IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 310 OF 2017

MBARAKA RAMADHANI @ KATUNDU .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

17/5/2018 & 3/7/2018

JUDGMENT

I.P.KITUSI,J.

The appellant Mbaraka Ramadhani @ Katundu was charged with Rape under section 130(I) (2) (e) and 131(I) and (3) of the Penal Code Cap 16 before Mkuranga District Court. It was alleged that on 3 December 2016 at about 10.00 hours at Kisemvule Village within Mkuranga District the appellant had sexual intercourse with Rahma d/o Bakari aged 7 years. After five witnesses for the prosecution and the appellant's own testimony in defence the trial court found him guilty and convicted him with the offence charged. He was sentenced to life imprisonment as the alleged victim was under the age of ten years.

The gist of the prosecution's case is that on the material day Rahma Bakari (PW1) and Norshand Hassan Chinoa (PW2) had gone with other children to collect or pick mangoes in the field.

What transpired while out in the field is told by Pw1 and Pw2 both minors aged 7 and 5 years respectively. Pw1, the alleged victim, did not

finish telling the story and according to the record the reason for that was recorded as thus;

> *"Court: after such testimony Pw1 stops to respond to posed questions by PP in chief examination. Let her break as she seems exhausted".*

The prosecution called the next witness and PW1 was later called back to the witness box to finish her story. It was Pw2 who narrated the alleged episode first. He stated that while in the mangoe field within the neighborhood of the appellant's place of residence, the appellant whom he knew so well grabbed Pw1 and led her away from the other children while caverning her head with a plastic bag normally used for packing fertilizers, commonly known as sulphate bag. He then undressed Pw1's underwear, unzipped his trousers and inserted his penis into Pw1's vagina. When he was done, the appellant warned Pw1 not to disclose the incident to anyone but Pw1 responded right away that she would report it. The appellant left the scene and Pw1 dressed up before she and Pw2 left for home too.

PW1 disclosed the rape incident to Sophia Baraka Mkwara (Pw3) who happens to be her sister and Pw2's mother. According to Pw3, her sister Pw1 had come to stay with her during school vacation for she was a pupil of Cornerstone Primary School and boarding at the school.

On 3 December, 2016 at about 16.00 hours while away from home she received a call from her husband informing her that Pw1 was not feeling well so she should get back home. On getting home, Pw3 was told by Pw1 that she felt pains when passing urine and on farther

interrogations she disclosed the fact that somebody had raped her. It was Pw2 who described the rapist to Pw3 and he turned out to be the appellant who was previously living within their neighborhood and the very person Pw3 had initially suspected.

The matter was referred to the street leader then to police where a PF3 was issued for Pw1's medical examination.

It was one Dr. Joseph Mganga (Pw5) who examined Pw1 on 3/12/2016 who confirmed that the girl had been ravished as her hymen had been perforated and her vagina had bruises. He recorded his findings on the PF3 which he tendered in Court as Exhibit P2.

The appellant was, presumably after his arrest, interrogated by WP 6156 DC Sanura (PW4) before whom he confessed to have slightly penetrated PW1'S vagina. Pw4 testified that he recorded the appellant's cautioned statement having informed him of his rights under section 57 of Criminal Procedure Act, hereafter the CPA. The prosecution's intimation to tender the cautioned statement in exhibit was objected to by the appellant while admitting that the contents were correct he raised issue with the reason that made him make that statement. He stated that he made the statement because PW4 promised him forgiveness if he told the truth. The learned trial Resident Magistrate (J.B.Kinyange) overruled the appellant citing section 29 of the Evidence Act which provides that no confession shall be rejected on the ground of it being a result of a promise or threat.

In defence the appellant denied committing the alleged rape and alleged that the case had been fabricated by Pw3 as a revenge after he appellant had refused to guard her house. According to the

appellant, Pw3 had requested him to guard her house when she was away on a journey, but he had refused to take up the task and that did not please Pw3. The appellant admitted being familiar with Pw1 and Pw2 and that he ran into them at the mangoe field where he had gone with his younger brother known as Yusuf. When cross - examined by the Public Prosecutor, the appellant denied the suggestion that he made a confession when his cautioned statement was recorded at the police.

