THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
DC. CRIMINAL APPEAL NO. 76 OF 2019
(From the decision of the District Court of Rungwe at Tukuyu in Criminal Case No. 123 of 2018)

ALPHONCE BISEGE MWASANDUBE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: *12/08/2020*
Date of Judgment: *15/10/2020*

NDUNGURU, J.

Alphonce Bisege Mwasandube, the appellant herein, was tried and convicted by the District Court of Rungwe sitting at Tukuyu of the offence of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code (Cap 16 R.E. 2002). Upon conviction, he earned a sentence of thirty (30) years imprisonment. It was alleged in the particulars of the offence that on 21st day of December, 2018 at about 17:45 hours at Kasanga Village within Rungwe District in Mbeya Region, he did have carnal knowledge one TN a child aged 6 years.

Briefly, the evidence which the trial Court found the prosecution had proved its case on the required standard and convicted the appellant as

charged was as follows: On the material date at about 17:45 hours, Atupakisye Nyangupe (PW3), a resident of Mpombo Kalambo Village saw the appellant half undressed his trouser and TN (victim) gown was upheld to her chest. Sara Kajuta (PW2) who is the mother of the victim told the trial Court that, she was at VICOBA and her phone was off thereafter one Atupakisye (PW3) went at VICOBA and informed PW2 that her daughter was raped by the appellant.

Again, TN (victim) in her testimony told the trial Court that, she knew the appellant by the name of Fons. She narrated further that, she lived at Kalambo and on the material date the appellant came at her home and took her to Mndola area. Thereafter, the appellant undress her dress and started to rape her by inserted his ***"dudu"*** into victim's private part then she cried. Also, she told the trial Court that, the appellant after finished beaten the victim and run away. Moreover, she told the trial Court that, she did not know why the appellant run away after finished raping her.

Being aggrieved with the decision of the trial Court, the appellant lodged the present appeal before this Court. The appellant filed the petition of appeal with seven grounds of appeal but after careful summary, I found that the appellant have three main complaints as follows:

1. That, the trial magistrate erred in law and fact by convicting the appellant while the prosecution side did not prove its case beyond reasonable doubt.
2. That, the trial magistrate erred in law and fact by convicting the appellant while the prosecution failed to call doctor who alleged to attend the victim.
3. That, the trial magistrate erred in law and fact by convicting the appellant while this offence was fabricated against the appellant.

When the appeal was placed before for hearing, the hearing was conducted through the video conference; the appellant entered appearance in person whereas Ms. Hanarose Kasambala, learned state attorney appeared for the respondent/Republic.

In support his appeal, the appellant prayed for the Court to adopt his grounds of appeal and he did not have anything to add.

In rebuttal, Ms. Kasambala stated that section 130 (1) (2) (e) of the Penal Code (Cap 16 R.E. 2002) in which the appellant was charged against requires the prosecution to prove whether the victim is below 18 years old and also that the victim was raped.She added that, there is no dispute that the victim is below 18 years old as she was six (6) years and further, the victim in her testimony had proved to have been raped by the appellant.

She went on to submit that, the victim said to had known the appellant who took her to Mndola under the tree then he undressed her and inserted the penis into victim's vagina this is seen at page 3 of the typed proceedings of the trial Court. She cited the case of **Selemani Makumba vs. Republic (2006) T.L.R 384** to the effect that, the true evidence of rape comes from the victim. Also, she argued that, the appellant never cross examined the victim when she adduced her evidence.

Ms. Kasambala continued to submit that, the evidence adduced by the victim was corroborated by the evidence of PW 3 this is seen at page 7 of the typed proceedings. She added that, PW3 in his evidence told the trial Court that, he heard the shout from the bush and when traced found the appellant undressed while the victim's dress was up. She further submitted that the presence or not of sperms is not a paramount proof of rape. She therefore prayed for the Court to dismiss this ground of appeal.

On the issue failure to call doctor, Ms. Kasambala contended that, it is true that the medical officer was not called to testify but the medical report shows only that the victim has been inserted with blunt object. To cement her argument she cited the case of **Selemani Makumba (supra)**. Also, she stated that, the evidence or record is sufficient to warrant conviction notwithstanding the absence of the medical officer.

In relation to the issue of fabrication, Ms. Kasambala contended that, this ground is an afterthought. She added that, when PW2 testified before the trial Court, the appellant never challenged the evidence nor told the Court the presence of the grudge between and PW2 this is seen at page 7 of the typed proceedings. She further submitted that, in the defence the appellant never testified on the existence of the dispute between him and PW2 this is seen at page 13 of the typed proceedings. Finally, she prayed for the Court to dismiss this appeal and upheld the decision of the trail Court.

In his rejoinder, the appellant submitted that, he leaves it with the Court to decide. He added that, he has just been subjected to this case due to the existed grudge. In conclusion, he prayed for the Court to allow this appeal.

Having careful scanned the submissions made by the both patties, the issue calling for the determination is whether this appeal has merit or not.

Starting with the first ground of appeal, my determination is that it is well established principle of the law that in rape case the prosecution side is required to prove that, if an adult, that there was penetration, it means the penis entering into the vagina and no consent and in case of any women where consent is irrelevant that there was penetration. Again, such

entering, however slight it may be, is an important and crucial ingredient to the offence of rape.

Turning to the facts of the present appeal, the victim (PW1) narrated clearly what happened to her on the fateful date, she was clear and coherent. In her testimony the victim gave a consistent story on how the appellant took her from home to Mndola under the tree up to when the appellant inserted his ***"dudu"*** to the victim's vagina.

