IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 228 OF 2021

KIDAI MAGEMBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate Court of Kigoma Extended Jurisdiction at Kigoma)

(G. E. MARIKI, PRM. EXT. JUR.)

Dated the 14th day of April, 2021
in
DC. Criminal Appeal No. 1 of 2021

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JUDGMENT OF THE COURT

1st & 13th June, 2022

KENTE, J.:

The appellant Kidai Magembe appeared before the District Court of Kibondo where he was charged and convicted of rape of a seven year old girl. He was subsequently sentenced to the mandatory custodial sentence of life imprisonment. The particulars of the charged offence alleged that, on 28th June, 2020 at about 11:00 a.m at Nyamwilonge area Nyamtukuza Village within the District of Kakonko in Kigoma Region, the appellant had carnal knowledge of a juvenile girl aged seven years. To conceal the identity of the said girl, we shall

hereinafter alternatively refer to her as "PW6", "the victim" or "the complainant."

Dissatisfied with the said conviction and sentence, the appellant appealed to the High Court (sitting at Kigoma) where an order was made for the transfer of the appeal to the Resident Magistrate's Court of Kigoma for hearing by Hon. G. E. Mariki, Principal Resident Magistrate with Extended Jurisdiction. Mr. Mariki heard the appeal and in the end, he found it wanting in merit and dismissed it in consequence. This is an appeal against the said decision of the Resident Magistrate's Court with Extended Jurisdiction.

The case against the appellant was essentially based on the testimony of four eye witnesses namely Leonia Jacob (PW4), Liswa Genge (PW5), the victim who testified as (PW6) together with one Mathias Shedrack Mayala a Medical Practioner who testified as PW7 and it was briefly to the following effect.

Until the occurrence of the rape incident, the appellant was a petty goldminer based at Nyamilonge area in Kakonko District Kigoma Region. He also used to do some video show business at the hall owned by his host one Tumbo Gadiga (PW2).

On 29th June, 2020 at about 11:00 a.m, PW4 the victim's mother was informed by her five year old son that the appellant had just pulled the victim into his bed-room and that the two were there doing "follies." Apparently, her face distorted with confusion and rage, PW4 responded to her young son's tip with enormous speed and quickly went to the appellant's room which was just a few paces from her residence. In unexpected circumstances, the appellant was surprised and caught virtually red handed. According to PW4, in an attempt to prevent her from spilling the beans to anybody, the appellant allegedly offered her sh.20,000/= but she turned him down. In the course of time, one of their neighbours Liswa Genge (PW5) went to the video hall where he overheard PW4 more or less crying and complaining in the appellant's room accusing him of abusing her young daughter. PW5 re-counted in detail the entire setting of the crime scene. He said that, at that time the appellant was in his room fastening his trousers with a zip as the victim sat by his side. When PW5 called him, the appellant allegedly returned no response. He simply got away and vanished through the back entrance. Following an urgent manhunt, he was arrested on the following day by PW2 and PW3 one Sita Sang'udi the victim's father. As we shall hereinafter reveal, the

appellant was traced and found at the home of one Kulwa Kibuyu in Biharamulo District where he had fled to. In the meantime, the incident was reported to the police station from where the victim was refered to the nearby Health Centre. She was examined by (PW7) whose medical examination report, the PF3 which was tendered in court as Exh. P.2 essentially confirmed her to have been raped.

With regard to the statement of the victim who testified as PW6, she gave unsworn evidence because she did not know the meaning of oath but immediately before giving evidence, she promised to tell the truth and not to lie in perfect alignment with section 127(2) of the Evidence Act, Cap 6 (R.E 2019). She told the trial court that on the fateful day, the appellant took her into his room, stripped her naked and lay on her. Further that, he went on to have sexual intercourse with her. Asked why she did not cry for help, PW6 is recorded to have told the trial court that the appellant had gagged her to stop her from shouting or crying for help. She also said that after sometime, her mother went to her rescue.

After his arrest, the appellant was whisked to the nearby police station and later on to the District Court where he was arraigned and formerly charged with rape.

The appellant preferred a solitary pursuit to his case. He gave a sworn statement denying in the strongest possible terms to have committed the charged offence. He however admitted to know PW6 together with her mother. He said while under examination in-chief that, on 29th June, 2020 PW4 was looking for her missing daughter something which at first did not bother him. Further that, sometimes later, he heard PW4 as saying that he had raped her daughter and that, quite disturbed by PW4's accusations, he asked her if she was mad. Seeing that it was pointless to argue with her and in order to avoid unnecessary verbal altercation, he then left for his work.

To the contrary the learned trial magistrate was satisfied that the appellant was caught in **flagrante delicto** as he was found in the circumstances of committing the charged offence. He was convinced that the appellant was well known to PW4 and PW2. It was his finding that the appellant was sufficiently identified by PW6. Moreover, the learned trial Magistrate considered that the evidence of PW7 together with the PF3 had corroborated the evidence of PW6. Accordingly, he went on convicting the appellant as charged.

