IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

DC CRIMINAL APPEAL NO. 09 OF 2021
(Originating from District Court of Singida in Criminal Case No. 126 of 2019)

DAKTARI JUMANNE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

25/8/2021 & 14/9/2021

KAGOMBA, J

On 09/06/2020 the District Court of Singida at Singida (the trial Court) convicted DAKTARI S/O JUMANNE of the offence of rape contrary to Section 130(1)(e) and 131(3) of the Penal Code, [Cap 16 R.E 2002] (now R.E 2019) after being charged under those provisions of the law. The accused person (now the appellant) was sentenced to life imprisonment as the victim was a girl child of 8 (eight) years and a pupil of standard one (1) in a local primary school. The law provides for life imprisonment for such an offence.

Being aggrieved by both conviction and the sentence, the appellant appeals to this Court. His Petition of Appeal lists ten (10) reasons for appeal three of which are not worth grounds of appeal but factual matters and prayers to this Court. The remaining seven grounds are as follows:

1. That, no proof of the victim's age was tendered before the trial Courts thus the trial court proceeded with the case under assumption of the victim's age that she was 8 years while it is well known that in rape cases the age of the victims is of paramount importance.
2. That, the victim knew the accused before the incidental date as they were living in the same neighbourhood but she has never mentioned his name thus the accused was convicted under shadow of doubts.
3. That, there was no proof from primary school teacher that the victim was a student thus creating doubts.
4. That, the affidavit sworn by victim's mother (PW2) is doubtful, as it could be made to suit the purpose and to hide the actual age of the victim to avoid her giving testimony under oath, thus its acceptance is an error by the Court.
5. That, the trial Court erred in law and fact for not conducting "*voire dire*" test to test the victim's intelligence. Under such circumstances the Court did not weigh properly the mental capacity of the alleged victim and knowledge of the duty to speak the truth before trial Court.
6. That, PW4 investigating officer didn't take caution statement of the accused (appellant) because he knew that this was a cooked case against him and lacked credibility before the Court.

7. That, the appellant was convicted and sentenced not because of the strength of the prosecution case but due to weakness of his defence.

Finally, the appellant prayed the court to quash both conviction and sentence and set him to liberty. He also prayed to be present during hearing of his appeal.

A brief back ground of this case needs to be stated. On 25th day of May 2019 the girl victim (PW1) who was living in the same house as the appellant, was left at home alone. Her mother had gone to a funeral. It was alleged that the appellant who was also at home called the victim, asked her for some drinking water from their house. As the victim took water to the appellant's room, the appellant removed her clothes and raped her. The girl cried for help in vain as was there was no one to help her out. It is alleged that the appellant then released her with a warning not to tell anyone about what happened. When her mother returned home, the victim told her what happened. The mother of the victim (PW2) reported the incident to the local area chairman and police where, as usual, the PF3 was issued for her examination at the hospital.

PW2, the victim's mother testified that she examined the victim and found her vagina bruised and her underclothes dirty. PW3 a medical doctor informed the trial Court that upon examining the victim, she found her vaginal labia majora swollen and the clitoris was red and enlarged against her normal size indicating penetration thereof. PW4, an investigation officer informed the trial Court that he issued PF3 for the victim and interrogated the accused "who admitted to have removed the victim's underwears and inserted his pens into her vagina, but then he thought it was a sin and stopped". The investigation officer did not write the statement of the accused.

Following the above record of evidence as per the judgment of the trial Court, the Court concluded thus;

> *'According to the evidence given, it is no doubt that the victim was raped since her examination by the medical officer revealed that her labia majora was slightly swollen and vagina wall was red, and swollen indicating penetration on her vagina, and since according to S. 131(4) of the Penal Code, Penetration, however slight was enough to prove the sexual intercourse necessarily for offence, this means the victim was raped'.*

The court went ahead to link the offence with the offender after being satisfied that the affidavit of PW2 the victim's mother proved that the victim

was born on 26/8/2010. The trial Court said the following with regard to proof of the appellant as the villain:

> *'As to the involvement of the accused person, the victim informed the Court that it was the accused who raped her. The girl knew the accused before the incidental date as they were living in one neighbour hood. Even the accused knew the victim, and so the issue of identification cannot be raised in this case, and his evidence and that of his witness have not revealed otherwise'.*

The above sums up the reasons why the trial Court convicted the appellant and sentenced him accordingly.

On the date set for hearing of the appeal, the appellant appeared in person while the respondent was ably represented by Ms. Salma Uledi, learned State Attorney. The appellant prayed to adopt his Petition of Appeal as his submission to the Court. Later in his rejoinder he argued that he was not examined by a doctor to see if it was him whose penis penetrated into the vagina of the victim. He denied to have committed the offence and prayed the Court to allow his appeal.

The learned State Attorney for the respondent made a longer submission. She vehemently supported the conviction and sentence meted

to the appellant as the child was nine (9) years at the time of commission of the offence. She argued that the victim was in standard one (1) and the affidavit of her mother, which was admitted without being challenged by the appellant, shows that the victim was born on 26/8/2010.