In dealing with this case the trial Court informed itself of the settled principle that penetration, however slight, is sufficient to prove rape and went on to consider the evidence of Pw1 and Pw5 as proving that there was penetration. It assessed Pw1 as being a truthful witness even though she testified without oath. Further the trial court was satisfied that the cautioned statement whose contents the appellant admitted as true provided additional ground for finding the said appellant guilty of the rape. As stated in the earlier pages, the appellant was sentenced to life imprisonment.

He appeals hereto, challenging both the conviction and sentence on 12 grounds. He was present during the hearing of this appeal and personally prosecuted it while the respondent Republic had the service of Ms. Rachel Magambo, learned Senior State Attorney. Of the 12 grounds of appeal many are on evidence and a repeatition, therefore I am not going to reproduce all grounds here. I shall cluster the grounds of appeal as thus;

1. Grounds 1, 3, 8 and 11 seek to fault the trial court for relying on the testimonies of Pw1 and Pw2 for the reasons of improper voir

dire test, credibility and omission to conduct medical tests on him that would link the appellant to the alleged rape.

2. Ground No. 2 alleges variance of the victim's names in the charge sheet and those she gave during her testimony.
3. Ground No. 4 raises the issue of failure to call material witnesses alleging that some of the people who escorted Pw1 to hospital were not summoned to testify.
4. Ground No. 5 criticized the trial court for basing its decision on the cautioned statement which had already been expunged.
5. Under ground No. 6 he alleges that he was held in police custody for longer than the law requires.
6. Under ground No. 7 the appellant raises the issue of age of the victim and that it was not proved.
7. Underground No. 9 the appellant raises doubt with the evidence of Pw5 and the PF3 for not showing that the victim's private parts or underpants had blood, which, given the victim's age, would inevitably be the consequences of penetration.
8. Ground No. 12 attacks the trial court for failing to consider the defence case.

The learned Senior State Attorney submitted in support of the conviction and sentence. To begin with, her attention was drawn to the fact that section 127 of the Evidence Act has been amended so as to remove the requirement of a voir dire test. The Senior State Attorney's response was that the consequence of conducting a voir dire test is to render the testimonies of Pw1 and Pw2 taken un procedurally. She moved the court to expunge the testimonies of Pw1 and Pw2.

Ms Magambo submitted however that even if the testimonies of Pw1 and Pw2 were expunged the remaining evidence was sufficient to prove the rape. She cited the evidence of Pw3 who testified that she knew the appellant well before and who is the one who handed him over to the police.

As regards the grounds of appeal the learned Senior State Attorney addressed them in the following sequence. She submitted in relation to the alleged variance of names of the victims that only the third name is missing in the proceedings when she gave evidence but there is no doubt that the person referred to in the charge is the one who testified as Pw1.

On the failure to call some witnesses Ms Magambo cited section 143 of the Evidence Act which provides that there is no specific number of witnesses required to prove a fact. As for the allegation that the court erred in relying on the cautioned statement, it was submitted that the conviction is supported by other grounds.

On the issue of age of the victim, she submitted that age is not proved by presentation of birth certificate alone. She cited the case of **Musa Mohamed V. Republic** Criminal Appeal No. 216 of 2015, CAT at Mtwara (unreported). Submitting in response of the complaint that the victim's blood stained under part was not tendered she pointed out that there is evidence that the appellant cleaned the said victim's private parts.

In response to the eleventh ground that raised the issue of the omission to do a medical examination on the appellant. Ms Magambo submitted that each case has to be decided on its own facts. In this case, she submitted, there was no need to conduct any medical or forensic examinations because there were no spermatozoa the appellant having cleaned the victim's private parts. Lastly she submitted that the trial court considered the evidence for both the prosecution and the defence.

The appellant just turned the other cheek by saying has was leaving it to the court to decide.

I will set off by restating the obvious principle that a first appeal is in a form of a rehearing. In doing so and on the basis of the evidence of Pw5 and the findings he recorded on the PF3 (Exhibit P2,) I agree with the trial magistrate's finding that Pw1 had sexual intercourse. Considering the inflammation and bruises that Pw5 detected in Pw1's vagina the doctor's conclusion that the sexual intercourse on the girl had taken place within twelve hours of the time of the examination, cannot be faulted. Thus the appellants complaint under ground No.9 that it was fatal for the prosecution not exhibiting the girl's blood stained under part is not valid and I dismiss it.