As stated earlier, the appellant's appeal to the High Court which was transferred to the Resident Magistrate's Court and which was

against both the conviction and sentence was dismissed for lack of merit. In dismissing the appeal, the learned Principal Resident Magistrate was satisfied that: **one;** at the time of occurrence of the rape incident, the victim was aged seven years, **two;** that the offence was committed in broad day light and therefore there was no possibility of a mistaken identity; **three;** that there was sufficient evidence to prove penetration, **four;** that there was direct evidence of two eyewitnesses, to wit PW4 and PW6 both of them implicating the appellant and finally that, as opposed to his explanation that he had ignored the accusations levelled against him by PW4 and gone to work, the appellant remained a fugitive until the following day when he was traced and arrested at his hideout.

Without rambling on too long, the essence of the appellant's grievances in this appeal may be summarised as follows: He preferred six-grounds in his memorandum of appeal the thrust of which centres on the important question as to whether his guilt was proved beyond reasonable doubt as to ground a conviction.

At the hearing of the appeal, the appellant appeared in person without legal representation and, having adopted his grounds of appeal, he chose to hear the response by Messrs. Benedict Kivuma

Kapela and Raymond Kimbe both learned State Attorneys representing the respondent Republic before he could fight back.

For the respondent, Mr. Kapela strenously resisted the appeal. Submitting on the first ground of appeal in which the appellant is complaining that the prosecution ought to have called as witness the victim's young brother who was a child then aged five years and who is said to have informed PW4 about the appellant's wrongdoings, Mr. Kapela briefly submitted that, given the evidence of PW4 and PW6 who were the eyewitnesses to the charged offence and whose evidence was true to the bone, it would have been rather superfluous for the prosecution to call the said young boy as a witness. As to the complaint in the second ground of appeal that the rape incident if at all it occurred, was not reported to the local leadership, the learned State Attorney could not see any resemblance of merit in this complaint. He argued in the first place that, there is no legal requirement to report a crime to the local leadership and that, most importantly, the incident was reported to the police and that is why after being arrested the appellant was charged in court. Moving forward to the third ground of appeal which challenges the learned Principal Resident Magistrate of the first appellate court for relying on the evidence of PW7 whose

medical examination report did not specify the nature of the blunt object which was alleged to have been inserted into PW6's front bottom, Mr. Kapela submitted that, being a medical expert and not having witnessed the rape incident, it would have been a leap in the dark for PW7 to give a clearcut opinion that it was someone's manhood and nothing else that had been inserted or caused to penetrate into the victim's private parts. On that account the learned State Attorney invited us to dismiss the first, second and third grounds of complaint for lack of factual and legal basis.

On the fourth ground of appeal in which the appellant is complaining that the age of the victim was not ascertained, Mr. Kapela submitted that, while PW1 told the trial court that the victim was aged seven years, her parents put her age at eight. But the learned State Attorney was quick to argue that, most of all though, is the fact that whether the victim was aged seven or eight that is a non-issue argument as what matters, in the circumstances of this case, is that whichever is said to be the age of the victim, it does not take the case out of the ambit of section 131(3) of the Penal Code which is the applicable law. Relying on **Mzee Aly Mwinyimkuu @ Babu Seya v. Republic,** Criminal Appeal No. 499 of 2017 (unreported), the learned

State Attorney reminded us of the settled position of the law that, where the victim's age is the determining factor in establishing the offence, under normal circumstances, evidence of the victim's age would be expected to come from any or either of the following witnesses, namely, the victim herself, both of or any of her parents, a guardian or may be proven by way of a birth certificate. The learned State Attorney concluded that, as long as the victim's mother and father gave evidence showing, among other things, that at the material time the victim who is their own daughter was seven years old, that was sufficient to prove her age. It is on the above premises that the learned State Attorney invited us to dismiss the fourth ground of appeal as well, for being unfounded.

Submitting against the complaint that, in upholding the decision of the trial court, the learned Principal Resident Magistrate of the first appellate court relied on hearsay evidence adduced by PW1, PW2, PW3, PW4, PW5, and PW7, Mr. Kapela was of the quite different view. He argued that, as opposed to the appellant's bare assertions, PW4, PW5 and PW6 gave an eyewitness account of the facts and circumstances surrounding the commission of the charged offence and their evidence was both convincing and damning.

Finally is the sixth ground of appeal which is centred on the complaint that the appellant was convicted on the basis of the weakness of his defence rather than the strength of the prosecution case. To this complaint, Mr. Kapela had no much to put across. He only reiterated his previous argument that the prosecution had led sufficient evidence to support a conviction and therefore, for all purposes and intent, the appellant's complaints were unwarranted.

