IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 373 OF 2016

(C/f Criminal case no 25 of 2016 at the Resident Magistrate Court of Morogoro at Morogoro)

AMIRI RASHIDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

6/6/2018 & 18/6/2018

B.K. PHILLIP, J

J U D G M E N T

In the Resident Magistrates Court of Morogoro at Morogoro, the appellant Amiri Rashidi was charged and convicted of rape contrary to section130 (1) (2)(e) and 131 (1) of the Penal Code. He was sentenced to 30 years imprisonment and ordered, to pay compensation to a tune shillings one million (Tshs 1,000, 000/=) to the victim for injuries he caused to her. It was alleged by the prosecution that on 15th January, 2016 at Usangi Guest House at Madizini area Mtibwa within the District of Mvomero in Morogoro Region, the appellant had carnal knowledge of one MARIAM SAID a school girl aged 13 years old.

During the hearing of the case, the prosecution called six (6) witnesses. PW 1 was Mwanaidi Mzawa, the mother of PW2.

PW1 testified in court that, she has a daughter, namely Mariam Said (PW2) 13 years old. Her daughter (PW2) was in std VII at Mtibwa Primary School. PW1 further stated that, she owns a guest house namely Usangi Guest House .On 15/1/2016 she assigned one Asha Charles Jonas who was the second accused person at the lower, to assist her in the management of her guest house. When Asha Charles Jonas was giving her the money that was collected in the guest house, she noted that, some amount of money was missing in particular, in respect of room No 2 which seemed to have been occupied by clients, but no money was paid. Upon interrogating her, she said that room No 2 was occupied by Amiri, the appellant and Mariam (PW2). PW1 decided to ask her daughter (PW2) what she heard from Asha Charles Jonas. PW2 admitted to have had sexual intercourse with the appellant in room No 2 at Usangi Guest House. PW1 testified that, her daughter (PW2) informed her that, it was Asha Charles (2nd accused person at the lower court) who told her to go to room No 2 and she was the one who brought the condom that was used by the appellant. PW1 stated that, she took her daughter (PW2) to Mabau Dispensary for checkup. PW1, testified further that on 16/1/2016 the appellant, came again to her home to see Mariam and he was demanding his cell phone that he gave Mariam. On that date PW1 made arrangement for the arrest of the appellant and the appellant was arrested.

PW2 was Mariam Said, she was sworn and stated that on 15/1/2016, Asha Charles Jonas (2nd accused person) told her that the appellant was calling her. It was about 8.00 hrs. She went to the guest house where she met the appellant. Asha Charles Jonas gave her money for buying voucher ,but the appellant forced her to enter into room no 2. He threatened to beat her. Asha Charles Jonas bought a condom and gave it to the appellant which the appellant wore and raped her. After raping her, he gave her his cellphone. Later on her mother interrogated her as to why she entered room No 2 at the guest house and had sexual intercourse. She admitted before her mother that she had sexual intercourse with the appellant. She further testified that, she was taken to hospital for medical examination and on 16/1/2016 the appellant followed her again. He was demanding his cell phone. PW3 was PW2's father, this witness was just informed by PW1 what happened to PW2. He took PW2 to hospital for medical examination. He testified in court that the Doctor confirmed that PW2 was raped. Furthermore he said, that on 16/1/2016 the appellant came to his home to take his telephone and that is when he was arrested.

PW4 was Tiba Hassani a Militia man. He testified in court that on 16/1/2016 he arrested the appellant at Usangi guest house. He found him in a room with a young lady, who was a victim in this case. PW5 was R.4691 D/CPL Halfani Mtibwa. This witness took the appellant's caution statement. He informed the court that, the

appellant in his caution statement denied to have committed the offence. He claimed that on 15/01/2016 at 8.00 was at Usangi Guest house with his girlfriend namely Zuhura and he left his telephone at the guest house because he had no money to pay for the room he used at the guest house. PW6 was a medical doctor who did the medical checkup for PW2. This witness testified in court that after examining PW2 he came to a conclusion that she was raped and he did not proceed to find spermatozoon because the rapist used condom.

