THE UNITED REPUBLIC OF TANZANIA

THE JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL No. 77 OF 2020.

(Original Criminal Case No. 16 of 2017, in the District Court of Mbeya District, at Mbeya).

JOHN S/O MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

25/11/2020 & 22/02/2021.

UTAMWA, J.

In this first appeal, the appellant, **JOHN S/O MOHAMED** challenged the judgement (impugned judgement) of the District Court of Mbeya District, at Mbeya (the trial court), in Criminal Case **No. 16 of 2017**. Before the trial court, the appellant stood charged with a single count of rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R. E. 2002 (Now R. E. 2019), henceforth the Penal Code.

It was alleged before the trial court, that, on 13th January, 2017, at Sisimba area within Mbeya City and Region, the appellant did have carnal knowledge of one MH (a branded name for protecting her dignity), a girl

aged 15 years old. The girl will hereafter be called the complainant for convenience purposes.

The appellant pleaded not guilty to the charge, hence a full trial. At the end of the day, the trial court, through the impugned judgment, found the appellant guilty, convicted and sentenced him to 30 years imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred this appeal. His petition of appeal was based on 6 grounds. However, the same can be smoothly condensed to only 2 as shown below:

1. That, the trial court erred in law and facts in convicting and sentencing the appellant, though the prosecution had not proved the charge against him beyond reasonable doubts.
2. That, the trial court erred in law and fact in basing the conviction against the appellant on the weakness of his defence evidence.

Owing to these grounds, the appellant pressed this court to allow the appeal, quash the conviction, set aside the sentence and to set him free from the prison.

It must also be noted at this juncture that, prior to the impugned judgment, the appellant was charged before a subordinate court with the same offence based on the same facts. He was found guilty and sentenced. He appeal to this court (in Criminal Appeal No. 1 of 2018). This court (Mongella, J.) found some serious irregularities in the judgment of the trial court. The court thus, set aside the judgment and order a proper

one to be recomposed. In compliance to that order, the impugned judgement was made and pronounced, hence the appeal at hand.

When the present appeal was called upon for hearing, the appellant appeared in person. The respondent (Republic) was represented by Mr. Baraka Mgaya, learned State Attorney.

Though the appellant had nothing to submit during the hearing of his appeal, the court noted the following facts in the petition of appeal: that, the appellant's complaints regarding the first ground of appeal were essentially that, the complainant's act of delaying to report the alleged rape to authorities or her guardian or neighbours casts doubts and shows that the case was fabricated against him. The trial court improperly banked on the evidence of PW. 3, the doctor who examined the complainant's private parts and found no bruises and blood discharge. He also stated that, according to the PW. 3, the complainant's urine had blood which could be caused by infection. The PF. 3 of the complainant was also doubtful for showing that, it was for one Martha Hoba which was not the name of the complainant, i. e. Masa Maxion. Again, the evidence of PW. 1 and PW. 4 were hearsay which could not prove any fact.

On his part, the learned State Attorney for the respondent contended in his replying submissions regarding the first ground of appeal that, the prosecution adduced sufficient evidence to prove the charge beyond reasonable doubts before the trial court. The appellant was charged with rape of Martha Hoba who testified as prosecution witness No. 2 (PW. 2) as shown at page 6-8 of the typed proceedings of the trial court. She testified that, the appellant pulled her into her room while they were only two in the

house. He then undressed her and inserted his penis into her private parts causing pain to her. In law, the best evidence comes from the victim of sexual intercourse. He supported the contention by the decision of the Court of Appeal of Tanzania (the CAT) in the case of **Seleman Makumba v. Republic [2006] TLR. 379.** The evidence of the complainant thus, sufficed to prove the charge.

It was also the contention by the learned State Attorney that, the trial court based on the evidence of the complainant to convict the appellant as shown at page 3 (paragraph 4) of the impugned judgement. The delay by the complainant to report the matter to her guardian (her grandmother) was, according to her own evidence, due to the fact that her grandmother had travelled leaving her with the appellant in the house. There is thus, no any sign showing that the case was fabricated against the appellant. Besides, the appellant did not cross-examine PW. 1 (grandmother of the complainant) and the complainant herself on the alleged fabrication of the case. The law guides that, where an accused person fails to cross-examine a witness on a particular fact implicating him, then he is taken to have accepted such fact. He supported this particular contention by the decision of the CAT in the case of **Martin Misara v. Republic, Criminal Appeal No. 428 of 2016, CAT at Mbeya** (unreported). The alleged fabrication is thus, an afterthought by the appellant.

Regarding the appellant's challenge against the PF. 3, the learned State Attorney argued that, the same is a mere expert opinion which does not necessarily prove the case. He cited the case of **Mawazo v. DPP,**

Criminal Appeal No. 455 of 2017, CAT at Mbeya (unreported) to support the argument. The complainant's oral evidence thus, sufficed in proving the charge against the appellant. He also admitted that, there were discrepancies on the name of the complainant that, the PF. 3 showed that the victim was Martha Hoba as indicated in the charge sheet. Again, the PW.3 (the doctor who examined her) testified that the examined person was Martha Hoba. However, when the complainant (PW.2) testified, she said she was Martha Maxon. The learned State Attorney, nevertheless, argued that, the discrepancy of the names did not show that those were two different persons.

It was also the contention by the learned State Attorney that, the discrepancy on the complainant's name did not prejudice the appellant. This is because, even in his defence, he stated that he had been charged with rape of Martha with whom he lived, meaning the complainant in the case under consideration. Besides, in law, discrepancies between the charge and the evidence are not fatal if they do not prejudice the accused. He cited the case **of Festo Domician v. Republic, Criminal Appeal No. 447 of 2016, CAT at Mwanza** (unreported) to cement the contention.

Concerning the appellant's complaint that the trial court based the concoction on hearsay of the PW. 1 and PW. 4, the learned State Attorney submitted that, the assertion was not true. This is because, page 5 of the impugned judgement shows that, the trial court based the conviction on the evidence of the complainant as PW.2.

Regarding the second ground of appeal, the learned State Attorney reiterated his contention that, the conviction was based on the evidence of

the complainant as shown at page 5 of the impugned judgement. The trial court evaluated the appellant's defence as required by the law and found it lacking strength to shake the prosecution evidence.

Ultimately, the learned State Attorney urged this court to dismiss the appeal at hand for want of merits and to uphold the impugned judgment of the trial court.

In his rejoinder submissions, the appellant reiterated the contents of his petition of appeal. He underscored that, the PW. 1 did not speak the truth before the trial court that when she came from a journey she found the complainant sick. He also blamed the prosecution for not calling the grandfather of the complainant as their witness. The man had informed the police that the complainant was not sick. He thus, insisted for his appeal to the allowed.

I have considered the record, the grounds of appeal, the arguments by the parties and the law. I will now test the grounds of appeal. I prefer to begin with the second improvised ground of appeal for the sake of convenience. If need will arise, I will also test the first ground of appeal.

Regarding the second ground of appeal, the issues for determination are three as follows:

i. *Whether or not the trial court in fact, based the conviction against the appellant on the weakness of his the defence evidence.*

ii. *In case the answer to the first issue will be affirmative, then whether or not the course taken by the trial court offended the law.*

iii. If the answer to the second issue will be positive, then what will be the legal remedy for the violation of the law.

As to the first issue, I am of the view that, the impugned judgment supports the contentions made by the learned State Attorney for the respondent. This is because, according to the fourth and fifth pages (of the unpaged impugned judgment), the trial magistrate evaluated the evidence of both sides. The magistrate in fact, based the conviction on the evidence of the complainant (as PW. 2). She had testified to the effect that, it was the appeal who had raped her in the house of PW. 1 while they were only two. The trial magistrate further considered the defence by the appellant that the complainant had been tutored by the PW. 1 to testify against him following some grudges between him and the PW. 1. The trial magistrate found that defence was incapable of shaking the evidence of the complainant.

Under the circumstances shown above, it cannot be argued that the trial court based the conviction on the weakness of the appellant's defence. Rather, it based it on the complainant's evidence. I therefore, answer the first issue under the second ground of appeal negatively. This finding makes the testing of the second and third issues needless since their examination depended much on the first issue being answered affirmatively. I therefore, dismiss the second ground of appeal. This finding thus, calls for testing the first ground of appeal.

Concerning the first ground of appeal, the issue is *whether or not the prosecution proved the charge against the appellant beyond reasonable*

doubts before the trial court. In my view, there are merits in some of the complaints advanced by the appellant as narrated above. In the first place, I agree with him that, in fact, the evidence of PW.1, one Agnes Solomon Shemndolwa (grandmother of the complainant) was not so helpful to the prosecution case. This was because, she mainly testified on the information given to her by the complainant. This was because, according to the evidence, she was not at the scene of crime (her home) on the material date. She had travelled to Dar es Salaam for medical check-up. The PW. 4, one Sgt. Jedar (investigator of the case) also testified on the information she had collected and was not at the scene of crime on the material date. Her evidence was not also so helpful to the prosecution.

