IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 89 OF 2021

(Originated from Criminal Case No. 80 of 2019 in the District Court of Mpanda at Mpanda before Hon. R.M. Mwalusako-RM)

SHINJE JAMES.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14th February & 29th February, 2024

MRISHA, J.

Before the District Court of Mpanda at Mpanda (the trial court), the appellant **Shinje James** was arraigned with one count of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 [Now R.E 2022) henceforth the Penal Code.

According to the charge sheet which formed a foundation of the case against the said appellant, the allegations levelled against him were that on the 13th day of November, 2019 at about 1115 hours at Kapanga Village in Tanganyika District within Katavi Region, the appellant did

have sexual intercourse with one XX, a 13 years old school girl whose name was withheld as such for the purpose of protecting her privacy and dignity due to the nature of the above mentioned charged offence.

Upon being informed about the charge against him in a language clearly understood to him, the appellant pleaded not guilty. Thereafter a plea of not guilty was entered by the learned trial magistrate and after a preliminary hearing was conducted, the matter went to a full trial after which the trial court found the prosecution's case to have been proved on the required standard and went on to find the appellant guilty of the charged offence, convict and sentence him to term of thirty (30) years imprisonment which he has been serving to date.

Prior to the above conviction and sentence, the prosecution side marshalled a total of five (5) prosecution witnesses including XX (PW1) who was the victim of the charged offence. The rest were AS (a biological mother of PW1), Dr. Victor Izack, Said Wambali and F 6702 D/CPL Japhet who testified before the trial court as PW2, PW3, PW4 and PW5 respectively.

In addition to the oral evidence of the above witnesses, the prosecution Republic/respondent Republic tendered three documents namely an

affidavit regarding the birth of PW1, a PF3 of PW1 and a Cautioned statement alleged to have been made by the appellant before PW5.

Whilst the Affidavit and the PF3 of PW1 were admitted by the trial court as exhibits P1 and P2 respectively without any objection from the appellant, the alleged Cautioned statement had to pass the test of an inquiry in order to ascertain whether it was actually taken from the appellant who objected its admission claiming that he neither knew the said statement nor did he make it before PW5.

After conducting an inquiry regarding such appellant's objection, the learned trial magistrate ruled out that the said caution statement was made by the appellant, admitted the same as exhibit P3 and proceeded with the hearing of the main case which ended with the appellant being found with a prima facie case.

Briefly, the evidence adduced by the five prosecution witnesses was to the effect that on 13.11.2019 PW1 was in the room of her parents; soon thereafter she saw the appellant entering into that room and began to embrace her by touching her breasts; she tried to stop him, but in vain, then the appellant who by then was shepherd of her parents' cows, pushed her into her mother's bed, undressed her clothes as well as his trouser and began to immerse his penis into her vagina.

That it took almost ten minutes before the appellant could stop sexually abusing PW1 and at that time PW1 was alone at home as her parents were not present. She cried for almost ten minutes, and then went to inform her parents' neighbour one mama Ngollo about what had befallen her. Following such information, other neighbours including PW4, a Village Executive Officer (VEO) of Kapanga Village, were informed about the incident and joined efforts to apprehend the appellant in connection with the allegations of raping PW1.

That after his arrest, PW1 and the appellant were matched to Kibo Police Station where after PW1 was taken to the hospital for medical examination. This evidence came from PW1 and it was corroborated by PW2, PW3 and PW4 who on different occasions, pointed fingers towards the appellant as a person who had sexual intercourse with PW1.

Apart from incriminating the appellant in connection with commission of the charged offence, PW2 also tendered Exhibit P1 to prove before the trial court that PW1 was thirteen (13) years old at the time the charged offence of rape was committed, while PW3 narrated to the trial court that after examining the private part of PW1, he observed that the said victim of a sexual offence was penetrated and her vagina had no hymen,

then he filled a PF3 and handled it back to PW1's parents for further steps.

Again, in his testimony PW4 told the trial court that on 13.11.2019 at around 1300 hours the appellant was brought to him by PW1's parents and other persons his hands being tied up by a rope and PW1 was also among those persons. He quizzed PW1 what had happened to her and without mincing words, PW1 narrated to him that the appellant entered her mother's room when her parents were not around and raped her.

