**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CRIMINAL APPEAL NO. 1 /2020**

***(C/F CRIMINAL CASE NO. 126 OF 2018 FROM DISTRICT COURT OF MWANGA AT MWANGA)***

**FRANK CHARLES @ SAMBUKA .....APPELLANT**

**VERSUS**

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

***19th October & 20th November, 2020***

**JUDGMENT**

**MKAPA, J:**

The appellant, Frank Charles Sambuka was charged with and convicted of the offence of rape c/s **130 (1) (2) (e)** and **131 (1)** of the Penal Code, Cap 16 [R.E. 2002] (the Penal Code) by the District Court of Mwanga at Mwanga.

The prosecution case in a nutshell is that on 30/08/2018 at 19:00 hours at Sofe Kilomeni within Mwanga District, Kilimanjaro Region the appellant did have carnal knowledge of PW3 (the victim) a standard three girl aged 10 years. It was alleged that, PW1 the head teacher of Sofe Primary where PW3 was schooling had received complaints from the teacher responsible for disciplinary affairs about PW3's bad behaviour of undressing and caressing private parts of boy pupils. When asked PW3 who was

living with her grandmother confessed to practise such behaviour as she used to have sex with her grandmother's houseboy named Frank (a. k. a "kaka Frank"). PW3's father (PW2,) was summoned by PW1 and informed about the incident. Thereafter PW2 made a follow up and reported the matter to police where PW3 was issued with PF 3 and sent to Kisangara Healthy Centre. The medical examination report by PW5 (the doctor) revealed that PW3's vagina was reddish colored with bruises and she had already lost her virginity which suggested was caused by penetration by a blunt object. The appellant was arrested and after a full trial was convicted of the offence of rape and sentenced to thirty (30) years imprisonment.

Aggrieved, the appellant preferred this appeal praying that the conviction and sentence be quashed and set aside. The appeal is comprised of the following eight grounds;

1. That, the learned trial magistrate grossly erred both in law and fact by convicting and sentencing the appellant despite the charge not being proved beyond reasonable doubt and up to the required standards by the law.
2. That, the learned trial magistrate grossly erred in both law and fact when she failed to note that, the charge sheet and the evidence on record were at variance.
3. That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant but

failed to note that the voire dire test was not conducted to the victim(PW3).

4. That, the trial learned magistrate erred both in law and fact in convicting the appellant but failed to note that the victim of the alleged offence (PW3) did not promise to tell the truth to the court and not to tell lies in conformity with section 127(2) of the Evidence Act No. 4 of 2016.
5. That, the trial magistrate grossly erred both in law and fact when she failed to note that the victim did not mention the date the sexual encounter is alleged to have been occurred. Thus the date indicated in the charge sheet is fabricated.
6. That, the trial magistrate grossly erred in both law and fact when she failed to note that the victim of the alleged offence (PW3) withheld the information of the sexual encounter against her for quite a while and non- disclosure the same to anyone at the earliest opportunity especially her parents, casts serious doubts on the credibility and truthfulness of her evidence.
7. That, the learned trial magistrate grossly erred in both law and fact in convicting the appellant but failed to note that the contents of the exhibit P1 ( the PF3) were read out loud before the court admitted it as exhibit, contrary to the requirement of the law on admissions of exhibits.

8. That, the learned trial magistrate grossly erred in law and fact when she used weak, incoherent, inconsistent, contradictory, uncorroborated and wholly unreliable prosecution evidence as a basis of the appellant's conviction.

On 6th July, 2020 when the appeal was set for hearing parties consented that the appeal be heard by way of filing written submissions. The appellant appeared in person, unrepresented, while the respondent was represented by Ms. Lilian Kowero, learned State Attorney.

Submitting in support of the first ground the appellant submitted that it is trite law that, in criminal proceedings the prosecution has a duty to prove its case beyond reasonable doubt. However, the appellant contended that the prosecution had failed to prove its case to the required standards.

On the second ground the appellant submitted that, the trial magistrate erred both in law and fact by failing to note that the charge sheet and the evidence on record were at variance as the preferred charge sheet and the evidence of PW1, PW3 and PW5 were at variance. The appellant went on explaining that while the charge sheet stated that the offence was committed on 30th August 2018, PW1 testified to the effect that PW3 was raped on 27th August, 2018 thus rendered the charge sheet incurably

defective. To support his argument he cited the case of **Pastory Gervas V. R** (1978) T.L.R No. 63 where the court held that;-

*".....A charge is defective if its particulars are not supported by the evidence adduced before the trial court....."*

Arguing on the third and fourth grounds jointly, the appellant faulted the trial magistrate for convicting the appellant without conducting a voire dire test to the victim thus the victim was unable to promise to say the truth as required by section 127(2) of Tanzania Evidence Act Cap 6 which requires a child of tender age to promise to tell the truth and not to tell lies.

As to ground number five the appellant contended that, the trial magistrate grossly erred in both law and fact when she failed to note that, the victim did not mention the date when the offence was committed thus it was the appellant's view that the date which is stated in the charge sheet was fabricated.

