IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 9 OF 2019

(Originating from Criminal Case No. 164 of 2014 in the District Court of Ilala at Samora (Hassan SRM)

GOODLUCK ALOYCE.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MASABO, J.:-

The appellant Goodluck Aloyce was on 28th August 2015 found guilty and convicted of the offence of rape contrary to section 130(1) (2) (e) and section 131(1) and of the Penal Code Cap 16 RE 2002 by the district court of Ilala at Samora. He was sentenced to 30 years imprisonment. Aggrieved, he lodged this appeal against the conviction and sentence. His petition of appeal is based on six (6) grounds of appeal.

1. That the trial magistrate grossly erred in convicting him on the basis of a defective charge
2. That PW1's *voire dire* test was un-procedurally conducted as the question put on her were not recorded
3. The trial court erred in basing its conviction on the PW1's testimony whereas she failed to prove penetration
4. That the trial magistrate erred in failing to realize huge discrepancies between PW2, PW5 and PW6 testimony as to when the PF3 (exhibit P1) was issued out and subsequent examination of PW1 conducted

5. That the learned trial magistrate erred in convicting the appellant where the prosecution failed to establish how he was apprehended in connection with the alleged offence
6. The trial magistrate erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt

When the appeal was called for hearing, the Appellant appeared in person, unrepresented whereas the Respondent Republic was represented by Ms. Esther Kyalla, learned State Attorney. Being lay the Appellant just adopted the grounds of appeal and prayed that this court be pleased to quash the conviction and sentence.

On her part, Ms. Kyalla while admitting that the sub section (2) of section 154 of the Penal code was erroneously included in the charge sheet, she argued that the mistake is negligible hence covered under section 3888 of the Criminal Procedure Act, [Cap 20 RE 2002]. With respect to the second ground she argued that *voire dire* test was properly conducted and that the trial magistrate having conducted *viore dire* test recorded that it was properly conducted and that PW1 knows the meaning of truth. On the third ground she submitted that penetration was proved by PW1 who eloquently explained how penetration happened. In support she cited the case of **Hassan Bakari @ Mamajicho v Republic** Criminal Appeal 103 of 2012 (unreported) whereby she argued that the use of words 'aliniwekea mdudu wake' was sufficient to prove that penetration happened. On the alleged

discrepancy she argued that all witnesses were consistence and there was no inconsistence of any kind.

I have carefully considered the ground of appeal and the submission from both parties. On the first ground, the appellant has argued that the charge was defective in that it contained contradictory provisions of law. For clarity I will reproduce the charge sheet below.

1ST COUNT

STATEMENT OF THE OFFENCE:

RAPE: Contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 RE 2002].

PARTICULARS OF OFFENCE:

Goodluck Aloyce on unknown dates within 2014 at Tabata Msimbazi within Ilala District in Dar es Salaam did have canal knowledge of one RUKIA OMARY a girl of 11 years.

2ND COUNT

STATEMENT OF THE OFFENCE:

Unnatural offence: contrary to section 154(1)(a) and (2) of the Penal Code [Cap 16 RE 2002].

PARTICULARS OF OFFENCE:

Goodluck Aloyce on unknown dates within 2014 at Tabata Msimbazi within Ilala District in Dar es Salaam did have canal knowledge of one RUKIA OMARY a girl of 11 years against the order of nature

From the face of the above charge sheet I see no error on the 1st count. Section 130(1) does create the offence of rape but cannot by its nature stand

alone. It has to be read together with the numerous types of rape provided for under section 130(2) of which paragraph (e) stablishes an offence of statutory rape against which the appellant was charged. Considering that the Appellant in the instant case was charged for raping a girl of 11 years an offence falling under subsection 2(e) it was imperative for the charge sheet to include sub section 2(e).

Turning to section 154 it provides as follows:

> 154. (1) Any person who-
> (a)has carnal knowledge of any person against the order of nature; or
> (b)has carnal knowledge of an animal; or
> (c)permits a male person to have carnal knowledge of him or her against the order of nature.
> commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a
> term of not less than thirty years.
> (2) where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment."

The appellant was charged under section 154(1)(a) and (2) which would imply that the victim was below 10 years old whereas the age of the victim was 11 years. As admitted by the State Attorney, the inclusion of subsection 2 was erroneous. This defect is however minor in that the statement of the offence explicitly describes the offence against which the appellant stood charged. It is my considered view that the contents of the charge sheet were

crafted in such a way that they sufficiently informed the accused of the charges facing him and thereby enabling him to prepare his defense. The Appellant knew that the charges against him was rape and unnatural offence of a girl of 11 years. Accordingly, I find the defect is salvaged by section 388 of Criminal procedure Act which provides that no conviction or sentence should be quashed on account of an error on the charge sheet unless such error has occasioned a failure of justice.

On the second ground of appeal, it is apparent from the record that PW2 Rukia Omari was 11 years at the material time. According to section 127 (2) a court may only receive evidence of a child of a tender year who does not understand the nature of an oath if in the opinion of the court the child is possessed of sufficient intelligence and understands the duty of speaking the truth. The procedure for administering a voire dire test required that some rational questions be put on the child to test its level of intelligent and whether or not he understands the meaning of telling the truth. It is a rule of practice that the question put to the child and the answers thereto be recorded. As held by the court of appeal in **Afason Samwel Vs. Republic**- Criminal Appeal No. 105 Of 2006- CAT at Arusha-

> "In determining whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth, the trial magistrate or judge must conduct a voire dire examination. He may put some questions to the child and from his answers he may be able to determine whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth. How a voire dire test is conducted appears to be a matter of style. But

> recording questions and answers appears to be a better way because this enables even an appellate court to know whether the questions asked and the answers given were such that any court of law would have come to the conclusion that the child was possessed of sufficient intelligence and understood the duty of speaking the truth.

In the instant case, at page 10 (this part must be read together with the hand written proceedings as the written proceedings seems to skip some of the details) of the proceedings it clearly indicates the voire dire test was conducted:

> **PROSECUTION CASE OPENS:**
> PW1 Rukia Omari 11 years, Muslim
> Court: The witness is a minor there is need to conduct voire dire test
> Sgd: Hassan SRM
> 22/10/2014
>
> Court: Voire dire examination
> Sgd: Hassan SRM22/10/2014
>
> PW1 Rukia Omari: I am in standard five. I know to speak the truth. It is sin to speak false. I will not speak false even if I am taught
>
> Court: Witness possesses intelligence her evidence can be received without oath:

While it is true as contented by the appellant that the questions were not recorded, the answers above indicate clearly which questions were asked to the PW1. In my opinion, the above excerpt from the proceedings leaves no

flicker of doubt that procedure for voire dire test was compiled save for the omission of questions, which in my opinion, is not fatal. If I were to agree with the appellant's contention, this would render PW1's testimony into unsworn evidence which cannot be relied upon to convict unless it is corroborated by independence evidence. Even with this finding, the verdict in this issue will remain intact because the testimony of PW1 was well corroborated by the testimony of PW3 Talls Mkude a neighbor who was the first to note that PW1 had a problem and upon interrogating her she confided on what was happening to her. Further, the testimony of PW1 was corroborated by the testimony of PW6 and exhibit P1 which as I will demonstrate letter confirmed that PW1 was raped and carnally known against the order of nature. This leads me to the conclusion that the testimony of PW1 was sufficiently corroborated. This ground therefore fails. Regarding the third ground that the testimony of PW1 did not establish penetration, I have noted that the testimony of PW1 Rukia Omar PW1 gave a detailed account how penetration happened when she told the court that:

> "in the night shemeji [the appelants] alinibaka aliniwekea mdudu wake kwenye uchi wangu, I felt pains. ...he intercourse me five times on different dates. He inserted his penis at the buttocks also"

This evidence was corroborated by expert evidence in form of medical report in PF3 dully tendered and admitted in court as Exhibit P1 and oral testimony of PW6 Nelly Stephen a clinical officer at Tabata hospital who testified that upon examining the victim on 24th May 2014. Her testimony and the PF3 report show the victims was found to have bruises in the vagina and the

anus and that the examination revealed he was intercourse several times.

The law on proof of penetration is clearly stipulated under Section 130 (4) (a) of the Penal Code, Cap 16, R. E. 2002 which states that:

> "130 (4) (a) For the purposes of proving the offence of rape,(a) penetration however, slight is sufficient to constitute the sexual intercourse necessary to the offence".

This provision has been interpreted in a number of cases including in **Selemani Makunge v R**, Criminal Appeal No. 94 of 1999; **Ramadhani Samo v Republic**, Criminal Appeal No. 17 of 2008 (unreported) and **Mathayo Ngalya @ Shabani V R** Criminal Appeal No. 170 of 2006, (unreported). In Mathayo Ngyala, the Court observed that:

> "The essence of ... offence of rape is penetration of the male organ into the Vagina. Sub-section (a) of section 130 (4) of the Penal Code Cap. 16 as amended by the Sexual Offence (Special Provisions) Act 1998 provides:- for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary for the offence. For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the Court to ensure that the witness gives the relevant evidence which proves the offence." [Emphasis added]

In the instant case, PW1's account of penetration is clear and free of any

ambiguity. Her account before the trial court that: " *alinibaka aliniwekea mdudu wake kwenye uchi wangu"* and that "he inserted his penis at the buttocks also" clearly established that penetration did happen. Although not expressly stated, it will appear to me that the Appellant is discontented by the use of the words *"aliniwekea mdudu wake kwenye uchi wangu."* If that is the case, I find his reasoning unfounded, baseless and oblivious of the current position of the law as espoused in the case of **Hassani Bakari @ Mamajicho v R** Criminal Appeal No. 103 CAT at Mtwara (unreported), where the Court of Appeal sanctioned the use of these words as correct description of intercourse or penetration as per section 130(4). In sanctioning the use of these words the Court of Appeal held that:

> " The words are defined in Longman Dictionary of Contemporary English as meaning-
> "the bodily act between animals or people in which the male sex organ enters the female" (Emphasis provided).
>
> The male sex organ means the penis and the female sex organ means the vagina. It is therefore common knowledge that when people speak of sexual intercourse they mean the penetration of the penis of a male into the vagina of a female. It is now and then read in court records that trial courts just make reference to such words as sexual intercourse or male/female organs or simply to have sex, and the like. Whenever such words are used or a witness in open court simply refers to such words, in our considered view, they are or should be taken to mean the penis penetrating the vagina. There are circumstances, and they are not few, that witnesses or even the court would avoid using such direct words as penis or vagina and the like, for obvious reasons including but not restricted to that person's cultural background;

> upbringing; religious feelings; the audience listening; the age of the person, and the like. These "restrictions" are understandable, given the circumstances of each case. Our considered view is that, so long as the court, the adverse party or any intended audience grasps the meaning of what is meant then, it is sufficient to mean or understand it to be the penetration of the vagina by the penis. We believe, that is why even section 130 of the Penal Code does not use directly the words of or phrases such as penetration of a vagina by a penis. Our cultural backgrounds and upbringing need to be observed and respected in matters of this kind.

On the strength of this authority the third ground fails

Regarding the alleged contradictions between PW2, PW35 and PW6 as to when the PF3 was issued and PW1 was examined, I have noted that there is no contradiction whatsoever. PW2, Najawa Shaban, PW1 sister testified that they reported the incident at police and was given a PF3 on 23/5/2014 and thereafter on 24/5/2014 PW1 went to hospital for examination. Her testimony coincides with the testimony of PW6 Nelly Stephen, a clinical officer at Tabata Hospital who testified he received PW1 on 24/5/2014 whereupon he examined her. PW5 WP 1606 DSSTV Joyce said nothing about PF3. Since there are no inconsistences in the testimony of these witnesses, I find this ground to be devoid of merit.

The fifth grounds will not hold me. Although I have noted that there is testimony of how the appellant was charged, this alone does not vitiate the

charges leveled against him. The fact that he was apprehended in connection with the offence charged can be inferred from the testimony of PW2, PW3 and PW5 which show that the apprehension of the appellant was directly linked to the offence he was charged. Besides, what the trial court was called to determine was whether or not the offence of rape was indeed committed and whether or not there was evidence directly linking the appellant to the said offence. As I have ruled above, the prosecution managed to lead adequate evidence to convict the appellant. Accordingly, the trial court did not err in its findings and conviction thereto as the evidence tendered in court consistently implicated the appellant.

Based on the grounds above, I dismiss the appeal and proceed to upheld the conviction and the sentence pronounced by the trial court.

DATED at DAR ES SALAAM this 9th day of October 2019.

J.L. MASABO

JUDGE

Judgment delivered this 9th day of October 2019 in the Presence of the appellant and Ms. Christine Jaos, learned State Attorney for the Republic

J.L. MASABO

JUDGE