IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 63 OF 2020
(Arising from the Judgment of the District Court of Musoma at Musoma in Criminal Case No. 73 of 2019)

BARAKA S/O STEVEN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

9th September and 21st October, 2020

KISANYA, J.:

Baraka S/O Steven, the appellant herein, was tried and convicted by the District Court of Musoma at Musoma of the offence of rape of girl of 8 years. He was then sentenced to 30 years' imprisonment. The prosecution alleged that, on 5th day of July, 2019 at Butasha Village within Butiama District, the appellant had carnal knowledge of ABC (name withheld), a girl aged 8 years, contrary to section 130 (1), (2) (e) and 131(1) and (3) of the Penal Code [Cap. 16 R.E 2002] (the Penal Code). The said ABC will also be referred to as "PW7" or "the victim".

Briefly, the evidence adduced by the prosecution before the trial court was as followed. PW7 a standard three pupil at Butiama "B" Primary School used to attend tuition classes at that school. On the material date, the appellant went to the school. He met and persuaded PW7 to go with him at his house to take some money for her mother. It appears that, the

appellant's house was not far from the school. PW7 agreed to follow the appellant. Veronica Kilikimba (PW4) saw the appellant and PW7 heading to the appellant's house. Upon arriving in the appellant's room, PW7 was carnally known by the appellant. In the course of having carnal knowledge of PW7, the appellant threatened her not to raise an alarm. As the appellant satisfied his desires, he escorted ABC back to the school. Thereafter, ABC proceeded to her home place. She informed his father one, Gimonge Mwikwabe (PW2) that she was feeling pain. PW2 examined her and noticed blood bruising from the abdomen. It is at that time when ABD narrated what had happened to her and named the appellant as the person who raped her.

PW2 and the victims' mother namely, Mgesi Sariza (PW5) reported the matter to Butiama Police Station. PF3 was issued and the victim taken to Butiama Hospital where she was examined by Dr. Thomas Makuru (PW1) on the same day. The medical doctor found bruises and male sperms in the victim's vagina. The PF3 was tendered and admitted in evidence as Exhibit PE1. The victim took the police officer (PW8), her father (PW2) and PW4 to the appellant's house on 06/07/2019. The sketch map of the scene of crime was drawn by PW8. It was tendered and admitted in evidence as Exhibit PE3. The appellant was not at his house. He was arrested by the villagers including PW3 and taken to the police station where he was charged with the above named offence.

The appellant's defence was rather unclear. He is recorded to have been arrested by one Rahaby Zabron, taken to the police station and charged with offence of rape. He contended to have been charged with the same offence in Criminal Case No. 61 of 2016 and discharged by the High Court

of Tanzania at Mwanza. However, in cross examination, he admitted that, the victim in Criminal Case No. 61 of 2016 was different from PW7.

Satisfied that the prosecution had proved its case on the required standard required, the trial court found the appellant guilty as charged. Consequently, he was convicted and sentenced as stated hereinabove.

Protesting his innocence, the appellant faults the trial court in his petition of appeal containing six (6) grounds of appeal as follows:

1. *That the appellant's conviction and sentence was wrongly based on the prosecution theoretical and deficit evidence which neither supported by scientific evidence of DNA-Profile Examination Report.*
2. *That, the conviction was wrongly based on a pure dock identification which was not supported by the appellant's prior description offered and proved to be issued any first recipients during first felony report.*
3. *That, the identification of the suspected appellant was made under unfavorable condition which was not supported by essential and salutary factors regarding positive identification.*
4. *That, the medical examination report reflected in PF3 was rather assuming as was not supported by scientific reasons in thus un cogent and unreliable.*
5. *That, the presiding court erred in law by failure to consider the appellants strong defence instead relied on prosecution case which not only was dubious but also it was not corroborated.*
6. *That, the case against the appellant was not proved beyond reasonable doubt as required by law.*

When this appeal was placed before me for hearing on 9/09/2020, the appellant was connected through a video link facility from the Musoma prison, unrepresented. On the other hand, the respondent/Republic was represented by Mr. Yesse Temba, learned State Attorney who was also connected through the video link from the National Prosecutions Service, Mara Region at Musoma.

When called on to argue his appeal, the appellant had nothing to say. He pleaded the Court to determine the appeal in his favour on the basis of the grounds advanced in the petition of appeal.

