IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 21 OF 2021

(Arising from Criminal Case No. 113 of 2020 of Kigoma District Court Before K.V. Mwakitalu, RM

SELEMANI S/O KANGIKAKA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G M E N T

01st & 02nd June, 2021

A. MATUMA J.

The appellant stood charged of Rape contrary to section 130 (1) (2) (e) and 131 (1) and (3) of the Penal Code, Cap. 16 R.E. 2019 in the District Court of Kigoma.

The trial court having heard the case for both sides was satisfied that the prosecution case was proved beyond reasonable doubts. It consequently convicted the appellant and sentenced him to suffer a custodial sentence of life imprisonment as the victim was aged 5 or 7 years old.

The appellant being aggrieved of the conviction and sentence preferred this appeal with four grounds whose major complaints are;

i. *That the prosecution case was not proved beyond reasonable doubts.*

ii. *That the evidence of PW2 and PW3 who were children of tender ages were received in contravention with section 127 (2) and (7) of the Evidence Act.*

iii. *That the conviction was bad in law as there was procedural irregularities in the proceedings.*

iv. *That the appellant was convicted in total disregard to the principle that the conviction should not be entered on the weakness of the defence but on the strength of the prosecution case.*

At the hearing of this appeal, the appellant was present in person while the respondent had the service of M/S Antia Julius learned State Attorney.

At the option of the appellant, the learned State Attorney started to address the court opposing the appeal.

The learned State Attorney submitted that the prosecution case was proved beyond reasonable doubt as the victim PW2 gave positive evidence explaining how the appellant inserted his penis into her vagina, the evidence of which was corroborated by that of the doctor and the PF3.

She was of the view that it is a well settled principle that the true evidence of rape comes from the victim herself.

The appellant on his party submitted generally that he was convicted on the evidence which was fed to the victim child and her brother PW3. He lamented that the evidence was fabricated due to the fact that he was indebted to the victim's family and was demanded to pay them Tshs 2,000,000/= for the local treatment they administered to him of his **"bawasili"** decease, and when he failed, it is when they fabricated him this case. He challenged the evidence of PW3 who could not even know the name of his father to narrate the crime as un adult. To him the child was fed what to say before the court against him.

On my party having gone through the proceedings of the trial court and the submission of the parties before me, I am of the firm view that this appeal should be allowed on the strength of the first ground alone that the prosecution case was not proved beyond reasonable doubt.

While it is true that the settled principle is that in Rape cases the best evidence is that of the victim as it was held in the case of **Selemani Makumba versus Republic** (2006) TLR 379 among others, it is as well as settled principle that the word of the victim of sexual offence should not be taken as a gospel of truth. The same should be pass all the tests

of the truthfulness. That means, it is not always that once the victim of sexual offence gives a story towards the alleged rape against the accused, his story should be taken without caution or test as to whether it contains nothing but only the truth. See; ***Mohamed Said versus The Republic,*** *Criminal Appeal No. 145 of 2017* (CAT) at Iringa.

In the instant matter, when the victim PW2 gave her evidence at page 22 of the proceedings stated that when the appellant took her to the kitchen for the stated rape, chased away her siblings Maiga and Lameck. The appellant then undressed her, covered her mouth and inserted his penis into her vagina. That during the rape the two siblings Maiga and Lameck came to peep in the kitchen and witnessed the rape. That the appellant when he finished raping her, he left away.

This piece of evidence contradicts that of Maiga PW3 who testified that at the time the victim PW2 was being raped Lameck was inside the locus in quo throughout and that it was him alone who was chased by the appellant;

> *'When you were raping PW2 Lameck was also inside the kitchen, you only chased me out'.*

Also, the two witnesses contradicted on the manner the appellant chased Maiga and or Maiga and Lameck. According to the victim PW2, the appellant chased them verbally;

> *'You verbally told Maiga and Lameck to go away while you were continuing raping me'.*

But according to PW3 it was a violent chasing;

> *'When I saw them, Seleman chased me away, he chased me with a stick'.*

When the evidence of these two witnesses are scrutinized thorough, it reveals that the two witness are at variance to what they claimed to have seen on the crime scene. PW2 the victim saw Lameck being chased away along with PW3 by appellant when the rape was in progress while PW3 maintained that Lameck was not chased away but was together with the victim during and throughout the rape and he was chased alone with a stick. If PW3 is to be believed then the appellant stopped the rape to chase him away with a stick and that would be contrary to PW2 who stated that the appellant merely told the two verbally to go away while he was continuing to rape. This means either of the two witness is a liar and his or her evidence cannot be acted as a whole truth, or either of the two witness was unable to capture well what was going on, on the crime

scene. If that is the case, then it is dangerous to act on his/her evidence to convict.

In the case of ***Jeremiah Shemweta Versus Republic***, *[1985] TLR 228* it was held that the discrepancies of prosecution witnesses on various counts of the story give rise to some reasonable doubts about the guilt of the appellant. As it is not clear as to who among the two witnesses was a liar or who could not capture well what happened on the crime scene, the general principle is that the appellant be given the benefit of doubts. More so when Lameck was not called to testify as a material witness for the prosecution who could have cleared the doubts on whether he was chased along with PW3 or was throughout in the locus in quo witnessing the rape. If he was in the kitchen throughout the rape then he was material witness whose absence prompts this court to draw adverse inference to the prosecution case as it was held in the case of ***Samwel Japhet Kahaya versus Republic***, *Criminal Appeal No. 40 of 2017* in which the Court of Appeal of Tanzania at Arusha held;

> *'Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since* ***if a party to a case opts not to summon a very important witness he***

does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act'.

I am aware that the said Lameck according to the evidence was also a child of tender age like PW2 and PW3, but it was the court to rule out whether he was capable of giving evidence or not in terms of section 127 (1) of the Evidence Act, supra.

The trial court did not address these contradictions and rule out whether they were minor or went to the root of the case. That was abrogation of the duty in the administration of justice as it was held in the case of ***Mohamed Said Matula versus Republic [1995] TLR 3*** that;

> *'Where the testimonies by the witnesses contains inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter'.*

In the instant matter, the inconsistencies and contradictions cannot be said to be minor as they affects the credibility of the two witnesses on what exactly happened at the crime scene.

In that respect the evidence of PW2 the victim required corroboration of an independent evidence. The issue is whether there is such

corroboration. The learned State Attorney M/S Antia Julius was of the argument that there was corroborative evidence of the doctor PW5 and the PF3.

It is my firm finding that the evidence of PW5 and the PF3 is wanting and could have not been taken as corroborative evidence in the instant matter. This is because he had conclusions which are bad in law as they are not authenticated. Thus, for instance at page 35 of the proceedings he testified;

> *'After examining her I concluded that the victim was penetrated in her vagina* ***by a penis*** *so I concluded that she was raped'.*

How did PW5 came to a conclusion that it was a penis which penetrated into the victim's vagina? Was he told so or he could through medical examination ascertain that it was a penis and not any other instrument or party of a body such as a finger which was used in the penetration. There is no explanation as such. In the circumstances, the findings of the witness were not free from prejudices. He also testified to have seen sperms coming from the victim's vagina. I wonder how could this witness so and identify the sperms flowing out of the vagina of the victim who was raped a day before. Were the sperms held in the vagina from flowing out the whole day of the rape and its whole night to await the doctor to

see? No answer. If the sperms continued to flow out from the time of rape at noon hours of the crime date 06/08/2020, and the whole night up to 07/08/2020 how much of the sperms were ejaculated into the victim's vagina. Not only that but also PW5 stated that in his examination he observed that the victim's vagina was open and hymen perforated. If that is the case, was the hymen perforated without causing bleeding or the perforation was old. If it was the instant alleged rape which perforated the hymen, how could the sperms be seen free of blood. Furthermore, could the child of such age be raped to the extent stated; ***open vagina, hymen perforation, swelling and bruises;*** yet the victim child be normal without any sign of pain as witnessed by the doctor himself that the victim was normal walking well by herself? It is like the victim child executed a normal sex as an adult would to with her lover.

Even in the PF3 the witness filled hearsays that according to the investigation and complaints the child was raped. Rape can not be established by medical examination but a court of law through evidence by the prosecution proving the ingredients hereof.

Another unusual issue in the insistent case is; it is alleged that the victim was raped on 6/8/2020 at noon hours. After the rape she stayed at home as if nothing bad had befallen her until evening hours when her mother

returned from the farm. She informed her of the rape incidence. Her mother PW1 on her returning home at 06:00 p.m. and being informed as such she inspected the victim and satisfied that the victim's vagina was swelling and discharge of white fluid. Yet she took no action waiting for her husband who returned at night 8:00 p.m. She did not even draw the attention of neighbours or report the incident to local authorities or even to police.

His husband on his return did not take any action until the next day at 11:49 a.m. when they reported to police and issued with the PF3. Why all this delay and reluctance in taking action against the appellant who was very familiar and living thereat.

I am aware that PW1 purported to testify that her husband reported the incident to local leaders and to police in the same night, but there is no evidence to that effect as the said husband did not testify nor the local leader. To the contrary the PF3 indicates that the incidence was reported the other day as herein above stated i.e. on 7/8/2020 at 11:49 a.m.

The conducts of the victim and her parents are inconsistence with the conducts of victims of crimes more so in a serious crime of rape like this.

It is from this observation, I find the defence of the appellant holds water that he was a patient at the victim's family being healed traditionally of

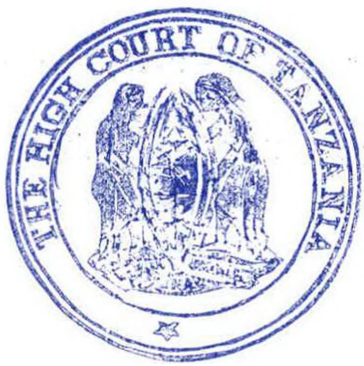
hemorrhoid decease (bawasili), but he failed to pay them Tshs. 2,000,000/= which they demanded as costs for the treatment and that resulted into misunderstandings between them and subsequently fabrication of this case. This defence cannot lightly be overruled in the presence of the inconsistencies and contradictions in the prosecution testimonies and the unwarranted conducts of the prosecution witnesses. The appellant was not even cross examined to negative the fact that he was a patient at the victim's family and failed to pay the required treatment fees.

To that extent, I agree with the appellant that the prosecution case was not proved beyond reasonable doubts. That suffices to dispose off the entire appeal without necessarily dwelling into the remining grounds of appeal.

I therefore allow this appeal, quash the conviction by the trial court and set aside the sentence of life imprisonment meted against him.

I order his immediate release from prison unless held for some other lawful cause. Right of further appeal to whoever aggrieved is fully explained.

It is so ordered.



A. Matuma

Judge

02/06/2021

Court: Judgment delivered in the presence of the appellant in person and Antia Julius State Attorney for the Respondent.

Sgd: A. Matuma

Judge

02/06/2021