IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 111 OF 2018

JOSEPH DAMIAN SAVEL.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the District Court of Mkuranga at Mkuranga)

(T.G. Barnabas, RM.)

Dated the 2nd day of August, 2017

in

Criminal Case No. 54 of 2017

JUDGMENT

16th & 27th July, 2018

DYANSOBERA, J.:

In the District Court of Mkuranga at Mkuranga, the appellant, Joseph s/o Damian @Savel was charged with the offence of rape contrary to section 130(1)(2) (e) and 131 (1) (3) of the Penal Code [Cap 16 R.E. 2002]. He was convicted as charged and was sentenced to thirty (30)

years prison term. Aggrieved by the decision of the District Court, he has appealed to this court.

The background to this case is simple. It was the prosecution's case that the appellant had sexual intercourse to one Rahma d/o Michael @ Mgaya (PW 2), a three years old child. On 17.3.2017, the girl was taken by the appellant to his farm. Her mother, PW 1 also went to her farm. At about 1400 hrs when PW 1 went back home, the appellant and PW 2 were yet to come back. She waited. Later, when they were back, the appellant greeted PW 1 who noticed that PW 2 was exhausted and went straight inside the house to sleep. When PW 2 got up at 1800 hrs, she was not walking properly and she was crying. PW 1 inquired as to what the matter was and she replied that the appellant "*kamuwekea mdudu wake* on her private parts after the appellant had told her to sit on his penis". PW 1 examined the victim and found her vagina with blood and dirty. PW 1 called her neighbours including Adolf Mwahoke and Athman. The latter confirmed that PW 1 had been raped. PW 1 reported to the cells leader who gave her a letter which she took to the hamlet office and then

to Kimanzichana police station where she arrived at 2200 hrs but to find the police station closed. She then went to Mkuranga Police Station and was given a PF 3. She then went to Mkamba Health Centre where after hearing the history of the incident from PW 1, PW 3, an Assistant Medical Officer medically examined PW 1. She found bruises on the labia minora-reddish in colour and some whitish discharge in the vagina. She however, found PW 2's hymen intact and was HIV negative. PW 3 formed an opinion that the rapist tried to penetrate the victim and that is why she had bruises. PW 3 concluded that there was slight penetration.

As expected from the child of her age, her evidence which was given not on oath and after a voire dire examination, was short. She is recorded to have said *"Joseph aliniwekea mdudu wake humu (showing her private parts). Mdudu wake alikuwa kwenye suruali. Joseph aliniambia mimi nikalie mdudu wake. Nilikalia, niliumia humu ndani"*. She concluded that Joseph was the one who injured her with the penis.

PW 4, a police officer stationed at Mkuranga Police Station investigated this case by collecting evidence and interrogating the appellant who denied. After she was satisfied that PW 2 had been raped by the appellant, she preferred a charge and took the appellant to court for arraignment. According to her, PW 1 told her that there was no any misunderstanding between her (PW 1) and the appellant.

In his defence, the appellant, a man aged 26 years old at the time he was testifying, denied to have raped PW 2. He told the trial court that he was puzzled to be arrested on 18.3.2017 at 0600 hrs. He said that the case was a concoction as P W 1 owed him Tshs. 92,500/= and the allegations of his having raped PW 2 were initiated when he started claiming back his money.

The trial learned Resident Magistrate was satisfied that the prosecution case had been proved beyond reasonable doubt.

Before this court, the appellant has raised a total of nine grounds of appeal to the following effect. One that the trial court erred in law in relying on unsworn

evidence of a victim. Two, that PW 3's evidenc3 was not believable on account that she said that PW 2 was raped but at the same time admitted that she was still virgin. Three, it was not proved that the liquid found in PW 2's vagina was sperms. Four that PW1 failed to tender PW 2's under pants or dress to prove blood and dirty. Five, the evidence of PW 1 and PW 3 was contradictory. Six, the evidence of PW1 and PW 2 was of the couched family members. Seven, the defence evidence was not considered. Eight, the age of the victim was not proved and nine, the appellant was not medically examined on the spermatozoa and STD's.

At the hearing of this appeal, the appellant prosecuted the appeal on his own whereas the respondent Republic was represented by Ms Faraja George, learned State Attorney. The appellant, at first, had nothing useful to add to his nine grounds of appeal. Learned State Attorney who supported both conviction and sentence opted to tackle the first ground alone, then 2nd, 3rd, 4th and 9th were argued together while the 7th ground was argued separately.

On the first ground of appeal, learned State Attorney told this court that the complaint that the *voire dire* examination was not conducted had no merit as at p. 11 although the trial court found the witness not to know the nature of an oath, it was satisfied that the witness possessed sufficient knowledge to enable the court receive her evidence, the conduct permitted under section 127 (2) of the Tanzania Evidence Act where the court can receive the evidence and act on it provided it is corroborated. According to learned State Attorney, PW 1 corroborated PW 2's evidence. She said that she knew the appellant and that it is the appellant who had picked the victim and she examined her private parts. She believed that it was the appellant who had raped the child. Besides, there was the evidence of PW 3 who, on 18.3.2017 medically examined PW 2 and found that there was penetration. A medical report was also tendered in proof.

As regards the 2nd, 3rd, 4th and 9th grounds of appeal, learned counsel argued that they also lack merit. She explained that PW 3 was clear that there were scratches though admitted that no hymen was ruptured, she confirmed

that there was liquid in the vagina, the evidence which shows that PW 2 was raped. Ms Faraja contended that a slight penetration is sufficient to constitute the offence of rape. This court was referred to the case of **Mussa Mohamed v. R**, Criminal Appeal No. 206 of 2006.

Responding to the 7th ground of appeal, learned State Attorney submitted that the defence was considered but found to have cast no doubt in the prosecution case which had been proved beyond reasonable doubt.