Mr. Temba vigorously supported the appellant's conviction. Pertaining to the first ground that the prosecution evidence was not supported by DNA report, Mr. Temba argued that the victim was convicted basing on the strength of the prosecution case. Citing the case of **Seleman Mkumba vs R** (2006) TLR 379, Mr. Temba argued that the best evidence in sexual offences comes from the victim. He went on to argue that, the victim (PW7) gave evidence which implicated the appellant. The learned State Attorney submitted that, PW7 was reliable and credible witness considering that, she named the appellant to PW2 immediately after the commission of offence. He referred the Court to the case of **Marwa Wangisi vs R** (2002) TLR 39.

It was further argued by Mr. Temba that, DNA is not required to prove sexual offence. Again, he moved the Court to consider the decision of the Court of Appeal in **Mawazo Nywandile Mwaipaya vs DPP**, Criminal Appeal No. 455 OF 2017 (unreported).

As regards the second ground that the appellant's conviction was based

on dock identification, Mr. Temba replied that, the appellant was well known to PW7 and that, he is the one who approached PW7 at her school and took her at his house where he raped her. The learned State Attorney argued further that, evidence of PW7 was corroborated by PW4 and that, she named him immediately after the commission of the offence. Citing the case of **Magina Kuburi @John vs R**, Criminal Appeal No. 564 of 2016, Mr. Temba reiterated that, PW7 was credible and reliable witness.

In relation to the third ground of appeal, the learned State Attorney argued that, the conditions were favourable for PW7 to identify the appellant. His argument was based on the fact that, the offence was committed during the broad day light as depicted from the evidence of PW7 and PW4.

In answering the fourth ground that, the medical examination report (PF3) was unreliable, Mr. Temba argued that PW7 was examined by PW1 who found male's sperms in her vagina and tendered PF3 to support his findings. The learned State Attorney argued that, evidence of PW1 and PF3 was to the extent of proving that PW7 had been raped and that, evidence as to who raped her was deposed by PW7 herself.

Responding to the fifth ground, Mr. Temba submitted that, the appellant's evidence was considered by the trial court. He pointed out that the trial court noted contradiction in the appellant's defence.

On the sixth ground, the learned State Attorney argued that, the appellant was convicted basing on the strength of PW7's evidence which was not shaken by the appellant. The learned counsel argued that, PW6 confirmed that the appellant was living in the house pointed out by the

victim. He went on to submit that, PW7's age was proved by her farther (PW2) who tendered the birth certificate (Exhibit PE2).

In conclusion, Mr. Temba submitted in respect of the sentence of 30 years' imprisonment imposed by the trial court. He argued that the said sentence was illegal. The learned counsel submitted that, since the victim was below ten (10) years, the appellant was required to be sentenced to life imprisonment as provided for under section 131 (1) and (3) of the Penal Code. Therefore, he moved the Court to enhance the sentence.

Rejoining, the appellant argued that, the victim did not identify him before the trial court. He stated further that, the sketch map of the scene of crime was not tendered in evidence. The appellant went on to allude that, he was not examined by the doctor to prove that, the sperms found in the victim's vagina were his. He reiterated his defence that, he was charged in 2016 and acquitted of the same offence. The appellant had nothing to comment on the sentence. He prayed the Court to allow the appeal and set him free.

Having carefully considered the grounds of appeal and the record before the trial court, it is now my duty to determine whether or not the present appeal is meritorious. I will consider the grounds of appeal as raised and argued by the parties.

In the first, fourth and sixth grounds of appeal, the appellant faulted the conviction on three reasons. One, the scientific evidence of DNA report was not tendered. Two, the medical examination report was not reliable. Three, the prosecution's case was not proved beyond all reasonable doubts. It is my considered opinion that, these grounds can be addressed

jointly by considering whether the prosecution's case was proved beyond all reasonable doubt.

Pursuant to the charge, the appellant was alleged to have raped a girl of 8 years. Thus, the statement and particulars of offence suggest that, the charge levelled against the appellant was statutory rape. In order to prove the statutory rape, the prosecution was required to prove age of the victim and penetration.

Starting with the victim's age, it is settled law that, such age can be proved by the victim, her parent, medical practitioner or by producing the birth certificate if the same is available. See the case of **George Claude Kasanda vs the DPP**, Criminal Appeal No. 376 of 2017 when the Court Appeal cited its previous decision in **Issaya Renatus vs Republic** that:-

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to the proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate..."*

