IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 167 OF 2020

(Original Criminal from the Resident Magistrate Court of Geita at Geita in Criminal Case No. 361 of 2019)

SEMENI S/O MATHIAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 24.11.2020

Judgment: 24.11.2020

A Z. MGEYEKWA, J

In the District Court of Geita at Geita, the appellant was arraigned and convicted of Incest by males contrary to section 158 (1) (a) of the Penal Code Cap. 16 [R.E 2019]. Upon conviction, he was sentenced to serve 30 years imprisonment. Aggrieved, the appellant appealed to this court for both the conviction and sentence. As I have hinted upon, the case for the prosecution was built around the accusation of prohibited sexual intercourse. It was

alleged that the accused person was charged on 29th March, 2019 at during night hours at Nyankumbu Village within the District and Region of Geita did have prohibited sexual intercourse with one Joyce DO Semeni a girl of 4 years old who was to his knowledge his daughter. Upon arraignment, before the trial court, the accused entered the plea of not guilty.

From the testimony of prosecution witnesses, the accused was also afforded his defence before the trial. The appellant now seeks to impugn the decision of the trial court upon a petition of appeal comprised of eight grounds of appeal as follows:-

1. *That the learned Trial Magistrate erred in law and in fact to convict the appellant basing on the evidence of the prosecution witnesses which cooked up, concoction and that lack strong support which should not be considered and not be trusted.*
2. *That the learned Trial Magistrate incurably erred in law and in fact to convict the appellant relying on the evidence of prosecution witnesses who did not witness the victim being raped by the appellant in the "Flagrant delicto".*
3. *That the Learned Trial Magistrate erred in law and in fact to convict the appellant basing on hearsay evidence from the prosecution witnesses worse enough the victim who alleged to be raped by the appellant did not testify in court.*

4. *That, the appellant should not have convicted with the weakness of his defence i.e for failure to cross-examination as concluded by the Learned Trial Magistrate.*
5. *That, the Learned trial Magistrate erred in law and in fact to attach much weight in the evidence of PW1 together with the Exhibit P1 the PF3 lack in authenticating to implicate the appellant as the sole person who committed the alleged offence.*
6. *That, the penetration which is the fundamental ingredient in proving the offence of rape was not legally and evidentially established and elaborated enough by the victim and the witnesses of the prosecution.*
7. *That, the Exhibit P2 and P3 with respect to the offence of rape offers nothing of the probative valve to link the appellant with the rape of the victim.*
8. *That in totality the evidence of prosecution witnesses hard carry nothing significance which puts the appellant strong blemished position of committing the alleged offence, so the prosecution witnesses failed to prove the case beyond reasonable doubt against the appellant.*

When the matter was called for hearing, the appellant fended for himself while the respondent the Republic had the service of Ms. Gisela Alex, learned State Attorney.

Submitting first, the appellant had not much to say he urged this court to adopt his grounds of appeal and set him free.

In support of the appeal, the learned State Attorney submitted that the republic is supporting the appeal because there is a legal point involved. She argued that there were some irregularities in the particulars of the offence, the word Geita was inserted without acknowledging the changes. However, the defect did not cause injustice to the appellant. She added that the defect is curable under section 388 of the Criminal Procedure Act, Cap.20 [R.E 2019].

The learned counsel further submitted that the offence of incest by the male was required to be proved by the victim herself. She added that in the instant case the victim was not able to testify. Ms. Gisela fortified her submission by referring to this court on page 27 of the court proceedings. She went on to state that the court found that the victim had no sufficient intelligence to testify. Ms. Gisela added that in rape cases the best evidence comes from the victim herself/himself. To bolster her submission she cited the case of **Shija Msalaba v R**, Criminal Appeal No. 226 of 2011.

Ms. Gisela did not end there, she stated that the trial court relied on hearsay evidence from the neighbours; PW3 and PW4 who asked the victim what happened and the victim told them that his father inserted a stick on her private parts. She referred this court to pages 16 to 18 of the trial court

proceedings. Ms. Gisela stated that the neighbours' testimonies were not to be relied upon.