In rejoinder, the appellant urged the court to consider all his grounds of appeal and set him free.

I have considered the record of the trial court, the grounds of appeal and the submission of learned State Attorney.

On the first ground of appeal, I have no doubt that a *voire dire* was conducted on the 1st day of June, 2017 on PW 2 and the trial Resident Magistrate though found that the witness did not understand the nature of an oath, was satisfied that PW 2 possessed sufficient intelligence to justify the court receive her evidence. There is nothing on record suggesting that the witness

had no such intelligence and I am not convinced that the questions put to her were irrational as the appellant would want the court to believe. Under section 127 (7) of the Tanzania Evidence Act, if found to be credible witness, the complainant's evidence can alone ground a conviction as true evidence of rape has to come from the victim. This ground has no merit.

It is true that PW3, an assistant Medical Officer who medically examined PW 2 found her hymen intact but she was quick to point out that her vaginal parts had bruises and fluid like sperms. She did not end there but also formed opinion that the rapist tried to penetrate her that is why she had bruises and concluded that there was a slight penetration. As correctly pointed out by Ms Faraja George, a slight penetration is sufficient to prove the offence of rape. In other words, penetration, however slight is sufficient. I am made to believe that the bruises in the PW 2's female organ suggested that it was tempered with. In terms of section 130 (4) (a) of the Penal Code, penetration however slight, is sufficient to constitute sexual intercourse necessary to the offence.

For clarity and ease of reference, the said provision runs as follows:

130-

"(4) For the purposes of proving the offence of rape.

(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."

In Criminal Appeal No. 170 of 2006, **Mathayo Ngalya @ Shabani v. R.** CAT (unreported) the Court of Appeal of Tanzania stated as follows:-

> *"The essence of the offence of rape is penetration. For the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence."*

The same Court of Appeal emphasized this position also in the case of **Octavian Morris v. R,** Criminal Appeal No. 254 of 2015 CAT (unreported). The fact that PW 1 did

not tender in court the underpants or dresses did not affect the strong and credible evidence of PW 1, PW 2 and PW 3 to the effect that PW 2 was raped. This is so because PW 1 was clear that what was found with the blood and dirty was neither PW 2's underpants or dress but her private parts and PW 3 told the court that the PW 2's private parts were found with bruises and fluid like sperms. There was not mention of clothes soiled with dirty, blood or sperms. Although PW 1 and PW 2 were related as mother and daughter, their evidence was corroborated by that of PW 3, a medical officer was related to neither of them. This disposes the second, third, fourth, fifth and sixth grounds of appeal. All of them are found without merit.

As regards the ninth ground of appeal, there was no evidence that the appellant was not with PW 2 before the latter was found in such a situation. The necessessity of medically examining the appellant did not, in such circumstances, arise.

It is complained on ground no. 7 that the appellant's defence was not considered, but the record is clear that

such evidence was considered. In concluding the judgment, the trial court record is clear at p. 5 of the printed judgment that:

"..now, in considering the charge sheet, the evidence adduced by both sides, the law applicable and the reason demonstrated in this judgment, I am satisfied that the prosecution side proves the offence of rape against the accused beyond all reasonable doubt…" this means that even the evidence of the defence was considered. After all, as correctly pointed out by the learned State Attorney, it was upon the prosecution to prove the case beyond reasonable doubt, the duty they discharged. The appellant was only required to raise a reasonable doubt in the prosecution case, the duty, the appellant failed to discharge according to the trial court's judgment. Indeed, there is no complaint in all nine grounds of appeal that the case against the appellant was not proved beyond all reasonable doubt. The ground no. 7 has not merit.

Lastly, there is ground no. 8 on the age of the victim. The appellant is complaining that **"the learned**

trial Resident Magistrate erred in law and in fact by convicting the appellant while the prosecution side failed to prove its charge beyond any reasonable speck of doubt as it failed to prove the age of the victim (PW 2) whether she was a child aged 3 years old or above as it failed to tender before the trial court any purported document including birth certificate and clinical card contrary to the procedure of law."

It is true that there was no documentary evidence that the victim was aged 3 years old. It cannot be gainsaid that age is of great importance in establishing the offence of statutory rape under section 130 (1) (2 (e), the more so, under the provision, it is a requirement that the victim must be under the age of 18. For this reason, it is most desirable that the evidence as to the proof by the victim, relative, parent, medical practitioner, or where available by the production of the birth certificate or even a clinical card. In this case, no any such document was produced to prove that the victim was of the age of 3 years. It is, however, not necessary that proof of age must be derived from such evidence as

the appellant would wish to suggest. The charge sheet was clear that the victim was 3 years old. PW 2 herself before she gave her testimony, introduced herself to be 3 years old. The appellant did not cross examine her on this; after all, the appellant had admitted during the preliminary hearing that he was well known to the victim as they were living in the neighbourhood. Aside that, the court may infer the existence of any fact including the age of the victim on the authority of section 122 of the Tanzania Evidence Act. For those reasons, I am satisfied that the complaint against PW 2's age is without any substance.

For the reasons I have stated, I find the appeal against conviction lacking in merit.

As to the appeal against sentence, this is a statutory rape and the minimum sentence according to law is life imprisonment. In this case, the appellant was sentenced to 30 (thirty) years term of imprisonment. He should thank God for the trial court's oversight.

In the result, I find that the appeal lacking in merit and I dismiss it entirely.

Order accordingly.

W.P. Dyansobera

JUDGE

30.7.2018

Delivered this 30th day of July, 2018 in the presence of Mr. Justus Ndibalema, learned State Attorney for the respondent and in the presence of the appellant in person.

W.P. Dyansobera

JUDGE