PW4 also testified that upon asking the appellant about those allegations, he responded that PW1 had taken his mobile phone and ran into her mother's room, then he followed her and that is when he raped her. Thereafter, the matter was reported to the Police of Katuma and the appellant together with the said victim of a sexual offence were conveyed to that Police Post.

On his part, PW5 who is a police officer of Tanganyika Police Station, told the trial court that on 13.11.2019 he was assigned to record the cautioned statement of the appellant whom he was told that he had been suspected of committing an offence of rape.

Before doing so, he took the appellant to the special room used for interrogation of suspects, informed him about his rights including the

right to call his relatives or a lawyer when his statement will be taken and the appellant opted to make his statement alone. He also cautioned the appellant that should he make any statement before him, the same will be used as evidence against him before a court of law.

It was also the evidence of PW5 that in the course of making his statement before him, the appellant on 13.11.2019 he was working at the house of PW1's father as a cow shepherd, and then at around 1000 hours he was assigned by his boss to cut some trees. As he was doing so, he was approached by PW1 who suddenly grabbed his phone and run into her parents' room, then sat on the bed.

That the appellant also told him that he followed PW1 and found her still on her parents' bed, then he took his mobile phone from her, but while going out of the said room, he heard PW1 calling his name and on turning around, he thought the said girl wanted to have sex with him and that is when he followed her and touched her breasts, but the girl did not do anything.

That upon observing that, it is when he undressed her clothes and he also undressed his clothes, then he took out his penis and inserted it into the vagina of PW1.

Also, according to PW5, the appellant told him that when his penis was half inserted into the vagina of PW1, the said girl began to cry. As indicated above, the said cautioned statement was tendered by PW5 and admitted by the trial court as Exhibit P3 after an inquiry was conducted.

On the other side, the appellant who fended for himself as DW1, told the trial court that on 13.11.2019 around 0900 hours he was cooking some stiff porridge before going to feed his boss's cows. That soon thereafter, he was approached by some neighbours accompanied by PW1 who was crying, and then they told him that he is the one who raped her.

That he asked them how he could do so while PW1 was not around when he was cooking some stiff porridge. He also told the trial court that he denied to have raped PW1 and repeated that he did not rape her. However, the appellant told the court that despite his repeated denials, he was arrested and had his hands being tied up with ropes by those persons who matched him to PW3 where after he began to be beaten.

The appellant went on telling the trial court that when asked what had happened to her, she responded that she was raped by him. However, when asked by the VEO (PW4) if he had done so, he denied those

allegations. He finally told the trial court that while at the Police Station he was probed by one police officer if he had really raped PW1, but he denied to have done so, then he was forced to sign a paper.

Upon gathering such evidence from both parties, the trial court was satisfied that the prosecution had made their case against the appellant on the required standard and that is when it convicted and sentenced him as stated above. Being aggrieved, the appellant decided to appeal against the decision of the trial court by filing with the court a Petition of Appeal which contain the following grounds: -

1. That, the case was not proved beyond reasonable doubt as required by criminal law.
2. That, the learned resident Magistrate erred in law and fact to convict the appellant for the offence of rape based on insufficient and uncredible evidence of PW1 the alleged victim of crime regarding to the nature of the (sic) alleged.
3. That, the learned resident Magistrate erred in law and fact (sic) failure to (sic) analyses and (sic) evaluates the evidence adduced by both parties.
4. That, the learned resident Magistrate erred in law and fact to convict and (sic) sentenced the appellant without conducting

proper analysis of the evidence adduced before him and hence reaching to the wrong decision.

5. That, the learned resident Magistrate erred in law and fact (sic) failure to consider that the prosecution (sic) witness were contradicting (sic) each other.

6. That, the learned resident Magistrate erred in law and fact to convict and (sic) sentenced the appellant without taking into consideration that the evidence adduced by PW3 was (sic) clearly to leave the appellant from the allegation since (sic) shows that after examination to the victim there was no any bruises and semen (sic) to her vagina and was no hymen.

7. That, the learned resident Magistrate erred in law and fact to convict and sentence an appellant basing on caution statement which (sic) tendered before the court and taken illegally.

