IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: KWARIKO, J.A., GALEBA, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 468 OF 2022

WACHAWASEME JOHN.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Manyanda, J.)

dated the 26th day of August, 2022

in

(DC) Criminal Appeal No. 3 of 2021

.....

JUDGMENT OF THE COURT

29th April & 8th May 2024

GALEBA, J.A.:

Wachawaseme John, the appellant, was arraigned before the District Court of Kibondo in Criminal Case No. 252 of 2020. He was charged on a single count of rape contrary to sections 130 (1) and (2) (e) and 131 (1) both of the Penal Code. The victim of the abuse was a young girl aged 10 years at the time. In order to disguise her identity, we will refer to her as the victim or PW4. Upon a full trial, the appellant was convicted and sentenced to 30 years imprisonment. His first appeal to the High Court was unsuccessful. In this appeal he is contesting the decision of the first appellate court.

The prosecution case at the trial, was that, in the evening hours on 13th September, 2020, the victim was playing around the house of one Martin Charles, her uncle at Nengo Village within Kibondo District in Kigoma Region. Then, the appellant, who is his grandfather because, he is married to her grandmother, called her and told her to get him fire from his uncle's place. She complied and took the fire to the appellant's house but, the appellant held her by the hand and carried her to his room and laid her on his own bed. As the victim had no underwear, the appellant raised the victim's skirt which act left her naked. The appellant then inserted his manhood in the victim's sexual organ. After he had finished, the victim went and told Martin Charles of what she has just gone through. Martin Charles also known as Ndabhona, called and informed Joyness Gerald (PW6), his neighbour, who passed on the chilling information to Liberata Charles (PW1), the victim's mother. The latter reported the matter to John Ntanyamala, the hamlet chairperson who advised that a militiaman be consulted in order to go and arrest the suspect. Pursuant to that plan, No. MG 345831 Bandiko Ngereza (PW5), a militiaman was advised to go and arrested the appellant and present him to the police, which he did.

As that was happening, PW1 also took the victim to the police where she was issued with a PF3, and went to Kibondo District Hospital, where Emily Malaki (PW7), an Assistant Medical Officer, examined the victim and

found her without virginity and opined that a blunt object which could be a male organ was responsible for the loss of the missing chastity. This witness also collected a sample of foul fluids from the victim's sexual organ, and upon subjecting it to medical tests, results were that the victim had sexual infections. The witness treated the victim, filled in the PF3 and permitted PW1 and PW4 to leave. At the trial, PW7 tendered the PF3 which was admitted as exhibit P1. These are the facts upon which, a charge of rape was brought against the appellant.

According to the appellant, he did not commit the alleged offence, because on 6th September, 2020 he went to the distant farms at Kagoti, stayed there and came back on 13th September, 2019 around 22:30 hours, and slept. As he was sleeping PW5 went to his house around 01:00 hours in the same night and arrested him. They took him to Kibondo Police Station where he was detained for 8 days before he could be arraigned in court. According to the appellant, he had leased land to PW1 and Martin Charles, but later he took his land from them, so there were grudges between him and those people. He concluded that this case was fabricated by PW2 and Martin Charles in order to just fix him. The trial court considered both the prosecution and the defence, and accorded more credence on the former. It convicted the appellant and sentenced him to

30 years imprisonment as indicated above. He was aggrieved and appealed to the High Court, but his appeal was dismissed.

As the appellant's first appeal did not succeed, he presented this appeal in order to contest the decision of the first appellate court. He initially raised 5 grounds of appeal, but at the hearing he abandoned the 2nd ground as the same was a new complaint whose substance had not been dealt with at the High Court. So, the appellant retained four grounds, which may be paraphrased as follows; **one,** that the evidence of PW7, the medical expert did not corroborate that of PW4, the victim, particularly on the issue of penetration and who committed the offence. **Two**, that the hamlet chairman and the victim's uncle were material witnesses, but were not called to give evidence. **Three**, there was a contradiction on the age of the victim, in terms of the evidence of the victim, PW4 and her mother, PW1, which evidence did not reconcile with the age mentioned in the charge sheet and; **four**, that the case was not proved beyond reasonable doubt.

At the hearing of this appeal, the appellant appeared in person without legal representation, whereas the respondent Republic had the services of Mr. Shabani Juma Masanja, learned Senior State Attorney, assisted by Ms. Naomi Joseph Mollel, learned State Attorney.