Furthermore, I agree with the appellant that, the PF.3 allegedly to be of the complainant (exhibit P.A) is unauthentic as evidence. This is so because, in the first place, the complainant introduced herself before the trial court as Masa Maxion. However, the PF.3 shows that, the girl examined by PW. 3 (Dr. Oliver) was one "Martha Hoba." The name of "Martha Hoba" is the one which also appeared in the charge sheet as the victim's name. Again, the second name of "Hoba" in the PF.3 is obviously altered by a pen after a correction of the previous name by white correction-fluid. The PF.3 also has another alteration in relation to the date of examination of the complainant. Nonetheless, the alterations are not initialled by anyone to show that the same was performed by an authorised person. It is thus, suspected that the alterations were effected by an un-mandated person so as to sweet the contents of the charge sheet and the facts of the case. It is more so since the PW. 3 herself (Dr. Oliver) did not

offer any explanation on the alterations when she testified before the trial court.

Owing to the weaknesses in the PF.3 and the discrepancies of the complainant's name demonstrated above, a sober court will not consider such piece of evidence as adequate for proving a fact beyond reasonable doubts. I will not thus, agree with the learned State Attorney for the respondent that the discrepancies did not prejudice the appellant. I thus, expunge the PF.3 from the record.

On the other hand, I have also considered the evidence of the complainant herself. She expressly testified that, it was the appellant who dragged her into her own room forcibly, undressed her and inserted his penis into her vagina three times. That act was done when they were only two in the house of PW. 1 where they both lived.

The appellant's defence that the complainant had been tutored by the PW. 1 to implicate him is not tenable. This follows the facts that, in the first place, the PW. 1 was not at home when the event occurred. It is also in the evidence by PW.1 that, she was in good terms with the appellant and she had assisted him in bailing him out when he was locked in a police cell. She was also smoothly communicating with him when she was in Dar es Saalm. Again, the appellant himself said in his defence that he had no grudges with the complainant. One cannot thus, imagine as to how the complainant could have implicated him for the alleged grudges between him and the PW.1. Besides, the appellant did not cross-examine the complainant on the aspect of being tutored by the PW. 1. He did not also cross-examine her and the PW. 1 on the alleged grudges between him and

the PW. 1. The effect of the accused's failure to cross-examine a witness on an implicating fact implies, in law, that, the accused has admitted the truth of that fact as rightly argued by the learned State Attorney for the respondent. The piece of defence evidence just mentioned above was thus, an afterthought that cannot help the appellant at this appellate stage of the matter.

The complaint by the appellant that the complainant delay to report the matter created doubts is also short of force. This view is based on the following facts: that, it is clear in evidence that, the house at issue did not have neighbours around. The husband of the PW. 1 was also not at home at the material time. It is further on record that, the PW.1 immediately reported the matter to police upon being informed by the complainant of the event when she returned back home from Dar es Salaam. The complainant also testified when cross-examined by the appellant that, she was afraid of telling the husband of the PW.1 on the event. She also testified that, she felt bad when the appellant did the act to her. The appellant also threatened to kill her if she told PW.1 of the incidence.

In my settled opinion therefore, the delay to report the matter to police or to the PW.1 or any neighbour was well explained by the complainant. The circumstances that surrounded her therefore, justified her delay to report the matter anywhere before she reported the same to the PW.1 when she came back home from Dar es Salaam. It is more so considering her young age of only 15 years. A girl of that age, who was also dependent on PW.1 could not be expected to act otherwise in the

absence of the PW. 1. I thus, do not think that the delay to report the matter implied any concoction of the case against the appellant.

The appellant's complaint that the complainant was not found with blood or bruises is also not forceful. Those are not part of important ingredients of the offence of rape in our law. The law guides that, one of the important ingredients of rape is only penetration. That penetration, however slight, may constitute the offence of rape; see section 130(4)(a) of the Penal Code. The complainant in the matter at hand, afforded to prove the penetration of the appellant's penis into her vagina as shown above.