The hearing of the instant appeal was done by way of oral submissions and despite the respondent Republic who was represented by Mr. Mathias Joseph, learned State Attorney, the appellant appeared himself, legally unrepresented. Being a layman, he just told the court that he prays to adopt his grounds of appeal and he also urged the court consider his grounds of appeal, allow his appeal and set him free.

To Mr. Joseph, he submitted that the respondent Republic oppose the appellant's appeal. Arguing in respect of ground number 2 of the appellant's Petition of Appeal, the respondent counsel submitted that the witness's evidence can be evaluated on two ways; one, is by assessing the coherence of the testimony and two, by considering other evidence in relation to the testimonies of other witnesses, even of the accused person.

He said that the above position was stated in the case of **Shani Chamwela Suleiman vs The Republic**, Criminal Appeal No. 481 of 2021 (unreported). Applying that position to the case at hand Mr. Joseph submitted that the evidence of PW1 is true and credible because she promised to tell the truth and not lies.

Also, she testified that on 13.11.2019 at 1100 hours the appellant went to the room of her parents and raped her. She also testified that she run to the neighbour and informed her about the incident of rape who also tipped other neighbours including PW4. Her evidence was corroborated by the evidence of PW2, PW4 and PW5.

It was also the respondent counsel submission that the act of the said victim to report and mention the appellant immediately after the incident to the neighbour gives credit to her evidence and the trial court was

entitled to believe her evidence. To support such proposition, the learned State Attorney cited the case of **Director of Public Prosecutions vs Juma Chuwa Abdallah**, Criminal Appeal No. 85 of 2018 (unreported) and submitted that due to the above submissions, he is of the view that the second ground of appeal lacks merit and is bound to be dismissed.

Thereafter, he prayed to merge grounds of appeal number 3 and 4 so that he could argue them together. It was his submission that the said grounds have no merits arguing that the trial court properly evaluated and analysed the evidence that was presented by both parties before it, as it is shown at page 7 of the typed judgement.

Turning to the fifth ground of appeal, Mr. Joseph had it that he is not in agreement with the appellant's argument that the evidence adduced by the prosecution witnesses was contradictory. He took an inspiration from the principle of law established by the Court of Appeal in **DPP vs Juma Chuwa Abdallah** (supra) where it was stated that,

"...in evaluating discrepancies, contradictions and omissions, the court should not pick pieces of sentences and consider them in isolation from the rest of other pieces of evidence. It is settled law

that a contradiction can only be considered as material if they go to the root of the case."

Having cited the above case, the respondent counsel further submitted that in the instant case, it is on record that the appellant was charged with the offence of rape and was convicted with that offence based on the evidence of the victim which does not contradict with the evidence of PW2, PW4 and PW5.

The respondent counsel also submitted that during cross examination, the appellant did not cross examine PW1 about contradicting parts of evidence. It was due to the above submission that the learned State Attorney submitted and prayed that the fifth ground of appeal be dismissed for want of merit.

In regards to the sixth ground of appeal, Mr. Joseph submitted that the same has no merit because in his testimony PW3, a medical doctor testified that upon conducting a medical examination, he discovered that the victim had been sexually assaulted by being raped and that her vagina had no hymen.

However, the appellant did not cross examine that prosecution witness upon being given a chance to do so which indicates that he was agreeing with that testimony of PW3. In that respect, a case of **Nyerere**

Nyague vs The Republic, Criminal Appeal No. 67 of 2010 (unreported) was cited to backup that proposition.

Arguing about the seventh ground of appeal, Mr. Joseph submitted that the trial court convicted the appellant by relying on the evidence adduced by the victim of sexual offence which was corroborated by the evidence of other prosecution witnesses.

Regarding the cautioned statement which is complained of by the appellant, the respondent counsel submitted that initially the appellant objected its admission and the trial court conducted an inquiry where after it dismissed the said objection and admitted it as Exhibit P3, as it is shown at page 27 of the trial court typed proceedings.

He added that after its admission, the contents of the said exhibit were read over loudly in presence of the trial court and the appellant. Hence, the appellant was convicted upon consideration of the victim's evidence and not only the cautioned statement of the appellant. Hence, it was the learned counsel's prayer that the seventh ground of appeal by the appellant be dismissed for want of merit.

As for the first ground of appeal, Mr. Joseph submitted that the prosecution ought to have proved two ingredients of rape in order to obtain conviction. The first ingredient was about the age of the victim

which according to the learned counsel was proved by the evidence of PW3 which was supported by Exhibit P2 which showed that PW1 was a child of tender age at the time the offence was committed.

The second ingredient according to the respondent's counsel was about penetration. It was his submission that the same was also proved by the evidence of PW1 who implicated the appellant as the person who raped her on 13.11.2019 at 1100 Hours and that since the offence was committed during a day light, the issue of identification was not at issue.

That apart, the respondent counsel submitted that in her testimony PW1 testified to have known the appellant before the incident and that the trial court's records reveal that the appellant agreed that he also knew the said victim as the two were living in the house of the victim's father. Also, the evidence of PW3 proved that there was penetration on the part of the said victim, as it is shown at page 18 of the trial court typed proceedings.

Having made the above submissions, Mr. Joseph contended that the prosecution side also prove the above second ingredient of an offence of rape. Hence, he prayed to the court to dismiss the appeal. On his part, the appellant submitted that he had nothing to add after hearing the submissions of the counsel for the respondent Republic.

As I have indicated above, the appellant being an aggrieved party has raised seven (7) grounds of appeal with a view of challenging the decision of the trial court. I have closely gone through and considered those grounds, as the appellant has implored me to. I have also gone through the records of the trial court, the impugned judgment together with the rival submissions of parties herein, including the authorities cited by the counsel for the respondent Republic.

The issue which calls for my determination is whether there is merit in the present appeal. For that issue to be determined, the court has to consider the grounds of appeal, the rival submissions along with the trial court's records without forgetting the impugned judgment. However, in my considered opinion, the grounds of appeal raised by the appellant contain two major complaints which come to the fore.

The first one is that the trial court convicted the appellant based on a case which was not proved on the standard required by the law and the second is that the trial court convicted the appellant based on a cautioned statement which was illegally obtained.

I say so because looking on the second, third, fourth, fifth and sixth grounds of appeal, it is apparent that they fall under the first ground of appeal of which the appellant has used to fault the trial court for

convicting him on a case which according to him, was not proved beyond any reasonable doubts. Again, the second complaint is there to question the competence of the alleged cautioned statement.

To start with the first complaint, it has been a common knowledge among the legal fraternity that the duty of the prosecution in criminal cases, is to prove the charge against the accused person beyond any reasonable doubts and the accused need be convicted not on the weakness of his defence, but on the strength of the prosecution's case; see **Christian s/o Kaale and Rwekiza s/o Bernard vs Republic** [1992] TLR 302.

The case against the appellant before the trial court was related to the charge of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 [Now R.E 2022) henceforth the Penal Code. Apart from the provisions of section 131 (1), Penal Code which provide for the penalty against the convict who is found guilty and convicted for an offence of rape, section 130 (1) (2) (e), Penal Code which creates an offence of rape provides that,

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) ,,, N/A

(b) ,,, N/A

(c) ,,, N/A

(d) ,,, N/A

(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"

From the above provisions of the law, it is obvious that in order for the offence of rape to be proved, two major ingredients must exist; first, that the accused must have a sexual intercourse with a girl or a woman and secondly, the act of having sexual intercourse must have been done by the accused with or without the consent of that girl or a woman. The only exception is where that woman is his wife who is fifteen or more of age and is not separated from him.

Reverting to the case at hand, the appellant's complaint is that the case against him was not proved on the standard required by the criminal

law. I am aware that the said appellant is a layman and therefore the court has to crosscheck the records of the trial court along with the evidence adduced by the prosecution in order to see whether his complaint has merits.

In his response to that complaint, the respondent counsel has contended that the offence of rape the appellant was convicted with, was proved beyond any reasonable doubts. According to him, due to the nature of the charged offence there two elements to be proved; first the age of the victim and second is penetration. It was his submission that the prosecution managed to prove that PW1 who was the victim of the above-named sexual offence was a child of tender age and that there was penetration on the part of the said witness.