Having heard the reply submissions by Mr. Kapela, the appellant was not powerless to fight back, albeit in relatively short terms. He contended in the first place that, it was necessary for the five-year old boy to be called as witness because PW4 did not give a first hand account of the rape incident. He also challenged the evidence of PW5 for not raising the alarm to alert members of the public if he really was found him in the act of committing rape. He argued that, if PW5 had raised the alarm, he could not have escaped as alleged as the young men would have outran, subdued and captured him within the vicinity of the crime-scene. The appellant was emphatic on the necessity for the local leadership to be informed of his alleged wrongdoings. Elaborating on this complaint, he argued that, if it is true that he committed such a heinous and despicable crime, that was not

something which could have gone unnoticed or otherwise winked at by the village leadership.

As to the medical examination of the victim, the appellant wondered why was she not examined until after his arrest and why was one of his relatives or close friends not called so as to be present and witness the said examination. To conclude his rejoinder submissions, the appellant contended, almost as an afterthought that, PW7 had demanded a bribe from him ostensibly, as an inducement to give him a favour by not giving a report which would incriminate him. All in all, he was of the strong view that the charge against him was not proved beyond doubt as to warrant a conviction.

To begin with, it is elementary but imperative to observe that, under the law in Tanzania, a male person commits the offence of rape under section 130(1)(2) and (2) (e) of the Penal Code;

(i) If he has sexual intercourse with a girl;

(ii) With or without her consent when she is under eighteen years of age unless she is his wife who is fifteen or more years of age and is not separated from him.

Therefore, to prove the offence of rape in the context of the instant case, it was incumbent upon the prosecution to lead sufficient evidence proving beyond reasonable doubt that, on 29th June, 2020 the appellant had sexual intercourse with PW6 and that PW6 was then under eighteen years of age. And for purposes of sentence, the prosecution was saddled with a duty to prove that the appellant had committed rape of a girl whose age was under ten years (vide section 131 (3) of the Penal Code). Those were the most important questions with which both the trial and the first appellant Magistrates were preoccupied.

For our part, we wish first to quickly dispose of the question whether the age of the victim was established as required under section 130(2)(e) of the Penal Code. On this question, we entirely agree with Mr. Kapela that indeed the position of the law as it stands today is that, where the age of the victim is a governing factor in establishing the offence, evidence regarding the age of the victim would be expected to come from the victim herself, the parents, guardian, teacher or may be proved by a birth certificate. (See **Andrea Fransis v. Republic,** Criminal Appeal No. 173 of 2014 (unreported). As it will be noted in the instant case, we have three

reliable and acceptable sources of the evidence of the victim's age. **One**, the victim herself, **two,** PW3 who is the victim's father and **lastly** PW4 the victim's mother. Both the victim and her parents were very candid that she was **eight** year old at the time of the appellant's trial which was almost two months after occurrence of the charged offence. As one would expect, we are not surprised that Detective Corporal Rajabu (PW1) who investigated this case had estimated the victim's age at seven which was not materially different or far below her actual age as attested to by herself and her parents. (See also **Isaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported). We thus take it as an established fact that the victim was aged eight and that finding brings her within the scope of section 130(2)(e) of the Penal Code which creates the offence of statutory rape. We shall now move on to deal with the remaining grounds of appeal in their totality without losing sight of the crucial question for our consideration that is, whether the appellant's guilt was demonstrated beyond reasonable doubt to justify his conviction.

As already stated, this is a second appeal and as a general rule of practice, in a second appeal, this Court will only interfere with the findings of fact by the lower courts if there have been some

misdirections or non-directions in the evaluation of the evidence or if the two courts below misapprehended the quality and nature of the evidence as to reach to an erroneous finding or conclusion. (See **The DPP v. Jaffari Mfaume Kawawa** [1981] T. L. R 387, **Seifu Mohamed E. L. Abadan v. Republic,** Criminal Appeal No. 320 of 2009 and **Nchangwe Marwa Wambora v. Republic,** Criminal Appeal No. 44 of 2017 (both unreported).

With regard to the direct evidence of rape, we wish to start with our observation which we made in the case of **Selemani Makumba v. Republic** [2006] T. L. R 379 where we held, inter *alia* that, true evidence of rape has to come from the victim.

As can be gleaned from the concurrent decisions of the lower courts, the two courts below believed the direct evidence of PW6 who told the trial court that having pulled her into his bed room and after laying on her, the appellant went on to have sexual intercourse with her by pushing his erected manhood into her lady parts. The learned trial and the first appellate Principal Resident Magistrate also took into account the evidence of PW4 and PW5. The totality of their evidence is that, they found the appellant and the victim in the circumstances suggesting that immediately before, the two had been engaged in a

sexual encounter. PW5 was very candid that at that time the appellant had his chest bare and was busy fastening a zip on his trousers. As for the question whether there was penetration or not, the two courts below believed as true the evidence of PW7 who examined the victim and established that she had some bruises and clots of blood on her private parts signifying that a blunt object had penetrated or been inserted thereinto.

