IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.82 OF 2019

(Original Lindi District Court Criminal Case No.8 of 2019 before Hon. J.M. KARAYEMAHA- Esq. Resident Magistrate)

BETWEEN

ABDUL MOHAMED NAMWANGA@MADODO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

15 May & 8 June, 2020

JUDGMENT

DYANSOBERA, J.:

The appellant was charged in the District Court of Lindi with the offence of rape contrary to section 130(1),(2)(e) and131(2)(a) of the Penal Code, [Cap 16 R.E. 2002]. It was alleged in the particulars of the offence that on 5th day of July, 2019 at Mitandi area within the District and Region of Lindi the appellant had carnal knowledge of one 'FC' a girl of 17 years old. After a full trial the appellant was convicted and sentenced to thirty

(30) years imprisonment. Dissatisfied with the trial court's decision, he has appealed to this court challenging both conviction and sentence.

The factual background of the appeal can be briefly stated as follows: The victim, FC who testified as PW 1 is an orphan having no live parents. She was, however, living with Rukia Samuli Chiku (PW 2) who is her aunt that is her father's sister. On 5th July, 2019, PW 1 who, by the time, was a form IV student at Angaza Secondary School woke up and performed various domestic activities including cleaning the premises, washing dishes and fetching water. Her mother Rukia Samuli Chiku (PW 2) then left without disclosing where she was going. Thereafter, the victim completed her domestic duties and thus decided to get in the house and started reading the newspaper. She then heard someone knocking at the door and in responding, the appellant entered from the backyard door and asked PW 1 the whereabouts of her parents. PW 1 responded that they were not around. The appellant instructed PW 1 to greet them and then left. PW1 went inside the house and went on reading the newspaper. However, few minutes later, the appellant re-appeared unnoticed and without knocking at the door and went straight to the PW 1's room which had no door but only curtains. The appellant had nails and warned her not to shout lest he kill

her. The appellant pressed her shoulders and fell her on the bed. He undressed his shots, uplifted her dela and pulled up her skin tight to her knees. He then inserted his penis into her private parts and had sexual intercourse with her. PW 1 raised an alarm. PW 2 rushed there in rescue. The appellant asked for pardon saying, "Dada nisamehe, shetani alinipitia. PW 2 closed the door from outside and went to call some neighbours including Said Abdulrahman (PW 4) and Faisal Ahmed Mussa (PW 5). PW 1 was taken to Sokoine Hospital and medically examined by PW 3 one Mwanamkasi who filled in the PF 3...."

PW 2 confirmed that the victim was 17 years old as she was born on 25th February, 2002 and took her to stay with her at the age of 8 years. W.P TP 2937 D/Sgt Siwabu (PW 6) confirmed the victim's age by producing the clinical card.

The appellant admitted almost all what the prosecution witnesses stated save the commission of the offence.

In this appeal, the appellant has eight grounds of appeal as follows:-

"1. That, the Appellant pleaded guilty to the offence charged against him because he did not commit the alleged offence.

2.That, the trial Magistrate erred in law and fact basing on the evidence produced by PW3 by stating at page 7 of the judgment that WP did not scratch manora labia because of fungus as the doctor did not find her with that deceased(sic) without considering that in the copy of proceeding the doctor shows that he is not sure as to whether the manora labia was inflamed because of penetration or caninaasis(fungus) while the penetration is the element of the offence of rape.

3. That, the trial Magistrate erred in law and fact in holding that PW1 (victim) is the one who is better positioned to tell the world that the penis was inserted into her vagina without considering that penetration need to be proved beyond reasonable doubt by medical doctor as not every penetration is felt easily due to the different sizes of penis since it was not PW1's first time to meet with a man.

4. That, the trial Magistrate erred in law and fact in holding that he believed the PW1 (victim) because she was unshaken and unambiguous in her testimony when she was testifying that she was penetrated by a penis without considering that failure of the defence to shake the prosecution witness testimony does not amount to conviction of accused as prosecution

still need to prove their case to the highest degree such proving the case beyond reasonable doubt.

5. That the trial court erred in law and fact in holding that because PW2 found a man on top of PW1, he is the one who raped without considering that finding a man on top of a woman does not in the absence of other evidence amount to conviction of the accused person of (sic) an offence of rape.