I have gone through the prosecution evidence and the typed records of the trial court and observed that indeed the above two elements were proved by the prosecution side. This is because first, the fact that PW1 was a child of tender age at the time the offence of rape was committed, was proved by the evidence of PW2 whose evidence reveals that PW1 was born on the 4th day of March, 2006 whereas the offence the appellant was charged with was alleged to have been committed on the 13th day of November, 2019.

By simple mathematics, counting from the date of PW1's birth to the date of the commission of the charged offence, it is obvious that PW1 was thirteen (13) years old at the time the said sexual offence was committed. I have found credence on the evidence adduce by PW2 because apart from mentioning the birth date of PW1 who is her biological daughter, she also tendered an affidavit regarding the birthdate of PW1 and the trial court records depict that the same was admitted as Exhibit P2 without any objection from the appellant, as it is shown at page 14 of the typed proceedings.

Not only that, but also, I have observed that during cross examination the appellant never pressed that prosecution witness about the age of PW1, which tells that he too was in agreement with PW2 that PW1 was thirteen years old at the time the alleged sexual offence was committed. All that indicates that what PW2 had testified before the trial court was nothing but true. Hence, there is no doubt that the first element which constitutes the offence the appellant was charged with, was proved on the required standard.

Secondly, regarding the element of penetration, the appellant through his sixth ground of appeal has complained that the trial court convicted and sentenced him for an offence of rape without considering the fact

that the evidence of PW3 ought to have been used to clear him from the allegations of raping PW1 because his evidence shows that after examining the said victim, he observed that there were no bruises and semen on her vagina and that even the hymen was not seen.

In responding to that complaint, the respondent counsel has contended that the element of penetration was proved by the prosecution side beyond any reasonable doubts due to several reasons including the fact that the evidence of PW1 who is the victim of sexual offence reveals that she testified to have well known the appellant as he used to reside at her parents' home where he was working as the cow shepherd and that on the fateful day she saw the appellant entering into her parents' room and raped her as it was around 1100 hours which was day light time; hence the issue of identification was not in dispute.

It is also the submission of the respondent counsel that the records of the trial court are glaring that the appellant never disputed to have known PW1 prior to the commission of the charged offence, as it is shown at page 37 of the typed proceedings. Also, it was argued by the respondent counsel that the fact that PW1 was penetrated was proved by the evidence of PW3, a medical doctor whose evidence shows that upon examining the said victim, he discovered that PW1 had sexual

intercourse and her genital part had no hymen, as it is revealed at page 18 of the typed proceedings.

From the above contentions, it appears to me that it is not only the credibility of PW3 which is called in question, but also that of PW1. Hence, there is a need to look on the evidence of all those witnesses as far as their credibility is concerned. I have scrutinized the evidence of PW1 and found that in the course of adducing her evidence before the trial court she narrated how the appellant committed the offence of rape to her. This is revealed at page 11 of the trial court typed records where she was recorded to have stated that,

"On 13/11/2019 I was alone at home cooking; (sic) It was around 11.00 hrs in the morning. Shinje the accused person came and by that time I was at my (sic) mother room. He came into the room and started to (sic) caress me, and touch my body. I tried to stop him but I failed. He slept over me and he sucked my breast. He pushed me into my (sic) mother bed. He undressed me removed his trouser and he took out his penis (uume wake) and he put it into my genital parts. I cried for almost 10minutes."

The above excerpt tells a lot about the appellant on how he approached PW1 and started to play her before fulfilling his evil mind of having

sexual intercourse with her. It shows pretty well that PW1 knew the appellant by name which is why she has mentioned him by a single name as *"Shinje"*.

It also portrays the previous conducts of the appellant before his commission of the offence of rape; the same include entering into the room of PW1's parents, touching her breast and sucking them by force, undressing her clothes together with his, and putting his penis into her vagina.

However, despite being mentioned by the said victim of sexual offence on the first instance as the person who did all that to PW1, the appellant failed to ask PW1 during cross examination whether it is true that he did all that to her. The records of the trial court only show that the appellant asked PW1 some few questions and her response was as follows: -

> *"When you found me into the room you started to push me. Yes you (sic) me. I know your penis. I know the same way you know it."*

In my view, the appellant's questions which resulted into the above response from PW1 were baseless and could not relieve him from the serious allegations levelled against him. This is because looking on the above response from PW1, it is apparent that PW1 was firm that it was

the appellant and no one else who raped her on the day in question that is why she repeated her previous testimony by telling the appellant that he pushed her before raping her.

