He argued that he was not a resident of Lupande Village where the incident happened. Instead, he stated that he lived at Lugarawa Village. He complained that, if he was indeed a rapist, why an incident occurred in 2016 and he was charged in 2018. The appellant argued that, on the 24th January, 2018 he was arrested for murder. He argued that the murder charges were dropped on the 23rd July, 2018. He added that, after the charges of murder were dropped, the prosecution framed him for rape. According to the appellant, he was framed because the victim in the present case was a relative to the person whom he was accused of killing in the murder charges.

As it were, the appellants' defence did not help him much, he was found guilty as charged, convicted and sentenced to thirty years imprisonment.

Aggrieved by the aforesaid judgment and order of sentence passed by the learned trial magistrate, the appellant has filed the present appeal. Briefly, the appellant is reproaching the learned trial magistrate with **inter alia**:

(1). Failure to comply with the mandatory provisions of section 312(1) and (2) of the Criminal Procedure Act [Cap. 20 R.E. 2022];

(2). Failure to afford him the right to mitigate;

(3). Reliance on the contradictory and uncorroborated evidence adduced by prosecution witnesses regarding his time and date of arrest;

(4). Not reading and explaining the contents of the undisputed facts before they were signed;

(5). For not considering that the prosecution failed to establish in evidence the reasons for the delay in prosecuting the appellant and for failure to show that after his arrest at the scene he escaped and was rearrested again;

(6). Not considering that Pw2, Pw3 and Pw4 adduced hearsay evidence;

(7). Misdirecting itself for placing reliance on weak evidence of identification adduced by prosecution witnesses;

(8). Not properly considering the defence case and doubts raised in the prosecution case; and

(8). Not holding that the prosecution failed to prove the charges against him beyond reasonable doubt.

To prosecute the appeal, the appellant appeared before the court in person, unrepresented. Being a lay person, he opted to adopt the grounds of appeal and had nothing to say in elaboration.

Mr. Burton Mayage, learned State Attorney, appeared for the respondent/ Republic. He urged the court to dismiss the appeal in its entirety for being devoid of merits. The learned state counsel argued that the provisions of section 312 (1) and (2) of **the Criminal Procedure Act [Cap. 20 R.E. 2022]** (hereinafter "the CPA") were fully complied with by the learned trial magistrate. While citing pages 4 and 5 of the typed judgment, the learned counsel argued that the judgment contained issues for determination. He added that the judgment contained a summary of evidence adduced during trial and the section of the offence with which the appellant was charged, convicted and sentenced. Having said that, the learned counsel argued that, even if the section was not complied with the same is curable under section 388 of the CPA as no injustice was occasioned to the appellant. For this he cited the case of **Abiola Mohamed @ Simba vs Republic** (Criminal Appeal 291 of 2017) [2021] TZCA 632 (2 November 2021) TANZLII at page 18 – 19.

Regarding failure to afford the appellant an opportunity to mitigate, Mr. Mayage argued that the appellant was afforded an opportunity to mitigate but elected to remain quiet. He argued that, having refused the opportunity, he cannot be heard to complain. For this he referred to proceedings dated the 25th day of November, 2019.

Turning to the contradictions and inconsistencies between prosecution witnesses as to the time and date of the incident. Mr. Mayage submitted that the charge indicated that the incident happened on the 25th day of June, 2016, and the victim, Pw1 also stated that the incident happened on the 25th day of June, 2016. The learned counsel argued that both Pw2, Pw3, Pw4, Pw5 and Pw6 confirmed that the incident took place on the 25th day of June, 2016. The learned counsel concluded that there were no material contradictions or inconsistencies between prosecution witnesses regarding the date of the incident.

Submitting on the non-compliance with the law and procedures during preliminary hearing, Mr. Mayage argued that the records indicated that the appellant conceded to his personal particulars only and disputed all the remaining facts. The learned counsel added that even assuming that the undisputed facts were not read, there is no indication that the appellant was prejudiced in any case. To bolster his

argument, the learned counsel cited the case of **Director of Public Prosecutions vs. Jaba John** (Criminal Appeal 206 of 2020) [2022] TZCA 406 (11 July 2022) TANZLII. According to the learned state counsel, this ground was lacking in merits.

Responding to the unexplained delay in prosecuting the appellant, Mr. Mayage conceded that there was delay in prosecuting the appellant for almost two years. To this end, the learned state attorney admitted that whilst the incident happened and the appellant was arrested on the 25th June, 2016, he was arraigned before the trial court two years later on the 23rd July, 2018. The learned counsel conceded further that, the police officer who investigated the matter, Pw5, did not provide a reason for such a long delay. Even then, the learned state attorney insisted that criminal cases have no time limit in their prosecution. In the opinion of the learned state attorney, the appellant would be tried even after the elapse of the period of two years since his arrest.

