IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 59 OF 2020

(Arising from Judgment of the District Court of Nyamagana in Criminal Case No. 202 of 2016)

ALEX S/O SEVERINE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 08.06.2020

Judgment date: 08.06.2020

A.Z. MGEYEKWA, J.

The appellant ALEX S/O SEVERINE was arraigned by the District Court of Nyamagana and charged with an offence of rape contrary to Section 130 (1),(2),(e) and 131(1) of the Penal Code, Cap. 16 [R.E 2019].

The brief background to this appeal is that the prosecution alleged that the accused raped the girl of 7 years known as Sophia d/o Antony. The

appellant was brought before the District Court of Nyamagana, where he pleaded not guilty to the charges consequently, the appellant was convicted and sentenced as he stands now. Dissatisfied and aggrieved by both conviction and sentence, he appealed to this court.

In the instant appeal, the appellant feels that his case was not proved to the required standard of law. He has therefore presented three grounds of Appeal, which can be compressed as follows; **One**, that the trial court erred in point of law and facts to convict and sentence the appellant without observing that the prosecution failed to prove the charge beyond all reasonable doubt on the standard required by law. **Two**, that the trial court erred in point of view and facts and failed to note out that the same lacked material fact with no proof of penetration and consisted of ambiguity consisting of such null conviction. **Three**, the trial court record shows that a *voire dire* test was not conducted on PW1 as required by law for a tender age.

Following the global outbreak of the Worldwide COVID - 19 pandemic (Corona virus), the hearing was conducted through audio teleconference whereas, the appellant defended fending for himself, whereas the

Respondent Republic had the service of Ms. Fyeregete, learned State Attorney.

The appellant, in his brief defense prayed for this court to adopt his ground of appeal and set him free because he is innocent.

On her part, Ms. Fyeregete did not support the appeal and she stated that the prosecution proved the case against the appellant beyond reasonable doubt.

Responding to the first and second grounds of appeal, she stated that PW1 testified clearly that the appellant raped the victim and it was proved by PW2. Ms. Fyeregete submitted that PW1 testified how she examined the victim and found redness on her vagina and found dirtiness on her underpants. She went on to state that PW1 called PW4 to witness that she saw sperm on her vagina thus penetration was proved. She added that PW1 and PW4 in their testimonies said that the appellant was at PW1's house and PW1 left her child at home, then later PW1 saw PW2 with the appellant entering the house together and later PW2 was raped. She went on to state that PW5, the Doctor after examining PW2 found that the victim was reddish and was not virgin, hence the penetration was proved.

Arguing on the third ground of appeal, the learned Senior State Attorney argued that PW2 was not tested, it is not shown if penetration happened. She argued that PW2 unsworn evidence in law needs to be collaborated by other evidence. Ms. Fyeregete further argued that PW1 narrated how she found out that the victim's vagina was reddish and PW2 named the appellant who raped her. She went on to state that PW5 testified that the victim was raped and he tendered a PF3 (Exh. PE1). She valiantly submitted that the Republic evidence is heavy enough to prove that the appellant was rightly convicted. She prays this court to dismiss the appeal.

The appellant in his brief rejoinder prayed this court to examine how this case was determined and request this court to do justice.

Having examined the grounds of appeal and the submissions made by the learned State Attorney and the appeal, I will determine the issue of *whether or not the present appeal is meritorious.*

I have opted to start with the 3rd and 1st ground of appeal, that relates to the credibility of PW2 (victim) that *voire dire* test was not conducted as required by law for a tender age and the standard of proof as I consider

these two grounds suffice to dispose of the appeal without necessarily dealing with the remaining grounds of appeal.

Using this legal benchmark, the prosecution dutifully, lined up five prosecution witnesses also tendered a PF3 (Exh. P1) which in total intended to prove the case to the standard required by the law. The prosecution believed on the evidence of Monica Magesa (PW1) Sophia Antony (PW2), Bulabo Paschal (PW3), Rehema Boniphance (PW4) and Geogina Bylorugulu (PW5).

Addressing the first ground of appeal that the prosecution failed to prove the case beyond a reasonable doubt, I have already explained in length that the prosecution witnesses failed to establish the offence of rape. Nevertheless, I have noted that PW5 tendered a PF3 which was admitted as Exhibit P1 but the trial Court wrongly admitted the exhibit. Like any other documentary evidence, whenever it is intended to be introduced in evidence, it must be initially cleared for admission and then admitted before it can be read loud. This was stated in the case of **Omari Iddi Mbezi v Republic,** Criminal Appeal No. 227 of 2009 (unreported). In the trial under scrutiny, at page 21 of the typed trial court proceedings, it is evidently shown that the

PF3 (Exhibit PE1) was not read over to the appellant as required by the law thus the same is a fatal and contrary to section 240 (3) of the Criminal Procedure Act, Cap.20 [R.E. 2019]. Therefore, I proceed to expunge the Exh. PE1 from the Court records.