Also, the question whether or not PW1 knew the appellant's penis is in my view, illogical because the fact that he had sexual intercourse with PW1 on the fateful, as the said victim claimed in her testimony, was enough to make her know that appellant's private part; she could in no way, be able to know it had she not been forced to have sexual intercourse with the appellant, as the appellant did to her.

Also, since the appellant omitted to cross examine PW1 on other important things like his act of entering into her parents' room, touching her breasts, sucking them, undressing her and immersing his penis into her vagina, it is my settled view that his failure to cross examine the above victim of sexual offence on such important matters, is tantamount to his acceptance of the truth contained in the testimony of that prosecution witness.

The above court's observation is fortified by the well-known established principle of law that failure to cross examine a witness on important matters is tantamount to an acceptance of the truth and the accused is estopped from denying the evidence accused against him; see **Hamis**

Hassani Jumanne vs The Republic, Criminal Appeal No. 397 of 2021 (CAT at Dar es Salaam, unreported) where it was stated that,

> *"It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted it and will be estopped from asking the court to disbelieve what the witness said, as silence is tantamount to accepting its truth".*

Based on the foregoing reasons and being guided by the principle established in that case, I am constrained to find credence on the evidence adduced by PW1 which I have alluded hereinabove describes how the appellant had committed the offence of rape.

Regarding the evidence of PW3 who is a medical doctor, I am in line with his observation that PW1 was actually penetrated because of having a sexual intercourse. The fact that he found no hymen on the vagina of PW1 does not dismantle the prosecution's case because at the age of 13 years PW1 had, it was possible for her to have engaged in the conducts of having sexual intercourse which could have led to perforation of her hymen. The task assigned to PW3 was to conduct a medical examination in order to see if PW1 had sexual intercourse and if she was pregnant.

His evidence shows that he did as he was required by the Police and prepared his report through a PF3 (Exhibit P2) which reveals that PW1 had sexual intercourse and her vagina had no hymen, save that she was not pregnant.

Therefore, the concern here is whether the appellant had sexual intercourse with PW1, a girl alleged to have been under the age of majority at the time the charged offence was committed. As it has been pointed above, it is not in dispute that PW1 was a girl of thirteen years old. In the circumstances, it is my settled view as rightly argued by the respondent counsel, that the issue of consent was irrelevant.

I may also add that even if the appellant had succeeded obtain PW1's consent before he could have sexual intercourse with her, yet it could be impossible for him to distance himself from the allegations of raping her because that is a statutory rape which is sanctioned by the provisions of section 130 (1) (2) (e) of the Penal Code, read together with section 131 (1) of the Penal Code.

Therefore, based on the above reasons and taking into account that there is enough prosecution evidence to show that indeed the appellant had sexual intercourse with PW1 on the 13th day of November, 2019 at 1100 hours, I am satisfied that the important element of penetration on

the part of PW1 was proved by the prosecution it was caused by no one else, but the appellant herein. Hence, I find that the appellant's complaints as indicated in the first, second and sixth grounds of appeal are without merits.

Again, I have noted that the appellant has tried to faulted the trial court alleging that it failed to analyse and evaluate the evidence adduced by both parties. This complaint was disputed by the respondent counsel who referred the court to page 7 of the typed proceedings in order to show how the trial court properly evaluated and analysed the evidence of both parties before making its conclusive findings.

As I have said before, I had enough time to go through the trial court impugned judgment. I agree with the counsel for the respondent that the evidence of both parties was analysed and evaluated by the Hon. Trial Magistrate, not only at page 7 of the typed judgment, but also at page 10 of the same.

I have also noticed that during defence hearing, the appellant complained that he knows PW1, but he was not in good relation with her mother that is why she accused him of raping her. This was narrated by him after being cross examined by the State Attorney. On my part, I do not find any logic on that complaint because the appellant did not

talk about it when testifying before the trial court and also, he did not cross examine PW1 and PW2 whether they had fixed him with the charged offence because of his conflict with PW2. Hence, I find that the third and fourth grounds of appeal have no merit.