Ms. Uledi turned to the proof of penetration. She said PW3 who is a medical doctor proved that there was penetration as per her testimony on page 15 of the proceedings. She further argued that PF3 showed that the victim was actually raped. And on whether it is the appellant who raped the victim, the learned State Attorney argued that the victim identified the appellant as the offence was committed during day time. She reckoned the testimonies that the appellant called the victim to his room and penetrated his penis into her vagina and that the victim was also able to identify the accused in Court during trial by pointing a finger at him while saying; 'he is the one who raped me'.

The learned State Attorney then drew the attention of the Court to the case of **Selemani Mahumba V. R. [2006] TLR 379** where the Court of Appeal stated that reliable evidence is the evidence adduced by the victim. She thus prayed that this Court to give due weight to the evidence adduced

by the victim on the strength of the cited decision of the Court of Appeal. Then she prayed that the conviction and sentence meted out by the trial Court be upheld and the appeal be dismissed.

After hearing the submissions by both parties, and upon perusal of the record of the trial Court, I find the following issues to be yawning for determination by this Court; Whether the conviction of the appellant for the offence of rape was sufficiently proved. Since the appellant also challenges the sentence, the second issue which flows from determination of the first one is whether the sentence meted to the appellant is lawful.

The offence of in rape in the situation of this case under Section of 131 (1) of the Penal Code, will be established if an accused male person has had sexual intercourse with a girl of the age of eighteen years or below with or without her consent. The offence requires proof of penetration, even if slight one, of the penis of the accused into the vagina of the victim girl child. The authority for this legal requirement is the case of **Masomi Kibisu V. Republic, Criminal Appeal No. 75 of 2005 (unreported)**, a Court of Appeal's decision.

Equally so, there must be a proof of age of the accused, and finally it must be proved that it is the accused who committed the prohibited sexual intercourse.

In the first ground of appeal, the appellant challenges the evidence that proved the age of the victim. He says there was no proof of the victim's age and that the affidavit of PW2 who is the victim's mother, could have been made to suit the purpose of the case and to hide the actual age of the victim to avoid her giving evidence under oath. We shall address the issue of the victim's evidence later. Regarding proof of age, PW2 Zubeda Ally Isingo gave her testimony after affirming to speak the truth. She testified that she gave birth to the victim child on 26/8/2010. She further stated that the victim was in standard one (1) at primary school. She tendered an affidavit to prove she gave birth to the accused on the stated date. The same was admitted as Exhibit "P1" and was read in Court. The totality of her testimony proved that the victim was born on 26/8/2010 and had 8 years by then. For this reason, the first ground of appeal has no merit and is dismissed.

The second ground of appeal is that the victim had never mentioned the name of the appellant despite the fact that they were living in the same neighbourhood. According to the appellant, the fact that the victim never mentioned his name implied that there were doubt in his conviction. This ground also must fail. Identification must not be through mentioning of appellant's names. It all depends on if she was asked to mention the name or not, and even if she had forgotten the name but was able to identify the appellant by pointing a finger at him in a dock identification or elsewhere in a proper manner, that should suffice.

The third ground was about lack of proof that the victim was a student. I consider this ground immaterial as the offence is not about sexing with a student but a child. The appellant questioned why no victim's teacher was called to testify. I am of a considered view that in the circumstance of the case and for the charge of rape which was drawn, there was no need to prove if the victim was a student or not. This ground has no merit at all and is also dismissed as such.

Ground four and five are about the testimony of the victim as a child and how it was taken. The two grounds are to the effect that the victim being a child, could not adduce her evidence under oath, yet the trial Court

did not conduct "*voire dire*" test, to test the victim's mental capacity and her knowledge of the duty to speak truth before trial court. These grounds arise from the evidence of by the victim, (PW1), as recorded on page 9 to 10 of the typed proceedings of the trial Court. The relevant part of the proceedings reads as follows:

> *'PP: For hearing I have two witnesses one being a child but the welfare officer is present.*
> *Raphael I. Tituhongewa, Social Welfare Officer, present.*
> *Accused: I am ready proceed (Sic).*
> *PW1. (name withheld) 8 years Unyanga Std I Unyanga Primary School Muslim.* ***Promises to speak the truth only'***
> **[Emphasis added]**

After this opening procedure, the evidence of PW1 was recorded.

It is my view that the above procedure satisfied the requirement of section 127 (2) of the Evidence Act, [Cap 6 R. E 2019], which provides:

> *'(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 the Court and not to tell any lies'.*

For the above reason the fourth and fifth grounds of appeal also collapse.

In his rejoinder, the appellant has continued to protest his innocence. He has raised an argument that the doctor did not examine him to see if he is the one who penetrated his penis into the victim's vagina. I think this examination was not necessary in view of the fact that the testimony of PW1 sufficiently identified the appellant as the culprit. I subscribe to the views of the Court of Appeal in **Selelmani Mahumba's Case** (Supra) that the most reliable evidence is that of the raped child herself.

In final analysis, the appeal lacks merit and is therefore dismissed. The decision of the trial Court is hereby upheld both in conviction and sentence.

It is ordered accordingly.

SGD. A. S. KAGOMBA
JUDGE
14/09/2021

Right of appeal duly explained.

DATED at Dodoma this 14th day of September, 2021

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA
JUDGE