IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: JUMA, C.J., NDIKA, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO 354 OF 2019

VICTORY S/O MGENZI@MLOWE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Iringa)

(Matogolo, J.)

dated the 09th day of August, 2019

in

DC. Criminal Appeal No. 73 of 2018

JUDGMENT OF THE COURT

27th & 30th April, 2021

JUMA, C.J.:

The appellant VICTORY MGENZI MLOWE was charged, tried, and convicted by the District Court of Makete, of the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002. The particulars of the charge against the appellant were that around 12:45 hours on 29th June 2018 at Tandala Village in Makete District of Njombe Region, he had carnal knowledge of a sixteen-year-old girl. For the sake of the girl's modesty, we shall refer to her as **JSC** or **PW1**.

Brief facts are that JSC, who testified as PW1, was walking to the farm to pick pea vegetables when the Appellant stopped his motorcycle taxi (*boda-boda*) and asked where she was heading.

After JSC had climbed onto the motorcycle, the Appellant rode to an unfinished building. Once inside, the Appellant undressed his trousers and asked why PW1 still had her clothes on. When she expressed her fear over getting pregnant, he successfully persuaded her by pledging partial sexual penetration. She undressed, and he proceeded to insert his penis three times into her vagina. While they were in the sexual act, the door was locked from the outside, blocking their exit. The Appellant used his mobile phone and called up his friend to open the door. His friend had to go away when he found crowds already gathered around the locked door. When the door finally opened, police officers entered the room. The police took the Appellant and PW1 to Tandala Police station. The police gave PW1 a PF3 as a reference to the hospital for a medical check-up.

Yusuph Ilomo (PW2) confirmed that he is the one who locked up the Appellant and PW1 inside a room. While going to the Village Executive Officer to obtain an introductory letter to enable him to open an account in a local NMB Bank, PW2 saw JSC, who he described as "our

daughter," climbing onto a motorcycle taxi. While waiting his turn with the Village Executive Officer, his curiosity got the better of him. He decided to check on PW1 and the motorcyclist. He saw the motorcycle parked outside a semi-finished building, but neither PW1 nor the Appellant was around. After ascertaining that the two were inside one of the rooms, PW2 locked the door from outside, phoned both PW1's grandmother and the Village Executive Officer to inform them about his findings. The Village Executive Officer called in the police.

Elias Yusuph (PW4) was at his workplace at Ikonda Hospital when Neema Sanga (PW3) brought her grand-daughter, PW1. PW4 examined PW1's vaginal area, saw sperms and bruises indicating sexual intercourse had taken place. PW4 conducted a pregnancy test, which turned out negative and looking at PW1's urine showed negative and had no urinal diseases. After completing the medical examination, PW4 filled a report (exhibit P1) which he tendered as Exhibit P1.

In his brief defence, the appellant offered an innocent explanation for his presence at the unfinished building. During his business operating his motorcycle taxi, PW1 hired his services and had just paid the fares when the police arrived, arrested him, and later charged him with the offense of rape.

The learned trial magistrate (Mpitanjia-RM) believed the evidence of PW1 that the appellant raped her three times. He regarded PW1's testimony as coming from the victim of a sexual offence (rape), and can stand on its own merits under section 127(7) of the Evidence Act, Cap 6 R.E. 2002 to sustain the appellant's conviction. After convicting the appellant, he sentenced him to serve thirty (30) years in prison and suffer twelve cane strokes.

Dissatisfied with the trial court's decision, the appellant filed his first appeal to the High Court at Iringa. Matogolo, J., who heard that appeal, concluded that the prosecution evidence in its totality proved the charge of rape against the appellant. He noted that although the sixteen-year-old PW1 had initially resisted the appellant's sexual advances, she later relented and consented to sexual intercourse. The learned Judge was quick to point out that under section 130 (1)(2)(e) of the Penal Code, a girl under the age of eighteen, like PW1, could not, on account of her age, consent to sexual intercourse. As a result, he dismissed the appellant's first appeal.

Still aggrieved, the appellant preferred this second appeal, disclosing five grounds of appeal.