As the appellant preferred the respondent's side to respond to his grounds first, Ms. Mollel reacted to the appeal, starting with the first ground of appeal.

In opposing the first ground, the learned State Attorney submitted that all the three ingredients of the offence of rape in persons below 18 years, were proved. As for the issue of penetration, she contended that PW4 at page 21 of the record of appeal, explained how she was raped by the appellant an aspect which was also corroborated by the evidence of PW7, the medical expert, and the victim's mother, PW1. She moved the Court to dismiss the first ground of appeal.

In rejoinder to the respondent's arguments, what we heard the appellant arguing is that the medical tests of the victim were carried out in his absence.

So, the issue in the first ground of appeal, is whether the evidence of PW4 was corroborated by that of PW7, in respect to the offence of rape, and whether it was the appellant who committed the offence. In this case, PW4 was the victim of the offence. She testified that while playing at her uncle's house, the appellant called her to take fire to his house, but when she got there, the appellant took her by the hand to his bedroom, where he undressed the victim and raped her. The evidence of the appellant calling the victim to his house, was corroborated by Sarah Bandiye (PW2)

at page 16 of the record of appeal, where she stated that she saw PW4 entering the appellant's house after the latter had called her to take fire to him, so that he could prepare a meal. The evidence of PW4 on penetration, was corroborated by PW7, an assistant medical officer, who found the child with no hymen, but foul fluids in her sexual organ, and concluded that the victim was raped.

It is essential that we be clear here; that the evidence of medical experts in sexual offence cases, does not, and is not expected to prove identity of the offender. The evidence is necessary however, to prove that the alleged sexual offence was committed. It is significant that we add here that, it is also not a requirement of any law that medical tests of the victim of sexual offences must be carried out in the presence of the suspected offender.

We are of a strong view therefore, and we agree with both courts below that, the evidence of PW7 corroborated that of PW4 on the issue of penetration. In view of the above, we do not find merit in the first ground of appeal, therefore we dismiss it.

The complaint in the second ground of appeal is that the hamlet chairman and the victim's uncle were material witnesses but were not called to give evidence. In addressing this ground of appeal Ms. Mollel submitted that the victim's uncle and the hamlet chairman were not

material witnesses and generally there is no specific number of witnesses set by law. On that point, the learned State Attorney referred us to section 143 of the Evidence Act. She argued further that, the omission to call those persons as witnesses, did not in any way, occasion any miscarriage of justice on the part of the appellant or his case. In any event, she submitted, that even if their evidence would be recorded, the same would still be hearsay. She thus implored the Court to dismiss that ground of appeal.

In rejoinder, the appellant did not say anything on the learned State Attorney's contention.

The issue in the second ground of appeal, is whether Martin Charles also known as Ndabhona and John Ntanyamala also called John Gwajikale, PW4's uncle and the hamlet chairman, respectively, were material witnesses for the case of the prosecution. In law, generally a material witness is a witness whose evidence is relevant and consequential to the substantive legal proceeding. In the case of the **Director of Public Prosecutions v. Sharif s/o Mohamed @ Athumani and Six Others,** Criminal Appeal No. 74 of 2016 (unreported), we defined a material witness as follows:

> *"...a material witness is a person who has information or knowledge of the subject matter*

which is significant enough to affect the outcome of a trial. (See the Free dictionary or legal dictionary)."

We will therefore be guided by the above definition in examining the information that each of the witnesses complained of, had in order to fairly assess, whether in view of such information, the witnesses were material witnesses.

In this case, according to the record, particularly at page 19 of the record of appeal, immediately after PW4 was raped, she reported the incident to Martin Charles, the said uncle. At page 27 of the record of appeal, the said Martin Charles called PW6 who then called PW1, the victim's mother, and informed her of what had happened. Essentially, according to the evidence of PW1 and PW6, that was the only role of Martin Charles in the case. In this case, the information that Martin Charles had, was that the child was raped. But all the 7 witnesses, who testified be it direct or hearsay, each had the information that PW4 was raped. In our view therefore, there was nothing special to expect from Martin Charles, other than the fact that he was told by PW4 that she was raped by the appellant, which information was available from all other witnesses including PW4 herself.

