IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 33 OF 2019

(C/F Criminal Case No. 310 of 2017 District Court of Moshi at Moshi)

BADI SALEHE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

6th July, 2020 & 3rd August, 2020

JUDGMENT

MKAPA, J:

The appellant was charged with and convicted of the offence of Rape c/s **130 (1) (2) (e)** and **131 (8) of the Penal Code,** Cap 16 [R.E. 2002] (Penal code) by Moshi District Court in **Criminal Case No. 258 of 2018**.

The prosecution case in a nutshell leading to this appeal is to the effect that, on diverse dates between March and April, 2018 at Kilototoni area, Njia Panda, within Moshi district in Kilimanjaro region the appellant had carnal knowledge of PW2 "Eva" (true identity hidden) a five (5) years old girl. It was alleged on those occasions the appellant who is Eva's paternal uncle was living with the victim and he raped the victim and sodomised the victim's younger brother when their mother was in hospital nursing a sick child. That, Eva reported the matter to her father

but did not take any action until PW1 (the victim's mother) returned from hospital when the unfortunate ordeal was revealed and the appellant was apprehended and charged with the current offence.

The appellant denied the allegations claiming that the case had been framed against him as he had grudges with his brother (victim's father PW2's) over a piece of inheritance land. However, the trial court found him guilty, convicted of the offence of rape and sentenced him to life imprisonment.

Aggrieved by the judgment and sentence of the trial court, he preferred this appeal praying that the judgment and sentence be quashed and set aside on seven (7) grounds. However, going through them I found that two of them are of the same character and can be summarized as hereunder:-

1. That, the trial magistrate erred in law and fact in failing to find that the charge was in contravention with **section 133 (2) of the Criminal Procedure Act,** Cap 20, R.E. 2002. (CPA)
2. That, the trial magistrate erred in law and fact in holding that the victim PW2 understands the nature of oath while the victim admitted that she didn't.

3. That, the trial magistrate erred in law and fact in not finding that the appellant is sort of mental disordered and deserve to be tested and be represented by a defence counsel.
4. That, the trial magistrate erred in law and fact in relying on the evidence of PW5 the doctor, which was in contradiction with the PF3.
5. That, the trial magistrate erred in law and fact in failing to test the credibility of the victim's testimony.
6. That, the trial magistrate erred in law and fact in shifting the burden to the appellant that there was no land dispute.

Parties consented that the appeal be argued by way of filing written submissions. The appellant appeared in person unrepresented while the respondent was represented by Ms. Grace Kabu, learned state attorney.

Arguing in support of the first ground the appellant submitted that there were two offences which the respondent had prosecuted him with at the trial court however, he was convicted of a single offence contrary to section 133 (2) and (3) of the CPA which provides that if the accused is charged with more than one offence the same must be reflected in the charge sheet. The appellant explained further that the prosecution never summoned victim's brother whom the victim had alleged was sodomized by the appellant while they belong to the same family

thus the appellant argued that he should be accorded benefit of doubt.

Supporting the 2nd ground the appellant submitted that the trial magistrate conducted an examination to PW2 who confessed to understand the meaning of oath thereafter she was sworn. It was appellant's contention that this is an irregularity as there is difference between an oath and duty to speak the truth as stipulated under **section 127 (2) as amended by section 26 (a) of Act No. 4 of 2016**.

With respect to the 3rd ground the appellant argued that he needed to be medically examined to establish whether he was mentally fit and able to defend himself or be represented by an advocate as provided under section 310 of CPA. On the 5th ground the appellant argued that PW5 the doctor, alleged that he received Eva on 1st April, 2018 but filled the PF3 on 2nd May, 2018 (more than a month after the said examination was conducted) further that the said medical examination report makes no mention of the victim's young brother as both of them were sent to the same hospital on the date of the occurrence of the incident. On the ground on variations, the appellant submitted further that, PW4, social welfare officer stated that the offence was reported to him on 4th May, 2018 before the victim was sent to hospital while at the preliminary hearing it is

alleged that it was on the 16th August. He went on explaining that these contradictions went to the root of the matter.

Arguing on the 5th ground, the appellant wondered why the victim aged 5 years failed to immediatelly report to her immediate relatives including her grandmother after the occurrence of the ordeal. Furthering his argument the appellant submitted that the fact that "Eva" said "he removed his *dudu* and entered it here" that alone does not prove penetration. It was the appellant's further testimony that, the trial court relied solely on the evidence of PW2 without analysing, assessing and examining her credibility as was held in the case of **Godi Kisengela V Republic**, Criminal Appeal No. 10 of 2018.

Lastly the appellant submitted that, the trial magistrate shifted the burden of proof to him in holding that 'DW2 did not know anything about the land dispute' which was not true. He finally prayed this court to scrutinise and evaluate the evidence and accord him benefit of doubt.

Disputing the appeal, Ms. Kabu conceded the fact that the appellant was charged with the offence of rape **c/s 130 (1) (2) (e) and 131 of Penal Code** only without unnatural offence **c/s 154 (1) of Penal Code**. She argued however, this omission does not contravene **section 133 (2) of the CPA** as the

respondent successfully adduced evidence on the former offence as the latter offence could be prosecuted separately.

Ms. Kabu submitted further on the 2nd ground that the trial magistrate gave her opinion on PW2 after she had interviewed her on whether she understood the meaning of an oath. Nevertheless, It was Ms. Kabu's contention that due the amendments effected under the **Written Laws (Miscellaneous Amendment) (No.2) Act No. 4 of 2016** *voire dire* examination is no longer a requirement. She cited the case of **Elia Bariki V The Republic**, Criminal Appeal No. 321 of 2016, CAT (unreported) to support her argument.

On the 3rd ground Ms. Kabu submitted that appellant's claims that he is mentally disordered is an afterthought as the same is not reflected in the proceedings. The same applies to the issue of the right to legal representation which the learned state attorney denied the same to have been denied to the appellant. On the 4th ground Ms. Kabu submitted that there is no contradiction between PW5's testimony and PF3, and further that since the appellant failed to cross examine on the same, he cannot raise it at appeal. On the allegations that both the victim and her young brother were treated in the same hospital by PW5, Ms Kabu argued that these are mere allegations as they did not feature in the trial court's proceedings. Finally Ms. Kabu argued on the 5th and 6th grounds combined to the effect that at

page 7 of the trial court's judgment the trial magistrate assigned reasons as to why she believed the victim's evidence and how appellant's testimony was too shallow to shake the prosecution's case and that the burden of proof was never not shifted to the appellant. Finally,Ms. Kabu prayed for the appeal to be dismisses for lack of merit.

Having considered arguments for and against the appeal, I find it pertinent to begin with the essential element in proving the rape offence namely "penetration" to the effect that the law is settled that the essential ingredient to be proven in rape offence is penetration. This position has been fortified in numerous cases including the case of Ally Mkombozi V.R, Criminal Appeal No 227 of 2007 CAT (Unreported) in which the court of Appeal had this to say:-

"The essence of rape is penetration, however slight is sufficient to constitute sexual intercourse necessary to the offence"

The appellant alleged that the victim's testimony when she said "he removed his dudu and entered here" does not constitute penetration.

It is worth mentioning the fact that, Recently several decision of the Court of Appeal have expounded the scope of section 130 (4) (a) in so far as proof of penetration in sexual offence is concerned. The said decision **include Hassan Bakari@**

Mama Jicho V. Republic Crim. Appeal No. 103 of 2012; Minani Evarest V. Republic Crim. Appeal No. 124 of 2007; Ndikumana Philipo V.R Crim. Appeal No 276 of 2009; Minani S/O Selestin V Republic Crim. Appeal No 66 of 2013; Matendele Nchanga @ Amilo V. Republic Crim. Appeal No 108 of 2010; John Martin@ Marwa V. Republic Crim No 22 of 2008; Joseph Leko V. Republic Crim Appeal 124 of 2013; Jumanne Shaabani Mrondo V. Republic Crim. Appeal No 282 of 2010; Baha Dagani V. Republic Crim. Appeal No 39 of 2014; Nkenga Daudi Nkya V.Republic Crim. Appeal No 84 of 2013 and Simon Eroo V. Republic Criminal Appeal No 2012.

This scope is now settled that, in proving that there was penetration it does not in all cases expected the victim of the alleged rape to graphically describe how the male organ was inserted in the female organ. The new development of interpretation of the provision of section 130(4)(a) of the Penal Code has been brought into being taking in to consideration inter alia, cultural background upbringing, religious feeling, the audience listening and the age of the person givin evidence. Thus in **Joseph Leko** (*supra)* the court instructively observed that;

" Recent decision of the court show that, what the court has to look at, is the circumstances of each case including cultural

background upbringing religious feeling, the audience listening and the age of the person giving evidence. There are instance and they are not few, where a witness and even the court would avoid using direct words of penis penetrating the vagina this is because of cultural restriction mentioned and related matters". Thus word like "he removed my underwear and started intercousing me" **in Matendele Nchanga Amilo**(*supra*) " sexual intercourse or have sex " in Hasssan Bakari @ Mama Jicho (*supra*) " he undressed me started to have sex with me" in **Nkaya Daudi** (*supra)"* Kanifanya tabia mbaya " in **Athuman Hassan**(supra) "alinifanya matusi" in **Jumanne Shaabani Mrondo"** ***he puts his dudu in my vagina*** " in Simon Erroor" *did sex me by force"* though not explicity described, taken by the court to make reference to penetration of penis of the accused in the vagina of the victim.

In present appeal, Eva, PW2 a girl of five (5) years narrated how the appellant sexually abused her five times at their house when her mother was away at hospital. She also testified at page 8 of the trial court's typed proceedings that;

> ***"... Badi cane (sic) and called me, he raped me, he put his dudu for urinating in my urinating parts her (PW1 show her vagina).He removed***

his dudu from his trousers and entered it here. He did it five times. ..."

It is evident from the above that, Eva managed to establish the ingredient of "penetration"

Turning to the first ground of appeal, the appellant had challenges the trial court for not charging him with both the alleged offence, the respondent/Republic had argued the fact that it is not mandatory for the appellant to be charged with both offences. However they did not explain further as to why they opted not to prosecute on the unnatural offence. However, it is evident that even with the only one charged offence the appellant was able to understand the offence of rape which he was charged with and was able to mount a defense. The fact that the appellant was prosecuted with only one offence does not bar the respondent from prosecuting him with the alleged remained offence. Therefore I do not see how the omission did prejudice the appellant. Thus this ground is dismissed for lacking merit.

As to the 2nd and 5th grounds combined both are centred on challenging the credibility of the victim's evidence as well as how such evidence was admitted. At this juncture I find it pertinent to revisit the relevant section to wit; **Section 127 (2) of the Evidence Act** (as amended) which reads;

(2) A child of tender age may give evidence without taking an oath or making an affirmation ***but shall, before giving evidence, promise to tell the truth to court and not lies.***

It is evident at page 7 of the trial court's proceeding, the trial magistrate did ask PW2 normal questions such as her name where does she study and mostly important whether she would testify the truth and not lies, the following is what the trial magistrate observed;

"The witness knows that to tell lies is not good, and there is punishment therefore she understands the meaning of oath. Swear and states as follows."

From there on PW2 went on testifying.

It is established from the foregoing the fact that a standard test on whether PW2 was telling truth or not was complied with irrespective of whether she was sworn or not. In the case of **Mohamed Said V Republic,** Criminal Appeal No. 145 of 2017, CAT at Iringa the Court held *inter alia* at page 14 that;

*"We are aware that in our jurisdiction it is settled that the best evidence of sexual offences comes from the victim [**Magai Manyama v. Republic** (supra)]. We are also aware that under section 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] a*

conviction for sexual offence may be grounded solely on the uncorroborated evidence of the victim.

However we wish to emphasize the need to subject the evidence of such victims to scrutivy in order for the courts to be satisfied that what they state contain nothing but the truth."

I fully subscribe to the above position especially on the trustworthy of the PW2's testimony as I am unable to understand why she would tell lies against the appellant. I therefore find no merit on the two grounds, hence I disallow them,

On the 3rd ground the appellant alleged that the trial court did not consider his mental instability and accord him right to legal representation. I am of the considered opinion that it is not the duty of the court to speculate on mental fitness of the appellant the appellant had a duty to inform the trial magistrate on his alleged mental problem. More so, **Section 21 and 33 (1) of the Legal Aid Act,** Cap 21 R.E. 2019 provides that;

"21.-(1) An indigent person who intends to receive legal aid may approach any legal aid provider and apply for legal aid services"

"33.-(1) Where in any criminal proceedings, it appears to the presiding judge or magistrate that-

(a) in the interests of justice an accused person should have legal aid in the preparation and conduct of his defence or appeal as the case may be; and

(b) his means are insufficient to enable him to obtain legal services,

the presiding judge or magistrate, as the case may be, shall certify that the accused ought to have such legal aid and upon such certificate being issued, the Registrar shall assign to the accused a legal aid provider which has an advocate for the purpose of preparation and conduct of his defence or appeal, as the case may be."

From the above provisions it is evident that legal representation is a right to any person, however such right is not automatic it is upon a formal application through respective officers in charge if a person is still under custody. However, such application can also be made orally during trial and court may grant by issuing a certificate for legal aid assigning the accused person to the legal aid provider.

My perusal of court record, has revealed that, the appellant was not bailed for lacking sureties. However, the proceedings does not reveal any request by the appellant for legal assistance. This

complaint only featured in his petition of appeal to which I consider it as an afterthought. This ground of appeal also crumbles.

On the 4th ground the appellant challenged the variances on dates of the occurrence of the incident when the matter was reported to the police station and when the victim was taken to the hospital. I have not observed any variances as PW4 Social welfare officer, narrated to the effect that Eva was taken to her office after she had already been taken to police and Himo hospital but PW4 took them to Mawenzi hospital as she had observed that the victim was still in pain.

This compliments PW5's testimony who attended Eva on 1st April, 2018 although he filled the PF3 on 2nd May, 2018. It is noteworthy pointing out that the PF3 revealed that Eva was taken to Himo Hospital and not Mawenzi. I therefore found no variance on the same, as a matter of practice not all the time PF3 is filled on the day the medical examination is conducted but until the results are ready. This ground also has no legs to stand and the same is dismissed.

Lastly, on the of appellant's testimony, the trial magistrate at page 9 of the typed judgment thoroughly gave reasons for disqualifying the appellant's defence to the effect that:-

"The evidence of DW1 who testified that he has land dispute with the victim's father that is why they cooked a case for him, has no use since his witness DW2 who testified before the court, on cross examination he replied that there was no any land disputes between accused and his brother"

I therefore hold that the observation by the trial magistrate regarding appellant's testimony as rightly submitted by the respondent did not shake the prosecution case nor shifted the burden of proof. This ground also crumbles.

For the reasons discussed, I found no reason to disturb the decision of the trial court.

In the final analysis this appeal is dismissed in its entirely and the trial court's decision is hereby upheld.

It is so ordered.

Dated and delivered at Moshi this 3rd August, 2020

S. B. MKAPA

JUDGE

03/08/2020