The first ground faults the first appellate judge for relying on evidence of PW1, who, apart from repeating that the appellant raped her, failed to describe the details of the sexual intercourse. In the second ground of appeal, the appellant contends that the judge could not evaluate his defence's evidence, specifically that PW1 was a passenger who had hired his motorcycle *(Boda-boda)*. The third ground contends that there was no direct evidence linking him to the rape and faults the first appellate judge for failing to evaluate the circumstantial evidence he used to sustain his conviction. The fourth ground faults the judge for relying on evidence of PW2 who, by merely finding a locked door to a disused house, falsely concluded that the appellant was raping PW1, a passenger who had hired his motorcycle. Lastly, the appellant contends that the prosecution did not prove the offence of rape beyond a reasonable doubt in light of unresolved doubt.

At the hearing of the appeal on 27/04/2021, Ms. Pienzia Nichombe, learned State Attorney, assisted by Ms. Elizabeth Mallya, learned State Attorney; appeared for the respondent Republic. The appellant appeared in person via a video link to Iringa District Prison. The appellant informed the Court that he would prefer the respondents' learned State Attorneys to address first the grounds of his appeal.

Ms. Nichombe did not support the appeal. She submitted on each ground of appeal seriatim. In the first ground of appeal, the learned State Attorney disagreed with how the appellant suggested that PW1 did not give details of her sexual encounter with the appellant. She referred us to the evidence of PW1 on page 9 of the record of appeal where PW1 lucidly explained such details as to when the appellant undressed his trousers, asked her why she was not undressing, how PW1 hesitated before she succumbed to his persuasion. They ended having sexual intercourse three times.

The learned State Attorney similarly urged us to dismiss the appellant's complaint in the second ground contending that the two courts below did not evaluate his defence evidence that PW1 had hired his motorcycle commuter services. Ms. Nichombe referred us to page 51 of the record where the first appellate Judge re-evaluated versions of evidence which the appellant offered in his defence, leading to the learned Judge's conclusion that the appellant could not be trusted:

> *"The appellant's defence was that the victim just hired him. The appellant and the victim were found inside the unfinished house after PW2 had locked them inside that house. But it appears what the appellant stated in his defence differs from what he alleged at the police station."*

The learned State Attorney next urged us to find that the victim's evidence (PW1) established the offense of rape, and we should accord her evidence the weight it deserves. For support that the evidence of the victim of rape is the best in the circumstances, she referred us to two unreported decisions of this Court in **JOSEPH LEKO V. REPUBLIC,** CRIMINAL APPEAL NO. 124 OF 2013 and **SELEMANI MKUMBA V. R.,** CRIMINAL APPEAL NO. 94 OF 1999. In **SELEMANI MKUMBA V. R** (supra), this Court restated that:

> *"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 woman where consent is irrelevant, there was penetration."*

Ms. Nichombe urged us to dismiss the third ground of appeal. The appellant blames the first appellate Judge for relying on circumstantial evidence because there was no direct evidence linking the appellant to the rape. She insisted that the evidence of PW1 was not circumstantial evidence but direct evidence. Evidence of PW1, she added, is supported by PW2 and PW3, who went to the crime scene and saw the appellant as he came out of the disused house.

Concerning the fourth ground of appeal contending that the evidence of PW2 misleads the general public, the learned State Attorney disagreed and urged us to dismiss it. She alleges that the evidence of PW2 and that of PW3 corroborated the evidence of the victim. The learned State Attorney referred us back to the evidence of the victim of the rape, PW1, to round up her submissions by urging us to dismiss the fifth ground of appeal where the appellant contended that the prosecution did not prove the offense of rape beyond a reasonable doubt.

Before the learned State Attorney sat down, we pressed her to show us where in the record of appeal PW1 testified that she was 16 years of age as suggested by the learned first appellate Judge to make the offense a statutory rape where only penetration needed proof. Consent is irrelevant once there is sexual penetration. At first, Ms. Nichombe referred us to page 8, where the record reads:

> ***"PROSECUTION CASE IS OPENED***
>
> *"PW.1 JSC (victim), Kinga, resident of Kidutegu, student Lupalilo Secondary School, 16 yrs old, Christian, Sworn and states as follows:-"*

When we asked whether the above reference to the age of 16 was evidence given under oath, she hesitated but hastened to refer us to the evidence age in the medical examination report (exhibit P1). She submitted that Exhibit P1 is evidential and confirms that PW1 was 16 years old when she and the appellant had sexual intercourse.

