IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MUSMA)

AT MUSOMA

CRIMINAL APPEAL NO. 02 OF 2021

(Original Criminal Case No. 55 of 2020 of the District Court of Tarime District at Tarime)

MINYA MASOLWA MINYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

30/6/2021 & 23/7/2021

MKASIMONGWA, J

This appeal challenges both Conviction and Sentence of thirty (30) years Imprisonment imposed on Minya Masolwa Minya (Appellant) in Criminal Case No. 55 of 2020 of Tarime District Court where the Appellant was charged with and convicted of Rape Contrary to Sections 130 (1), (2) (c) and 131 (1) of the Penal Code [Cap 16 R. E 2002]. In the Petition of Appeal filed the Appellant listed seven grounds, all of which point out weaknesses in the evidence relied on by the trial Court in reaching at its findings.

What constituted the prosecution case was that stated in evidence by the victim (identified as **ABC**), Selina Robert, Hamis Marwa Nyamatoha and Masiaga Joseph Chacha, (PW1), (PW2), (PW3) and (PW4) respectively, that: **ABC** (PW1) is 13 years old. On 6/1/2020 in the evening when she was in her way back home from a Milling Machine, PW1 met with the Appellant to whom she refused his call. Again as she was on her way to fetch some charcoal as she was sent for by his sister one Maria, PW1 met with the Appellant for second time. This time the later caught and took **ABC** to his home place threatening to cut her by a machete he was in possession of if she raised any alarm. At the home the Appellant stripped off her clothes as he also undressed himself and started to penetrate his male organ into hers. As he was so doing somebody pushed the door. It was Selina Robert (PW2) the ABS's mother who went there accompanied by Hamis Marwa Nyamatoha (PW3), among others, on being informed by Maria who was crying that the Appellant took **ABC** into his room. Before pushing the door, PW2 heard PW1 crying inside the home and when she entered inside, PW2 lit her Mobile Phone torch and saw the Appellant on the bed lying on his back and PW1 standing on at a Conner dressed. She held the Appellant on his neck. The Appellant however did successfully

escape through a window as someone had locked the door from outside. The incidence was reported to the Street Chairman who referred it to the Police Station where the victim was issued with a PF3 for Medical Examination. Eventually **ABC** (PW1) came to Tarime Government Hospital where she was received and attended by PW4. Upon conducting a clinical examination, PW4 found that PW1 was penetrated on her female organ. She was neither pregnant nor infected with any of the sexual transmission diseases. A high vaginal cervical examination was also conducted and PW4 found sperms on the cervix which evidenced penis penetration on her. PW4 reported of his observations vide the PF3 which he tendered to the Court as Exhibit and admitted in evidence marked as **Exhibit P1**.

Based on the above evidence the trial Court was satisfied that **ABC** was 13yrs old and she had the best evidence in proving penetration and that considering the age of the victim consent, if any, was immaterial. As such the Court found the Appellant guilty and it convicted him of the offence as charged and sentenced as foreshown.

On the date the appeal was placed for hearing before me, the Appellant appeared in person whereas Ms. Agma Haule, learned State Attorney, appeared on behalf of the respondent Republic. When the

Appellant was invited by the Court to argue his case, he stated that in the appeal he has seven grounds from which he challenges both the conviction and sentence imposed by the trial Court. He prayed the Court that it considers the grounds and ultimately find that he was wrongly convicted of the offence. As such the conviction should be quashed and sentence set aside and that an order should be given that he be released from jail.

On the other hand, Ms. Haule (SA) resisted the Appeal. She instead supported both conviction and sentence imposed against the Appellant by the Court below. The learned counsel contended that, in a case involving the offence the Appellant was charged with, the prosecution has to prove that the victim was under 18 years of age and that there was penetration of the accused's male organ into that of the victim.

As regard to the age of the victim Ms. Haule contended that the age of the victim was not disputed. She added that since the victim appeared in Court and testified in accordance to the requirements of the provisions of Section 127 of the Evidence Act [Cap 6 R.E 2019] her testimony as to the age that she was a child was true. She cemented the contention by citing the decision in the case of **Masalu Kayeye v. R:** Criminal Appeal No. 120 of 2017, CAT. Mwanza (unreported) at page 14.