The learned State Attorney went on to state that in accordance with section 130 (4) (a) rape was not proved since penetration was not proved. She stated that PW1, a Doctor testified to the effect that he observed the victim and saw bruised and smell on her private parts. PW1 concluded that the victim was sexually assaulted. Ms. Gisela added that the Doctor did not say if there was penetration and he did not say how the victim was assaulted. In her view, the Doctor failed to prove whether or not the victim was raped.

Submitting further Ms. Gisela supported all grounds of appeal by stating that the trial Magistrate relied upon hearsay evidence since there was no direct evidence. She added that the PF3 did not prove that the victim was raped, thus penetration was not proved. Therefore, the learned State Attorney ended up to support the appeal because of weak evidence of the prosecution witness, and they pray this court to allow the appeal and set aside the conviction and sentence.

In his brief rejoinder, the appellant stated that the case was framed thus, he urged this court set him free and set aside the sentence.

Having heard the submissions for both sides, I should state at the outset that in the course of determining this appeal, I will be guided by the canon of the criminal cases that, the onus of proof lies with the prosecution to prove that the defendant committed the offence for which he is charged with. In this case at hand, the issue is *whether the prosecution case was proved beyond a reasonable doubt.*

I have opted to address the second and third grounds of appeal which relates to hearsay evidence. I have perused the court records and as rightly pointed out by the learned State Attorney and after reading the trial court proceedings, I have noted that the prosecution failed to prove the case beyond reasonable doubt. Reading the records specifically page 24 of the trial court proceedings, I have found that the victim was brought before the court and the trial Magistrate ascertained whether the child is endowed with sufficient intelligence to justify the reception of his evidence and whether the victim understands the nature of an oath.

In the end, the trial Magistrate ruled out that the victim was not possessed with sufficient intelligence to justify the reception of her evidence. That means the key witness was not able to testify in court to prove the prosecution case. Therefore in such a situation, the trial court relied on corroboration evidence.

The other prosecution witnesses; PW2, and PW3 testified to the effect that they were informed by the victim that her father inserted a stick in her private parts. In other words, they were not in a better position to explain some missing link. Their evidence was hearsay evidence. The law requires that a witness who is called to testify to prove the fact and not leave any gaps. Therefore in the case at hand, the prosecution was required to call witnesses who could prove the offence of rape. This was observed in the case of **Boniface Kundakira Tarimo v Republic**, Criminal Appeal No. 351 of 2008 (unreported).

But again, the remaining evidence on record in particular the evidence of PW1, a Doctor and the PF3 (Exh.P1) as pointed out by the learned State Attorney did not prove that the victim was raped. PW1 testified to the effect that he observed the victim and observed that she was in fear, pain and could not explain herself well. He also examined the victim and found out that her vagina was discharging bad small fluid and her vagina was swollen. He did not state whether there was any penetration to confirm the offence of rape. Therefore, PW1, PW2, and PW3 did not confirm that the victim was raped.

For the foregoing reasons, I am satisfied that there was no substantial evidence to prove the case against the appellant. I find there is no need to

discuss other grounds of appeal as it is vivid that the prosecution failed to prove the case beyond reasonable doubt. Therefore, I proceed to quash the conviction and set aside the sentences which were meted out against the appellants, and direct their immediate release from prison unless they are being continually held for some other lawful cause.

Under the circumstances, I allow the appeal. I quash the conviction and set aside the sentence. I order the immediate release of the appellant from prison unless he is lawfully held.

Order accordingly.

DATED at Mwanza this 24th November, 2020.

A.Z.MGEYEKWA

JUDGE

16.11.2020

Judgment delivered on this 24th November, 2020 in the presence of the appellant, and Ms. Gisela Alex, learned State Attorney for the respondent.

A.Z.MGEYEKWA

JUDGE

24.11.2020