In respect to the third ground of appeal, I will determine whether PW2 testified without oath and what are the consequences thereto. The trial court records reveal that PW2, was a child, aged 9 years old, who knew nothing about the oath and she testified without taking an oath. She informed the court that the appellant took her to the dormitories and she explained how the appellant undressed her and inserted his male organ into her private parts. Then, PW2 was warned by the appellant not to tell her mother instead she should go straight to the toilet and clean herself. On the other side, the appellant denied the chargers.

Reading, the trial court records, it is clear that the trial court was attracted by the evidence of PW2. However, as I have alluded earlier, the evidence of PW2 was taken without an oath. In situations like this and as rightly pointed out by the Senior State Attorney, the court cannot rely on unsworn evidence thus, this is a situation where corroboration was required.

It is settled law that unsworn evidence most often requires corroboration, I am referring the case of **Raphael Mhando v The Republic**, Criminal Appeal No. 54 of 2017 [1st March, 2019 TANZLII] and **Hassan Bundala @ Swaga v The Republic**, Criminal Appeal No. 386 of 2015 (unreported). As long as PW2 gave unsworn evidence, her evidence needed to be corroborated. Therefore, I proceed to expunge PW2 evidence from the court records.

Examining PW2 evidence she testified that she saw PW2 with the appellant and late she examined PW2 and found that PW2 vagina was reddish with some dirtiness. PW1 asked the PW2 her whereabouts and she informed PW1 that she went to *Mjanini* with the appellant and the appellant undressed PW2 started to play with her by using his male organ. The evidence of PW1 does not prove if there was penetration because she stated that PW2 informed her that the appellant started to play with PW2 by using his male organ, playing with male organ does not amount to penetration. Nevertheless, PW1 evidence is purely hearsay evidence she did not witness the act of rape. PW3 and PW4 were called by PW1 to witness the status of PW2. PW3, a street Chairman of central Mhina street testified that he received a call from PW1 and was informed that they need his support

because the appellant raped PW2. PW3 testified further that he saw PW2 and he interviewed PW1, and she told her that the appellant raped her. Reading the evidence of PW1 and PW3, it clearly shows that their testimonies are not compatible since PW1 testified that the appellant was playing with his male organ while PW3 testified that she was informed by the victim that the appellant raped her.

PW4, testified that PW1 approached her and they started to search for PW2 and suddenly they saw PW2 and the appellant. PW4 further testified that PW2 informed them that she was with the appellant, he promised to buy her pipi and they went to Nursery School then the appellant undressed PW2 and slept on top of her. PW2 and PW4 evidence are contradicting each other; PW1 testified that PW2 told her that they went *Mjanini* and the appellant played with his male organ while PW4 testified that PW2 told them that they went to a Nursery School then the appellant undressed her and slept on top of the victim.

In the record, PW5 is the one examined PW2 and observed that PW2 vagina was reddish and she prepared a PF3 (Exhibit P1) which I have expunged from the Court records for being admitted in contravention of

section 240 (3) of the Criminal Procedure Act, Cap. 20 [R.E. 2019]. Assume that PW5 saw some features suggesting that PW2 was raped, he could not be in a position to know who did it.

The evidence of PW1, PW3, PW4, and PW5 created doubts considering that the appellant denied the chargers. Therefore, PW1 PW3, PW4, and PW5 evidence cannot be taken to corroborate PW2 evidence as their evidence were a mere hearsay as to who raped PW2 and the same have no impact on the outcome of this case. It is unsafe to base a conviction on uncorroborated evidence as it was held in the case of **Adrian Masongera v The Republic**, Criminal Appeal No. 77 of 199. It is trite law that for the "offence of rape "...there must be unshakeable evidence of penetration". It was the duty of the prosecution to prove beyond a reasonable doubt that the accused took part in an act of sexual penetration with the victim.

For the aforesaid reasons, I am satisfied that PW1, PW3, PW4, and PW5 evidence did not shade any green light to rule out that the appellant is the one who raped PW2. I am in accord with the appellant that the first and third grounds of appeal were not proved beyond a reasonable doubt. Therefore, the first and third grounds of appeal are answered in affirmative.

In the final event, I allow the appeal, quash the conviction, and set aside the sentence imposed on the appellant. Further, I order the appellant be released forthwith from prison unless held for other lawful reasons.

Order accordingly.

DATED at Mwanza this 8th day of June, 2020.

A.Z. MGEYEKWA

JUDGE

08.06.2020

Judgment delivered on this 8th day of June, 2020 via audio teleconference, and both parties were remotely present.

A.Z. MGEYEKWA

JUDGE

08.06.2020

Right to appeal full explained.