IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 59 OF 2021

(Arising from Criminal case No. 97 of 2020 in the District Court of Musoma at Musoma)

JUMA JUMA..... APELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

10th Aug and 30th Aug, 2021

F. H. MAHIMBALI, J.:

Juma Juma, the appellant together with Amos Nyakangara @Kitukuru (not part of this appeal) were together arraigned before the District Court of Musoma charged with the offence of rape contrary to section 130 (2) (e) and 131A (1) and (2) of the Penal Code [Cap. 16, R.E. 2019]. It was alleged by the prosecution that on 19/09/2019 at Machinjioni area within Musoma Municipality, Amos Nyakangara @ Kitukuru and Juma Juma had a carnal knowledge of one, XY (name withheld to disguise her identity) a girl aged 16 years.

The material facts of this case are as follows: XY (PW4) who was a student and the victim in this case was living with her grandmother (PW1) at Machinjioni area in Musoma municipality from the year 2017

together with her other relatives. On the 19/09/2019 which is the date of incident, her grandmother had sent her to shop to buy sewing needle after she had returned from her tuition classes. As she had delayed returning home, her grandmother got worried and she started looking for her. She inquired from XY's friends but in futile. The grandmother then decided to share her concern with her neighbor one Bernadetha Monica (PW2). They decided to search for her in various places. They inquired about the direction XY took and eventually passed near one unfinished building where they entered inside it. As it was dark, they used a torch light as aid to enable them see. As they entered into the building, two boys ran out from it, (one after another). In the building they found XY unconscious, naked and bleeding badly in her vagina. They raised an alarm for help and people came. They took XY to police station and then to hospital where she was attended by doctor Daniel Yoyo (PW3). PW3 examined her and explained that she had lost her virgin and that she had bruises in her vagina caused by blunt object and also noted numerous remains of male sperms in her vagina. He admitted XY for two days and thereafter she was discharged. He tendered the PF3 that was admitted in court as Exhibit P1.

XY (PW4) is the one who told her grandmother and their neighbors and the court that it is the appellant and Amos Kitukuru who

had raped. However, she had no previous knowledge about Kitukuru but she knew the appellant who was a well-known herdsman *"mchunga ngómbe".*

In investigation of the matter, the appellant was interrogated by G. 9421 PC Edwin where he admitted that he raped the victim (PW4) being with his fellow (1st Accused). The said cautioned statement dully recorded was admitted as exhibit P.2 of the case.

On the other hand, the appellant in his defense testimony, denied to have committed the offence and stated that on 12/9/2019 he was at his grandfather's farm at Songe and on 19/9/2019 from 17:00 hours to 19:00 hours he was still at his grandfather's place with his grandfather, Kababu and Stephano.

Consequently, the trial court was dully satisfied that the prosecution had proved its case beyond all reasonable doubts and thus sentenced him to life imprisonment.

Dissatisfied with the said conviction and the sentence imposed, the appellant lodged this appeal. His grounds of appeal in verbatim are as follows;

1. *That the trial magistrate erred in law and fact to convict and sentence the appellant as the appellant was not addressed on his basic right at the proceedings and on admission of exhibit P2.*
2. *That, the case against appellant was fabricated since what is on record is story telling as PW3 who claimed to have examined the victim neither he filed any report to show the result of his examination nor did he disclose his qualification as expert to hold doctor's position.*
3. *That, the sentence imposed against the appellant is too excessive as during the commission of the alleged offence the appellant was still a minor, as before, the case at hand was admitted as criminal case no. 119 of 2019 in Musoma District court which was remitted for retrial by the High court of Tanzania Musoma district registry and admitted as criminal case no. 97 of 2020 again in the same court but different magistrate.*
4. *That, the trial magistrate erred in law and fact by convicting and sentencing the appellant basing on the evidence of PW4 (the victim) who claimed to have identified the appellant at the scene of the crime merely relied on claims of familiarity and failed to give descriptions of the appellant's outlook or attire on how he appeared at the scene of crime while it was darkness (sic).*

5. *That, the learned trial magistrate erred in law and fact to convict and sentence the appellant basing on the appellant's caution statement which was obtained by intimidating, threating and beating the appellant but no inquiry was conducted by the trial court to sustain the truth.*
6. *That, the trial magistrate erred in law and fact in convicting and sentencing the appellant without prosecution side proving the case beyond all reasonable doubt.*

At the hearing of this appeal, the appellant fended himself (in person) through video link from Musoma prison while the respondent was represented by Mr. Tawabu, learned State Attorney, who also appeared through video link from Musoma NPS office.