Coming to the seventh ground of appeal Mr. Mayage argued that the question of identification of the appellant was not questionable because he was arrested at the crime scene as affirmed by Pw1, Pw2, Pw3 and Pw4 who all witnessed that the appellant was arrested at the victims' house. The learned counsel added that, in the present case, it

was not relevant for the prosecution to establish the conditions for identification. He also added that there was therefore no need for an identification parade as the appellant was apprehended at the crime scene.

Replying to the eighth ground of appeal Mr. Mayage reasoned that the appellants defence was considered and the learned trial magistrate resolved that it was insufficient to erode the prosecution case. In his view, the learned trial magistrate was correct in convicting and sentencing the appellant.

Finally, the learned state counsel concluded that the prosecution succeeded in proving the charges against the appellant by establishing that the appellant penetrated the victim without her consent. In elaborating his conclusion, the learned counsel made reference to the testimony of Pw1, Pw2, Pw3, Pw4, Pw5 and Pw6; and exhibit P1. In the end, the learned counsel prayed that the appeal be dismissed and the decision of the trial court be upheld.

In his rejoinder the appellant insisted that the prosecution failed to explain the delay in prosecuting him for two years. He argued that he was initially arrested for murder before charges were changed to

pe. The appellant believed that he was suffering in prison out of ɔricated charges.

Having considered the records and carefully evaluated the bmissions made by the parties, I have no inhibition in holding that, nsidering grounds 3, 5, 8 and 9, there are reasonable doubts in the osecution case. I will illustrate the reasons for such a conclusion.

There is no dispute that the appellant was arraigned before the al court for the first time on the 23rd day of July, 2018. The charges ainst him were that he had raped the victim on the 25th day of June, 116. However, it is clear that he was not prosecuted for the charge eet read to him on the 23rd day of July, 2018. Instead on the 21st day June, 2019, the prosecution substituted the charge sheet by reading the appellant a new charge. The particulars of the substituted charge ere as follows:

"PRTICULARS OF THE OFFENCE

> ***GERODI SEVERINE WILLA***, *on 25th day of June, 2016, at Lusapo - Lupande Village within Ludewa District in Njombe Region, had carnal knowledge of one* ***GYM*** *a woman of 73 years old without her consent."*

The evidence at the trial court was also that the incident took place on the 25th day of June, 2016. This seems to be the testimony of the victim Pw1. The testimony of the victim was also confirmed by all prosecution witnesses. That is Pw2, Pw3, Pw4, Pw5 and Pw6. It is also not in dispute that Pw5, the police officer who testified before the trial court, did not provide any explanation as to why there was a delay in arraigning the appellant before the court.

In his defence, the appellant raised the issue of the unexplained delay and complained that he was initially arraigned for murder. In his defence, the appellant argued that it was after the murder charges had been dropped that the present case was preferred. The purpose of raising such a contention is to show and prove that there was a planned effort on the part of the complainant or the prosecution to falsely implicate the appellant.

It is trite that before convicting an accused person a court is enjoined to consider the evidence before it holistically and upon an appraisal of all the evidence not just the evidence of the prosecution only. In doing so the court must weigh all the essentials of the evidence that point to the guilt of the accused person against all those which are suggestive of his innocence, taking proper account of intrinsic strengths

and weaknesses, probabilities and improbabilities on both sides. Thereafter, the trial court must decide whether the balance weighs so heavily in favour of the Republic to exclude any reasonable doubt about the accused's guilt. See **David Zabron @ Lusumo vs Republic** (Criminal Appeal No. 241 of 2020) [2023] TZCA 17748 (29 September 2023) TanzLII.

In its evaluation, a trial court is to be put on alert when there are allegations of delay in reporting and incident or prosecuting an offender. On the other hand, where there are delays in either reporting the incident or prosecuting the offender, the prosecution has a duty to offer an explanation for such a delay. Of course, a delay perse is not a mitigating circumstance for accusations when an accused person is faced with serious charges such as rape. However, if the prosecution fails to adequately explain the delay and there are possibilities of aggrandizement in the prosecution version on account of such delay, then the delay becomes a relevant factor. Several decisions of the Court of Appeal have considered this aspect including the case of **Ramson Peter Ondile vs Republic** (Criminal Appeal 84 of 2021) [2022] TZCA 608 (6 October 2022) TanzLII; **David Zabron @ Lusumo vs Republic** (supra); and **Ally s/o Shabani @ Nzige vs Republic**

(Criminal Appeal No. 12 of 2021) [2024] TZCA 135 (23 February 2024) TANZLII.

