IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 02 OF 2021

(Originating from the judgment of the District Court of Nyamagana in Criminal Case No. 95 of 2019,)

RENATUS MAJESHI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

12th April & 10th May, 2021.

TIGANGA, J.

The appellant herein, Renatus Majeshi, stood charged before the District Court of Nyamagana with an offence of rape contrary section 130 (1) (2)(e) and 131(1) of the Penal Code [Cap 16 R.E 2019]

The particulars of the offence are that, on 30th day of April 2019, at Lwanhima area within Nyamagana District in Mwanza Region, the appellant did unlawful sexual intercourse with one **S d/o R,** (names in initials) a girl aged eight years old.

After full trial before the trial court, the appellant was found guilty and convicted as charged, and was consequently sentenced to the mandatory sentence of 30 years jail imprisonment.

Dissatisfied by the conviction and sentence the appellant filed four grounds of appeal as follows;

i) That the trial court erred by failing to caution itself before convicting the appellant convicting the appellant on strength of a medical examination carried out sixteen (16) good day after the alleged offence had happened had happened, without any explanation whatsoever on this inordinate delay,

ii) That the testimonies of PW4 and PW5 were so contradictory to cast an ounce of doubt on prosecution case particularly with regard to bruises alleged by the PW5 to exist on the victims private parts but which PW4 says were absent,

iii) That the trial courts analysis and evaluation of evidence is partisan, un balanced and biased against the appellant, whose defence was ignored by the Hon. Trial Magistrate,

iv) That both conviction and sentence of the appellant are improper, defective and illegal to the extent of rendering the whole judgment a nullity.

In consequence thereof, the appellant prays this appeal to be and the trial court judgment be declared a nullity by quashing both the conviction and its sentence and order that the appellant be released from custody. In his petition of appeal, he expressed his wishes to be present at the hearing of his appeal.

When this appeal was called for hearing, the appellant appeared in person and unrepresented, but through audio teleconference, while the respondent was represented Miss. Magreth Mwaseba, learned State Attorney.

Called upon to argue his appeal, the appellant opted to adopt his grounds of appeal and asked the court to consider them as his submissions, he asked the State Attorney to respond thereby reserving his right to rejoinder, should there be anything to rejoinder from the arguments by the State Attorney.

The learned State Attorney for the respondent did not support the appeal, she instead supported the conviction and the sentence meted out against the appellant. She said instead the appellant deserve severe sentence than what was imposed against him. In her submission in opposition of appeal, she argued one ground after the other. Submitting on the first ground of appeal, which raises a complaint, that the appellant was convicted on the strength of a medical examination which was carried out sixteen (16) day after the alleged offence, without any explanation whatsoever on this inordinate delay, which evidence is unreliable, she submitted that the appellant's contention is a lie as the incident happened on 30/04/2019 and the victim was examined on 03/05/2019, therefore it is not true that the that the PF3 was filled in after 16 days.

Further submitting on that the first ground, she submitted that however, the court did not only base on the evidence as contained in the PF3, according to her the court also considered the evidence other witnesses including the local leader before whom the appellant confessed. She urged the court to find the first ground of appeal to be without merits.

Regarding the second ground which raises the complaint that the testimonies of PW4 and PW5 were so contradictory which raises doubt on

prosecution case particularly with regard to bruises alleged by the PW5 to exist on the victims private parts but which PW4 says were absent. She submitted that, this ground is imaginary because PW5 only record the cautioned statement of the accused while PW4 was a street chairperson who said he witnessed the arrest of accused and that the accused confessed before him, therefore making the evidence of the two witnesses not to be touching the issue of bruises in the private part of the victim. She on that base asked for the court to dismiss the ground of appeal.

Regarding the third ground of appeal which raises the complaint that, the trial courts analysis and evaluation of evidence is partisan, un balanced and biased against the appellant, whose defence was ignored by the Hon. trial Magistrate. She submitted that, the court evaluated the evidence and had no bias against the appellant. Citing the example on how the evidence was evaluated she said it considered the defence of impotence advanced by the appellant and concluded that the appellant had the duty to prove the allegation. She prayed for the court to find the third ground of appeal is also meritless.

