IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 154 OF 2020

(Originating from the judgment of the District Court of Geita in Criminal Case No. 122 of 2020,)

OMARI AMANZI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

19th April & 17th May, 2021.

TIGANGA, J.

The appellant herein, Omari Amanzi, stood charged before the District Court of Geita with an offence of rape contrary section 130 (1)(2)(e) and 131(1) of the Penal Code [Cap 16 R.E 2019] and impregnating a school girl contrary to section 60A(3) of the Education Act [Cap 353 R.E 2002] as amended by section 22 of the Miscellaneous Amendments Act No. 2 of 2016.

The particulars of the offence were that on diverse dates and time between July 2019 and 2nd day of February 2020, at Nyankumbu area

within Geita District and Region, the accused person, now appellant, did have carnal knowledge of and impregnated one **C d/o E**, (names in initials) a standard VII pupil of Nyankumbu Primary school a girl aged 16 years old.

After full trial before the trial court, the appellant was found guilty and convicted as charged in the first count, and was consequently sentenced to the mandatory sentence of 30 years jail imprisonment, but he was acquitted in the second count of impregnating a school girl.

I wish to narrate, albeit briefly, the background facts leading to the appellant's arrest and arraignment as featured in the prosecution's case with a view to appreciating the appeal before me. Between July 2019 and 2nd day of February 2020, the appellant had sexual intercourse of the victim, a girl aged 16 years old a pupil of standard VII of Nyankumbu Primary Court as a result he impregnated her. The ordeal started in July 2019 when the appellant seduced the victim and promised to marry her before he took her to his friend's room where they had sexual intercourse and thereafter he gave her "ubuyu". Their so called love relationship did not end there, they had sex for the second time when the victim was given Tshs. 5,000/= and the third and last time was in August, 2019 when they

used the same room of the accused's friend to have sex and on this day she was given 8,000/= which she used to buy skirt.

The matter were not put to light immediately, it came to be known after the victim had missed her period which was a sign of pregnancy which condition alerted the victim's mother, PW2, who upon asking the victim of her condition, the victim denied to be pregnant. It was after the mother had insisted when the victim admitted to be pregnant.

Thereafter the matter was reported to police station, where the victim was given a PF3 and taken to Geita Hospital where she was examined by PW3, and found to have no hymen and to be seven months pregnant. When she was asked, who was responsible, she mentioned the accused person, now the appellant. Following that mention, the appellant was arrested, interrogated and in the cautioned statement which was recorded by PW4, the appellant admitted to have raped the victim and impregnated her.

Following that finding of PW3, the victim who was by then a standard seven leaver who passed the standard seven exams and was selected to join Kivukoni Secondary School, did not join the said secondary school as proved by PW5, the Headmistress of the said secondary school.

The appellant disputed to have committed the two offences but that when he was interrogated he admitted and signed the said cautioned statement because he was tortured by the police.

As earlier on pointed out, the appellant was convicted in the first count, but acquitted in the second count. Following that verdict, the appellant was aggrieved by the conviction and sentence meted out against him, he has now come to this Court filing ten grounds of appeal to vindicate his innocence, as follows;

i) That, the appellant was convicted in the absence of any cogent, credible, and tangible evidence to prove that, when and where the appellant raped the victim.

ii) That, the trial Magistrate erred in law and fact to attach much weight of the evidence of PW1 whose evidence was not concrete, substantial and water tight to implicate the appellant on conviction, sic

iii) That, the appellants cautioned statement exhibits P3 endemically and procedurally was acted wrong by the trial court on basing on the appellant's, sic

iv) That, without prejudice with the ground number three above the appellant's cautioned statement was not meet the threshold

set of the law and if the appellant was a free agent in recording that cautioned statement why did he not go to the justice of the peace, sic.

v) That, the weak evidence from the prosecution which failed to prove the second appellant's offence was required to be used to acquit the appellant in the offence of rape.

vi) That, the evidence of PW2, PW3, and PW5 was hearsay evidence which cannot put the appellant in the conviction also the documentary evidence i.e P1, P4 and P5 were not link the appellant as the one who raped the appellant.

vii) That, in the absence of sufficient and scientific evidence of DNA profile examination report, it is hardly impossible to link the appellant with the victims hymen as per evidence of PW3 Rashid Rugunisha whose exhibit P2 lacks in the authenticated to prove that offence.

viii) That, the evidence against the appellant given by PW2 was cooked up, lacks support corroborative which should not be considered and not be trusted in court, sic

ix) That, the prosecution witnesses failed to prove the case against the appellant without reasonable doubt.

x) That, the defence of the appellant was proper straight and strong enough which was required to be considered by the trial magistrate as defence of alibi also the admitted offence by appellant was due to the fact that he was beaten by police and forced to confess.

In consequence thereof, the appellant prays this appeal to be allowed the conviction passed by the trial court to be quashed and its sentence be set aside and appellant be released from custody.

When this appeal was called for hearing, the appellant appeared in person through audio teleconference, while the respondent was represented by 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 to the ground 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.

In her submission in opposition of appeal, she argued one ground after the other. Submitting on the first ground of appeal, which in essence raises the complaint that the appellant was convicted without sufficient evidence, he prayed to submit that the ground has no merit because the victim PW1 stated in her evidence at page 4 of the typed proceedings, that she was having sexual intercourse with the appellant after being seduced and promised to be married. She cited the case of **Seleman Makumba vs The Republic**, [2006] T.L.R 350 where a principle was made that the evidence of the victim is the best evidence in rape cases. She therefore submitted that, the evidence was cogent and sufficient to found the conviction.

Regarding the second ground of appeal which raises the complaint that the trial Magistrate erred to attach much weight of the evidence of PW1 whose evidence was not concrete, substantial and watertight to implicate the appellant and found a conviction, she submitted that there was proof that the victim was born 2004 and at the time when the offence was committed she was under 18 years, therefore she could not in law have consented the sexual intercourse.

Submitting in opposition of the third ground of appeal, which raises the complaint that, the cautioned statement was improperly admitted and

acted upon, he submit that there is no error committed by the trial court in admitting it, and at page 13 of the proceedings the same was admitted without any objection from the appellant. He said after the statement was admitted, it was read loud in court therefore there is no error committed in admitting the said cautioned statement.

Submitting in opposition of the fourth ground, which raised the complaint that the appellant's cautioned statement, did not meet the threshold set by the law as there was no proof if the appellant was a free agent in recording that cautioned statement and no reason why he did not take him to the justice of the peace. The counsel submitted that, there is no legal requirement that, every person who confesses must be taken to the justice of the peace even if he does not personally request. She said the ground has no merits.

Arguing in opposition of the fifth ground of appeal, that the case was proved beyond reasonable doubt, she said according to the authority cited by the trial Magistrate, the offence of impregnating a school girl is proved by scientific evidence specifically the DNA tests which requirement is also provided under the Law of Child Act, she submitted that, the offence of rape is distinct from the offence of impregnating a school girl with different

ingredients of the offence. Therefore the fact that he was acquitted in the 2nd count does not mean that he did not commit the first offence of rape.

Arguing in opposition of the sixth ground of appeal which raises a complaint that, the evidence of PW2, PW3 and PW5 together with exhibit P1, P4 and P5 did not connect the accused with the commission of the offence of rape, she submitted that the best evidence in rape cases is from the victim and her mother, PW2 who proved the age of the victim, the evidence of PW3 proved that the victim was raped, while PW5 proved that she was a school girl, she therefore submitted that the evidence given connected the appellant with the offence.

Regarding the seventh ground of appeal, which raises the complaint that in the absence of the DNA test there is no way the appellant could be connected with the offence he was charged with, she submitted that, the DNA test is not one of the requirement of proving rape cases.

Regarding the eighth and ninth ground of appeal, which raises common complaint that the evidence against the appellant given by PW2 was cooked up lacks support corroborative which when considered along with other evidence, could not have been trusted by the court to bring home the cumulative effect that the prosecution witnesses proved the case

against the appellant beyond reasonable doubt. She submitted that, there is no evidence to prove that the evidence was framed. She further said that, the evidence against the appellant is direct and proved the case beyond reasonable doubt.

Regarding the tenth ground of appeal which raises the complaint that, he was not present when the offence was committed and that the admission of the offence was due to the fact that he was beaten by police and forced to confess were required to be considered by the trial magistrate. The learned State Attorney submitted that, the appellant did not object the admission of the cautioned statement when it was being tendered and admitted. Regarding the allegations of torture, she said there is no evidence that the appellant was tortured, she submitted further that, the victim said she was carnally known in July and August, 2019. The alibi that he was not at Geita was not proved as required.

In rejoinder, the appellant submitted that he did not commit the offence he was charged with, he prayed the conviction to be quashed and sentence passed against him to be set aside.

Now having summarised the record and the submissions made in support and opposition of appeal, and substantially studied one ground

after the other, I find the 1st, 2nd, 5th, 8th, and 9th, grounds of appeal to be raising common complaint as to whether the evidence given by the prosecution was water tight to warrant the findings that the offence of rape has been proved at the required standard, and the evidence could be relied upon to found a conviction against the appellant? The 3rd and 4th grounds of appeal also raise the complaint against the evidence as contained in the evidence of PF3. For that reason, I will discuss and resolve these five grounds i.e 1st, 2nd, 5th, 8th, and 9th, together, while the 3rd and 4th grounds will also be argued together, and the rest of the grounds will be argued one after the other in the manner they were argued by the parties.

As earlier on pointed out, the first issue which is framed out of the 1st, 2nd, 5th, 8th, and 9th, grounds of appeal is whether the evidence given by the prosecution was water tight to warrant the findings that the offence of rape has been proved at the required standard, and the evidence could be relied upon to found a conviction against the appellant?

The appellant was convicted of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 R.E 2019] which for easy reference the relevant provision is hereby reproduced.

"(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

This provision has been interpreted in the case **Wiston Obeid vs The Republic,** Criminal Appeal No. 23 of 2016 CAT- Bukoba, which quoted with approval the authority in the case of **Solomoni Mazala vs The Republic**, Criminal Appeal No. 136 of 2012 CAT-Dodoma and **Andrea Francis vs The Republic,** Criminal Appeal 173 of 2014, in which it was held that, in statutory rape, the republic needs to prove three ingredients, **one,** that the age of the victims is under 18 years, **two,** that the accused had sexual intercourse with the victim, by proving penetration, **three,** that having proved the age of the victim to be bellow 18 years, it becomes immaterial as to whether the victim consented or not.

From the beginning, the age of the victim was not in dispute, it was sufficiently proved by PW2 first, by her oral evidence, and secondly by affidavit of birth of the victim, exhibit P1. From that evidence the trial Court

was justified to believe the evidence of prosecution regarding the age that she was below 18 years.

Regarding the issue whether the appellant had sexual intercourse with the victim or not, as earlier on pointed out, this fact did not come to light immediately after the rape, it came to be known after the victim's pregnancy was noticed. It was when the victim told her mother PW2 that it was the appellant who had sexual intercourse with her and impregnated her. The evidence of PW3 proved the victim to have no hymen and to be pregnant and that the findings meant that the victim was carnally known by a man, which means she was penetrated. Now the issue remains, who penetrated her? This issue is built in the philosophy in the principle enunciated in the case of **Maliki George Ngendakumana Vs The 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"*

The fact that the offence of rape was committed has been proved by the evidence of PW1, PW2 and PW3, the second component of who committed the offence was built in the evidence of the victim, PW1, who

told all other witness the person who had sexual intercourse with her. In her sworn evidence she narrated how the accused seduced her, how they went to the house of the appellant's friend and had sex on the promise that he would marry her and that she was being given money all the time she had sex with the appellant, mentioning "Ubuyu" on the first occasion, Tshs. 5,000/ on the second occasion and 8,000/= on the third occasion.

She also told the court on how she missed her period the fact which signified that she was pregnant. The trial court believed her and relying on the authority in the case of **Selemani Makumba vs The Republic**, [2006] TLR 379 that the best evidence in rape cases is that of the victim of the offence, it found the appellant guilty and convicted him as charged in the first count of rape.

That depicts a true position of the law, however, that position stands where the evidence of the victim is self-sufficient and free from any doubt. It is the law that where the evidence of the victim is not self-sufficient, that evidence needs some other corroborating evidence, as it was decided in the **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 this case, the evidence of the victim on who had sexual intercourse with her is clear, credible and reliable, as there is no reasons given as to the possibility of the victim framing the case against the accused person and mention him as the person who had sexual intercourse with her. For that reasons and basing on the evidence, the trial court was justified to find that the evidence proved that the appellant was the one who raped the victim.

The 3rd and 4th grounds of appeal, raises the complaint that the cautioned statement, i.e exhibits P3, did not meet the threshold set by the law, as it is doubtful as to whether the appellant was a free agent when recorded the cautioned statement, that is why he was not taken to the justice of the peace. The other complaint was that, even if we agree that it met the threshold and was freely recorded, it was endemically and procedurally was wrongly acted upon by the trial court.

In respect of these grounds, the learned State Attorney submitted that, the cautioned statement was recorded in accordance to the procedure

and met the standard prescribed by law. She further submitted that, there is no legal requirement that every person who admits or confess the commission of the offence must be taken to the justice of the peace, even if he does not personally request. According to her, there is no error committed by the trial court in admitting the exhibit P3, as at page 13 of the proceedings, the cautioned statement was admitted without any objection from the appellant and that after admission, and the same was read loud in court therefore there is no error committed in admitting the said cautioned statement.

It is true that from its anatomy, exhibit P3 was surely recorded in compliance with the law that is section 57 of the Criminal Procedure Act [Cap 20 R.E 2019], it contains the personal information which could not be known by the police who recorded it, without being told by the appellant.

Further more, it is a fact that, when the same was being tendered for admission, the appellant not only that he did not object but also did not ask any question during cross examination suggesting that he was tortured at the time when the cautioned statement was recorded or gave it under any type of undue influence.

The defence of torture ensued during his defence when he just said that he admitted to commit the two offences because he was beaten by the police on his legs, he did not say what is false and what is true in the whole statement, what he just said is that, he did not at all know the victim. Looking at the content of the statement and the way it was admitted, it goes without saying that the trial court was justified to hold that the cautioned statement was properly recorded and admitted.

Besides, close examination of the judgment of the trial court, shows that, the court did not much capitalize on the evidence of confession, it mostly relied on other type of evidence especially the testimony of the victim and other witnesses to found the conviction against the appellant. That said, I find the 3rd and 4th grounds of appeal to have no merits, they are dismissed.

Regarding the sixth ground of appeal which raises the complaint that, the evidence of PW2, PW3, and PW5 was hearsay evidence which cannot put the appellant in the conviction also the documentary evidence i.e P1, P4 and P5 did not link the appellant as the one who raped the victim. On this I entirely agree with the submission of the learned State Attorney that in rape cases the best evidence is from the victim who told the court the person who had sexual intercourse with her, and her mother

PW2 who proved the age of the victim. Although there are some elements of truth that, the evidence PW3 and PW5 did not directly link the appellant with the rape of the victim. However, the evidence of PW3 proved that the victim was raped, while PW5 proved that she was a school girl, she therefore submitted that, the evidence given connected the appellant with the offence. All these are corroborative evidence of the testimony of the victim, therefore through her evidence, the appellant is well linked with the commission of the offence.

Regarding the seventh ground of appeal, which insist of scientific evidence of DNA profile examination report to prove the offence of rape, and that it is hardly impossible to link the appellant with the victim's hymen as per evidence of PW3 Rashid Rugnisha and exhibit P2. On this, I entirely agree with the argument by the learned State Attorney that, the DNA test is not one of the requirements of proving rape cases.

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 The Republic**, (supra) it is instructive to find that the fact that, there is no DNA profiling does not mean that the offence of rape was not committed, where there is enough and reliable evidence from the victim. This ground also lacks merit and it is disallowed.

Regarding the tenth ground of appeal, which raises a complaint that the defence of *alibi* and torture raised by the appellant were not considered, regarding the allegations of torture, I adopt what I have decided when I was dealing with the 3rd and 4th grounds, while regarding the defence of *alibi*. Looking at the judgment, I find that, the trial court

considered the defence of *alibi* raised by the appellant and properly rejected.

The defence of *alibi* is provided under section 194 (4) of the Criminal Procedure Act (supra) which provides that;

> *"Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case".*

Under sub section (5)

> *"If he fails to give such a notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed".*

These provisions have been interpreted in the case of **Hamis Bakari Lambani vs The Republic,** Criminal Appeal No. 108 of 2012,

> *"First, the law requires a person who intends to rely on the defence of alibi to give notice of that intention before the hearing of the case, section 194(4) of the Criminal Procedure Act, Cap 20. If the said notice cannot be given at that early stage, the said person is under obligation, then, under subsection 5, to furnish the prosecution with the particulars of alibi at any time before the prosecutions closes its case. Should*

the accused person raise the alibi much later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence, section 194 (6)."

On the subject, I have been inspired by the persuasive decision in the case of **Kibale vs Uganda,** (1999) ERL volume I (EA) 148, in which it was held *inter alia* that;

"A genuine alibi is expected to be revealed to the police investigating the case or to the prosecution before the trial on hearing. Only when it is so done, can the police or the prosecution have opportunity to verify the alibi. An alibi set up for the first time at the trial of the accused person is more likely to be an afterthought other than a genuine one."

Ordinarily the principle governing the defence of *alibi* was designed to enhance the rule of disclosure. It intended to disclose the defence to the investigator and the prosecutor, to investigate the truthfulness of the defence and take appropriate action or prepare to counter it. Failure so to give notice at the appropriate stage denies the prosecution the opportunity to prepare to challenge it.

That being the intention of the law, the court has been given the discretion under section 194 (6) of the CPA (supra) after considering the

defence of *alibi* raised without having first furnished the court and prosecution with notice and particulars of alibi respectively, pursuant to section 194, to accord no weight of any kind to the defence.

Having raised the defence of alibi, the accused person was expected to prove it by evidence. Failure to do so, leaves a defence weak and un believable as held in the case of **Chrisant John vs The Republic,** Criminal Appeal No 313/2015 CAT - Bukoba (unreported) and **Masound Amlima vs The Republic**, (1989) TLR 25.

For that reason, I find that the alibi raised by the accused person has not been proved for the reasons that, **first**, it was given contrary to section 194(4) and (5) of the Criminal Procedure Act, (supra). Moreover, the appellant failed prove it by evidence even of a bus ticket which he used to travel to Geita from Dar es Salaam on the date he alleges to travel.

Having considered all these factors and the strength of the evidence given, I find the raised defence of *alibi* to be weak; I find that the trial court was justified to reject it in terms of section 194(6) of the Criminal Procedure Act [Cap 20 R.E. 2019]. That said the 10th ground of appeal has also no merit, it is dismissed.

Under sections 3(2)(a) and 110 requires the accused to be convicted only when the prosecution had proved the case beyond reasonable doubt.

The term beyond reasonable doubt has been defined in the case of **Magendo Paul and Another Vs Republic** [1993] T.L.R 219 (CAT), in which 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 findings 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 possibility must be very remote and in

capable of displacing strong evidence against the appellant therefore amenable to be ignored. That said, I find entire appeal to be wanting in merits and the same has to fail. I therefore dismiss the appeal for the reasons given herein above the conviction and sentence passed by the trial court are up held.

It is so ordered.

DATED at **MWANZA** this 17th day of May, 2021

J.C. Tiganga

Judge

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

J.C. TIGANGA

JUDGE

17/05/2021