In the present case, the victim's age was proved by her parents (PW2 and PW5) who testified that, the offence was committed at the time when PW7 was 8 years old. They stated under oath that, PW7 was born on 24/04/2012. PW2 tendered a birth certificate (Exhibit PE2) registered by RITA on 14/12/2018 to prove that fact. The same shows that, PW7 was

born on 24/04/2012. Also, the PW7 testified that, she was 9 years at the time of giving evidence (26/02/2020). On the other hand, the charge sheet and evidence adduced by PW2, PW4, PW5 and PW7 shows that, the offence was committed on 05/07/2019. This implies that, the offence was committed at the time when PW7 was 7 years and 3 months. Though her parents (PW2 and PW5) testified that, the appellant was 8 years, I am of the considered view the variance between the charge sheet and evidence by PW2 and PW5 on one hand, that the victim was 8 years and evidence deduced from Exhibit PE2 that the victim was 7 years and 3 months is minor. It does not go to the root of the case to the extent of vitiating the charges levelled against the appellant. This is so when it is considered that, PW2 mentioned 24/04/2012 as the date when PW7 was born. Therefore, I find that apart from proving that, the victim was below 18 years, the prosecution also proved that, she was below 10 years.

I now move to consider the second ingredient of rape namely, penetration. As rightly argued by Mr. Chuwa, the law is also settled that, the best of evidence to prove offence of rape comes from the victim. This position was stated in the case of **Paul Juma Dabiel vs R**, Criminal Appeal No. 200 of 2017 (unreported) and **Selemani Makumba** [supra]. In the latter case, the Court of Appeal held:

> *"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 other woman where consent is irrelevant that there was penetration."*

At this juncture, I find it pertinent to revisit what stated by the victim to prove penetration. This is reflected at page page 27 of the typed

proceedings. PW7 deposed:

> *"On 5/7/2019 during evening hours, the accused person BARAKA STEVEN came at our school and told me "twende ukafuate pesa ya mama yangu nyumbani mwake, tukaenda wite palepale jirani na shule, tukafika kwa akaniingiza chumani, akanivua nguo na chupi akaingiza dudu lake "uume" wake katika uchin wangu "kikojoleo" akiwa amevua nguo zake huku akitoa kisu akasema ukipiga yowe atakanikata na kisu"*
>
> *Dudu lake la kukojelea BARAKA lilipokuwa linaniingia kwenye uchi wangu damu ikaanza kutoka kwenye uchi nikaanza kulia....*
>
> *The accused washed me with later (sic), he returned me to the school, then I decided to go home to my father and told him for such act as was suffering much ator (sic) feeling much pain at my stomach and vagina."*

It is clear that, the above evidence proved that, the appellant had sexual intercourse with the victim and that, there was penetration. PW7 was consistence in her evidence. When cross examined by the appellant, she was firm that, it is the appellant who raped her and that, he was a bad man.

The victim's evidence was corroborated by her father (PW2) who testified how PW7 told him that she was feeling pain and named the appellant as the one who had raped her. His evidence is found at page 19 of the typed proceedings. PW2 stated as follows:

> *On 5/7/2019 at 16.00PM, ... told me that she was sick, she*

was filling (sic) abdomen pain, it was a serious abdomen pain. I examined her I found some blood in her body...she told me that "nimebakwa na BARAKA STEVEN"

The above evidence shows clearly that, the victim named the appellant immediately after returning to her father's house. This added value on her credibility and reliability. This stance was taken in **Godfrey Gabinus @Ndimba and 2 Others** (*supra*) where the Court of Appeal cited with approval its decision in **Swaleh Kalonga and Another vs R**, Criminal Appeal No. 45 of 2001 that:.

"..the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his reliability."

Furthermore, the victim's evidence corroborated by PW4 who testified to have seen the appellant and the victim heading to the appellant's house. Not only that, there is medical evidence adduced by the medical doctor (PW1) who tendered the medical examination report (Exhibit PE1) to the effect that, the victim's vagina had bruises and male sperms. Such evidence was relevant to corroborate PW7's evidence that, she had been raped. In a summary, the evidence given by the victim, PW2 and medical doctor (PW1) proved without doubt that there was penetration. It is also in evidence that PW2 acted quickly to report the matter to the police and other neighbours who aided the arrest of the appellant.

The appellant faults the trial for convicting him while the medical report and the DNA was not conducted to prove that the sperms found in the victims came from the appellant's. It is my considered view that, since

there is sufficient evidence to prove that, the appellant who had carnal knowledge of the victim, no further medical evidence was required to prove the offence. It is trite law that, rape is not proved by medical evidence or DNA but by evidence of the victim of the offence. In the present case, the victim gave evidence which implicated the appellant in the offence. In **Aloyce Maridadi vs Republic**, Criminal Appeal No. 208 of 2016, CAT Mtwara (unreported), the Court of Appeal laid down the following principle:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness."*

The reasons that may be advanced to discredit the witness include the fact that, the witness has given doubtful or unbelievable evidence, or where the evidence has been materially contradicted by other witnesses. In the present case, the trial court found the victim and other prosecution's witnesses as credible witnesses. I find no reasons to hold otherwise. Nothing doubtful, implausible or material contradiction was noted in PW7 and other evidence adduced by the prosecution which resulted for not believing them. For the foresaid reasons, the first, fourth and sixth grounds fails.