Arguing jointly in respect of ground of appeal number six and eight the appellant submitted that, the trial magistrate erred in convicting and sentencing the appellant based on PW3's testimony to the effect that PW3 did not disclose the ordeal to her grandmother at the earliest opportunity until it was discovered by PW3's teacher. It was the appellant's argument that the case against him was fabricated because of the grudges between himself and PW3's father. Finally, he prayed for this

court to allow the appeal, quash the conviction and set aside the sentence.

Responding to appellant's submission while supporting both the conviction and sentence Ms. Kowero argued jointly, ground number one, two, five, six, seven and eight by submitting that, the charge and offence against the appellant was proved beyond reasonable doubts. Ms. Kowero went on submitting that PW3 had explained before the court without any doubt on how the appellant raped her several times in the month of August. Ms. Kowero referred to page 7 and 8 of the trial court's typed proceedings where PW3 stated how the appellant took her to his room and sometimes at the kraal, undressed her and took his penis and inserted it in her vagina and this was corroborated by exhibit P1 (PF3) which was tendered, admitted and read in court. (page 13 of the proceedings). Furthering her argument Ms. Kowero stated that at page 8 of the trial court's typed proceedings while interrogated by the trial magistrate, PW3 had stated that the appellant warned her not to disclose the incident to her grandmother otherwise she would be beaten up. Ms. Kowero further recalled the principle that the best evidence of rape offence comes from the victim, by citing the landmark case of **Selemani Makumba V. R 2006 T.L.R 379.**

On the issue of variation in the charge sheet and the evidence adduced in court relating to exact date when the offence was

committed it was Ms. Kowero's contention that, the variation did not render the charge sheet incurably defective. Supporting her argument she cited section 135 (a) (ii) of the Penal Code which provides that the charge sheet must contain the essential elements of the offence and specific section of the law creating the offence. She went on explaining that, in the instant appeal the charge sheet did provide for essential elements of the offence to wit; rape and the relevant provision creating the offence. Thus it was Ms. Kowero's view that the variance in the charge sheet did not render the charge defective nor did it prejudice the accused.

Ms. Kowero further challenged the Appellant the fact that, while cross-examining PW3, he did not examine the victim on the aspect that no doubt the appellant understood the fact that PW3 was referring to the dates of the month of August 2018, since a party who fails to cross examine a witness on a certain matter means the statement of the witness has not been disputed. To support her argument she cited the case of Nyerere **Nyague V. Republic**, Criminal appeal No. 67 of 2010 (Unreported).

Regarding ground number three and four Ms. Kowero submitted jointly on the allegation that the voire dire test was not conducted in court thus the victim did not promise to tell the truth. Ms. Kowero disputed the argument by referring to page seven (7) of the typed proceedings where the trial magistrate

warned herself the fact that PW3 possessed sufficient knowledge and understood the nature of oath and duty of speaking the truth as required under section 127 (3) of Tanzania Evidence Act. Ms. Kowero argued further that, PW3 did took oath before adducing her evidence in court thus appellant's allegations are baseless. Ms. Kowero cited the case of **Herman Henjewele Vs. Republic, Court of Appeal No. 7 of 2005** where the court considered the evidence of a child of tender age taken without conducting voire dire test as long as the court warned itself if the child understood the nature of an oath and the duty of speaking the truth.

Finally, Ms Kowero prayed for this court to dismiss the appeal and uphold the conviction and sentence.

In his rejoinder, the appellant reiterated his submission in chief and maintained his prayer that appeal be dismissed as the prosecution has failed to prove its case beyond reasonable doubt.

Having considered parties' arguments for and against the appeal the only issue for determination is whether the prosecution has proved its case beyond reasonable doubt.

On the 1st and 8th ground of appeal in which the appellant faulted the prosecution for failure to prove its case beyond reasonable doubt and grounding conviction against the appellant

based on unreliable prosecution evidence, I find it pertinent to begin with the essential ingredient in proving rape offence namely "penetration". The law is settled to the effect that penetration is an essential element in proving rape offence. This position has been fortified in numerous cases including the decision in the landmark case of **Ally Mkombozi V. R, Criminal Appeal No, 227 of 2007** CAT (unreported) where the Court had this to say;

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

I have observed at page 8 of the trial court's typed proceedings the victim (PW3) graphically narrated how the appellant on several times raped her by inserting his penis in her vagina and had this to say;

***"Kaka Frank's room is near the kitchen outside the house, when I was asking utensils, he was taking them and pulling me to his room where he was undressing me, taking his penis and put it on my vagina where I use to urinate. He was telling me not to tell anyone when finishing he was telling me to dress up and grandmother was complaining I was late"***

From the above statement it is my considered opinion that the victim's evidence was cogent enough and that she was able to direct herself to the essential ingredient of the rape offence,

to wit; penetration. Therefore, I find no merit in these grounds of appeal, hence I disallow them.