Regarding the fourth ground of appeal which raises the complaint that, both conviction and sentence of the appellant are improper, defective

and illegal to the extent of rendering the whole judgment a nullity, the counsel submitted that the appellant was properly convicted and was given a chance to mitigate the sentence and asked for the copy of judgment.

Regarding the sentence, the learned state Attorney asked the court to enhance the sentence imposed as the victim is a child bellow 10 years therefore having been found guilty and convicted the accused was supposed to be sentenced to life imprisonment instead of 30 years.

In rejoinder after the appellant had been informed off record, the importance of addressing the court in respect of the last prayer by the State Attorney, of enhancing sentence, the appellant rejoined extensively as follows;

Regarding the first ground of appeal, he submitted that the fact that he said he was claiming the money from the person who said his daughter was raped create doubt which was supposed to be resolved in his favour.

On the second ground of appeal, he insisted that the days from when the victim was raped to when she was medically examined by the doctor are so many.

Regarding the third ground of appeal, he submitted that if you look at the proceedings, the father of the victim proved that the father of the victim owed the appellant his money which he promised to pay in the next day, but instead of paying him he complained that the appellant raped his daughter. He said he did not rape the victim but the father of the victim was his boss and decided to frame a case against him.

Regarding the allegations that he was sentenced inadequately he said he did not commit the alleged offence, therefore as deserved no conviction he also deserved no sentence at all, he prayed this court to do justice by just discharging him.

Now having summarised the record and the submission made in support and opposition of appeal, I will discuss and resolve one ground after the other in the manner they were argued by the parties.

The first ground raises the complaint that the judgment based on the evidence in the PF3 reporting the examination conducted which was done sixteen days after the incident; the State Attorney submitted that, the allegation is not true. Further to that the state attorney submitted that, even if we find that the examination was conducted after some days, yet,

the judgment did not base solely on the PF3, it based on other evidence including the evidence of the victim her self. Now, from these arguments, two issues can be framed, first, whether the examination of the victim a report of which is contained in the PF3 was done in 16 days, second, whether the conviction of the appellant substantively based on the evidence contained in the PF3?

The answer to these issues can be obtained in the evidence on record. The charge sheet indicates that the offence was committed on 30th day of April, 2019, on Tuesday, and the examination was done on 03rd day of May 2019, on Friday, at 11.48. Arithmetic, the examination was done on the 4th day after the commission of the offence. That means it is not **sixteen** days but **four** days. In the normal course, it is expected that once it has been alleged that an assault of any kind, whether normal or sexual has been reported, the victim must be given the PF3 and be taken or go to hospital for examination and consequently treated. Immediate attendance and examination does not only assure the perfect results of the injury sustained by the examined victim, but also the immediate treatment should the examination reveal that the victim needs one. If the victim is not given the PF3 on time or given it on time but not taken to hospital and examined

on time, there must be a sound explanation of what prevented him from being so taken to hospital and examined on time. This is because examinations conducted after so many days had lapsed, tend to have their results doubtful as to whether what was revealed by the examination was caused by the accused.

As indicated hereinabove, in this case, the victim was taken to hospital and examined on fourth day after the alleged rape was committed, as the offence was committed on 30/04/2019 in the morning and the appellant was found red handed and arrested on the spot, however, the victim was not taken to hospital on that date, but was taken on 03/05/2019. This is exhibited by the PF3 it self exhibit P1 and the testimony of PW6 the clinical officer who examined the victim that he received and examined the victim on 03/05/2019. However, looking at the evidence of PW2 there is no explanation as to why they did not take the victim to the hospital for examination, how sure are we that the bruises observed by PW6 were caused by the appellant. These questions create doubt in the exhibit P1. The evidence was not supposed to be acted upon.

Regarding the second issue on this ground, whether the conviction of the appellant substantively based on the evidence contained in the PF3?

Looking at the judgment from page 5 to 7, it is evident that the trial court did not rely and substantively convict basing on the evidence of the PF3, it substantially relied on oral evidence of PW1 and PW2 and on the case of **Selemani Makumba vs R,** [2006] TLR 384.

Further to that, in the case of **Christopher Kandidus @ Albino vs The Republic,** Criminal Appeal No.394 of 2015, DSM, where the Court of Appeal of Tanzania, was inspired on the decision of the Court of Appeal of Kenya in the case of **Evans Wamalwa Simiyu vs Republic** [2016] eKLR that,

> *"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."*

Also the Court of Appeal of Tanzania, in the case of **Prosper Manjoel Kisa Vs Republic, Criminal App No.73/2003** (unreported) (CAT) it was held *inter alia* that;

> *".....lack of medical evidence does not necessarily in every case have to mean that rape is not established where all other evidence point to the fact that it was committed..."*

From the principle elucidated in the case of **Christopher Kandidus @ Albino vs The Republic,** and **Prosper Manjoel Kisa Vs Republic**, (supra) it is instructive to find that the fact that the evidence in the PF3 has been discredited does not mean that the offence of rape was not committed, the ground therefore lacks merit and it is disallowed.

Regarding the second ground of appeal, which raises a complaint that, the testimonies of PW4 and PW5 were so contradictory to cast an ounce of doubt on prosecution case particularly with regard to bruises alleged by the PW5 to exist on the victims private parts but which PW4 says were absent. The learned State Attorney in her submission made in opposition of appeal, submitted that the ground is imaginary because PW5 only recorded the cautioned statement of the accused while PW4 was a street chairperson who said he witnessed the arrest of accused and that the accused confessed before him, therefore making the evidence of the two witnesses not to be touching the issue of bruises in the private part of the victim.

Looking at the proceedings, I partly differ with what the learned state attorney submitted, the proceedings show that PW4 was a neighbour of the victim and PW2, she immediately responded to the alarm after PW2

had raised the alarm and being a female she was given a task to go and inspect the victim in her private parts. It is true that in her evidence she said upon inspection she found the victim to have scratches and there was evidence that she had already carnally known by a man. However, PW5 did not involve herself in any inspection or examination of the private parts of the victim, he only recorded the cautioned statement of the accused person now the appellant.

In law the evidence of witnesses can contradict each other if those witnesses are giving evidence of the same nature. In this case PW4 and PW5 testified though testified in a single case but testified on two different aspects. Therefore there cannot be contradiction in the evidence they gave, especially in respect of the presence or absence of bruises in the private parts of the victim. This ground also lacks merit, it is disallowed.

With regard to the third ground of appeal, which raises a complaint that, the trial courts analysis and evaluation of evidence is partisan, un balanced and biased against the appellant, whose defence was ignored by the Hon. trial Magistrate. Opposing the said ground the she submitted that, the court evaluated the evidence and had no bias against the appellant. Citing the example on how the evidence was evaluated she said it

considered the defence of impotence advanced by the appellant and concluded that the appellant had the duty to prove the allegation. I have passed through the evidence as reflected in the proceedings, and the judgment as prepared and delivered by the trial court, I am satisfied that, the trial Magistrate evaluated and considered the evidence of both sides. There is no piece of evidence of the defence side which was ignored.

Form the record, the defence was built on two main premises; one, that the case was framed against him by PW2, the father of the victim to prevent the appellant from further demanding his salary which he was supposed to be paid by PW2, therefore the victim being a child, was just instructed by PW2 to give false evidence against the appellant. Two, that, the appellant was impotent, therefore due to that state, could not commit rape. All these defence were considered and the trial court and all were found to have no weight to raise doubt which would dislodge the strong evidence by the prosecution case.

I entirely agree with the trial magistrate that although the law, section 110 read together with section 3(2) (a) of the Evidence Act, [Cap 6 R.E 2019] require as interpreted by the case of **Woodmington Vs DPP**

(1935) AC 462 in which the court did not only talk of the burden, but also the standard of such proof when it held that;

> *"It is the duty of the prosecution side to prove its case and the Standard of proof is beyond all reasonable doubt."*

However, section 112 of the Evidence Act, [Cap 6 R.E 2019] creates an exception to the general rule, which require the prosecution to prove the case to the standard of beyond reasonable doubt. This exception is in the circumstances where there is allegation of the existence of the particular facts, where the person so alleging the existence becomes burdened to so prove. For easy reference the provision provides that;

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person".*

In this case the appellant alleged to be claiming salary from PW2, the father of the victim, and that the case was framed so that PW2 can deprive the appellant his right to salary. That was alleged by the appellant, he was supposed to be proved by him, not beyond reasonable doubt, but to the extent of raising doubt in the evidence presented by the prosecution case.

That was supposed to be indicated in the cross examination of PW2 where he could have indicated that he was claiming the unpaid salary.

In the cross examination he really seemingly indicated, however that meant, that he would give the full details of his defence in his defence, however in his defence, although he said he was claiming his salary he did not say the amount he was claiming, which probably was huge enough which PW2 was unable to pay, thus decided to frame a case against him. His failure to mention an amount he was claiming makes this court to find that the defence he raised was manufactured to exonerate him from criminal liability. Having so said, I find that he failed to discharge the burden under section 112 of the Evidence Act (supra) failure of which justifies the findings of the trial court on the issue.

Further to that, his other evidence was on his impotence, on critical examination of the evidence, I also find the evidence manufactured. I find so because the appellant did not give that defence when he was testifying in chief, but mentioned it when he was cross examined by the learned State Attorney, it means had the state Attorney decided not to cross examination that wouldn't have featured as his defence.

Further to that, it is a principle of law as indicated under section 130(4)(a) that, for the purposes of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence, whether the person is impotent or not, is not material in law, what is important is that, he inserted his penis (whether erect or not), in the vagina of the victim, whether it wholly or partially penetrated.

On this as to whether the victim was penetrated or not, there are three witnesses to prove that, the first is the victim herself, who narrated how she entered in the room which was being used by the appellant to fetch water for washing the house hold utensil, she also told the court how the appellant followed him there and undressed her and put his dudu in her private part while laying on her chest, she also narrated on how she felt pain and cried, while the appellant covering her mouth preventing her from screaming, how she felt pain, how her father, PW2 came in and found them and the attempt of the accused to run away, before he was arrested. The second is PW2, who told the court on how he heard his daughter complaining to be feeling pain while the appellant, pleading her sorry, how he went there and found the appellant on top of the victim red handed having sexual intercourse with her, how he arrested him and how he asked

PW4 to inspect the victim, while PW4 saying how she inspected the victim and found scratches (bruises) and on how she found the accused under arrest. Looking at the nature of the evidence of this case, one would find that, the case would succeed or fail basing on the credibility of the three witnesses. It is a principle in law in the case of **Shija Juma Vs The Republic,** Criminal Appeal No. 383 of 2015. CAT (Bukoba) (Unreporrted), that only a credible and reliable witness can be believed, for their evidence to form a base of the conviction in criminal cases.

That being the case, it means those witnesses who are not credible, their evidence must be disregarded. In law, any witness who is competent to testify deserves to be believed except those who are not credible.

To establish whether a witness is credible or not, there are factors to consider. In my considered view, there is a number of factors which affect the credibility of witnesses, few of them being the followings;

(i) Contradictions, discrepancies and the conflicting statement in the witnesses evidence,

(ii) Failure of the witness to mention the suspect at the earliest opportunity possible,

(iii) To give evidence basing on suspicion,

(iv) Evidence based on hearsay,

(v) Witness testifying as accomplice and

(vi) A witness with interest to serve.

Without the short comings caused by these factors and others certainly not mentioned here, a witness deserves to be believed, if he is competent to testify.

It is also a principle that, a trial judge is better placed to assess the credibility of witnesses as he is in the position to grasp the inconsistencies, to assess the demeanours and the flow of the evidence. See **Goodluck Kyando Vs The Republic,** Criminal Appeal No.118 of 2003 CAT- Mbeya (Unreported).

I have passed through the judgment of the trial court, the evidence of the three witnesses I have mentioned, I find them credible, therefore, the trial magistrate was justified to believe them. It should also be noted under the authority of **Tatizo Juma vrs Republic,** Crim. Appeal No. 10 of 2013,

> *"The best evidence to prove the offence of rape is that of the victim herself..."*

This is also the position in the case of **Selemani Makunge versus Republic,** Criminal Appeal No. 94 of 1999, **Tatizo Juma Vrs Republic,** Crim. Appeal No. 10 of 2013**,** and **Abdalla Mohamed Vrs Republic** Crim. Appeal No. of 2009.

