IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 113 OF 2020

PETER SIMON @ MHAGA ..... APPELLANT

Versus

REPUBLIC.....RESPONDENT

Date of last order: 13/07/2020
Date of Ruling: 27/7/2020

J U D G M E N T

MGONYA, J.

Before this Honorable Court lies an Appeal originating from **Criminal Case No. 544/2017** at Ilala District Court where the Appellant was found guilty of the charges against him and sentenced to a term of imprisonment of 30 years from two counts that were levied against him.

Being aggrieved by the decision of the trial Court, the Appellant knocked the doors of this Court with nine (9) grounds of appeal being:

1. ***That, the Learned Trial Magistrate grossly erred in law and fact by convicting the Appellant based on a case where the age of the alleged victim was not proved by either tendering a birth certificate or hospital chit. Despite cases of this nature depending on the age of the victim to give sentence;***
2. ***That, the Learned Trial Magistrate grossly erred in bot law and fact by accepting to work under the influence of a Social Welfare officer to an extent of including her in the Court's quorum, yet she is not an officer of the Court, which is contrary to judicial ethics, hence she could not have delivered a just judgment;***
3. ***That, the Learned Trial Magistrate grossly erred in both law and fact by basing the appellant conviction on PW7's (Doctor's) evidence yet he was giving contradictory and inconsistence evidence;***
4. ***That, the Learned trial magistrate grossly erred in both law and fact by convicting the Appellant based on charges of rape and grievous harm courts***

despite their lacking cogent evidence to establish any of those offences;

5. ***That, the learned Trial Magistrate grossly erred in both law and fact by convicting the Appellant based on assumption that he (the Appellant) must have been raping the victim as they were living under the same roof, yet failed to consider the fact being as guardian he must have been living with her like a parent;***
6. ***That, the Learned Trial Magistrate grossly erred in both law and fact by convicting the Appellant basing on evidence of PW2, PW3, PW4, PW5 and PW7 yet failed to asses exhaustively their credibility before basing on their evidence;***
7. ***That, the Learned Trial Magistrate grossly erred both in law and fact in convicting the Appellant basing on PW1's evidence despite her (magistrate) failing to conduct voire dire test before receiving the victim's testimony in order to ascertain herself if PW1 knew and promised to tell the truth;***
8. ***That, the learned Trial Magistrate grossly erred in law and fact by convicting the Appellant basing on***

PW1's and PW7's evidence yet failed to observe the contradictions, material inconsistence and blatant lies which rendered their story to be improbable, and,

9. ***That, the learned Trial Magistrate grossly erred in concluding that the prosecution case has been proved to the required standard.***

After a thorough intensive reading of the records of the trial Court, grounds of appeal and submissions by the parties before the court of which I do not intend to reproduce in cause of construing this Judgment as the first Appellate Court. It is my view to determine the grounds of appeal by beginning with the **1st ground** of Appeal to be followed with others accordingly.

First to begin with the **1st ground** of Appeal, the Appellant is dissatisfied with the fact that the age of the victim was not dealt with properly before the trial Court as to the nature of the offense the Appellant faced. From the records the victim in her testimony testifies on the matter of age by saying she studied at MEMKWA for one year and at the day of testifying she claims to be 14 years, although she does not know when she was born.

It is my belief that it is from the above testimony of PW1 that the trial Magistrate found that the age of PW1 to have been

proved; since from the records of the trial Court there was no witness that stepped forth to have ascertained the exact age of PW1. It is a set and a non- negotiable fact that matters regarding age have been set already by case laws in the manner of proving the same.

However, going through the records, the Appellant was personally present at the trial and heard the evidence of PW1 but never contested the age of PW1 during cross examination or at any particular time and therefore I find the objection at this stage be an afterthought. In the case of ***NYERERE NYEGUE VS. REPUBLIC Criminal Appeal No. 67 Of 2010*** where the Court stated that:

> ***"As a matter of Principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial Court to disbelieve what the witness said".***

This same position was referred to in the case of ***MUSTAPHA KHAMIS VS. REPUBLIC, Criminal Appeal No. 70 of 2016, CAT 2016.*** And it is from the above named case, I choose to settle with their holdings and **therefore find that ground number one is meritless.**

Secondly, for consideration is the **2nd ground** of appeal where the Appellant is complaining that the Learned Magistrate worked under influence of the Social Welfare officer where the same was included in the Court's Quorum while is not an officer of the Court.

It is my understanding that a Social Welfare officer is sometimes an officer of the Court but not in the circumstances of a case like this one, where the offence has been committed against a child of tender age and not the child of tender age committing an offence. It is when a child of tender age commits an offence is when a Social Welfare Officer becomes an officer of the Court. This position and construction of such quorum is found in the Law of the Child Act of 2009 and the Regulations thereto. Therefore, it is indeed that the Trial Magistrate must have misdirected herself to what was occasioned at that material day and therefore, **I find this ground of appeal holds water.**

Next for determination is the **3rd ground** of appeal. In this ground, the Appellant states that the error by the trial Magistrate was on basing the Appellant's conviction on PW 7's evidence which was contradictory and inconsistence. Having gone through the records of the trial Court and the testimony of PW 7, I find

the evidence being based on the Doctor's line of duty that's examining the victim and his findings after examining the victim.

