IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 44 OF 2020

(Arising from the judgment of the District Court of Kwimba at Ngudu, in Criminal Case No. 170/2019)

AMOS CHARLES.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

06th & 24th July, 2020.

TIGANGA, J.

The above named appellant has filed this appeal after having been found guilty and convicted of two offences of rape contrary to sections 130(2)(e) and 131(1) and abduction contrary to sections 133 and 134 of the Penal Code [Cap 16 R.E 2019]. It was alleged that on the 12th day of July, 2019, at about 12:00 hrs at Nyamigamba village within Kwimba District in Mwanza Region, the accused person did have carnal knowledge of a girl aged 16 years named N d/o F; (names in initials) and that on the same date and time, the accused then abducted the said girl while being a standard six student at Nyamigamba Primary School.

When he was arraigned the Appellant pleaded not guilty to both counts and disputed all the facts which constituted the offence. The Republic called a total of six witnesses to prove the charge, while the defence called only one witness who is the accused person now the appellant himself.

After full trial, the accused person who is now the appellant, was found guilty and convicted in both counts and consequently he was sentenced to a mandatory sentence of 30 years in the 1st and three years in jail in the second count, the sentence which were to run concurrently.

Aggrieved by both the conviction and sentence, the appellant appealed to this court and filed eight grounds of appeal as follows;

1. That failure for PW1 to inform PW2 once she reached to the resident of PW2 that she was in abduction by the appellant renders her evidence suspect, cooked up and should not be considered, also not be trusted.

2. That in the absence of the evidence of Medical Examination to prove whether she raped or not, turn the evidence of prosecution in the level of hearsay evidence which cannot implicate the appellant in raping the victim PW1.

3. That it is uncertain whether or not the victim PW1 was a girl whose age was 16 years old in the absence of the legal proof.

4. That there is an incurable intricacies and / or deficiency in ingredients of rape i.e penetration and consent which were not sufficient elaborated (sic).

5. There was an omission by prosecution to summons material witnesses i.e VEO of the victim, ten cell leader of the victim, mother and father of the victim who could have corroborated the evidence of PW3 Dominician Ngarage Mayamba that PW1 was a school girl and that she became absentee after being abducted by Appellant.

6. That, the evidence of Exhibit PE1 and PE2 was doubtful, unreliable to implicate the appellant in committing the alleged offence worse enough the trial magistrate erred in law to attach much weight of the exhibit PE3 caution statement which was wrongly obtained and illegally admitted.

7. That the trial magistrate incurably erred both in law and facts to convict the appellant basing on hearsay evidence of PW5 and PW6 who did not witness PW1 being raped by the appellant flagrant delicto".

8. That the trial magistrate erred in law and facts to conclude that the case of prosecution had been proved beyond reasonable doubt while the defence of the appellant was not properly assessed without giving reason.

When the matter was called for hearing, the appellant had nothing to add. He asked the court to adopt his grounds of appeal as part of his

arguments in support of his appeal. On the other hand, the republic was represented by Miss Magreth Mwaseba, learned State Attorney, who submitted that, after passing through the evidence and the record she found the age of the victim was not ascertained and proved. She submitted that the offence being a statutory rape, it was imperative that the age of the victim must be ascertained and proved. She submitted further that, in the offence of rape, as provided in the first count, where the victim is alleged to be of the age of below 18 years of age, it is necessary that the age of the victim be proved.

Regarding the second offence of abduction, she supported the conviction and the sentence of three years imposed. She submitted on that count, in the evidence of PW1, PW2 and PW3 and in the cautioned statement that he was living with the victim. She referred to section 133 of the Penal Code [Cap 16 R.E. 2019], and said the law is clear and that there is also enough evidence from the victim in the proceedings that the accused person abducted her and took her by force. The appellant went with her to his sister and his brother in law came and proved that.

That being the position of the law and the evidence on record, she submitted that the prosecution has proved the second offence beyond reasonable doubt. She asked this court to uphold the guilty of the accused person in the second count; she has no problem with the sentence.