The above finding narrows the scope of the matters for this court's attention. It seems therefore that what calls for determination in essence is whether it is the appellant who had carnal knowledge of PW1. Before I address that issue I want to discuss the issue of the age of PW1 which the appellant raised under ground No.7. The law is settled that in cases of statutory rape, the age of the victim must be proved. [See

the case of **Andrea Francis V. Republic**, Criminal Appeal No. 173 of 2014 CAT at Dodoma (unreported)]. Ms Magambo submitted that the age of the victim need not be proved by presentation of a birth certificates, and cited the case of **Musa Mohamed V. Republic** (supra) in support.

I agree with the learned State Attorney that proof of the victim's age is an imperative requirement but need not be by presentation of a birth certificate. In this case PW3 the victim's elder sister testified that the age of PW1 was seven (7) years, a version that has not been contradicted. It is therefore my finding that the age of the victim was proved to be 7 years. Thus the seventh ground of appeal has no merits and I dismiss it.

I now turn to the main issue regarding the perpetrator of the rape. When the issue of voir dire was put by the court to Ms Magambo she submitted that the evidence of Pw1 and Pw2 may be expunged. Then she went on to submit that the evidence of PW3 who handed the appellant over to the police was sufficient to prove the said appellant's guilt.

The essence of raising the question of voir dire to the learned State Attorney was the amendment to section 127 of the Evidence Act that was introduced by the Written Laws (Miscellaneous Amendments) (No.2) Act No. 4 of 2016 which amended sub section (2) and (3) and substituted it with;

> *(2) " a child of tender age may give evidence without taking an oath or making*

an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies"

Neither that provision nor any in the Evidence Act stipulates the manner in which the court shall proceed in getting a child witness make that promise

In the instant case the court examined Pw1 and Pw2 on their respective ability to testify before they took the stand. In the course of this process which it was termed voir dire, PW1 did not promise to tell the truth but Pw2 did. As a general rule, the best evidence of rape comes from the victim [**see God Kasenegala. V. Republic**. Criminal Appeal No. 10 of 2008 CAT, (unreported)]. However I do not think that rule applies in this case where what is at issue is the identity of the perpetrator who was allegedly seen by a third party. It is therefore my finding that Pw2 is competent to testify on what or who he saw on the material day.

According to Pw2 it was the appellant who had sex with PW1 at the mangoe field where the said appellant admits in his defence to have gone. The learned trial magistrate believed the versions of Pw1 and Pw2.

In my conclusion I partly uphold the appellant's complaints in grounds 1,3.8 and 11 in as far as they relate to PW1.

However on the strength of the evidence of PW2 I agree with the learned Resident Magistrate that the appellant is the one who ravished PW1. This is because Pw2 and the appellant were acquainted to one another and the rape took place in broad daylight in the field. The appellant stated

in his defence that he had gone to the field in the compa' brother Yusuf, and they met Pw1 and Pw2, which story er. of Pw2.

The trial Court's finding was also based on the appellant's cautioned statement (Exhibit P1). Admissibility of this statement had been objected to by the appellant but the court overruled him citing section 29 of the Evidence Act. I note that the appellant did not allege involuntariness in making the statement nor did he contradict its contents except during his defence. In a similar situation in **Amir Ramadhani V. Republic**, Criminal Appeal No. 228 of 2005, CAT at Arusha (unreported) the Court of Appeal held;

> *" We are satisfied that the trial court was entitled to find on the strength of the confession and corroborating evidence that the appellant was one of the bandits who committed the robbery.."*

I associate myself with that line of reasoning and conclude that the trial court was entitled to find the cautioned statement as material proof of appellant's guilt. Thus I find no merit in the 5th ground of appeal.

Appellant's last ground was that his defence was not considered. Ms Magambo submitted that the learned trial magistrate considered evidence of both sides. Indeed it did, and this is clear from the last page of the judgment of the trial court. This ground has no merits.

In conclusion therefore this appeal has no merits and I dismiss it in its entirety.

I.P.KITUSI

JUDGE

3/7/2018

Date: 3/7/2018

Coram: Hon. I.P.Kitusi.J

Appellant: Present

Respondent: Ms Rachael Magamba , SSA

CC: Banza

Court – Judgment delivered in court.

I.P.KITUSI

JUDGE

3/7/2018