IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

AT

CRIMINAL APPEAL 57 OF 2020

(Appeal from the Decision of the district court of Mvomero at Mvomero in Morogoro dated 24th April 2019 in Criminal Case No. o1 of 2019

DEO S/O JOHN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MASABO, J.:

The District Court of Mvomero convicted the appellant of the offence of rape contrary to section 130 (1) (2) (e) of the Penal Code. It sentenced him to 30 years imprisonment. He is now appealing against the conviction and sentence. The appellant's memorandum of appeal contains six grounds. These are to the effect that: **One**, the charge sheet was defective. **Two,** the trial court did not comply with the mandatory requirement of section 210(1)(a) and (3) of the Criminal Procedure Act [Cap. 20 R.E. 2002]. **Three**, the age of the victim was not proved. **Four**, the trial court erred in law in relying on contradictory evidence of PW2, PW3 and PW5. **Five,** the trial court erred in law and fact in failing to objectively asses the credibility of

prosecution witnesses. And, **six** the court erred in holding that the prosecution proved its case beyond reasonable doubt.

Before dwelling on these grounds of appeal, it is refreshing to state briefly the facts leading to this case. On 2nd December 2018 at Wami Luhindo village, Dakawa road area at Mvomero district the appellant raped XY (narne withheld) a girl of 7 years of age. XY met the appellant around 18:30 at a shop where she had gone to buy salt and groundnuts. Having bought the items she left the shop in the company of the appellant who convinced her to go through a pathway that was unfamiliar to her. As they were walking down, he grabbed her and forcefully lied her on the ground. Meanwhile he undressed and raped her. The dreadful act caused her severe pain. She cried for help but the appellant wouldn't let her. He slapped her and grabbed her neck. XY story was corroborated by the testimony of her mother who testified as PW2; a medical doctor who examined her and testified as PW3; a PF3 which was admitted as exhibit; testimony of PW4, a neighbour who assisted PW1; PW5 the shop keeper who attended XY and saw her living the shop in the company of the appellant.

The appeal was argued orally through video conference hosted by the judiciary. The appellant appeared unrepresented. Ms. Christine Joas, learned State Attorney appeared for the Republic. The appellant had nothing to add to his grounds of appeal. He briefly prayed that the court find merit in his grounds of appeal and order his discharge. On the respondent's party Ms. Joas supported both, the conviction and sentence. On the first ground she submitted that, the averment made by the Appellant is correct in that, the charge sheet indicated that he was charged of section 130(1) whereas

subsection 2(e) which was also relevant was omitted. She argued however that, the omission is not fatal and is cured by Section 388 of Criminal Procedure Act because the appellant was not prejudiced. He knew very well that he was charged of raping a girl child and he accordingly presented his defence. Thus, the ground should be dismissed.

Regarding the 2nd ground, she submitted that it is baseless because the records reveal clearly that the mandatory requirement of section 210(1)(a) and (3) were fully complied with throughout the trial. On the issue of age, she argued that it was ascertained in the charge sheet, and was also mentioned in the course of PW1's testimony and in the evidence of the doctor. In support, she cited the case **of Isaya Renatus v R**, Criminal Appeal No. 542 of 2015, CAT (unreported).

On the 4th ground the learned State Attorney submitted that there are no material contradictions between the testimony of witnesses. She argued that the only contradiction is with respect to date of commission of offence which could have been a typographical error. On the fifth and sixth ground Ms. Joas argued that the court objectively evaluated the evidence and found that it strongly established that the appellant was guilty of the offence. She argued further that the story of the victim which is the best evidence was not only clear and consistent, but was also corroborated by the testimony of other witnesses including PW3, the doctor who examined her, PF3, and testimony of PW5, the shop keeper who saw her leaving the shop in the company of the appellant shortly before the incident. Thus, the conviction was well founded.

I have given due regard to the grounds advanced in the memorandum of appeal, the prayer by the appellant and the submission by the Respondent. The first ground calls upon me to determine whether the charge sheet was defective and whether the defect was fatal and incurable. I will not waste time on the first element because both parties are in agreement that the charge sheet had a defect in that, it omitted sub section 2(e). It suffices to just state briefly that, 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 7 years it was crucial for the charge sheet to include sub section 2(e).

The lingering question, therefore, is whether this defect is fatal and incurable. Section 388 of the Criminal Procedure Act states the finding, sentence or order of the court shall not be reversed on appeal or revision on account of any error, omission or irregularity in the charge save where the omission or irregularity complained has occasioned a failure of justice. I have carefully scrutinised the records to see whether the appellant was anyhow prejudiced by such omission, but I found none on record. The statement of the offence explicitly described the offence against which the appellant stood charged. 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 of a girl of 7 years. The defect is, therefore, salvaged by section 388. The first ground, is consequently found to be devoid of merit.

Regarding the second ground of ppeal, section 210 imposes mandatory requirements to be complied with in recording the evidence of witnesses. The **first** requirement is for the magistrate to personally record the evidence of each witness in writing or to cause the same to be recorded in his presence and under his personal direction and superintendence. **Second**, the requirement for the magistrate to sign the evidence so recorded. And, **third,** the requirement for the presiding magistrate to inform each witness of his right to have his evidence read over to him and if he so wishes, to have the evidence read over to him. Failure to comply with these mandatory requirements is fatal and vitiates the proceedings (**Musa Abdllah Mwiba & 2 others v R,** Criminal Appeal No, 200 of 2016, CAT (Unreported). In the instant case, the proceedings vividly demonstrate that this provision was complied with. Not only were the proceedings recorded in writing by the presiding Magistrate Hon. Waziri, A.H but were signed and at end of every witness's evidence, there are following words**: "Court: S.220 of CPA c/w"** which demonstrate that indeed the requirement of the law was complied with. The 2nd ground, is therefore with no merit.

Regarding the age of the victim, the law is settled as to how the issue of age of a victim has to be determined in court. When considering whether the age of the victim was sufficiently proved, section 114 (2) of the Law of Child Cap 29 of 2009 is relevant. It states that:

> Without prejudice to the preceding provisions of this section, where the Court has failed to establish the correct age of the person brought before it, then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person".

There is in addition, a plethora of authorities on this provision, including the case of **Francis versus Republic**, Criminal Appeal, No. 173 of 2014 (CAT) (unreported); **Isaya Renatus v R**, Criminal Appeal No. 542 of 2015, CAT (unreported); and **Bashiri John vs Republic**, Criminal Appeal No.486 of 2016 CAT (unreported). In **Francis v R** (Supra) the Court of Appeal stated that;

> "Where the victim's age is the determining factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim under normal circumstance. Evidence relating to victim's age would be expected to come from the following; the victim, both her parents and at least one of them, a guardian, a birth certificate etc.

In the same vein, in **Bashiri John vs Republic** (supra), it stated that

> "proof of age is done by either evidence from the parents, medical practitioner or by birth certificate"

In the instant case, the charge sheet indicated that the victim was 7 years of age. In her testimony she stated that, she was 6 years old, the evidence of PW3, the doctor who examined her shows that she is 7 years; and the PF3 which was admitted in court as exhibit P2, shows that she was 7 years. In view of the above, although there were disparities, the evidence of the

medical doctor which coincides with that in the charge sheet sufficiently ascertained the actual age of the victim. In any case, the disparity is inconsequential because, it was the determinant factor for conviction but for imposition of sentence pursuant to section 130(3). It is equally inconsequential in sentencing because all the years mentioned fall within the range of section 130(2) which states that:

> "Subject to the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment." [emphasis added]

On the fourth ground the appellants case is that there were inconsistencies on the date the offence was committed. Examination of the record reveal that in deed there is an inconsistent in that, PW2 testified that the incident happened on 2/12/2018; PW4, stated that it happened on 2/12/2018 whereas PW5 stated that it was on 12/12/2018. These inconsistencies are immaterial because save for this inconsistent, the records show consistently that the incident happened on 2/12/2018. Therefore, as correctly argued by Ms. Joas, the disparity is inconsequential. As held in **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 CA (unreported), minor contradictions, inconsistencies, or discrepancies do not affect the case of the prosecution because they do not corrode the credibility of a party's case compared to material contradictions and discrepancies. More so in this case where the evidence of the victim which is the best evidence under the scenario is solid and intact. For this reason, I find and hold that this complaint is not well founded and I accordingly dismiss it.

The 5th and 6th complaints are without merit. As I have just hinted above, the evidence of the victim child was strong and elaborate. She testified that after she had bought salt and groundnuts at PW5's shop, the appellant told her that she was using wrong way and offered to show her a different path. He even carried her in pretext of showing her the right way. What transpired thereafter, her testimony loudly speaks by itself through her testimony appearing on the last paragraph of page 6 and the first paragraph of page 7 of the proceedings where she was recorded to have said that:-

> "while on the way around the bush area he undressed my pant and lie me down he just push me down and I fell lie upward. He then lays on top of me he even undresses his pant and lie on top of me I felt pain on my private parts. I don't know what he inserted on my private parts as it was dark back, I felt pain. I cried but he slapped me and then grabs my neck with his hands.

Her story was not only appalling and dreadful but was also elaborate, strong and believable. It also important to note that her evidence, being the victim's testimony is, according to the law, the best evidence (see **Mohamed Haji Alli v. DPP**, Criminal Appeal No. 225 of 2018 CAT (Unreported) and **Juma Mohamed v. Republic**, Criminal Appeal No. 4 of 2011 CAT (Unreported) was corroborated by independent witnesses. Here, a specific reference is to the testimony of two witnesses: **First**, PW5, a shopkeeper who attend both, the victims and the appellant, and saw them leaving together shortly before the dreadful incidence. **Second**, is the testimony and medical report of PW3, Fatuma Yusufu Msuya, a medical doctor at Morogoro Regional Hospital who

on 3rd December, 2018 (only one day after the incident) examined the victim and found evidence of penetration on her vagina which occasioned her bruises and loss of virginity.

With this strong evidence, I find no reason to fault the findings of the trail court and the conviction there to. On a different note, I have observed that the conviction imposed on the appellant was below the statutory mandatory sentence for offence against which the conviction was metered. As stated earlier, section 130(3) of the Penal Code imposes a mandatory sentence of life imprisonment for the offence of rape committed against a girl under the age of ten years. Since the victim in the instant case was below 10 years, having convicted the appellant, the trial court was statutorily obligated to sentence the appellant to life imprisonment.

In the final event, I dismiss the appeal in entirety. I also invoke the powers vested in this court by section 44(1) of the Magistrate Courts Act [Cap 11 R.E 2019] substitute the mandatory sentence of life imprisonment in place of the thirty (30) years imprisonment meted by the trial court

Order, accordingly.

DATED at DAR ES SALAAM this 15th day of July 2020

J.L. MASABO

JUDGE