When his turn came to respond to the learned State Attorney's submissions, the appellant reiterated the contents of his grounds of appeal and urged us to allow his appeal.

We have considered this appeal and submissions on the five grounds of appeal. In terms of Section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 our mandate when hearing a second appeal is mainly concerned with issues of law, not matters of fact.

It is an established practice of the Court when sitting to hear a second appeal; it avoids upsetting concurrent finding of facts by the trial and first appellate courts. In **WANKURU MWITA V. R.**, CRIMINAL APPEAL NO. 219 OF 2012 (unreported), the Court reiterated this practice:

> *"The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be*

shown that there are perceived, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of evidence; mis-directions or non-directions on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice (See, ***AMRATLAL DANODAR MALTASER AND ANOTHER T/A ZANZIBAR HOTEL*** *(1980) T.L.R. 31;* ***MOHAMED MUSERO V. R.*** *(1993) T.L.R. 290;* ***SALUM MHANDO V. R.*** *(1993) T.L.R. 170;* ***COSMAS KARATASI V. R.,*** *CRIMINAL APPEAL NO. 119 OF 2004 (CAT, unreported)."*

The trial magistrate, Mpitanjia—RM, evaluated the evidence and addressed whether the appellant raped PW1. He weighed up the testimony of PW1, who revisited how she and the appellant had sexual intercourse three times. In his defence the appellant vehemently denied insisting that PW1 was anything but his passenger; the learned trial magistrate disregarded this defence because of the weight of prosecution evidence, especially PW1 and evidence of PW2. The learned trial Magistrate relied on section 127 (7) of the Evidence Act, which translates to the legal position that the best evidence in sexual offences

comes from the victim of rape. He concluded that the prosecution had proved the case against the appellant.

After re-evaluation of evidence of the victim (PW1), that of PW2, and the medical officer (PW4), the first appellate High Court (Matogolo, J.) was not in any doubt, PW1 was a victim of rape. Matogolo, J. pointed out PW1 was a victim of a sexual offence. Evidence of a victim of a sexual offence is believable unless there are good reasons not to. The learned Judge re-evaluated the evidence of Elias Yusuph (PW4) of Ikonda Hospital. PW4 medically examined PW1; he found bruises and sperms in her vagina. The first appellate court similarly evaluated the evidence of PW2 and PW3 and confirmed that the Appellant and PW1 locked themselves inside the disused house. Matogolo, J. went as far as concluding that from the evidence, it appears 16-year PW1 had sexual intercourse with the Appellant.

The trial and the first appellate courts concluded that the Appellant had sexual intercourse with the 16-year-old PW1. It is appropriate to ask whether, from the perspectives of the Appellant's grounds of appeal, there are reasons to interfere with that concurrent finding of facts.

In the first ground of appeal, the Appellant faults the concurrent finding of facts so far as the evidence of PW1 is concerned. It begs

whether the Appellant is correct that PW1's evidence failed to explain how she and the Appellant had sexual intercourse. PW1 testimony what happened when she and the Appellant arrived at the disused house:

> *"...we entered therein, he removed his trousers, he asked me why don't you remove your clothes, I told him that I fear to get pregnant, he solicited me that let us do a little (kidogo tu), then I removed my clothes then he raped me, he took his penis to vagina for three times, at the time the door was closed from outside...."*

We think PW1 has disclosed everything that transpired. Her testimony graphically proves that there was more than slight sexual penetration which the appellant had requested earlier. In **YUSUPH MGENDI V. R.**, CRIMINAL APPEAL NO. 148 OF 2017 (unreported), the Court stated:

> *"In any case, we think, we need to emphasize that it is now settled that* ***it is not expected that in proving all cases of rape each victim of such offence would graphically explain how a male organ was inserted into her female organ****. (See* ***BAHA DAGARI V. REPUBLIC,*** *CRIMINAL APPEAL NO. 39 OF 2014 (unreported)."* [Emphasis added].

As far as the Appellant's defence is concerned, we agree with Ms. Nichombe, the learned State Attorney, that we should dismiss the second ground of his appeal. She is correct to submit that on page 51 of the record; the first appellate court considered the Appellant's defence. The Judge found his defence at his trial differed from what he later said at the police station. The Judge found the Appellant to be untrustworthy and prone to change his versions several times.