We have carefully considered the direct evidence given by PW6 along with the circumstantial evidence adduced by PW4, PW5 and PW7. As it will be noted, in any case of rape, what the law essentially requires is for the prosecution to lead either direct or circumstantial evidence or both category of evidence connecting the accused with the charged offence. This is so because, in the ordinary nature of things, except for the evidence of the victim herself as it were in the instant case, the direct evidence of an eye-witness to the offence of rape is seldom available and therefore reliance must be placed upon the evidence of the victim and the circumstantial evidence, if any.

We have considered the complaint by the appellant that the prosecution should have called as witness the young boy who informed PW4 about his wrongdoings. Like Mr. Kapela, we find this complaint

to have no merit as the plausible evidence adduced by the victim herself was sufficient to prove rape and if necessary, the evidence led by PW4 and PW5 was sufficient enough for the two courts below to draw the inference as they did that, indeed rape had taken place and that the perpetrator was none other than the appellant. We do not therefore think that the omission to call the said boy as witness could have discredited the prosecution case. Similarly, is the complaint that the local leadership was not informed about the whole episode the omission which, in our view, did not discredit the prosecution witnesses. While we agree that in many cases, as a starting point, in rural areas incidents of criminality are ordinarily reported to the local leaders, we do not think that reporting a criminal incident directly to the police who are charged with the duty of investigating and prosecuting crimes would render incredible one's complaint. For, it seems obvious in this case that, the rape incident was reported to the police who dutifully conducted investigations leading to the appellant's prosecution and conviction. Without belittling the local leaders who are in fact doing a hard and important work at the grassroot, we are not prepared to lay down a general rule that, every incident of criminality must be reported to the local leadership before the

complaint is formally made to the police. As correctly submitted by Mr. Kapela, there is no law nor rule of practice which makes the reporting of a crime to one's local leadership an indispensable legal requirement. We thus dismiss that complaint for being unfounded.

As to the complaint against the report by the medical practitioner who examined the complainant and confirmed her to have been sexually abused and was challenged by the appellant for not specifically pointing out the name of the blunt object which was inserted or caused to penetrate into the complainant's private parts, we wish to quote what was held in the English case of **J. P. Morgan v. Springwell** [2007] I ALL ER (Comm) 549 where the court held that:

> *"An expert is not to find facts but to express his opinion on the basis of assumed facts."*

It is on the basis of the above-cited authority that we do not expect PW7 to have conjectured that nothing else could have been inserted into the victim's private parts other than a man's manhood.

To that end, we do not entertain any doubts whatsoever that the findings by the medical expert witness proved that the offence stated

in the charge had been committed against PW6 as penetration which is one of the ingredients of the offence of rape was proved beyond reasonable doubt. We therefore dismiss the third ground of appeal.

Finally is the sixth ground of appeal which criticizes the learned Principal Resident Magistrate of the first appellate court for allegedly upholding the decision of the trial court without taking into account that he was convicted on the basis of the weakness of his defence rather than the strength of the prosecution case. With due respect to the appellant, we cannot buy his story. There was ample evidence connecting him with the offence with which he stood charged. The direct evidence given by PW6 remained lucid, straight forward and was well corroborated by the circumstantial evidence of PW4, PW5 and PW7. We also take into account the appellant's unexplained disappearance immediately after occurrence of the rape incident a conduct which in our view, was completely incompatible with the conduct of an innocent person.

From all this evidence, the learned PRM of the first appellate Court concluded, rightly so in our view, that the guilt of the appellant was proved beyond all reasonable doubt. Likewise, we are satisfied beyond reasonable doubt as was the first appellate court that the

appellant's guilt was proved to the required standard. Since the sentence imposed is the minimum, we have no reason to fault the two courts below.

In the ultimate event and for the reasons stated, we find ourselves constrained to dismiss the appeal in its entirety which we hereby do.

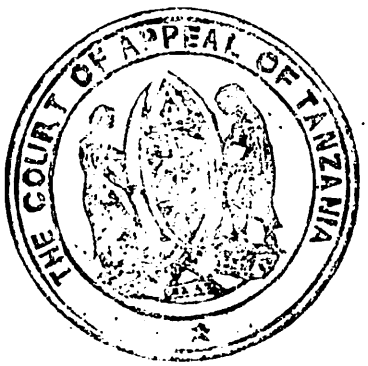
DATED at **KIGOMA** this 10th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of June, 2022 in the presence of the Appellant in person, unrepresented and Messrs. Benedict Kivuma Kapela and Raymond Kimbe both learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL