IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 165 OF 2020

(Arising from Criminal Case No. 170 of 2019 of the Court of the District Court of Nayamagana District at Mwanza before Hon. Ryoba (RM) dated 20th May, 2020)

MECLINO MICHAEL @ MSECHU..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last Order: 20/11/2020

Date of Judgement: 14/12/2020

F. K. MANYANDA, J.

A period of thirty (30) years serving in prison following conviction of the offence of rape, contrary to sections 130(2)(e) and 131(1) of the Penal Code, [Cap. 16 R. E. 2019], with which he was charged, has aggrieved the appellant. He has come to this Court by way of an appeal on the following grounds.

1. *That, the trial Court erred when did not realize the fact that the first felony report was fabricated, and/or concocted as it was absorbed*

after trickily pressure unnecessary succumbing pressure (sic) to the victim before wrongly processed (sic) through un testified health officer and latter (sic) to Police;

2. *That, the trial court erred in law and fact in holding that the victim's hymen was perforated only after being raped by the appellant and not otherwise regardless of other possibilities of the same to be removed by other means which was too high and not eliminated;*

3. *That, the conviction was wrongly based on mere theoretical evidence which is lacking legal proof on both previous and recent penetration as alleged but the trial court erred in law and fact to believe that the prosecution witnesses were credible;*

4. *That, no evidence was led to prove the victims minor aged and whether she was a school girl by then to support the prosecution case;*

5. *That, the conviction was wrongly based on uncorroborated prosecution evidence which is too shaky as in contrast to the strong defence case; and*

6. *That, it is grossly irregularity and illegality for the arresting Police Officer to investigate the case against the one arrested but the trial court overlooked this fact thus cast doubt on planting evidence and exhibits.*

The background of this matter is that the appellant was, at the time of commission of the offence, living neighbour to the victim who, in this case, will be referred to by a pseudo name assigned to her by the trial court 'Z d/o A' or simply 'the victim'.

The appellant was selling clean water to his neighbours. Z d/o A used to buy water from the appellant. The said Z d/o A was 11 years of age at the time of commission of the offence and she was a standard V pupil at Nyabulogoye Primary School. It started on 25/10/2019 when the Ward Executive Officer one Shadrack Mboje (PW4) become curious upon seeing Z d/o A not going to school on that day, he interrogated her as to what caused her not to attend at school. Z d/o A told PW4 that she had been making love with a man known as 'Dodolima' whom she met when she went to fetch water at his (dodolima's) house, and that the man seduced her to have sexual intercourse with him a proposal which she agreed with

and they did have sexual inter course after which that man gave her Tsh. 500/=. The man, who is the Appellant, threatened her not tell any person otherwise he would make her a zombie. Z d/o A also added that she had since that day been having sexual intercourse with the Appellant.

PW4 informed the mother of Z d/o A who testified as PW2, the latter reported to police at Igogo Police Station. On 28/10/2019 the appellant was arrested by a police Officer one E. 2670 D/Cpl. Mustafa who also investigated this case. The appellant gave a cautioned statement in which he admitted to know the victim as his neighbour and that she used to fetch water from his house but denied the allegations of raping her. Albeit he was charged with the offence of rape and the trial court convicted and sentenced him to 30 years imprisonment. He is aggrieved by the said conviction and sentence, hence this appeal.

At the hearing of the appeal the appellant appeared in person unrepresented while Ms. Lilian Meli, learned State Attorney appeared for the Republic.

The appellant been a lay person had nothing to say other than adopting the grounds in his petition of appeal and leave it to the Court to decide.

On her side Ms. Meli supported the conviction and the sentence. She argued the grounds of appeal seriatim.

She argued in opposition to ground one where the appellant complains that he was just framed up with the case of rape because the Medical Officer did not testify in Court. Ms. Meli stated that this ground is not true because the Clinical Officer one Josephat Oseme, testified as PW5. His testimony was to the effect that he examined the victim and found that her hymen was raptured and concluded his opinion that the victim was carnally known by a man even though there were no bruises in her vagina. Ms. Meli argued that this ground is baseless and an afterthought.

In respect of ground two Ms. Meli argued that the contention by the appellant that rapture of the hymen could be caused by anything else not necessarily rape is unfound. It was her contention that according to the testimony of Z d/o A, who testified as PW1, she had sexual intercourse with the appellant several times. That on the first time the appellant

seduced PW1 when she went to fetch water at his house. He took her into his house, he started touching her private part including her vagina, he then undressed her and he too undressed. Then the appellant laid on top of her and inserted his penis into her vagina. Ms. Meli observed that PW1 lost her virginity due to rapture of her hymen following the act of the appellant penetration of his male organ into her vagina; an act which accounts to rape, she was threatened not to scream or shout or tell anybody or else the appellant would make her a zombie; as a result, she stopped attending school.

Regarding ground three where the appellant complains that the prosecution witnesses are not reliable and credible. Ms. Meli submitted that they were credible and reliable. The State Attorney stated that there were five prosecution's witnesses. PW1 was the victim who testified proving that she was raped. She cited the famous case of **Selemani Makumba vs Republic** [2006] TLR 379 where the Court of Appeal said that true evidence of rape comes from the victim who says that there was penetration and, where it is material, that there was no consent. Ms. Meli argued that in this case it is statutory rape, therefore, consent is immaterial.

The State Attorney went further that PW1 is supported by the evidence of PW4, the WEO, who interrogated her as to why she was not going to school, and PW1 revealed the whole matter that she was been raped by a man who is the appellant and the said WEO reported to police. The State Attorney argued further that PW2 proved the age of the victim and produced the PF3 which shows that the victim's hymen was raptured due to rape. PW3 was the arresting police officer who linked the appellant with act of rape after interrogating him and admitting that the victim was one of his client who used to fetch water at his house. PW5 is a Clinical Officer who examined the victim and filled the PF3.

The testimonies of these witnesses, according to Ms. Meli, were credible, reliable and proved the case.

In respect of ground four, where the appellant challenges proof of age of the victim that it was not established to be 11 years of age. The State Attorney submitted that the age of the victim was proved by PW2 the mother. She was of the view that evidence of a mother of a child regarding age suffices to prove it. PW2 testified that her daughter was aged 11 years and was a pupil.

As regard to ground five where the appellant complains that testimony PW1 was not corroborated, Ms. Meli argued opposing this argument. She submitted that there is corroborative evidence from PW2 who is the victim's mother and PW5 the Clinical Officer that PW1 was raped. She was of the view that Exhibit P1, the PF3, also supports PW1 that she was raped. She added that the defence by the appellant that he did not rape PW1 alleging that he was framed up with the case does not shake the prosecution's case. He had no grudges with either PW1 or her parents and any of the prosecution's witnesses, there was no reason for them to frame up with the case.

In respect of ground six the appellant argues that the arresting officer was the same as the investigator, there is likelihood of planting fake evidence in order to implicate him with the crime. Ms. Meli submitted that though it is true that PW3 was both investigator and arresting officer, there is no evidence showing that the appellant was prejudiced. PW3 was a credible and reliable witness. Moreover, Ms. Meli argued that section 15(4) of the Criminal Procedure Act, [Cap. 20 R. E. 2019] allows an investigator to record statements of suspects, the ground has no merit.

Ms. Meli prayed to the Court to dismiss the appeal for want of merit.

The appellant reiterated his earlier submissions in chief that he leaves it to the Court to decide. He finished by stating that he is innocent, the victim was not his neighbour but was his client who used to fetch water at his house. Also he said that he was arrested by a Police Officer after been pointed by the victim.

This Court will address ground 1, 2, 3 and 5 together because they concern a complaint about poor analysis and evaluation of the evidence by the Trial Court.

This being the first appellate Court can step into the shoes of the trial Court and analyze the evidence and come up with its own conclusion which need not be necessarily the same as that of the trial Court.

This position of the law was stated by the Court of Appeal of Tanzania in the case of **Halid Hussen Lwambano vs Republic, Criminal Appeal No. 473 of 2016** (unreported). See also the case of **Jumanne Salum Pazi vs Republic [1981] TLR 246** where it was held by this Court (Kisanga, J as he then was) that

> *"(i) this Court being the first appellate Court must consider the evidence evaluate it itself and draw its own conclusion"*

I will start with recapturing of the facts from the evidence as reordered in the proceedings. It is the case of the prosecution that the appellant raped the victim, PW1.

In total five witnesses testified for the prosecution and three witnesses testified for the defence.

PW1 testimony was to the effect that one day in September, 2019 when she went to fetch water at the appellant's house as he was selling water the appellant enticed her to make love. He took her into his room and started touching her vagina and then he gave her Tsh 500/=. He undressed her and undressed himself, he lied on top of her and inserted his 'mdudu' into her vagina. He then threatened her not to tell anybody or else he could make her a zombie.