It was the Doctor's expert opinion that from his examination he saw that the victim has lost 3 upper teeth as a result of being injured by a blunt object. Further, the victim had no hymen thus she had been carnally known by a blunt object continuously as she had no bruises nor blood during the examination.

It is from this point of the Doctor's expert opinion, I see that the same was in line with the offences that the Appellant is charged with. And the Doctor was clear that he did not know the person who carnally knew the victim.

I find that the inconsistency and contradictions complained of by the Appellant have no chance to exist and **therefore the 3rd ground of appeal is meritless.**

Basing on the **5th ground** of appeal, the Appellant states that, the Court erred by convicting the Appellant basing on assumption that the Appellant must have been raping the Victim because he lived with her forgetting that he being a Guardian ought to have been living with her. It goes without saying that the records shows the Appellant to have been living with the Victim (PW1) and that it is PW 1 who states to have been raped by the Appellant and that is what is the testimony in the Court's

records. However, it should be taken into account that **Suspicion** no matter how grave does not warrant a conviction. This was stated in the case of ***REPUBLIC VS MT. 60330 PTE NASSOR ALLY Criminal Appeal No. 73 of 2002, TZCA 71.***

However, it is fair enough to believe one being a guardian to the Victim must be living with the victim. Now, since what transpired between the two in the circumstance of this case is what was evidenced by the two and is what was stated in Court. Therefore, suspicion is overweighed by the corroboration of the victim's evidence to other witnesses and the circumstantial evidence that stands to exist in such kind of cases.

Under the circumstances of this case, I see that, the victim's evidence especially where she was under the oath is the at most important issue. Apart from the circumstantial evidence that surrounds this matter, being the male adult (the Appellant), being of 46 years of age sleeping with a young girl of 14 years in the same room alone, being very strange and suspicions. Had it be his wife, one could just complain on the victim's age against that of the Appellant and the fact of illegal marriage because of the tender age of the victim and nothing else.

However, the victim being the Appellant's niece, sleeping with him in the single room, and in the midst of it, there is a

strong allegation from the victim that the Appellant was occasionally raping her, and taking into account that in rape cases, victim's evidence is the best evidence, why shouldn't other people and especially a trial Magistrate reject the victim's evidence? The benefit should under the circumstances go in favor of the victim.

In the case of ***NASIBU RAMADHANI VS REPUBLIC (Criminal Appeal No. 310 of 2017) [2019] TZCA 389; (08 November 2019) Tanzlii*** the Court quoted the reasoning of Mwambegele J. (as he then was) where he stated:

> ***"It is my considered opinion that the victim's evidence was cogent enough and that she was able to direct herself to the ingredients of the offence, more importantly penetration.....".***

The above concept was also propounded in the case of ***SELEMANI MAKUMBA VS REPUBLIC [2006] TLR 379*** it was also held that:

> ***"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in case of any other woman where consent is irrelevant that there was penetration".***

Under the circumstances, I would like to cement my point by quoting some part of the victim's evidence over this matter at the trial court. She said:

"After one week uncle Peter came on my bed at night when I was on sleep, he undressed the trouser I wore and the under pant. He took a condom and wore in his penis, took his penis inserted and entered it in my vagina by force; I did not make any alarm as he threatened to beat me. He inserted it deep in my vagina; it was in and out for more than four minutes until when he was satisfied. After that I saw blood coming out from my vagina. The house has electricity, but electricity light was off. He told me to wash my vagina, I washed it inside the house. Later on he left and went to work as he used to live at night for work at abattoir (Machinjioni).

Uncle Peter continued to have my carnal knowledge whenever he needed for many days which I cannot count, and this was done at night, I did not tell anyone about what Uncle Peter was doing to me as he said that if I dare to tell anyone he will kill me.

Uncle Peter used to wear condom on all days he had known me carnally."

At this end, neglecting the victim's evidence is sinful, who else is to be believed more than the victim? The Appellant? No under the circumstances, the Appellant in all forms had to defend himself out of this mess.

At this stage let me also show my disappointment first to the landlady who was living with these two under the same roof by allowing this situation to happen.

Second is the rest of the tenants who were living under the same roof too with the Appellant and the victim. Lastly is the entire community/neighbor hood who knew about the situation. All these had a duty to report this unbecoming situation in the earliest possible time to the Local Government leadership so that they could have entervined. The omission of not taking any step towards this matter is an acceptable sin; hence children are to be protected, not only by the parents and guardians, but by the entire community, see ***section 9 (3) of The Law of The Child Act of 2009;*** which states that:

"Every parent shall have duties and responsibilities whether imposed by law or otherwise towards his child which include the duty to;

(a) Protect the child from neglect, discrimination, Violence, abuse, exposure to physical and moral Hazards and oppression; activity that may be harmful to his health, education, mental, physical or moral development.