Also, it is apparent from the record that, the appellant never cross examined the PW1's evidence which was capable of incriminating the appellant of the charged offence. Again, it is trite law that, a party who fails to cross examine a witness on certain matter is deemed to have accepted and will be estopped from the Court to disbelieve what the witness said, as silence is tantamount to accepting its truth. On that regard, this Court believes the evidence adduced by the victim. See the case of **Ridhiwani Nassoro Gendo vs. Republic**, Criminal Appeal No. 201 of 2018, Court of Appeal of Tanzania (unreported).

Furthermore, in his testimony PW3 testified that, he saw the appellant undressed while the victim's dress was up. Indeed the evidence adduced by the PW3 only support what is narrated by the victim during the trial. I hold so because in sexual offence the best evidence comes from the victim. This position is well emphasized in the case of **Selemani**

Makumba vs.Republic (2006) T.L.R 384 where the Court of Appeal of Tanzania was held that:

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in case of any women where consent is irrelevant that there was penetration."*

This jurisprudence development comes from the reason that, always the sexual offence was committed on the secret place and the victim is one who experience the pain of the said act, no one witness the same. Therefore, the law believes that, the best evidence comes from the victim.

Moreover, I subscribe to the argument adduced by the learned state attorney for the Republic that, the issue of age of the victim was not contested. In my opinion, the age of the victim was clearly proved by her mother (PW2) who told the trial Court that the victim had 7 years old and also tendered Exhibit P1 which is clinic attendance card of the victim to support the same. And, the appellant did not cross-examine the witness on that. Thus raising an alarm after his failure to cross-examine the witness on the age of the victim is but an afterthought

In this regard, I find irresistible to reiterate the position of the law I took in **Ismail Ally vs. Republic**, Criminal Appeal No. 212 of 2016, Court of Appeal of Tanzania (unreported) where the Court observed that:

> *"....the complainant's age was not raised during trial. It is also glaringly clear that the appellant did not cross examine PW1, PW2 and PW3 on that point. Therefore, raising it at the level of appeal is an afterthought-See the cases of* ***Edward Joseph vs. Republic****, Criminal Appeal No. 272 of 2009,* ***Damian Ruhele vs. Republic****, Criminal Appeal No. 501 of 2007,* ***Nyerere Nyegue vs. Republic,*** *Criminal Appeal No. 67 of 2010, and* ***George Maili Kemboge vs. Republic,*** *Criminal Appeal No. 327 of 2013, Court of Appeal of Tanzania (all unreported)."*

Be that as it may, the presence or not of sperms is not a paramount proof of rape. In my considered view, the fact that the victim was carnally known was sufficient proved by PW1 (victim) when she told the trial Court on how she was raped by the appellant. In that regard, the prosecution proved its case beyond reasonable doubt. Therefore, this ground must fail.

Regarding to the second ground of appeal, my determination is that the failure to call the medical officer cannot affect the prosecution case at any means. I hold so because the medical report, as the PF 3, was not received in evidence at the trial Court. Also, in my consider view, the evidence adduced by the PW1 and PW3 were sufficient enough to support the prosecution side.

The same was re-stated by the Court of Appeal of Tanzania in the case of **Musa Mohamed vs. Republic**, Criminal Appeal No. 216 of 2005 (unreported) where the Court stated that:

"The lack of medical evidence does not necessarily in every case have to mean that rape is not established where all the other evidence point to the fact it was committed."

In the light of the stated position of the law, it is clear that the medical evidence from the doctor who attend the victim was immaterial in the case at hand due to the fact that, the victim's evidence was sufficient enough to warrant conviction to the appellant. Therefore, this ground lack merit.

Coming to the third ground of appeal, my determination is that, it is my settled view that, there is no truth in the appellant's complaint that, he has just been subjected to this case due to the existed grudges between him and mother of the victim. I hold so because during the defence case, the appellant never testified on the existence of the said grudge between him and mother of the victim this is seen at page 13 of the typed proceedings of the trial Court.

Again, the trial Court carefully weighed the evidence of the victim and was satisfied that she was a credible and believable witness. On that regard, the victim's evidence can alone ground a conviction as true evidence in cases of this nature has to come from the victim. Therefore, the appellant's argument that the case against him was fabricated is an afterthought hence untenable in law. See the case **Selemani Makumba**

vs. Republic (supra) and **Hussein Hassan vs. The Republic**, Criminal Appeal No. 405 of 2016, Court of Appeal of Tanzania (unreported).

From the observation and authorities cited above, I find this appeal lacks merit and dismiss it entirely.

As regarding sentence, the victim is of 6 years old according to Section 131 (3) which provides for the sentence, the appellant was to be sentenced for life imprisonment but upon conviction the appellant was sentenced as per Section 131 (1) of the PC and sentenced to 30 years imprisonment. According to the provisions the appellant was charged with, the sentence given is not proper, the proper sentence is life imprisonment. I hereby substitute sentence from 30 years to life imprisonment which is proper according to the charged section of the law.

It is so ordered.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
15/10/2020

Date: 15/10/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Republic: Mr. Baraka Mgaya – State Attorney

B/C: M. Mihayo

Mr. Baraka – State Attorney:

The case is for judgment, we are ready.

Appellant:

I am ready.

Court: Judgment delivered in the presence of Mr. Baraka Mgaya learned State Attorney and the appellant through Video Conference.

THE HIGH COURT OF TANZANIA

D. B. NGUNGURU
JUDGE
15/10/2020

Right of Appeal explained.