I have also considered the fact that, the appellant's charge before the trial court was statutory rape. The complainant's consent was not thus, a necessary ingredient. However, age was. In the case at hand, it is on record that, the complainant testified that, she was born on the 6th November, 2002. This showed that she was in fact, aged around 15 years and was under the age of 18 years on the material date (13th January, 2017). The appellant did not also dispute this age of the complainant and did not even cross-examine her on this fact.

The law guides on how age of a child (or victim of crime) can be properly proved in evidence under circumstances of the nature under consideration. The CAT for example, held in the case of **Kazimili Samwel v. Republic, Criminal Appeal No. 570 of 2016, CAT at Shinyanga** (unreported) following its previous decision in **Issaya Renatus v. Republic, Criminal Appeal No. 542 of 2015** (unreported) as follows: that, such age can be proved through the evidence of the victim

himself/herself or by deducing or inference it from other evidence or circumstances of the case under section 122 of the Evidence Act. These provisions guide that, the court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Moreover, this court (Ismail, J.) in the case of **Tuma s/o Malando @ Sungwa v. Republic, High Court of Tanzania (HCT), at Mwanza** (unreported) following the **Issaya Renatus case** (supra) underlined the position highlighted above in the **Kazimili Samwel case** (supra). The HCT further held, (in following the **Issaya Renatus case**) that, it is most desirable that, evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate. That however, does not suggest that proof of age must, of necessity, be derived from such evidence.

Owing the reasons just shown above, I am convinced that, in the matter at hand, the ingredient of age of the complainant was proved beyond reasonable doubts.

It follows thus, that, the complainant was generally a credible witness. In fact, her own evidence was capable of proving the case against the appellant in this charge of sexual offence (rape) without any corroborative evidence as per section 127(6) of the Evidence Act. It is also the general law on evidence that, a single witness is capable of proving a fact on issue and support a conviction. This is because what matters is the weight of evidence and not the number of witnesses; see section 143 of

the Evidence Act and the decision in **Mohamed Msoma v. Republic [1989] TLR 227** (HCT). It is also the law that, every witness is entitled to credence in his/her testimony and must be believed unless there are cogent grounds for not believing him or her; see the Court of Appeal of Tanzania (CAT) decision in **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003, CAT at Mbeya** (unreported). In the case at hand, there is no reason to disbelieve the evidence of the complainant as demonstrated previously. The law further commands that, the best evidence in offences of this nature comes from the victim of the offence as guided in the **Seleman Makumba case** (cited supra by the learned State Attorney for the respondent).

Owing to the reasons shown above, I agree with the learned State Attorney, though on slightly different reasons, that the prosecution in fact, proved the charge against the appellant beyond reasonable doubts before the trial court. The issue regarding the first ground of appeal is thus, positively answered. Consequently, I also dismiss the first ground of appeal.

Having made the above findings regarding the first and second grounds of appeal, I dismiss the entire appeal for want of merits. It is so ordered.

THE HIGH COURT OF TANZANIA

JHK. UTAMWA.
JUDGE
22/02/2021.

Date; 22/02/2021.

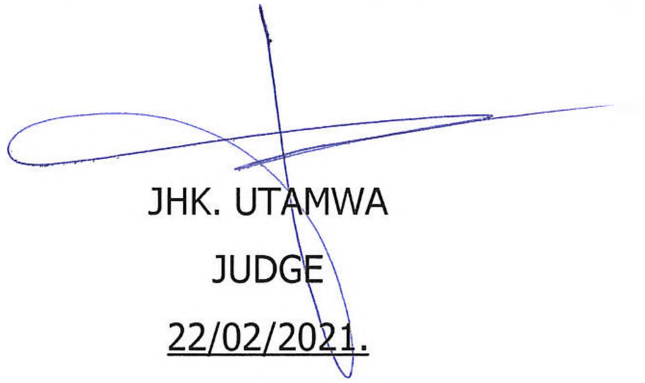
CORAM; Hon. JHK. Utamwa, J.

Appellant; present (by virtual court link while in Ruanda Prison-Mbeya).

For Respondent; Ms. Hanarose Kasambala, State Attorney.

BC; M/s. Gaudencia, RMA.

Court: Judgment delivered in the presences of the appellant (by virtual court while in Ruanda Prison-Mbeya) and Ms. Hanarose Kasambala, learned State Attorney for the Respondent, in court, this 22nd February, 2021.



JHK. UTAMWA

JUDGE

22/02/2021.