As far as the penetration element of the offence is concerned, Ms. Haule stated that the same was proved by the testimony of the victim, **(ABC)** and supported by that of PW2, PW3 and PW4. This is despite the fact that in terms of Section 127 (6) of the Evidence Act [Cap 6 R.E 2019] corroboration of the evidence was not a necessary requirement as it was stated in the case of **Selemani Makumba v. R** (2006) TLR. 319 that in sexual offences, the evidence of the victim is the best one.

In her submission Ms. Haule (SA) stated further that in the appeal the Appellant also faults the judgment of the trial Court on ground that there in the case was no evidence adduced proving if the appellant was properly identified by the witnesses there at the scene of crime. She admits that indeed going by the guidelines for a proper identification of the accused as narrated in the case of **Waziri Amani v. R** (1980) TLR 250, the identification of accused at the scene of crime in the case at hand was doubtful. She submitted that an issue regarding identification of the accused at the scene of crime should be decided according to the prevailing circumstances of each case as it was held in the case of **Makame Simon v. R:** Criminal Appeal No. 412 of 2017 CAT (unreported) at pages 12 – 14. In this case, the accused did not put any question during

cross examination challenging the evidence on identification of the accused. This evidences an admission by the Appellant that the evidence adduced by the witnesses was nothing but the truth as it was held in the case of **Martin Misara v. R:** Criminal Appeal No. 428 of 2016, CAT at Mbeya, (Unreported) pages 7 and 8. Here there is ample Evidence that PW1 well knew the Appellant and that on the material day she met with him prior to the material time. As regards to the extent of the light there at the scene of crime, the learned State Attorney referred the Court to the decision of the Court of Appeal of Tanzania in the case of **Abdallah Rajabu Waziri v. R:** Criminal Appeal No. 116 of 2004 at Tanga (Unreported) at page 10 where the Court was of the view that even the match box light can be enough to enable one properly identify a suspect. In the light of the above, Ms. Haule submitted that in the case at hand the appellant was properly identified at the scene of crime, and nothing suggests that the case against the Appellant was just a fabrication.

In respect of the fifth ground of appeal, The learned State Attorney argued further that the Appellant challenges the decision of the trial complaining that it was based on the hearsay evidence adduced by PW2 and PW3. Ms. Haule said that going by the testimony of PW3, the later was

there at the scene of crime. He saw the victim getting outside of the Appellant's room together with PW2. In evidence PW4 gave an expert opinion. The two witnesses therefore did not have the hearsay evidence which fact defeats the ground of appeal hence deserves a dismissal.

In arguing the Sixth ground of Appeal Ms. Haule adopted her earlier submission that PW1 had the best evidence in the matter. She added that going by the decision in the case of **Masalu Kayey**e (supra) and **Goodluck Kyando v. R** (2006) TLR, 362, it is the trial Court which is better placed and entitled to determine on the witnesses' credibility and that every witness is entitled to be believed unless there are reasons driving the Court to find otherwise. The State Counsel, concluded by praying the Court that it finds no merit in the appeal and the same should be dismissed in its entirety.

The Appellant upon being invited to submit by way of rejoinder had nothing material to state and that marked the end of the submission.

I have considered the submissions above as well as the evidence on record. As shown above, the Appellant stood charged with and convicted

an offence under Section 130 (1), (2) (c) of the Penal Code. The Section reads that:

> *"130.-(1) It is an offence for a male person to rape a girl or a woman.*
>
> *(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*
>
> *(a) ...*
> *(b) ...*
> *(c) ...*
> *(d) ...*
> *(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"*

As pointed out by the leaned State Attorney, where one is charged with an offence under the above provision of law, the prosecution has to prove that, the victim was at the time of rape under 18 years of age and that there was penetration. As to the age of the victim, in the case at hand, **ABC** was silent in her testimony to the Court. PW2 was recorded stating

that *"My daughter is 13 years old".* The record is clear that the Accused did not contradict that statement in the evidence of PW2. This meant that he was admitting that what PW2 had told the Court as regards to the age of the victim was nothing but the truth.