However, where the evidence of the victim is not self-sufficient, that evidence needs some other evidence to corroborate it, as it was decided in **Godi Kasenegala versus Republic,** Criminal Appeal No.10 of 2008 (un-reported) that;

> *"it is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident such as doctors may give corroborative evidence"*

In the case at hand the victim testified as PW1 telling how she was raped by the appellant, PW2 witnessed the appellant raping the victim as he found him red handed doing the act, and PW4 inspected the victim immediately after the incident and found bruises in the vagina of the victim. This means though the evidence of the victim is credible and self sufficient, the same was corroborated by the evidence of PW2 and PW4.

For that reasons therefore the trial court was justified to find that there was enough evidence proving the charge.

It is a principle of law that the prosecution is bound to prove two important elements as directed in the case of **Maliki George Ngendakumana Vs Republic, Criminal Appeal No. 353 of 2014 (CAT) BUKOBA (unreported)** which held *inter alia* that:-

> *"...it is the principal of law that in criminal cases, the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it is the accused person who committed it"*

In the case of **Magendo Paul and Another Vs Republic** [1993] T.L.R 219 (CAT), it was held *inter alia* that,

> *"...for a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed"*

In the case of **Chandrankat Jushubhai Patel Vs Republic Crim App No 13 of 1998 (CAT DSM)** it was held that;

> *"...remote possibility in favour of the accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of criminal justice if they were permitted to displace sold evidence or dislodge irresistible inferences"*

On the strength of the reasons and authority above, it is my finding that the case before the trial court was proved beyond reasonable doubt. I find no possibility in the favour of the appellant. However, if it was there and by chance escaped the attention of the trial court, and has managed to escape my attention as well, that must be very remote and incapable of displacing strong evidence against the appellant therefore amenable to be ignored. That said, I find the entire appeal to be wanting in merits and the same has to fail. I therefore dismiss the appeal for the reasons given herein above.

Before finalising this judgment, let me discuss the issue posed by the learned State Attorney for the respondent that the appellant was supposed to be sentenced to life imprisonment instead of 30 years in jail. In responding to this the appellant said he did not commit any offence therefore he deserved no any punishment at all. In considering this issue I will be guided by the principle in the case of **Seleman Makumba vs Republic** [2006] TLR 379 that the High Court has powers to interfere with the sentence of the trial court where the sentence is manifestly excessive or inadequate or where the trial court acted on a wrong principle or took into account irrelevant matters. Now the issue is whether the sentence

meted out by the trial court against the appellant was manifestly inadequate or excessive or the trial court acted on a wrong principle or took into account irrelevant matters?

The offence, for which the appellant was convicted, has its sentence prescribed by the law upon which the appellant was convicted, that is section 131(3) of the Penal Code [Cap. 16 R.E 2019] which provide that;

> *"(3) Notwithstanding the preceding provisions of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment".*

In this case the victim was proved to be eight years old, that age was proved by her father PW2 and the victim herself when she was testifying. That fact stands undisputed and therefore it is deemed to be proved. Being the eight years old, then the sentence was falling under subsection (3) quoted above. That being the case then, imposing another sentence is which is 30 years imprisonment is illegal and therefore manifestly inadequate the facts which warrant this court to interfere with the imposed sentence. Having so found I find that the trial Magistrate misdirected himself for sentencing the appellant 30 years jail imprisonment, I

therefore, under section 30 of the Magistrates' Courts Act, [Cap 11 R.E 2019] revise the sentence and substitute the sentence of 30 years imprisonment and enhance it to life imprisonment as prescribed by section 131(3) of the Penal Code (supra).

It is so ordered.

DATED at **MWANZA** this 10th day of May, 2021

J.C. Tiganga

Judge

Judgment delivered in the presence of the appellant on line via audio confrence and Miss Mbuya learned Senior State Attorney for the respondent. Right of Appeal explained and guaranteed.

J.C. TIGANGA

JUDGE

10/05/2021