It is from the above explanation, I proceed to uphold the trial court that indeed basing from the victims' evidence committed the offence of rape against the victim therefore, **I find this ground of Appeal devoid of merits.**

The **6th limb** of complaint by the Appellant is based on the Court convicting the Appellant basing on PW2, PW3, PW4, PW5 and PW6's evidence yet failed to asses exhaustively their credibility before basing on their evidence. From the records, the above named witnesses as they introduced themselves before the Court were credible witness for they are the ones that were first in hand to obtain information from the victim as what had transpired to her injuries. These witnesses' testimonies is of importance and carry weight only when it comes to corroboration of their testimonies together with the victim's testimonies of which I find to be true as it appears in the trial court proceedings before the Court. As said, PW 1 (victim) was very clear in testifying of how she was carnally known and how she was

assaulted by the Appellant and her evidence was clearly corroborated with the evidence of the above witnesses and therefore called for the Appellant's conviction. The role played by the above witnesses amounts to them being credible witnesses. Having said so, **the 6th ground of appeal does not hold water.**

Having the **7th ground** of appeal for consideration on the complaint by the Appellant that the Magistrate convicted the Appellant on PW1's evidence after failing to conduct *voire dire* test. As it is well known that *voire dire* test was a mandatory test conducted to children of a tender age to ascertain their understanding of knowledge on an oath before testifying in the Court of law; Various case laws laid down procedure to conduct the same.

However, the *voire dire* test faced a new era in **2016** under the ***Miscellaneous Amendment Act No. 4 in terms of Section 127 (2) of the Evidence Act.*** This amendment imperatively required a child of tender age to **PROMISE TO TELL THE TRUTH.** A Magistrate is therefore mandatorily required to lead the child to state/promise that he/she would tell the truth and such promise has to be recorded **where the evidence is taken without oath or affirmation.**

However, the record of this matter shows that, before the trial Court, PW1 (the victim) had sworn and testified under oath as it appears in the Court records, as she is also the only eye witness who actually knows what transpired between her and the Appellant. In the case of ***SELEMANI MAKUMBA VS REPUBLIC [2006] TLR 379*** it was also held that:

> ***"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant that there was penetration".***

In the case at hand, the evidence of PW 1 did not stand alone but as said earlier was corroborated by evidence of other witnesses as required by law and therefore be sound for conviction as it was observed in the case of ***SELEMANI MOSSES SOTEL @WHITE VS REPUBLIC, Criminal Appeal No. 385 0f 2018, TZCA 2020***; Tanzalii where it was held that:

> **"We wish to add hear that under section 198 (1) of the Criminal Procedure Act Cap. 20 [R.E. 2002] it is mandatory that in a Criminal case every witness has to give evidence on oath or affirmation unless by a written law he is exempted from doing so that provision states as follows:**

"198 (1) every witness in a Criminal Cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the oath and statutory declaration acts."

Although therefore, section 127 (2) of the Evidence Act allow the child of tender age to give evidence without oath or affirmation, hence an exception to the mandatory requirement of section 198 (1) of the CPA that provision of the Evidence Act does not bar a child witness to the contrary

it is clear from the amendment to section 127 of the evidence act that the purpose was to do away with the old procedure of conducting *voire dire* examination on the child."

In the event therefore, I find the evidence by PW 1 taken by the court to be proper and that it was sufficient enough to have warranted a conviction on the two counts that the Appellant was charged with before the lower Court. Having said so, **I find this ground of appeal meritless.**

In the **8th ground** of appeal the Appellant is of the complaint that the Court erred to convict him basing on the

evidence of PW1 and PW7. PW1 is the victim who was the one bitterly evidenced that she had undergone the **brutes** acts of the Appellant. On the other side, PW7 is the Doctor who examined the Victim. The Victim states to have been raped by the Appellant and PW7 in his examination found that the victim has no hymen a fact that proves that the victim has been carnally known though there was no blood at that time neither bruises and states that the victim is used to the act and the victim claims the act to have run for so long and that she got used to it.

Further to that, the victim also complained to have been assaulted to the extent of losing three (3) upper teeth a fact that was diagnosed by PW7. Where he states that PW 1 lost the teeth by being beaten with a blunt object. From the above, I find PW1's and PW 7's evidence very strong to prove what the Appellant is arguing to be contradicting, inconsistent and blatant.

It is from the above that I will not be detained to determine the forth ground of appeal that I suspended earlier as it also based on evidence relied upon to warrant Appellant's conviction. **This ground of appeal too fails.**

Lastly, on the **last ground** of appeal where the Appellant sates that the prosecution had not proved their case beyond reasonable doubt, As from my point of view after all that has been said above and basing on the record of trial Court, Criminal cases to win conviction must be based on

proof beyond reasonable doubt. From the records and corroborating evidence **I found that the evidence has been proved beyond reasonable doubt, against the Appellant thus it commanded conviction of which I hereby uphold.**

Having said all the above, **this appeal in not merited and is hereby dismissed in its entirety.**

It is so ordered.

Right of appeal explained.

L. E. MGONYA
JUDGE
27/07/2020

Court: Judgment delivered in chamber in the presence of Ms. Faraja George, State Attorney for the Respondent, the Appellant in person and Ms. Veronica RMA this 27th day of July, 2020.

L. E. MGONYA
JUDGE
27/07/2020