In **Ramson Peter Ondile vs Republic** (supra), one of the appellant's complaints was that there was a delay in his arraignment. The evidence on record showed that the incident occurred in October, 2018 and the information was reported to Pw1 on the same month. However, the appellant was arraigned before the trial court on 14th August, 2019, that is about ten months later. The Court (Kwariko, J.A) at page 13 observed that:

> *"Upon our inquiry about the delay, Ms. Mshanga, learned Principal State Attorney contended that it was due to ongoing investigation although she conceded that there is no evidence from the investigating officers to that effect. There was actually no explanation why there was such a delay. In fact, there is no evidence to show when and how the appellant was arrested and what he said after arrest. What PW3 said is that, when the case file was assigned to her, the appellant was in lock up and had already been interrogated."*

Having made the above observation the Court went on to observe as follows:

> *"We are querying this matter, because from the beginning, the appellant complained that PW1 was a friend of his estranged wife and was close to his children hence anything against him could have been framed. PW1 also admitted that she was very close to*

PW2 and his younger sister. Unfortunately, this line of defence by the appellant was not even considered by the two courts below and it is the complaint in the appellant's fifth ground of appeal. It is therefore our considered view that the unexplained delay to arraign the appellant in court creates doubt in the prosecution case as to whether the incident occurred as alleged."

Inspired by the decision in the above quoted case, the Court (Mgeyekwa, J.A) in **David Zabron @ Lusumo vs Republic** (supra) made the following observations:

"Deducing from the above excerpt, there is no dispute that there was nexus between the charge and the appellant's defence evidence. The trial court was required to analyse the appellant's evidence in deciding his guilt. When we read the charge sheet, the first thing that came to our mind was the unexplained delay to arraign the appellant immediately after the commission of the offence. The unexplainable delay which is featured in the charge sheet has some connection with the appellant's defence story that he was once charged and acquitted on the same offence."

Having said that, the Court then remarked that:

"As alluded above, the charge sheet shows that the appellant was charged after a lapse of approximately nine (9) months from the date when the alleged offence was committed. There is no justifiable explanation of the said delay on record considering the fact that he was arrested on the fateful date. It was echoed in the case of ***Ramson Peter Ondile v. The Republic****, Criminal Appeal No. 84 of 2021 [2022] TZCA 608 (6 October 2022) TANZLII ..."*

I fully subscribe to the above authoritative guidance by our Apex Court. In light of the above guidance, the argument raised by the appellant that there was inordinate and unexplained delay in arraigning him in court is therefore merited. As pointed out earlier in this judgment, the incident occurred on the 25th June, 2016 whereafter the accused was arrested on the same day and kept under police custody. It is also not disputed that the appellant was arraigned before the district court of Ludewa on the 23rd July, 2018. There was therefore a delay of almost two years from the date of his alleged arrest to the day when he was formally charged. None of the prosecution witnesses provided any plausible explanation of the delay in arraigning the appellant immediately after the commission of the offence.

The unexplained delay is further compounded by the fact that his case did not immediately took off after his arraignment in court on the 23rd July, 2018. The records show that the prosecution substituted the charge a year later on the 21st June, 2019. Again, there was no any justifiable reason for the additional delay of almost a year. It can therefore be deduced from the records that the appellant was charged almost three years after the incident was allegedly reported to have happened.

The inordinate and unexplained delay in arraigning the appellants in court, coupled with his defence that he was initially arrested and prosecuted for murder raises doubts in the prosecution case. In **Ally s/o Shabani @ Nzige vs Republic** (Criminal Appeal No. 12 of 2021) [2024] TZCA 135 (23 February 2024) TANZLII, the Court of Appeal observed that there was a delay of almost six months from the date when the incident happened and the arraignment of the appellant in court. Having made such an observation, the Court (Mgeyekwa, J.A) stated:

> *"The unexplainable delay, which is featured in the charge sheet is linked with the appellant's defense story that he was once charged and acquitted on the same offense. It is therefore, our considered view that the delay in arraigning the appellant in court was inexcusable and unjustified. The same created a reasonable doubt in the prosecution case which the appellant claimed was framed against him."*

Having considered the circumstances of the case under scrutiny, I am satisfied that had the learned trial magistrate considered the defence case, he would have realized, as I have, that the appellant's complaints were justified and raised doubts in the prosecution case. In the end, he would have decided in favour of the appellant.

For the foregoing reasons, I am in all fours with the appellant that the prosecution did not prove the case beyond reasonable doubt. Accordingly, I am of a decided view that in the light of the evidence led at the trial, viewed cumulatively, the appellant's defence is highly probable, hence entitled him to a finding of not guilty.

All said and done, I will allow the appeal, quash the conviction and set aside the sentence. I also order the immediate release of the appellant from prison custody unless otherwise lawfully detained.

The appeal is disposed in the above terms.

DATED at **IRINGA** this **05TH** day of **APRIL, 2024**.

S.M. KALUNDE

JUDGE