In rejoinder, the appellant submitted that, he did not admit to have committed the offence, as there was no person who appeared in court to prove that he abducted and threatened the victim except the victim herself. He also disputed what was said by his brother in law as

he did not find reason as to why he didn't take action when the accused went with the victim there. He said the case was framed against him, he asked to be acquitted.

That marked the argument by both parties in the Hearing of this Appeal, hence this Judgment. In this appeal I adopt the manner adopted by learned state attorney in dealing with this appeal. In so doing, I will start with the third ground of appeal which raises a complaint, that it was not ascertained that the victim was aged 16 years when the offence was allegedly committed. In the case of **Mathayo Kingu vs. The Republic,** Criminal Appeal No. 589 of 2015, CAT Dodoma it was held *inter alia* that;

> *"The age of the victim was important to be mentioned and proved to ascertain as to whether real the victim was girl aged between 18 years to constitute the offence of statutory rape."*

In this case, the victim is said to be 16 years of age when the offence was committed, however as properly submitted by Miss Mwaseba, learned State Attorney, there is no evidence leading to prove the age of the victim. Since it is a legal requirement for the age to be proved and the same has not been proved in this case, it cannot be said that the offence of rape has been established. That said, i Find merit in the 3rd ground of appeal I consequently allow it. Now having allowed this ground of Appeal, then the 2nd and 4th die naturally as they were basically based on the offence of rape.

Regarding the complaint in ground number 1 and 5 which are basically dealing with the second counts; the complaint was generally

that, all evidence adduced in relation to the offence of abduction, that the evidence is suspicions and cooked and should not be relied upon and trusted. He submitted further that, had the evidence been true PW2 would have reported the matter as early as possible and the Republic would have called the VEO, ten cell leader and the parents of the victim to prove that the victim was abducted. Miss Mwaseba in her submission submitted that, the evidence of PW2 and the victim herself are enough to prove that the appellant abducted the victim.

The evidence on record proves through the evidence of PW1 that the appellant took her to the witchdoctor at Malya where they stayed for about seven weeks before they shifted to the appellant's sister who is the wife of PW2, where the appellant was arrested from. Further to that, the evidence of PW2 proved that the appellant went with the victim at his home and informed them that the victim was his wife and they were on their way to Tabora. According to him, it was the demeanor, look, age and behaviour of the victim which made him suspicious, and it was upon inquiry when he found that the appellant was accused of abducting a girl.

The other evidence proving the offence of abduction, though not straight forward was that of the teacher of the victim who proved that the victim was standard six (VI) pupil, and that she went missing before she was found with the appellant.

In law, section 133 of the Penal Code (supra) for the offence of abduction to be proved there must be evidence proving the following elements;

i. That the accused person took away or detained the victim who is a girl or a woman of any age.

ii. That the taking away or detaining must be with intent either to marry or have sexual intercourse with the victim, or the victim to have sexual intercourse with other person.

iii. That the taking away or detaining must be against the will of the victim.

From the evidence of PW1, PW2 and PW3 there is enough evidence to prove that the victim was taken away and detained at the witchdoctor place. Further to that, the taking away or detaining was with intent to have sexual intercourse and probably to marry as evidenced by the evidence of the victim and that of PW2 respectively where the appellant introduced the victim as his wife. That being the evidence, I entirely agree with the submission by Miss. Mwaseba that, the offence of abduction was proved at the required standard. I find these grounds to have no merits and dismiss them.

That said, then in the fine, I find that the grounds of appeal against the offence of rape are allowed while those of abduction are dismissed, the appellant therefore is acquitted in the offence of rape and be released immediately in that offence, while in the second offence of abduction I find the prosecution to have proved the case beyond reasonable doubts, the appeal is dismissed, conviction is upheld and the sentence of three years meted out by the trial court against the appellant is sustained.

It is so ordered

DATED at **MWANZA** this 24th day of July, 2020.

J.C.Tiganga

Judge

24/07/2020

Judgment delivered in open chambers in the presence of the Appellant in person and Miss. Margreth Mwaseba, learned State Attorney.

J.C.Tiganga

Judge

24/07/2020

Right of appeal explained and fully guaranteed.

J.C.Tiganga

Judge

24/07/2020