The appellant was called first to submit in support of his appeal. In his short submission, the appellant asked the court to adopt his grounds of appeal as part of his submission. He added that he is astonished that he was arraigned before the district court together with the other accused person but he was the only one convicted. He further submitted that all the prosecution witnesses were relatives hence their testimonies were legally speaking doubtful. He prayed his appeal to be allowed and that he is set free.

Replying on the first ground of appeal, Mr. Tawabu submitted that there was no any irregularity done procedurally in the admission of exhibit P.2. Regarding his basic rights, the trial court record is clear that the accused persons were arraigned before the court, pleaded to the charge, cross examined the prosecution witnesses and dully made their defense. On the admissibility of the prosecution exhibit P.2, it was done in compliance to the law. It is true that there was an objection by the appellant on its admissibility, however an inquiry was dully conducted in compliance to the law as per pages 28 to 34 of the trial court's proceedings. He submitted that; the ground of appeal lacks any legal merits.

On the second ground of appeal, the appellant's grief was that PW3's testimony is fabricated and the credentials of PW3 are not clear and his expertise is questionable. The learned state attorney replied and stated that at page 18 of the typed trial court's proceedings it is clear that PW3 in his testimony stated that he holds a diploma in Clinical Medicine and that he got his skills from Mafinga Cots. He thus, as per these qualifications qualified to be an expert witness as per law. He submitted that this ground of appeal is baseless.

Regarding the third ground of appeal, the appellant's grief is that the sentence imposed to him is excessive as at the time of commission of the offence he was a minor. Replying, the learned state attorney stated that the offence of rape falls in the minimum sentence and its minimum sentence is 30 years, hence the offence could not be lesser than 30 years jail imprisonment. The complaint that he was a minor is an afterthought. He submitted that it was a matter of fact which needed evidence even if he testified that he was 18 years by March 2021. The appellant should have raised this concern at the earliest opportunity to contest the issue of his age. He prayed the court to find this ground unmerited and thus should be disregarded.

On the fourth ground of appeal, the appellant's concern was that the trial magistrate erred in law and fact in convicting the appellant basing on the evidence of PW4 who identified the appellant at the scene of the crime on the claims of familiarity and failed to give description of the appellant's outlook or his attire of the material date as it was dark. The learned state attorney submitted the appellant's main complaint is based on identification. As per page 22 of the trial court's proceedings there was a good description of the appellant when cross examined by the victim:

"I know you, you are Juma , you are "Mchunga ngómbe", you are not my relative"

Considering the above words, he considers it as proper dock identification of the appellant. Hence this ground is devoid of merit.

The appellant's fifth ground of appeal is that the conviction was based on the confession statement which was wrongly considered as the same was obtained by intimidating, threats and beatings and there was no inquiry. The learned state attorney objected this ground and stated that as he partly argued in the first ground, inquiry was duly conducted in respect of admissibility of exhibit P.2 as per page 28 to 34 of the typed trial court's proceedings and his concern was dealt with accordingly.

Lastly, on the sixth ground of appeal, the appellant's grievance is that the prosecution did not prove its case beyond reasonable doubt. The learned state attorney objected this ground and submitted that there is enough evidence on record from all the five witnesses how the case against the appellant on the charge of rape was proved beyond reasonable doubt. He prayed that this appeal be dismissed in its entirety for lack of valuable ground to alter the conviction entered.

Rejoining, the appellant submitted that he was sentenced to life imprisonment and not 30 years, he thus reiterated his earlier submission.

Having heard the contesting submissions of the both parties and gone through the court's record, it is now the court to determine the issue of contention, whether this appeal is meritorious and whether the prosecution proved its case beyond all reasonable doubt.

The appellant's contention in the first ground of appeal is that he was not addressed on his basic rights during the trial court's proceedings on the admission of exhibit P2. I have gone through the court's records, it is apparent that prior to the admission of exhibit P.2, the appellant raised an objection that he was tortured and intimidated into signing the caution statement. The trial court rightly opened an inquiry proceeding where eventually ruled that the caution statement was admissible and thus admitted it as exhibit P2. The trial court's records establish that after its admission, the contents of exhibit P2 were loudly readout in court in the presence of the parties. It is a settled law that in order for a documentary evidence to be acted upon by the court, it must first undergo three stages which are clearance, admission and reading it out in court. This is as well clarified in the case of **Robinson Mwanjisi and**

Three Others vs R. [2003] T.L.R. 218 also as stated in **Lack Kilingani vs R**, Criminal Appeal No. 404 of 2015 (unreported) when the Court of Appeal held:

> *"Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful The Court in, at page 226 alluded to the three stages of clearing, admitting and reading out; which evidence contained in documents invariably pass through, before their exhibition as evidence".*

Having stated the above and guided by the principle established in these two authorities, it is my humble view that there was no any irregularity during the admission of exhibit P2. Hence the first ground of appeal is devoid of merits and it is dismissed.