As regards the second and third grounds, the appellants contends that, he was identified in the dock and that, the conditions were not favorable for the victim to identify him. I have revisited the evidence in record. It is depicted from the evidence of PW7 that, the offence was committed in the evening time and that, the appellant took the victim from the school

to his house. PW7 did not mention the time. Such time is reflected from other prosecution witnesses including PW4 who saw the appellant and the victim heading to the appellant's house on 5/7/2019 at 16.00 PM. Also, the victim's father (PW2) deposed that, the victim told to have been raped by the appellant at 16.00 hours.

In the circumstances, I agree with the learned State Attorney that the offence was committed in broad day light. PW7 had ample time to identify the appellant. Further, the appellant was seen by PW4 and was not a stranger to PW7. Thus, it is apparent that, the victim knew the appellant before the incident. That is why she named him to PW2 immediately after the offence. Also, it is the victim who took the police (PW8), PW2 and PW5 to the appellant's house. On that account, I am of the considered view the conditions were favorable for PW7 (the victim) to identify the appellant. He was not only identified in the dock as contended by the appellant. The dock identification corroborated her previous evidence. Thus, the second and third ground of appeal are not merited.

Finally, in the fifth ground of appeal, the appellant faulted the trial for failure to consider his defence. It is on record that, the appellant's defence was that, he was previously charged with the same offence and discharged. As rightly argued by Mr. Temba, the said evidence was considered by the trial court which was convinced that, the appellant contradicted himself in his defence. This is reflected at page 13 of the typed judgment where the trial magistrate held:

> *"The evidence adduced by DW1 that he was previously convicted and acquitted for the same offence and same parties by the High Court before Hon. Judge Makaramba*

contradicts as the accused himself admitted that he had contradicted himself and that the victim in the previous case is not the same."

The above extract from the trial court's judgment indicates how the appellant defence was considered. I have gone through his evidence. The victim's name in Civil Case No. 61 of 2016 stated by the appellant in his defence is different from the victim in the case at hand. Also, the appellant deposed that, the victim had changed the name. I find that evidence as an afterthought. This is because, the appellant did not cross examine the victim (PW7) and her parents (PW2 and PW5) in line of the said defence. It is trite law that, failure to cross examine a witnesses on important fact amounts to admission or agreement on the said fact. Thus, the appellant admitted evidence adduced by PW2, PW5 and PW7 who named the victim as ABC. I understand that the appellant was not required to be convicted basing on the weakness of his evidence. His duty was to raise doubt on the prosecution case. I am of the firm view that, the prosecution evidence was watertight and that, the appellant did not raise any doubt to challenge the prosecution case. Hence, the fifth ground fails as well.

In view of the above, I uphold the conviction of the appellant for offence of rape contrary to section 130 (1), (2) (e) and 131(1) and (3) of the Penal Code.

I now consider the sentence imposed by the trial court. As stated herein, the appellant was sentenced to thirty years' imprisonment in respect of offence of rape. It is settled law as held in **Yusufu Abdalla Ally**

Appellant vs The Director Of Public Prosecutions, Criminal Appeal No. 300 of 2009 (unreported) that, an appeal court will only alter a sentence imposed by a trial court if it is evident, among other that, the sentence was plainly illegal.

In the present case, the prosecution proved that, the offence was committed at the time when the victim (PW7) was below ten years. According to section 131(3) of the Penal Code which was also cited in the statement of offence, the punishment to a person convicted of rape committed to a girl below ten years is life imprisonment. The section reads:

> *"Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."*

In view thereof, I agree with Mr. Temba that, the sentence imposed by the trial court was illegal. I am inclined as hereby do, exercise the powers vested in this Court by section 366(1) (b) of Criminal Procedure Act, Cap. 20, R.E. 2019, to enhance the sentence imposed by the trial court to life imprisonment.

The upshot is that, the appeal against conviction is hereby dismissed in its entirety and the sentence is enhanced from thirty years imprisonment to life imprisonment. It is so ordered.

DATED at MUSOMA this 21st October, 2020.

E. S. Kisanya
JUDGE

COURT: Judgment delivered through video link this 21st day of October, 2020 in the appearance of the appellant in person and Ms. Hokororo learned State Attorney for the Republic/respondent. B/C, Mariam present.

The appellant is informed of his right to appeal to the Court of Appeal.

E. S. Kisanya
JUDGE
21/10/2020