6. That, the trial court erred in law and fact basing on the evidence of PW2 who did not witness the penetration of the penis of the accused to PW1'S vagina.

7.That,the trial court erred in law and fact basing on the evidence of PW1 who testified that she was making noise without considering that when PW2 entered the house, she did not hear noise as PW2 as PW2 did not testify to that effect.

8.That,the trial cout erred in law and fact in convicting and sentencing the appellant without considering that the prosecuting(sic)have failed to prove this case beyond reasonable doubt.

When the appeal was called for hearing before me on 15th May, 2020, the appellant appeared in person and unrepresented. The respondent Republic enjoyed the services of Mr. Meshack Lyabonga, learned State Attorney. The appellant nothing useful to add to his filed grounds of appeal.

In response Mr. Meshack Lyabonga, supported both conviction and sentence of the Lindi District Court. He argued all the grounds of appeal together submitting that all boil down to one complaint that the prosecution failed to prove the case beyond reasonable doubt, a complaint which is also reflected in the 1st ground of appeal. Learned State Attorney pressed that the prosecution had proved the case beyond reasonable doubt. He assigned some reasons for his argument. First, he said that PW1 from page 6, explained how the offence was committed stating that the appellant inserted his penis into her front private parts. The evidence of penetration was supported by PW3 (at page 13 and 14) who stated how she medically examined the victim and medical findings that the vagina was "deflamed" implying to have been caused by either slight penetration or fungus. Mr. Lyabonga further submitted that PW3 found sperms. He was of the view that the element of penetration was proved. to buttress his argument, learned state attorney relied on the case of **Kabalagala**

Kadumbagula and another versus Republic, Criminal Appeal No. 128 and 129 of 2017 on the authority that to prove the offence of rape, the doctor's report is not necessary.

It was the learned state attorney's further submission that PW2 witnessed the incident (ana kwa ana), her evidence being reflected at pages 10 – 11. .victim and since the offence is statutory rape hence they are bound to prove the age.

Mr. Lyabonga admitted that this being a statutory rape, the prosecution was duty bound to prove the age of the victim. He explained that PW 2 at page 9 of the typed proceedings of the trial court, managed to prove that PW 1 was 17 years old. The evidence of PW 2 PW6 was supported by that of PW 6 who at page 19 stated that the victim was seventeen years.

In conclusion, learned counsel insisted that both penetration and age elements were proved and the whole evidence implicated the appellant. He prayed this court to endorse the judgment of the lower court.

In his rejoinder, the appellant avowed that the doctor failed to prove that the appellant committed the offence in that she said that PW 1's vagina had fungus. The appellant contended that the penetration was not proved and that PW2 lied when she said that she found appellant in the

act. He further contended that he was at the sitting room holding a nail and PW2 asked him not to shout otherwise she would claim that he raped her daughter. The appellant confirmed that PW2 shut the door from outside and went back with witnesses and eventually claimed that he was a rapist. The appellant admitted that he was in good terms with both PW 1 and PW 2 but argued that the case against him was a frame up.

Having heard and considered the submissions by the learned State Attorney and the appellant in the light of the grounds of appeal and the trial court's record, the issue for determination and as rightly put by the appellat in his first ground of appeal and admitted by the learned state attorney, is whether the case against the appellant was proved beyond reasonable doubt.

It is a cardinal rule as provided by section 3 (2)(a) of the Evidence Act [Cap 6 R.E. 2002] that the fact is said to be proved if the court is satisfied by the prosecution beyond reasonable doubt that the fact exists. In the present appeal, there is no dispute that the case facing the appellant was statutory rape and as rightly submitted by learned state attorney, the prosecution was duty bound to prove beyond reasonable

doubt the two elements of penetration and age of the victim and whether the appellant was the culprit.

As regards the issue of penetration, the evidence of PW 1 was clear. She testified that on 5th July, 2019 after PW 2 had left and when she was reading a newspaper in her room, the appellant entered inside twice. For the first time, he knocked at the door and then asked her if her parents were around. PW 1 replied in the negative. The appellant then left. He then went back for the second time, now unnoticed and without knocking at the door. He was handling nails. What transpired can best be discerned from PW 1's own words as recorded at page 7 of the trial court's typed proceedings.

> "He had nails in his hand. He threatened me that if I make noise he would kill me. He placed the nail on the bucket. He then pressed my shoulders and fell me on the bed. He undressed his shots (bukta). I dressed a gown (dela) and skin tight. He uplifted my gown and pulled my skin tight up to the knees. He took his penis and inserted it in my private part (in front). The penis penetrated into my vagina. I was shouting when he was sexing. Suddenly my mother entered inside. He was asked what was going on. Uncle Madodo was

alarmed. He left the bed and started begging pardon. He was begging my mother. He was saying, "Dada nisamehe. Shetani alinipitia".....He had not ejaculated but his penis was inside me"

PW 2 supported PW 1's evidence in material particular. She recalled that she found a person who later turned to be the appellant lying on top of PW 1 carnally knowing PW 1 who was lying supine. PW 2 locked the door from inside and went to call her neighbours. These included PW 4 and PW 5. PW 4 who medically examined PW 1 was clear that upon inserting her finger into PW 1's vagina, the vagina was discharging white coloured waste and the laboratory test through High Vaginal Swap, showed that PW 1 had no spermatozoa. According to PW 3 (Exhibit P 1), there was inflammation of labia minora. This evidence clearly supported the evidence of PW 1 that she was penetrated by the appellant but that the appellant did not ejaculate. The appellant admitted to have gone to PW 1 and PW 2 with nails. He also admitted to have been found in the house with PW 1 and that the latter was found by PW 2 crying. Likewise, the appellant admitted that PW 2 found him with PW 1 inside the house, locked the door from outside and called some neighbours including PW 4 and PW 5. It was also in the appellant's admission that he was in good terms with both PW 1

and PW 2. With that compelling evidence, I am satisfied that the element of penetration was proved beyond reasonable doubt.

With respect to the age of the victim, PW 1 testified that she was 17 years old. PW 2, apart from supporting PW 1's evidence on the age , confirmed that the victim was born on 25th day of February, 2002. PW 6 confirmed the date of birth by tendering PW 1's clinical card (Exhibi P 2). This evidence was not contradicted. Indeed, the appellant admitted that PW 1 was calling him her uncle while PW 2 was her sister. The fact that PW 1 at the time of the sexual act was 17 years old was proved to the required standard. Considering the totality of evidence and the undeniable fact that not only was the act committed during the broad day light and the appellant was found in flagrante delicto having sexual intercourse with PW 1, I am satisfied that the appellant carnally knew PW 1 on 5th July, 2019 as alleged in the charge sheet.

As far as the appellant's grounds 2, 3, 4, 5, 6, 7 and 8 are concerned, the answer can be found in the wisdom of the Court of Appeal of Tanzania in the case of **Selemani Makumba v.R** [2006] TLR 384 in which it was explicitly stated:-

A medical report or evidence of a doctor may help to show that

there was sexual intercourse but it does not prove that there was rape, that is uncontested sex, even if bruises are observed in the female sexual organ. True evidence of rape has 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, there was penetration.

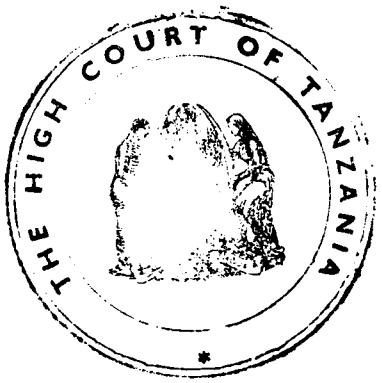
In the instant case, the appellant carnally knew PW 1 who was 17 years old hence under the age of 18. Under section 130 (1) and (2) (e) he committed an offence known as statutory rape. He was rightly convicted. Under the provisions of section 131 (2) the minimum sentence for a person convicted for such offence is thirty years prison term. The sentence was the bare minimum prescribed by law.

On the strength of my finding, I am inclined to agree with the learned state attorney that the case against the appellant was proved beyond reasonable doubt. I find the appeal devoid of merit.

I thus dismiss the appeal in its entirety.

W.P. Dyansobera
JUDGE
8.6.2020

This judgment is delivered under my hand and the seal of this Court on this 8th day of June, 2020 in the presence of Mr. Paul Kimweri, learned senior state attorney for the respondent Republic and in the presence of the appellant (virtually present in court).



W.P. Dyansobera

JUDGE