Secondly, the record shows that on 12/5/2020, the trial Court conducted an Preliminary Hearing, following the hearing it was recorded as an undisputed fact that. ***"... the victim in this case is ABC, a student 13 years, Kurya, a resident of Makire Street".*** Under the law the Preliminary Hearing was conducted by virtue of the provisions of Section 192 of the Criminal Procedure Act [Cap 20 R.E 2019]. Subsection (4) of the section reads as follows:

> *"(4) Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved; save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved."*

I have considered the proceedings, before the trial Court as the victim's age was not disputed during the Preliminary Hearing and it was recorded as undisputed fact, the Court below was right where it directed not (though there was evidence led by the prosecution as to the age of the victim) that the age of the victim be formerly proved. It is certain that at the time of the alleged offence PW1 was 13 years old. In the circumstances, the Appellant could not even defend himself that **ABC** was his wife not seperated from him.

The second issue is whether the accused did carnal knowledge of the victim in that, there was penetration. Indeed going by the decision in the case of **Selemani Makumba v. R** (2006) TLR. 319, the best evidence in sexual offences is that of the victim. In the case at hand it remains therefore that it is the testimony of **ABC** (PW1) which is the best one. In evidence PW1 was heard stating that:

> *"We went together and entered into his bedroom he told me to put off my clothes, I refused. He forced me and undressed me by force. He also undressed himself. Then he started penetrating my vagina using his penis. While doing that shortly I heard someone pushing the door. Then my mother came in".*

I have considered this evidence and that of PW4 who in terms of the PF 3 **(Exhibits P1)** reported that he found the victims hymen not intact the fact which evidenced penetration. He also found her with discharges from the genital region whitish in nature. Blood/Urine. He remarked that there is evidence of penetration. I have again, considered the testimony of PW1 along with that of PW2 which goes as follows:

> *"We went to Minya's place I lighted my Mobile phone torch. At the door I heard my daughter crying. I pushed the door, and entered inside while raising alarm. I lighted the torch of my phone and saw Minya lying on bed facing upward ... I found Minya sleeping facing upward, while my daughter ABC was dressed standing on the corners. Minya was dressed too".*

I lean from these testimonies that:

1. In the room going by the testimony of PW1 the appellant and **ABC** were all naked
2. When the appellant was starting penetrating his penis on PW1's vagina the door was pushed by PW2.
3. Upon entering into the room PW3 found the Appellant and the victim **ABC** all being well dressed, and that whereas the Appellant was on his bed, PW1 was standing at the room's Conner.

4. The victim ABC had no intact layman and had sperms discharged from her vagina.

The observation above, leave the Court with the following questions.

1. Whether the victim's hymen was raptured on that same day to have it be not intact or on the other day.
2. If the appellant and the victim were all naked and since, PW2 entered into the room in an ambush manner at what opportune, they had all properly dressed and separated from the bed.
3. If, according to PW1 when the Appellant was starting penetrating his male organ into that of PW1, PW2 suddenly pushed opening the door, whether had the appellant ejaculated to leave PW1 with sperms alleged to have been found by PW4.

With the above questions in mind one may reasonably find that the testimony of PW4 **(Exhibit P1)** does not support the oral evidence of PW1. Indeed, we may leave the testimony of PW4 aside and hold that even the slightest penetration suffices rape; the first and second questions above remain not answered. PW1 did not tell the Court whether or not it was her first time to have sexual intercourse with a man/boy. Secondly the

fact that, it was practicable for two persons having sexual intercourse while fully naked in the ambushed manner as it was in this case could within no time properly dress and separate in the way the appellant and PW1 were met in the room by PW2. This leaves the Court with no certain affirmative answer to the question whether there was actually sexual intercourse on that date, place and time, between PW1 and the Appellant.

In event, I find the prosecution did not prove the charges against the Appellant beyond doubt. It was therefore, not proper when the trial Court convicted and sentenced the Appellant as it did. Accordingly, I quash the conviction and set aside the sentence and order that the Appellant be released immediately from prison if he is not otherwise lawfully therein. The appeal is allowed in its entirety.

DATED at **MUSOMA** this 23rd of July, 2021.

THE HIGH COURT OF TANZANIA
MUSOMA

E. J. Mkasimongwa
JUDGE
23/7/2021