We also agree with the learned State Attorney in her submission that the complaint about lack of direct evidence in the third ground lacks merit. We should point out here that in sexual offences, there can be no more direct evidence than the evidence of the victim of the crime concerned. PW1 testified first-hand how she and the Appellant had sexual intercourse three times. Even if there is no other evidence remaining on the record, the evidence of PW1, as the victim of sexual, can still stand alone to convict without any corroboration. Sub-section (6) of section 127 of the Evidence Act, Cap 6 R.E. 2019 regards the evidence of the victim of sexual crime to be the best evidence:

> *127 (6).-"... where **in criminal proceedings involving sexual offence** the only **independent evidence is that** of a child of tender years or **of a victim of the sexual offence, the court shall receive the***

evidence, *and may,* ***after assessing the credibility of the evidence of*** *the child of tender years of as the case may be* ***the victim of sexual offence on its own merits,*** *notwithstanding that such evidence is not corroborated,* ***proceed to convict,*** *if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."* [Emphasis added].

As correctly submitted by the learned State Attorney, the direct evidence of PW1 does not stand alone. PW2 and PW3 rushed to the disused house where the Appellant and PW1 were locked in.

We also agree with Ms. Nichombe's urging that we should dismiss the fourth ground. Through this ground, the Appellant blames PW2 for playing tricks to make the public believe he raped PW1. There is no doubt that it was the efforts of PW2, who followed up the Appellant and PW1 right to the disused house. PW2 went to check on what PW1 and the Appellant were doing inside a disused house. He saw the two inside that house and had the presence of mind to lock the door and alert other witnesses. PW3 received a call from PW2 and rushed to the scene. Through a window, he saw PW1 and the Appellant inside the locked house. We accordingly dismiss this ground of appeal.

From submissions on the five grounds of appeal, the one main issue of law which calls for our determination falls under the fifth ground of appeal. That is, whether the evidence on record supports the concurrent finding of facts that the appellant committed the offence of statutory rape under sections 130 (1) (2) (e) and 131 (1) of the Penal Code for which the two courts below, convicted him.

The essence of this statutory offense of rape boils down to the proof of age of the victim. A girl under eighteen cannot consent to sexual intercourse under section 130 (2) (e) of the Penal Code, Cap. 16 R.E. 2019, which provides:

> *130 (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:*
>
> ...
>
> *(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.* [Emphasis added].

Proof that the PW1 was under the age of eighteen when she and the Appellant had sex is determinative in proving the statutory offence of rape under the above provision.

In **GEORGE CLAUD KASANDA VS. DPP,** CRIMINAL APPEAL NO. 376 OF 2017 (unreported), this Court reiterated the duty of the prosecution to lead evidence proving the age of the victim in offenses of rape that fall under section 130 (1) (2) (e) and 131 (1) of the Penal Code:

> *"The prosecution is duty-bound to establish, among other ingredients, that the victim is under the age of eighteen to secure a conviction."*

The Court in **GEORGE CLAUD KASANDA** (supra) referred to **ISSAYA RENATUS VS. REPUBLIC,** CRIMINAL APPEAL NO. 542 OF 2015 (unreported) where the Court identified possible sources of proof of age of victims of a sexual offence. Proof of age may come from either the victim or her relative, parent, medical practitioner, or by producing a birth certificate.

In our view, the learned State Attorney correctly submitted that the medical examination report (Exhibit P1) had sufficiently proved that PW1 was 16 years of age when she and the appellant had sexual intercourse.

In the present appeal, we agree with the learned State Attorney that the age of PW1 appears in the medical examination report, which is on record as exhibit P1. This report (exhibit P1) proves that the victim was sixteen years old when she and the appellant had sexual

intercourse. The appellant did not object when the prosecution offered to tender the medical examination report in the evidence. Again, the contents of this report were read over to the appellant during his trial. We are, as a result, satisfied that the prosecution proved that PW1 was under the age of eighteen, when she and the appellant had sexual intercourse.

As a result, this appeal is devoid of merit and is hereby dismissed.

DATED at **IRINGA** this 30th day of April, 2021.

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 30th day of April, 2021 in the presence of the Appellant in person linked via video conference at Iringa Prison and Ms. Piezia Nichombe, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

K. D. MHINA
REGISTRAR
COURT OF APPEAL