Coming to the hamlet chairman. According to the evidence of PW1, the victim's mother, after she was informed on telephone by PW6, that her

daughter had been raped, she quickly rushed to the house of Martin Charles, and after being properly briefed of what had transpired, by the victim and her brother, she immediately reported the matter to John Ntanyamala, the hamlet chairman. The latter instructed PW5, a militia, to arrest the appellant, which PW5 dutifully did and presented him to Kibondo Police Station. So, the information that the hamlet chairman had was that PW4 had been raped; yet such information, all witnesses were privy.

The issue before the trial court was proof of rape of PW4. Rape in persons of less than 18 years, may only be proved by demonstrating penetration, that it was the accused who committed the offence, and that the victim was a person of below 18 years. This is the significant evidence that was necessary to be adduced in the case. The question we ask ourselves, is which of the two witnesses had information on the penetration, the person who raped the victim or even PW4's age? If either of the two had such information, the same would be hearsay.

Our considered holding in this ground of appeal is that, none of the two witnesses possessed information or knowledge of the subject matter (that is rape of PW4), which was significant enough to affect the outcome of the appellant's trial. Accordingly, neither Martin Charles, nor John Ntanyamala was a material witness in the case. Thus, the second ground of appeal is hereby dismissed.

Next is the third ground of appeal. The issue in this ground is whether there was any material contradiction between the evidence of PW4 and that of PW1 in respect of PW4's age, and also whether their statement on that aspect did not match the victim's age as stated in the charge sheet.

In arguing this ground of appeal, Ms. Mollel submitted that there is no contradiction at all on the issue of age of the victim. She referred us to pages 13 and 20 of the record of appeal, where PW1 and PW4 respectively, stated that the latter was 11 years at the time when the case was being tried. She concluded that although the charge sheet mentions 10 years as the age of the victim, still, the victim was under age.

In respect of this ground of appeal, we did not hear any rejoinder by the appellant on the submission of the learned State Attorney.

Resolution of this ground, will not take a lot of our time. As submitted by the learned State Attorney at page 13 of the record of appeal, PW1 testified that:

> *"PW4 is my daughter and* ***she is aged 11 years old for now*** *and she lives with her grandmother, Agness Paschal."*
>
> [Emphasis added]

Similarly, at page 20 of the record of appeal the victim, PW4 started off her evidence by stating that she was 11 years old. So, we find no contradiction between the evidence of PW1 and PW4 on the latter's age.

It is however true that the charge sheet shows that the victim was 10 years. Nonetheless, we find no contradiction either. That is so because, the charge mentions the age of the victim in the year in which the offence was committed. In this case, the offence was committed on 13th September, 2020. At that time, the victim was 10 years that is why when giving evidence in November 2021, the victim and her mother testified that the former was 11 years, which is both logically proper and mathematically verifiable. Briefly, we find no merit in the third ground of appeal and, we accordingly dismiss it.

The fourth ground of appeal was that the prosecution did not prove the case beyond reasonable doubt. In this respect Ms. Mollel submitted that in view of what she submitted in respect of the other grounds of appeal, the case was proved beyond reasonable doubt.

In rejoinder, the appellant on this issue implored the Court to review the entire case and hold that the same was not proved against him.

In view of what we have discussed above, and having held in respect of the first and third grounds of appeal that all the ingredients of the offence of rape were proved, we do not agree with the appellant that the

case was not proved beyond reasonable doubt. In the circumstances, the fourth ground of appeal is dismissed.

Finally, as all grounds of appeal have been unsuccessful, this appeal has no substance, it is hereby dismissed in its entirety.

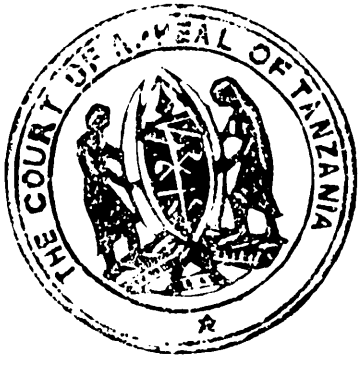
DATED at **KIGOMA** this 7th day of May, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 8th day of May, 2024 in the presence of the appellant appeared in person and Mr. Shabani Juma Masanja, learned Senior State Attorney assisted by Ms. Naomi Joseph Mollel, learned State Attorney for the Republic/Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL