IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 229 OF 2020

(Originating from Criminal Case No. 104 of 2015 in the District Court of Mafia at Mafia (Minja RM)

HEMEDSEIF ....APPELLANT

VERSUS

THE REPUBLIC..... . ... RESPONDENT

JUDGMENT

21st and 30th October 2020

MASABO, J.:-

Hemed Seif, the appellant herein, was on 29th August 2015 found guilty and convicted of the offence of rape contrary to section 130(1) (2) (b) and section 131 of the Penal Code [Cap 16 R.E 2002] by the district court of Morogoro. He was sentenced to 30 years imprisonment. Aggrieved, he lodged this appeal against the conviction and sentence. His appeal is armed with 8 grounds of appeal which can be summarized as follows: **First,** the evidence rendered by prosecutor's witness did not correlate to the provisions of the Penal Code under which the appellant was charged. **Second,** the age of the victim was not ascertained. **Third,** section 210 (3) of the Criminal Procedure Act [Cap 20 R.E 2019] was not complied with; **Fourth,** PW2's testimony was unreliable as she failed to disclose incidence to her mother; **Fifth,** the evidence of PW1, PW2, PW3 was implausible. **Sixth,** admission of Exhibit Pl, (PF 3) was marred by irregularities, to wit, it was not prescribed

by the witness prior to its identification, it was tendered by a public prosecutor and, it was not read after its admission. **Seventh,** the arresting officer did not testify to establish that the apprehension was in connection with the offence he stood charged. **Eighth,** the charge was not proved beyond reasonable doubt.

Hearing proceeded through video conference facility. The Appellant who defended himself, did not have much to submit. He just reiterated his grounds of appeal.

On her side, Ms. Christine Joas, learned State Attorney who appeared for the Republic supported the conviction and sentence and proceeded to submit that the ground that the charge sheet was defective is with no merit because, although there was an omission to mention section 130(2)(e), there was no injustice occasioned as the appellant knew all along the charges against him that he was alleged to have raped a 12 years old girl who also testified in court in the presence of the appellant. On the second ground she cited the case of **Isaya Renatus v R** Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania (Unreported) and submitted that the age of the victim can be proved by a doctor and that in this case, the age of the victim was proved by her mother who testified as PW3; the doctor and the victim who all testified that the victim was 12 years.

On the third ground she submitted that, the requirement to have the exhibit read over is not mandatory. It could be read if the witness/parties requested so and since in the instant case there was no request that it be read, the ground cannot be sustained. As for the victim's failure to disclose the incidence to her mother

she briefly submitted that it is baseless as she was fearful of the appellant threatened to kill her if she disclosed. On the 6th ground of appeal, she conceded that indeed the exhibit was rendered by a prosecutor who is incompetent. She prayed that the exhibit be expunged from the records. She however added that, even in the absence of the exhibit, the evidence on record is sufficient to sustain conviction and sentence as the testimony of the victim which is the best evidence is credible and self-explanatory. Also, the oral testimony of the doctor corroborates the victims' story. On the seventh ground, Ms. Joas submitted that it is baseless as there was no dispute that he was arrested in connection of the offence as it could be seen in page 3 of the proceedings. On the fifth and eight ground of appeal, Ms. Joas argued that, the evidence rendered by the Prosecution was sufficient to warrant a conviction as the evidence of PW1, PW2, and PW3 were very critical and water tight.

The appellant rejoined briefly. He submitted that in the case of **Yohana Huale, Mussa Abdalla and Others v R** Criminal Appeal No. 2016, CAT (unreported) it was held that, reading of the document which was admitted is mandatory. This marks the end of the submission by the parties.

I have carefully considered the grounds of appeal, the records in the original case file and the submission made by the parties. In the first ground of appeal, I have been invited to determine whether the charge sheet was defective and whether the defect was fatal and incurable. I will not waste time on the first element because both parties are in agreement that the charge sheet was defective as it omitted sub section 2(e). It suffices to just state briefly that, Section 130(1) does

create the offence of rape but cannot by its nature stand alone. It has to be read together with the numerous types of rape provided for under section 130(2) of which paragraph (e) stablishes an offence of statutory rape against which the appellant was charged. Therefore, considering that the Appellant in the instant case was charged for raping a girl of 12 years it was crucial for the charge sheet to include sub section 2(e).

In answering the second element, I am guided by Section 388 of the Criminal Procedure Act, [Cap 20 RE 2019] which states that the finding, sentence or order of the court shall not be reversed on appeal or revision on account of any error, omission or irregularity in the charge save where the omission or irregularity complained has occasioned a failure of justice. I have carefully scrutinised the records to see whether the appellant was anyhow prejudiced by the omission to mention sub-section 2(e) but, I have found none on the record. The statement of the offence explicitly described the offence against which the appellant stood charged. The contents of the charge sheet were crafted in such a way that they sufficiently informed the accused of the charges facing him and thereby enabling him to prepare his defense. As correctly submitted by the learned State Attorney, the Appellant knew very well that the charges against him was rape of a girl of 12 years. The defect is, therefore, salvaged by section 388. In view of this the first ground of appeal is, consequently, found and held to be devoid of merit.

Regarding the second ground as to the age of the victim, the law is settled as to how the issue of age of a victim has to be determined in court. When considering whether the age of the victim was sufficiently proved, section 114 (2) of the Law

of Child Cap 29 of 2009 is relevant. It states that:

> Without prejudice to the preceding provisions of this section, where the Court has failed to establish the correct age of the person brought before it, then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person".

There is in addition, a plethora of authorities on this provision, including the case of **Francis versus Republic,** Criminal Appeal, No. 173 of 2014 (CAT) (unreported); **Isaya Renatus v R,** Criminal Appeal No. 542 of 2015, CAT (unreported); and **Bashiri John vs Republic,** Criminal Appeal No.486 of 2016 CAT (unreported). In **Francis v R** (Supra) the Court of Appeal stated that;

> "Where the victim's age is the determining factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim under normal circumstance. Evidence relating to victim's age would be expected to come from the following; the victim, both her parents and at least one of them, a guardian, a birth certificate etc.

In the same vein, in **Bashiri John vs Republic** (supra), it was stated that:

"proof of age is done by either evidence from the parents, medical practitioner or by birth certificate"

In the instant case, the charge sheet indicated that the victim was 12 years of age. In her testimony, the victim who testified as PW2, stated that she was 12years. Her testimony was corroborated by the medical practitioner who testified

as PW1 and her mother who testified as PW3. In view of this, there is no flicker of doubt that the actual age of the victim was sufficiently ascertained. This ground fails in entirety.

The third and sixth grounds of appeal are related, I have taken the liberty to consolidate them as they all relate to the admission of the PF3 which was admitted as exhibit Pl. The, appellant claims that its admission was marred by irregularities and he mentioned four, namely, that it was not prescribed by the witness prior to its identification, it was tendered by a public prosecutor who is not a competent witness to tender exhibit, it was not read after its admission. The learned State Attorney has conceded to the third irregularity, that is, the exhibit was wrongly tendered by the prosecutor who is not a competent witness.

Upon perusal of the records, I have observed that as correctly submitted by the parties, the PF3 was not tendered by PW1. After PW1 had laid a foundation for tendering it, the prosecutor prayed to tender the exhibit and proceed to tender it. This was certainly inconsistent with the law of evidence which vests the duty of tendering exhibits into the witness. The law in our jurisdiction is well settled that exhibits must only be tendered by a witness not the prosecutor (see **Thomas Ernest Msungu@ Nyoka Mkenya v R,** Criminal Appeal No. 78 of 2012 CAT (unreported); **Silvery Adriano v. R,** Criminal Appeal No. 121 of 2015 CAT (unreported); and **DPP v Festo Emmanuel Msongaleli & Nicodemu Emmanuel Msongaleli,** Criminal Appeal No. 62 of 2017 CAT (unreported). Based on these authorities, I sustain the sixth ground of appeal and expunge Exhibit Pl from the record. Since the expungement of Exhibit Pl naturally disposes of the third ground of appeal, I will not proceed to determine it as that would

only serve an academic exercise.

The Fourth ground of appeal is, with respect devoid of merit. While it is true that the victim did not immediately disclose the incident to her mother, this alone does not render her testimony uncredible. As held in **Abilahi Mshamu Mnali v. R**z Court of Appeal of Tanzania at Mtwara, Criminal Appeal No. 98 of 2010 (Unreported), in cases where an incident of rape/ sexual offence was not immediately reported, reasons for delay should be objectively considered. The court must be sensitive and responsive to the plight of victims by and free of any myths or preconception. In the instant case, it is not disputable that PW2, did not immediately disclose the incident to her mother. She even did not disclose it to the medical doctor who examined her. She disclosed the incident when taken to a police officer. Her reasons for non-disclosure are well articulated in her testimony where she testified that, she did not disclose the incident as she was afraid of the appellant who had threatened to kill her if she dared disclose the incident to any person. She also testified that she could not lie to the police officer as she was afraid of the consequences. Having considered PW2's testimony, I am of the firm view that, her ground for non-disclosure was credible. The fear of being killed by the appellant, was certainly a sufficient bar for disclosure. This ground consequently, fails.

As to the seventh ground that the arresting officer did not testify to establish that the apprehension was in connection with the offence, he stood charged, this too is without merit as the issue as to the grounds of arrest was not among the contested matters as it was listed under the memorandum of agreed facts

contained in page 3 of the proceedings. Therefore, no proof was required in respect of this mater. Besides, in page PW4, 8166 D. Atukuzwe, narrated how the accused was arrested,

The fifth and eighth grounds of appeal calls upon me to determine whether there was sufficient evidence to convict the appellant. Having expunged Exhibit Pl from the record, the new question to be answered is whether in the absence of Exhibit Pl the conviction and sentence can be sustained. The answer to this question is dependent on the evidence of the prosecutrix. Where the evidence of the prosecutrix is credible, conviction and sentence will be sustained as, in sexual offences, the evidence of the prosecutrix is the best evidence (see the decision of the Court of Appeal in **Mohamed Haji Alli v. DPP,** Criminal Appeal No. 225 of 2018 CAT (Unreported); **Juma Mohamed v. Republic,** Criminal Appeal No. 4 of 2011 CAT (Unreported);

Godi Kisangela v R Court of Appeal of Tanzania, Criminal Appeal No. 10 of 2008 (Unreported); and **Alfeo Valentino v. Republic,** Criminal Appeal No. 92 of 2006, CAT (unreported).

In the instant case, the testimony of PW2 was credible as she eloquently explained how the incident happened. As well assessed by the trial court in page 8 of the judgment, she credibly described how penetration happened and all the ordeal she went through on the fateful date. Besides, as correctly held by the trial court, the oral testimony of PW1 also corroborated her story. To that extent I find and hold that there is sufficient evidence on record to sustain the conviction and sentence.

To the extent demonstrated above, I uphold the conviction and sentence metered by the trial court and dismiss the appeal in entirety.

Dated at Dar es Salaam this 30th day of October 2020.

J.L. MASABO

JUDGE