In this appeal the appellant has raised (9) nine grounds of appeal as follows:

(1) That the learned trial magistrate did erred both in law and fact for receiving the testimony of PW2, the girl of 13 years old without concluding *'voire dire'* test as required by law and rely in that evidence to convict the appellant.

(2) That the learned trial Magistrate did erred both in law and fact to convict the appellant in a case involving a girl of 13 years in open court instead of chambers contrary to the procedure of the law.

(3) That the trial magistrate grossly erred in law and fact to convict the appellant hereby relying on the prosecution evidence, which did not point irresistibly to the guilty of the appellant.

(4) That the trial magistrate erred in law and fact to convict the appellant relying on the evidence of PW2 (victim) who was not emphatic in her evidence as he did not clearly state the main ingredients of the offence of rape whereas' penetration is a must ingredient to prove the charge.

(5) That the trial magistrate did erred in law and fact to convict the appellant in a case where prosecution failed to tender in evidence of the phone claimed to have some contacts between the appellant and PW2 (victim), condom claimed to have been used by the appellant when doing sexual intercourse with Mariam.

(6)That the trial magistrate erred in law and fact to sustain conviction against the appellant by hereby relying and believing that the appellant confessed to rape PW2 which failed to observe and put findings that the purported caution statement was not tendered at the trial.

(7) That the trial magistrate erred in law and fact for not assessing exhaustively the veracity of PW3 who said that the appellant left the cellphone to PW2 (victim) as a gift, but PW5 and his testimony said, the phone was left there by the appellant because by that time he had no money.

(8) The trial magistrate erred in law and fact by not taking all the prosecution evidence as one and then subject it to an objective scrutiny before relying in it as basis for conviction against the appellant.

(9) That the trial magistrate erred in law and fact for using inconsistence incredible and unreliable evidence which lacked cogent proof to be relied as a basis for convicting the appellant.

At the hearing of this appeal the appellant appeared, in person and Yasinta Peter learned State Attorney appeared for the respondent (Republic).

The appellant opted to rely on the ground of appeal filed in court. In response to the 1st ground of Appeal the learned State Attorney submitted that, since PW2 was 14 years. old, it was not mandatory for "voire dire test "to be conducted. The trial magistrate was satisfied that PW2 was capable of giving evidence under oath. She further submitted that PW2 testimony was consistent and managed to give sufficient explanations about what the appellant did to her. She referred this court to the case of **Gelard Daudi** Vrs **Republic** criminal appeal No 591/2015 (CA) (unreported) and pointed out that at page 10 of the Judgment the Court of Appeal discussed the significance of a witnesses' ability to name the accused person at an earliest time possible to the effect that such ability shows reliability of the evidence given by the witness. She

submitted further that pages 10 and 11 of the proceedings show that PW2 stated eloquently that it was the appellant who raped her. Responding to the 2nd ground of Appeal the learned State Attorney submitted that court's proceedings do not show that the case was heard in open court.

On the 3rd and 8th ground of appeal the learned State Attorney submitted that the court has powers to analyze the evidence adduced in a way it deems fit and rely on any evidence adduced which it believes to be true and correct.

On the 4th ground of appeal the learned State Attorney submitted that this ground of appeal lacks merits; The court's proceedings show that PW2 explained clearly what happened and PW6, the doctor confirmed in court that PW2 was raped. Also, PF 3 was tendered in court to prove that PW 2 was raped.

On the fifth ground of appeal the learned State Attorney submitted that failure to tender the cellphone and condom in court was immaterial, while on the 6th ground of appeal she submitted that the trial court did proper analysis of all the evidence. The mere fact that the appeal's caution statement was not tendered in court cannot exonerate the appellant from the offence charged against him.

In the 7th ground of appeal, the learned State Attorney submitted that the charge against the appellant was rape, so the issue of cellphone was irrelevant.