It was PW1 further testimony that one day when she was loitering in the streets, PW4 the WEO, took her to his Office and inquired why she was not going to school. It was at that time when she narrated the story that she was raped by the appellant. PW4 called her mother PW2 who reported to police. PW1 was given a PF3 and taken to hospital. In cross examination by the appellant PW1 stated that he had been inserting his mdudu several days she went to his house to fetch water.

PW2 testimony was that on 25/10/2019 she received a call from the WEO to go to his Office when she arrived, she found her daughter and was told that she was raped for several days. PW2 took initiatives of sending her daughter to hospital after taking a PF3 at police where she reported the act. She tendered the PF3 as exhibit P1.

PW3 is a police Officer who arrested the appellant and investigated the case. He testified that in the course of his investigation he realized that the suspect was the appellant. He arrested him on 28/10/2019 and recorded his cautioned statement in which he admitted to know the victim as one of his clients who bought water from his house. He inspected the appellants house to see if some utensils which mentioned by PW1 were there. He also confirmed at Sahara Primary School that the victim was a pupil. He realized that the suspect was the appellant hence he charged him.

PW4, the WEO, testified that on 25/10/2019 while on his routine inspection in his area of operation, saw PW1 loitering. He took her into his office and inquired her why she was not going to School. PW1 told him that she was a standard IV pupil at Sahara Primary School and that she had been having love affair with the appellant whom she named as

"dodolima". She met him when she went to fetch water at his house and he gave her Tshs 500/= for spending at School and threatened her not to tell anybody or else he could make her insane.

It was PW4 first time to meet PW1. The last prosecution witness was PW5 the Clinical Officer, who testified that he examined PW1 on 26/10/2019 and noticed that she had no bruises(scratches) there was no hymen meaning that was already carnally known by a man. She had no pregnancy or any sexual transmitted diseases, there were no sperms. He filled the PF3.

In his defence the appellant simply denied to have raped the victim though admitted that he knew her and her parents as she (PW1) used to go to his house to fetch water.

The appellant called DW2 to support him, who testified that the appellant was arrested by PW3 after been pointed by PW1 who was in company of PW2, her mother.

DW3 was a ten-cell leader who witnessed PW3 when searching the appellants house, he had nothing useful.

I may add that before this Court, the appellant when praying for his appeal to be allowed he said that it was the victim PW1 who pointed him as a person who raped her before his arrest by PW3.

It is therefore obvious that on the day the victim met PW4 she was not raped according to the evidence of PW5, the victim's vagina was normal, there were no bruises and no sperm as the same can stay in a vagina for 24 hours. PW1 herself in her testimony said she was been raped several days. In September, 2019.

The arrest of the appellant started with PW4 upon inquiring PW1 who stated that she had been having love affairs with the appellant called "dodolima" at his house where she were fetching water.

This means the arrest of the appellant was based on a historical rape acts which took place some days before the report was made on 25/10/2019. PW1 herself testified it was in September, 2019.

This Court has asked itself two issues. One, whether rape of the victim was proved; two if in affirmative, then, whether it was the appellant who raped the victim.

Starting with the first issue, there is no any witness who witnessed the act except PW1 who stated that she was raped.

The State Attorney relied on the case of **Selemani Makumba (supra),** it is true that true evidence of rape that there was penetration comes from the victim. In this case PW1 stated that she was carnally known by a man. PW5 a clinical officer opined that PW1 had raptured hymen, though it is not necessary to be caused by rape. It remains a fact that PW1 been an 11 years of age girl had her hymen raptured. The cause of the rapture is only known to PW1 who said it was due to insertion of a virile male organ into her vagina, therefore there was penetration and because she is a girl under 18 years of age, then it was statutory rape.

This Court has no reason to differ with the trial Court finding that PW1 was in fact raped. The first issue is answered in affirmative. The second issue is whether it is the appellant who raped PW1. To get an answer to this question, it is important to look at the evidence on how it links the appellant to the commission of the rape of PW1.

In her testimony PW1 connecting the appellant stated that: -

> *"I remember from September, 2019, I was living near with the accused in this case. I went to fetch water to the accused's home and in material date the accused called me and started to touch my private parts and later on he gave me Tshs 500/= and he undressed me and he too undressed*

his clothes and that he inserted his "mdudu" into my private parts and hence threatened to make me insane if I will tell any person".