The appellant's second grief is that PW3's testimony is fabricated, his credentials are unclear and his expertise is questionable. I have gone through the court's record and PW3 was Daniel Yoyo a doctor working at Musoma Regional Referral Hospital. He obtained his medical skills from Mafinga Cots in 2018 and was awarded an ordinary diploma in clinical medicine. I am at one with the learned state attorney that at

page 18 of the typed proceedings the credentials of the doctor (PW3) were well stated. It is this court's findings that if the appellant had any doubt about the doctor's credentials, he should have raised his concern there and thoroughly cross examined the doctor. His failure to do so meant agreeing to what was testified by the doctor. In the case of **BONFACE ALISTEDES vs THE REPUBLIC**, Criminal Appeal No. 346 of 2016 at page 10 where they reproduced what was held in the case of **DAMIAN RUHELE v. THE REPUBLIC,** Criminal Appeal No. 501 of 2007 (unreported) the Court of Appeal stated;

> *"It is trite law that failure to cross examine a witness on an important matter ordinarily, implies he accepts of the truth of the witness".*

In that regard and relying on the well-established principle above, this ground of appeal also lacks merits and it is dismissed as well.

The appellant's third anguish is that the sentence imposed to him was excessive as he was sentenced to life imprisonment and he was a minor during the commission of the offence. The learned state attorney submitted that since rape falls under the minimum sentence, the sentence could not be lower than 30 years imprisonment. The concern by the Respondent Republic that the Appellant was a minor is an afterthought, he should have raised that concern earlier.

In the case at hand the appellant and the co accused were both charged with rape and to be specific it was gang rape as per section 131 A(1) of the Penal code [CAP 16 R.E 2019]. When the matter was heard by the trial court, the appellant was the only one found guilty hence convicted and sentenced him as per section 131A (2) of the Penal Code [CAP 16 R.E 2019]. The charged section 131A (2) provides that;

> *"(2) subject to provision of subsection (3) every person who is convicted to gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape"*

With due respect I beg to differ from what the learned state attorney submitted in respect of this ground. In the case at hand the appellant together with the first accused person were jointly charged with gang rape and at the end of the trial, the trial court acquitted the first accused person and convicted the appellant. It is my humble opinion and according to the evidence of the victim that she was raped by two people and that constitutes gang rape regardless of whether the other person was found guilty or not. In that regard this court finds that the sentence imposed on the appellant was not excessive and it is as per law.

Regarding the issue of age of the accused person being 18 years old by the time he was charged with the offence thus not liable for custodial sentenced as done, it is a fact which needs to be resolved legally. According to law, a person of 18 years old is not exempted from custodial sentence as he is not a minor. The law as it is by now, a person below the age of eighteen years shall be known as a child (**Section 4(1) of the Child Act, Act no.21 of 2009**). Even if considering the fact that the appellant was 18 years at the time of commission of the offence, the court records are not in his favour. The charge sheet describes him as being 19 years old at the time of commission of the offence and also at the time of being charged. Interestingly, when the case was set for Preliminary Hearing on 10th December, 2020 the appellant was particularized by the facts of the case being 19 years old by the time of his arrest and being charged. When he was asked to reply to those facts of the case upon being readout by the prosecution, he is recorded to have replied the following, I quote:

> *"I only admit my personal particulars, the rest of the facts are disputed".*

This being an open fact, he is now precluded from disputing it as it is the settled law that undisputed and admitted facts during preliminary hearing are deemed as proved in law. The appellant can now not deny what he admitted as being true and undisputed. This is purely an afterthought ground as well countered by the learned state attorney. Hence, this sub ground of appeal too lacks merits and it is dismissed.

On the fourth ground of appeal the appellant's complaint is that he was convicted basing on the evidence of PW4 who identified him at the scene of the crime on the claims of familiarity but descriptions of the appellant's clothing at the time of commission of the offence were not stated and it is a common ground that it was dark. According to the court's record and PE2 exhibit, it is clear that though PW1and PW2 reached the scene while dark, the testimony of PW4 and exhibit PE2 put it clear that the episode started at the evening (just near or immediately after sun set) and considering the closeness of the distance between the two (appellant, co-accused and the victim which was almost zero distance) and that there was conversation amongst them for a while prior to the gang rape, the identification is well clear. Furthermore as per typed proceedings (at page 22) the victim gave the description of the appellant as follows;

"I know you, you are Juma; you are 'mchunga ngómbe', you are not my relative. That is all "

From this statement it is very clear, the victim was aware of who raped her as she was familiar to the appellant. Also, it is a well-established principle that the best evidence of a rape case comes from the victim herself. This principle was well stated in **Selemani Makumba v Republic**, [2003] TLR 203 when the Court of Appeal held:

> "***True evidence of rape has to come from the victim*** *if an adult, that there was penetration and no consent, and* ***in case of any other women where consent is irrelevant that there was penetration***"
> [Emphasis supplied]

Also, in the case of **Godi Kasenegala vs R,** Criminal Appeal No. 10 of 2008 (unreported). In that case, the Court of Appeal held:

> *"It is now settled law that proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors may give corroborative evidence; see for instance,* ***Selemani Makumba vs Republic,...,*** ***Alfao Valentino Vs Republic,*** *Criminal Appeal No. 459 and 494 of 2002 (unreported). Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so. See C.D Desouza Vs B.R Sharma (1953) EAC4 41"*

In the case at hand the victim was the one who testified in court that on the material date the appellant and the first accused person took her to unfinished building and had carnal knowledge with her. She also identified the appellant at the dock and she knew him before. It is my humble view that the fact the victim knew the appellant before as a herdsman *"mchunga ng'ombe"* and she identified him in court is sufficient to hold that she recognized the appellant and there was no chance of mistaken identity. Having stated so this ground is devoid of merits and is dismissed.

Regarding the fifth ground of appeal, this court holds that this issue has already been answered in the first ground of appeal as the caution statement was exhibit P2. This ground will not detain as it has already been answered in the negative. This ground is also devoid of merits and it is dismissed.

The last ground is that the prosecution did not prove its case beyond reasonable doubt. In the case at hand, the appellant was charged under section 130 (2) (e) and 131 A (1) and (2) of the Penal code. These provisions provide for the offence of rape and gang rape committed to a girl below 18 years, it is commonly called as statutory rape. The said offence has two ingredients namely, penetration and age

of the victim. Consent is never an issue when it comes to these provisions.

Therefore, this court will determine whether there was penetration and whether the age of the victim was established. Regarding penetration, PW4 testified at the trial court that she was taken to unfinished building and they took off her clothes and took out their penis and started sexing (raping) her. The law is settled that penetration however slight is sufficient to constitute sexual offence. In the case of **OMARY KIJUU vs THE REPUBLIC**, Criminal No. 39 of 2005, Court of Appeal at Dodoma at page 8

> *"... But in law, for the purposes of rape, that amounted to penetration in terms of section 130 (4) (a) of the Penal Code Cap. 16 as amended by the Sexual Offences Special Provisions Act 1988 which provides:*
>
> *"For the purposes of proving the offence of rape – penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*

In the case at hand the victim being alone at the scene clearly told the trial court that the appellant and the co-accused had sexual intercourse with her. That is sufficient to prove penetration. PW3 also testified that the victim was carnally known (PE1 exhibit).

Regarding the age of the victim, the law is settled that such age may be proved by the victim, her parents or medical practitioner. See **Isaya Renatus vs R**, Criminal Appeal No. 342 of 2015, CAT at Tabora (unreported). In the case at hand PW4 who is the victim testified in court that she was born in 2004 and the incident took place in the year 2019. In that regards the incident took place when she was 16 years old. Hence it is safe to state that the victim's age was proved. In fine, this court finds that the prosecution has proved the case beyond reasonable doubt and thus the sixth ground of appeal is equally devoid of merits and it is dismissed.

Before I pen off, it has come to my knowledge that in reading the trial court's judgment, it is clear that the appellant was sentenced without first being convicted. That omission was in law an error. However according to the current position of the law, the irregularity didn't prejudice the appellant. As per section 388 of the Criminal Procedure Act, Cap 20 of the Revised Edition, 2019, the said irregularity is curable (see **Mzee Ally Mwinyi Mkuu@ Babu Seya v. Republic**, Criminal Appeal no.499 of 2017, CAT at Mbeya, **Musa Mohamed V.Republic**, Criminal Appeal No. 216 of 2005, **Ally Rajabu & 4 Others V. Republic**, Criminal Appeal No. 43 of 2012, **Amitabachan Machaga @ Gorongóndo v. Republic**, Criminal Appeal No. 271 of 2017 and

Mabula Makoye v. Republic, Criminal Appeal No. 227 of 2017, all are unreported but searchable and retrievable from Tanzlii).

Since all grounds of appeal are devoid of merits, this court dismisses the appeal.

DATED at MUSOMA this 30th day of August, 2021.

F. H. Mahimbali

JUDGE

30/08/2021

Court: Judgment delivered this 30th day of August, 2021 in the presence of appellant, Mr Tawabu learned State Attorney for the Respondent and CC Kelvin – RMA.

Right of further appeal is well explained.

F. H. Mahimbali

JUDGE

30/08/2021