Before talking about the seventh ground of appeal, I wish to talk a little bit about the fifth ground in which the appellant has complained that the trial magistrate failed to consider that the prosecution witnesses were contradicting to each other. In my view, this complaint need not detain me much.

The only contradiction appears to be available among the targeted prosecution witnesses is on the time mentioned by PW3 and PW4. This is because Exhibit P2, a PF3 filed by PW3 shows the same was filled by him at 1200 hours, but in his testimony PW4 said the appellant was brought to him at around 1300 hours where after he made some efforts to call the police who arrived and picked the appellant to Katuma Police Station.

Admittedly, there was contraction between the above two witnesses and it appears that PW4 was the first person to see the appellant, then PW3. However, I do not think if that contradiction can affect the prosecution case because the PW4 did not tell the trial court if he had a watch when

approached by those who apprehended the appellant, in order to assure himself that it was around 1300 hours when the appellant was brought to him.

Also, under normal circumstance, the times between 1200 and 1300 hours are not much different; hence, it is possible for a person who has no watch to think that it is 1300 hours even though it may still be 1200 hours. Again, the records of the trial court typed proceedings are silent on whether either the trial magistrate or the appellant sought some clarification from PW3 and PW4 in order to draw a line between the time written by PW3 while filling the PF3 and the one mentioned by PW4 while adducing his evidence before the trial court. In the circumstances, it is hard to agree with the appellant that the above two witnesses contradicted to each other.

If that is not enough, it is a trite law that a contradiction can only be considered material if it goes to the root of the case; see **Director of Public Prosecutions vs Juma Chuwa Abdallah** (supra). The root of the case before the trial court based on the allegations that on 13.09.2019 at 1100 hours, the appellant raped PW1 by having sexual intercourse with her while she was still thirteen years old.

Those allegations were proved by the prosecution's evidence, as pointed out above. Hence, based on the foregoing reasons, I am unable to hold that the minor contradiction detected in the testimonies of PW3 and PW4 goes to the root of the prosecution's case to the extent. In the premise, I also find that the fifth ground of appeal is unmerited.

Next is the seventh ground of appeal which also is not supposed to detain this court much in addressing it. The appellant has complained that the trial magistrate relied on the cautioned statement to convict him while the same was taken illegally. Like the respondent counsel has argued, the appellant was not convicted merely basing on the said cautioned statement as there were other strong evidence including the one adduced by PW1 which the trial magistrate considered and accorded weight.

Also, concerning the alleged cautioned statement there is no proof, whatsoever, that the same was illegally obtained. It is on record that when the appellant objected its admission, the trial court conducted an inquiry in order to ascertain whether the said cautioned statement was actually made by the appellant and in the end, it found that there was sufficient evidence to show that the same was made by the appellant

voluntarily. This is shown at pages 13 to 31 of the trial court typed proceedings.

Another interesting fact is that in the course of raising his objection regarding the said cautioned statement, as it is shown at page 27 of the trial court typed proceedings, the appellant just said that,

"I don't know it. I didn't give such kind of statement"

However, like the common saying goes that, *"Wonders shall never end!"*, during defence hearing, the appellant was recorded to have complained as follows: -

"I was taken to Kapanga police station. There I was locked up. Then a police officer came and asked me if I really raped and I denied. He then left. On the return he said that on arrival to the police station it is mandatory to sign"

Also, when cross examined by the State Attorney, the appellant responded as follows: -

"It was a police officer one Japhet who told me to sign. Japhet was among the prosecution witness. I didn't cross examine him about the mandatory of signing at the police station because I wasn't aware of its necessity"

From the above excerptions, it is apparent that the appellant was a liar. Had it been true that he was forced to sign the alleged cautioned statement, he could not hesitate to say that when he was objecting the admission of the cautioned statement. He waited until his case was opened and decided to raise that complaint. In my view, that was not correct and I find that his lies have corroborated the prosecution's case. This marks the end of my discussion about the seventh ground of appeal which I also find to be without merit.

Having said the above, I find that the present appeal has no merit and consequently I dismiss it on its entirety.

It is so ordered.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

A.A. MRISHA
JUDGE
29.02.2024

DATED at **SUMBAWANGA** this 29th day of February, 2024.

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