Then the appellant cross examined as follows: -

"I went to your home I came from school. You took me to your room. You continued with behaviour of inserting your dudu for several days when I came to fetch some water in your house".

As it can be gleaned from the testimony of PW1, she was very consistent such that she was not shaken even on cross examination by the appellant.

Another piece of evidence tending to connect the appellant from the prosecution case is that of the arresting police officer PW3 who testified that he was accompanied by PW1 (the victim) and PW2 (her mother) that he arrested the appellant after been pointed by PW1. This version is supported by the defence witness DW2 who testified that he witnessed arrest of the appellant by PW3 who was accompanied by PW1 and PW2 after been pointed by PW1.

Moreover, as this Court recorded in its proceedings the appellant himself stated that he was arrested by PW3 after been pointed by PW1.

There is ample evidence that PW1 knew the appellant and the appellant admits that he knew PW1 and her parents very well close neighbours before he was arrested. The Appellant had no any grudges either with the victim nor her parents.

To this stage this Court believes the prosecution evidence as true that the appellant is connected to the rape of PW1.

However, there is one inconsistence in PW4 testimony. It was his testimony that when he interrogated PW1 (the victim) she told him that she had been making love with the appellant to whom she used to fetch water. She referred his name as "dodolima."

The appellant was in Court and PW1 pointed at him and mentioned him using a nick name "dodolima.".

It was expected that the appellant would have cross examined on this nick name; he failed to do the same.

It is a principle of law in evidence that failure to cross examine on an implicating fact is taken that the concerned party admits that fact as true.

The Court of Appeal of Tanzania has put this position of law clear in many cases including a recently decided case of **Athuman Rashid vs.**

Republic, Criminal Appeal No. 264 of 2016 (unreported) which was decided on 27/04/2018. In that case the Court of Appeal of Tanzania referred to the case of **Damian Ruhele vs. Republic,** Criminal Appeal No. 501 of 2007 (unreported) where it was held: -

> *"it is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witnesses."*

See also the cases **Nyandwi John Bosco vs Republic Criminal Appeal No. 42 of 201**2 (unreported) and **Emmanuel Saguda @ Sukuma vs Republic, Criminal Appeal No. 422 B of 2013** (unreported) to mention a few.

In this appeal, this Court thinks it was important for the appellant to cross examine the witness on who was been implicated between the men in the accused's dock and the one named to PW4 by PW1 as "dodolima".

All in all, this Court finds that the evidence points at the appellant as a person who raped PW1 (the victim) on reasons explained above.

In ground four it is complained by the appellant that the age of the victim was not proved. The State Attorney submitted that the testimony of

PW2 (her mother) proved that her daughter was 11 years of age and was born in 2008.

In a case involving statutory rape like this one it is imperative that age of the victim is established by evidence. In the case of **Isaya Renatus vs. Republic, (supra)** the Court of Appeal of Tanzania stated that: -

> *"We are keenly conscious that 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 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 production of a birth certificate".*

It follows therefore that a parent is one of the persons who can prove the age of the victim. In this case PW2, a biological mother of the victim, gave her age as been 11 years at the time of commission of the offence. This ground is none meritorious.

In ground six the appellant complained that since the arresting officer was also the investigation officer who took down his cautioned statement it

is likely that he planted the evidence implicating him. The state Attorney argued that the testimony of PW3 is credible and reliable and there is no evidence of prejudicial to the appellant.

This Court agrees with the State Attorney. The testimony of PW3 was that he arrested the appellant after been pointed by PW1 (the victim). The appellant admits this fact. He also repeated stating the same fact before this Court in his rejoinder. In his defence, the appellant admitted also that he neither had grudges with the victim nor her parents whom he knew before the incident as his neighbours. PW3 took a cautioned statement of the appellant in which he denied raping the victim though he admitted to have known her and that she used to fetch water from his house.

The said cautioned statement which the Appellant complains of was not even admitted in evidence. This Court fails to see any prejudicial act by PW3 to the appellant. After all the law permits an arresting officer to be investigator of the same case under the provisions of section 15(4) of the CPA. This ground is baseless.

In the upshot and for reasons given above, this Court finds that the offence of rape, with which the accused was charged, was proved beyond all reasonable doubts. There is no any ground to fault the finding of the trial Court. I do hereby dismiss the appeal by the appellant in its entirely. The conviction and sentence given by the trial Court is upheld. It is so ordered.

F. K. MANYANDA
JUDGE
14/12/2020