Regarding the 2nd ground of appeal on discrepancies arising from the charge sheet and the evidence adduced by PW1, PW3 and PW5 relating to the date when the crime was committed, I am in agreement with the learned State Attorney's argument the fact that, the discrepancy is minor and does not go to the root of the case as the charge sheet did contain the essential elements of the crime named "rape" which the appellant was able to understand and prepare his defence. More so, in my view even if the charge were to be defective the defect is curable under section 388 of the CPA Cap 20 [R.E 2002] which provides the following:

*"(1) Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of error, omission or irregularity in the complaint, summons, warrant, charge, proclamation order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable"*

From the above cited provision of the law I do not see how the appellant was prejudiced by the alleged defective charge as the charge was framed in such a way to accord the appellant with the understanding of the nature of the offence he was charged with. I therefore find this ground of appeal meritless and I dismiss it.

As to the 3rd 4th and 5th grounds combined, all are centred on challenging the credibility of victim's evidence as well as how such evidence was admitted. At this juncture I find it imperative to revisit the relevant section namely, 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 not to tell lies.*

In the instant appeal, I have observed at page 7 of the trial court's typed proceedings the trial magistrate recorded the following;

*PW3; Digna Dominic 10 years, witness examined and it is of court's opinion that she possess sufficient intelligence, understand nature of oath and duty of speaking the truth. S. 127 (3) of TEA C/W.*

Sgd; M.B. Lusewa

Srm i/c

0/11/2018

**PW3; Sworn and states [***Emphasis mine***]**

From there on PW3 went on testifying.

From the foregoing observation I am of the considered opinion that the standard test on whether PW3 was telling the truth or not was complied with after PW3 sworn to tell the truth.

In the case of **Mohamed Said V. Republic, Criminal Appeal No. 145 0f 2017**, CAT 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 scrutiny in order for the courts to be satisfied that what they state contain nothing but the truth"*

I fully subscribe to the above position. As to the trustworthy of PW3 I am unable to understand why she should lie against the appellant whom he had even identified on the dock.

I therefore find no merit on these grounds and I dismiss them.

Turning to the 6th ground where the appellant challenged the credibility of the victim's evidence for failure to report the ordeal

to her grandmother at the earliest, my perusal of the trial court's typed proceedings has revealed at page 5 the fact that, when PW3 was summoned for the first time by her head teacher and discipline teacher the victim did name the appellant in the first instant to the effect that,"kaka Frank" (her grandmother's house boy) used to have sex with her. More so, any reasonable person would not have expected the victim to disclose the ordeal much earlier after being threatened by the appellant that she would be beaten up as explained by PW 3 at page 8 that;

"**I could not tell grandmother for kaka Frank told me I would be beaten"**

From the foregoing, I find the 6th ground is meritless and I dismiss it.

Turning to ground number seven (7) the appellant has faulted the trial magistrate for having read over the contents of Exhibit P3 (PF3) prior to its admission into evidence. In his testimony at page 12 of the trial court's typed proceedings PW5 the Doctor, at Kisangara health centre had this to say;

"*They came with PF3 I examined the girl 10 years they said she was raped four days past with a guy she knows. I examined her accompanied by a nurse. We looked at her vagina and discovered there were bruises and reddish coloured and showed there was penetration by blunt object which led to bruises on*

*the walls and she was no longer a virgin.....at her age even seven days after penetration could reveal penetration".*

At page 13 of the typed proceedings I have observed that, the trial Magistrate did read over Exhibit P1 (PF3) prior to the same being admitted into evidence.

**In Robinson Mwanjisi & Others V. Republic Criminal Appeal No. 154 of 1994 (2003) TLR No. 218** the court held that;

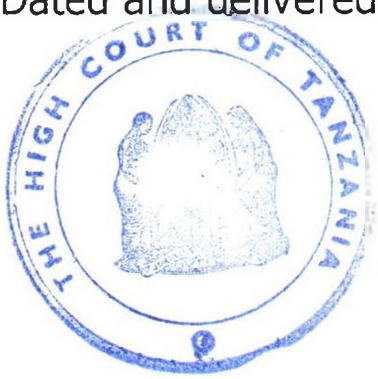
*"Whenever it is intended to introduce any document in evidence, it should be cleared for admission and be actually admitted before it can be read out otherwise it is difficult for the court to be seen not to have been influenced by the same."*

This ground of appeal therefore is meritorious and I expunge Exhibit P1 (PF3) from the record.

According to the evidence sufficiently adduced by the victim (PW3) which is corroborated by the doctor as well as the evidence adduced by the discipline teacher to whom the victim was able to narrate the ordeal, I have no hesitation in finding that evidence of the victim is credible to safely secure a conviction as per section 127 (7) of the Tanzania Evidence Act Cap 6 [R.E 2002] unless the contrary was established by the appellant which is not the case here. Therefore the appeal lacks

merit save for the order I made herein expunging the PF3 from record. The appeal is accordingly dismissed.

Dated and delivered at Moshi this 20th day of November, 2020




**S. B. MKAPA**

**JUDGE**

**20/11/2020**