THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO 15 OF 2020

(Originating from Lindi District Court Criminal Case No 88 of 2019)

HASSANI BACHO NASSORO............................ APPELLANT

VERSUS

THE REPUBLIC.. RESPONDENT

JUDGEMENT

Hearing date on: 12/5/2020

Judgement on: 08/6/2020

NGWEMBE, J:

The Appellant in this appeal was convicted by the District court of Lindi in Criminal Case No.88 of 2019. He was sentenced to jail for the period of thirty (30) years, 12 strokes and to compensate the victim a total amount of 1,000,000/= for the offence of rape contrary to section 130 (1), 2 (e) and 131 (1) of the Penal Code [Cap 16 R:E 2002 now Revised Edition of 2019]. It was alleged that on 2nd day of December, 2019 at Matwapa-Mipingo Village within the District and Region of Lindi, had carnal knowledge with a girl of 14 years old. Since she is under the age of majority, her name is hidden preserving her respective privacy, integrity

and future respect as per section 33, read together with section 76 of the Law of the Child, accompanied with the Chief Justice's Circular No.2 of 2018, dated 20th March, 2018. Thus, her actual name is hidden, instead she is baptized as "ABC".

Being so convicted and sentenced as per dictates of law was dissatisfied, hence this appeal clothed with four (4) grounds namely:-

1. That the trial court erred in law and in fact for convicting and sentencing the appellant basing on the evidence of PW2, a child of tender age which was taken in absence of prior promise to tell the truth.

2. That the trial court erred in law and fact in convicting and sentencing the appellant based on the testimony of PW1, PW2, PW3, PW4 and PW5 while their evidences were hearsay.

3. That the trial court erred in law and fact to convict and sentence the appellant while the prosecution side failed to prove the case beyond reasonable doubt.

4. That the trial court erred in law and in facts in convicting and sentencing the appellant basing on the weakness of defence side rather than on the strength of the testimony of the prosecution side.

On the hearing of this appeal, the appellant being unrepresented had very limited contributions to his appeal. When he was invited to argue his appeal, asked this court to give the first right to argue the appeal to the

Republic/Respondent who was represented by Mr. Paul Kimweri, Senior State Attorney.

Exercising that right to argue the appeal, the learned Senior State Attorney supported the conviction and sentence meted by trial court. In ground 3 he argued that, the key prosecution witness was the victim herself (PW2) a fourteen (14) years old girl, whose testimony was to the effect that the appellant being a close relative, was treated as a father, as he married a younger sister of the victim's mother, who was responsible to purchase school exercise books, pen and clothes. On 2/12/2019 in the morning when she was going to school, the appellant decided to hide on the way and raped her.

Further added that penetration was proved by medical doctor and the victim herself. Proving penetration is an important ingredients of rapes as was rightly so decided in the case of **Hassan Bakari Vs. R, Criminal Appeal No.103 of 2012 at page 9** the Court defined penetration. Thus the evidence of PW2 left no doubt on penetration, such evidence was supported by a medical doctor and PF3.

Moreover he argued that, another key witness was PW5 Halima Mohamed who proved the age of the victim that she was born in 2005, thus, by 2019 she was 14 years. In this point he referred this court to the case of **Mathew Kingu Vs. R, Criminal Appeal No. 589 of 2015** (CAT) at Dodoma, where the Court urged prove of age of the victim is mandatory.

On the first ground, that is affirmation or promise to speak truth. The learned Senior State Attorney, argued that the proceedings of the trial court at pages 6 the victim ABC (PW2) affirmed instead of promising to speak truth. Section 127 (2) as amended by Act No.2 of 2016 removed the mandatory requirement of *voire dire* to the victim of a tender age. He referred this court to the most celebrated case of **Seleman Mosses Sotela @ White Vs. R, Criminal Appeal No.385 of 2018** (CAT) at Mtwara, where the Court removed the legal requirement of *voire dire test.* Thus the first ground lacks merits because the victim confirmed prior to her testimonies.

In ground two, the State Attorney submitted strongly that, the evidence of PW1, PW3, PW4 and PW5 corroborated the key evidence of PW2. Further PW1 was a doctor who testified on her expertise on medical examination she conducted to the victim, while PW5 testifies on the age of the victim, thus the question of hearsay is unfounded.

On the third ground of proving the case beyond reasonable doubt, its test is rested to the trial court and this court to determine if at all the adduced prosecution evidences satisfied the legal requirements of establishing a *prima facie case* against the accused/appellant. Therefore, I need not to labour much on it.

He rested his submission on the last ground by arguing that the issue of failure of the trial court to base the judgement on strength of prosecution evidence instead relied on weak defence evidence is baseless and unfounded. The judgment of the trial court is authentic in pages 8 & 9

that clearly discussed in details the prosecution evidences and defence case. In totality the evidence of the prosecution left no doubt and the conviction and sentence were proper.

In turn and briefly, the appellant responded by a prayer that this court should consider all his grounds of appeal, and let him free. He came up with a defence of family conflicts. That they had family conflicts which led into his conviction and sentence. He rested by raising the issue of two hospitals, that PW2 was examined in two different hospitals but the result was from Sokoine Hospital.

From the outset, to prove criminality there must be a strong evidence from the reliable and credible witnesses linking the accused with the offence committed. There must be reliable evidences pointing to none than the accused. In this appeal the testimonies of PW2 partly testified as follows:-

> *"On 2/12/2019 at the morning I was going to school I met with Hassan Bacho who raped me. He told me that yesterday you said I raped you, while not, I will rape you today. Give me back what I bought for you. He bought me shoes, exercise books and pen. I gave back shoes which I had at that time. He told me to go back home to give him. We went back home but before we reached home.... he ordered me to move forward then he strangled me to the forest where he started raping me. He undressed me and undressed himself, he undressed my underpants and raped me.... after he completed raping me my clothes became dirty."*

This piece of evidence when read together with medical examination report, and the testimonies of PW3, PW4 and PW5, obvious leaves no

doubt the offence was committed to "ABC". The question is who did it? An immediate answer is found to the previous undisputed facts that the appellant bought shoes, exercise books and a pen for ABC. That the appellant and ABC knew each other and were relatives, for he married a younger sister of her mother. Thus, treated him as a father. The event occurred on a day light in the morning when she was going to school dressed with new shoes bought by the appellant for the victim. Therefore, identification is not an issue at all.

Moreover, the victim's clothes became dirty after rape, that was evident as testified by PW1, PW3, PW4 and PW5. Even the medical report, indicated that there was bruises and bleeding in the ABC's private parts (Vagina) due to that act of rape. Thus, the evidence adduced by the prosecution witnesses proved penetration, identification of the rapist, age of the victim and circumstances led into that criminal act.

Part of the testimonies of PW1 in court was to the effect that, "*the bruise was in the vagina and it was fresh bruises that is why she was bleeding, she was bleeding due to the bruises, I confirmed that the victim vagina was penetrated by blunt object.*" Such piece of evidence when considered together with other testimonies, satisfies the legal requirements that indeed the victim was raped.

I am aware that medical doctors, when called to testify in court, are not witnesses of facts, but are experts in their field providing expert opinion. The expert opinion is admissible to furnish the court with scientific information, which is likely to be outside the experience and knowledge of

a trial judge or magistrate. The court is not bound to follow such expert opinion, when there is enough and cogent evidence to arrive into conclusion without help of that expert opinion. But when thee is a serious doubt on certain testimony, the expert opinion would help the court to arrive into clear position of the alleged offence. This position was also articulated by the Court of Appeal in the case of **Edward Nzabuga Vs. R, Criminal Appeal No. 136 of 2008 a**nd in the case of **Agness Doris Lindu Vs R, [1980] TLR** where the court held:-

> *"The court is not bound to accept medical testimony, if there is good reasons for not doing so, at the end of the day, that is, it remains the duty of the trial court to make the findings and in doing so, it is incumbent upon it to look at, and assess, the totality of the evidence before it, including that of a medical expert."*

I would urge that in rape cases, the mother or father of that offence is 'penetration' defined to mean males reproductive organ enters into female reproductive organ with or without female's consent, if she is of majority age and consent is not required if she is below the age of majority. Penetration is a legal requirement as per section 130 (4) (a) of the Penal Cdoe Cap. 16 R.E 2019. Apart from the provision of law, yet we have numerous precedents to that effect. Section 130 (4) (a) is quoted for clarity purposes:-

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."*

To supplement that statutory provision, the Court of Appeal in the case of **Godi Kasenegala Vs. R, Criminal Appeal No. 271 of 2006** (CAT)

(Unreported), asked the question on what constitutes the offence of rape? They answered as follows:

> *"under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of 18 years without her consent. Two, having sexual intercourse with a girl without her consent. Two, having sexual intercourse with a girl of the age of 18 and below with or without her consent (Statutory rape). In either case,* ***one essential ingredient of the offence must be proved beyond reasonable doubt. This is the element of penetration i.e. the penetration, even to the slightest degree, of the penis into the vagina."***

In similar pronouncement in the case of **Baraddi s/o Deo Vs R, Criminal Appeal No.33 of 2010** (unreported) and in the case of **Mbwana Hassan Vs. R, Criminal Appeal No.98 of 2009 (CAT – Arusha)** (Unreported) held:-

> *"It is trite law also that, for the offence of rape... There must be unshakeable evidence of penetration."*

Based on the section and precedents aforementioned, I may summarize the fundamental elements of the offence of rape as; **first** is sexual intercourse without consent to a woman above the age of eighteen years, but if is eighteen or below consent is immaterial; **second**, is penetration of male penis to a female reproductive organ (vagina); **third,** prove of age of the victim if she is low the age of majority; **four,** availability of unshakable evidence proving the offence of rape beyond reasonable doubt. In establishing and proving these elements of rape, among others,

(the list is not exhaustive), may lead the trial court to convict the accused and subsequently issue the required statutory minimum sentence.

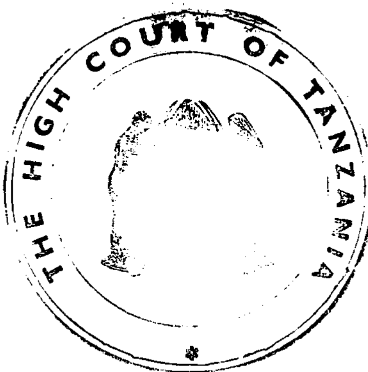
In the case of **George Mwanyigili Vs. R, Criminal Appeal No.335 of 2016 at page 12,** the court held:-

> *"We agree with Mr. Mtega that what is important is the fact that there were bruised in the victim girl's female organ, an aspect which was indicative of the fact that there was penetration which is crucial ingredient of the offence of rape."*

In this appeal, I have no slight doubt, the evidence adduced in court during trial, proved the offence against the appellant to the standard required. All four grounds raised by the appellant in this court have failed to shack and specifically pin point any relevant error committed by the trial court. As such I find no cogent reason to depart from the judgement of the trial court. I accordingly, dismiss it forthwith, consequently uphold the conviction and sentence meted by the trial court.

I, accordingly order.

Dated at Mtwara in Chamber on this 8th day of June, 2020.



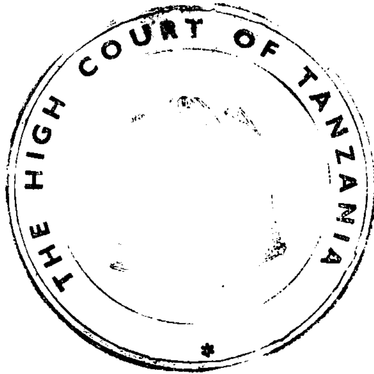
P.J. NGWEMBE

JUDGE

08/6/2020

Court: Delivered at Mtwara in Chambers on this 8th day of June, 2020 in the presence of the Appellant and Mr. Paul Kimweri, Senior State Attorney for the Respondent.

Right of Appeal to the Court of Appeal explained.



P.J. NGWEMBE
JUDGE
08/6/2020