On the 9th ground of appeal the learned State Attorney submitted that the evidence tendered by the prosecution was water tight. The charge against the appellant was proved beyond reasonable doubts. She finally prayed the appeal to be dismissed in its entirety.

In his response to the learned State Attorney's submission the appellant submitted that, PW1 testified in court that he found him (appellant) and PW2 (Mariam) at the reception desk . Mariam (PW2) was the attendant at the guest house . Finally he requested this court to take into consideration his grounds of appeal and set aside the decision of the trial court.

At this juncture, it is worthy pointing out that, at the Resident Magistrates Court of Morogoro, the appellant was charged together with one Asha Charles Jones, whereas the appellant was the 1st accused person charged of rape as aforesaid and Asha Charles Jones was the 2nd accused , was charged with sexual exploitation of children contrary to S. 138 B (1) (a) and (2) of the penal Code, cap 16 R.E 2002. All of them were convicted as charged.

In the first ground of appeal, the appellant invites this court to disregard the evidence of PW2 on the ground that the trial court did not conduct a *"voire dire"* examination a head of availing itself the evidence of PW2, (complainant).

Before I dwell on the appropriateness of the evidence of PW2, I shall first determine whether there is any other evidence on record which corroborated the evidence of PW2 that she was raped by the appellant.

I have noted that, there is evidence of other prosecution witnesses which proves the ingredients of the offence of rape and the age of PW1. The particulars in the charge sheet states dearly that, MARIAM SAID (PW2) was a school girl aged 13 yrs. The age of PW2 was proved by the evidence of her mother PW1 and PW2's birth certificate that was admitted in court as Exhibit P2. Exhibit P2 shows that (PW2) Mariam Said was born at 1st June 2003, hence in 2016 she was 13 yrs. old.

The evidence of the Doctor (PW6) as well as the PF3 that was admitted in court as Exhibit P1 proves beyond reasonable doubt that PW2 was raped. In his testimony PW6 stated clearly that on 15/1/2016 – 16/01/2016 at night he examined PW2 and come to realize that she was raped. He did not proceed to find out spermatozoon because there was use of condom. PW6's evidence and Exhibit P1 proves that there was penetration hence PW2 was

raped. In addition to the evidence of PW6, during the hearing of the case, the 2nd accused person upon being cross examined by the prosecutor admitted that she brought the condom alleged to have been used by the appellant. This evidence corroborated the evidence of PW6, that the one who raped PW2 used condom.

The appellant in his defence admitted that on 15/1/2016 he went to Usangi guest house where he met PW2 who allowed him to use room No 2. The appellant testified further that he gave PW2 his cellphone because he had no money to pay for the room. In short, the above facts as admitted by the appellant in his defence ,support the evidence of PW1, PW3, PW4 and PW5.

In the case of **Gelard Daudi** Vs. **Republic** (Supra) referred to this court by the learned State Attorney whereby the appellant who was convicted of the offence of rape, was challenging among other things, the trial court's failure to comply with the provisions of S. 127 (2) of the Evidence Act, Cap 6, Re 2002. The Court of Appeal of Tanzania, having found that the Evidence of other prosecution witnesses was sufficient to prove the ingredients of the offence of rape beyond reasonable doubts, up held the conviction and sentence for the offence of rape and declined to make any finding on the appellant's complaint on the trial magistrates' failure to comply with the provisions of S. 127 (2) of the Evidence Act Cap 6 RE 2002.

Likewise, in this appeal, as I noted earlier, the evidence of PW1, PW3, PW4, and PW6 is sufficient to establish the guilty of the appellant without recourse to the evidence of PW2. I find no reason to discuss the testimony of PW2.

As correctly submitted by the learned State Attorney, the trial court did a thorough analysis of the evidence adduced. A mere fact that the cellphone and condom were not tendered in court as Exhibits cannot exonerate the appellant from the offence charged against him.

I hereby dismiss this appeal against conviction and sentence.

Dated at Dar es Salaam this 1st. day of June, 20018.

B.K. PHILLIP
JUDGE
18/06/2018