IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 49 OF 2020

(Originating from Tabora Resident Magistrate Court in Criminal Case No. 54 of 2019)

ISAYA S/O ATHANAS .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date: 14/06/2021- 30/07/2021

BAHATI, J.:

This appeal originates from the District Court of Tabora at Tabora, where the appellant, **ISAYA S/O ATHANAS** was arraigned and found guilty of the offence of rape. The charge sheet indicated that the offence of Rape was **contrary to Section 130 (1) (2)(e) and 131 (3) of the Penal Code, Cap 16 [R.E 2019]** and sentenced to serve life imprisonment.

Aggrieved, the appellant paraded four grounds against the conviction and sentence, that:-

1. *The case for the prosecution was not proved beyond reasonable doubt as required by the law.*

2. *The general value of the case for the prosecution as put by PW1 (the victim herself), PW2 (the mother), and PW3 (the doctor) and carried further by the appellant, was of sexual molestation and not statutory rape.*
3. *That until at the closure of the case for the prosecution, the charge preferred against the appellant and another namely Rape contrary to Section 130 (1) (2) (e) and 131 (3) of the Penal Code, Cap. 16 [R.E. 2019] was contradictory given the number of male persons charged and the requirements of the section of the law preferred. In the alternative and without prejudice to the foreground of complaints the appellant contends.*
4. *That the defence evidence of the appellant was not considered on its own merits by the learned trial magistrate when composing the judgment.*

The brief facts of the case as gleaned from the record states that the victim was a girl child aged 5 years. It was alleged that on different dates between January and April, 2019 at Cheyo B area Ward within the Municipal and Region of Tabora, the appellant did have carnal knowledge of a girl name withheld for dignity purposes. PW1, the victim promised to tell the truth and testified to the effect that she knows Isaya Athanas, 1st accused who used to work at their home as a house boy in the same house and living there. She went on narrating

that the accused used to enter his finger at her vagina and anus and he also sometimes entered his penis at her vagina and anus and used to do these so many times. She later pointed to the second accused in dork and said that one was never involved in raping her, but the first accused person.

PW2, mother testified to the court that on 27 April, 2019 her son Christopher told her that at the shop *"wanamchokonoa"* Salome at her vagina and anus so she went there and arrested them, and when questioned; the victim mentioned Isaya Athanas to be the one who sodomized her. PW2 then went to the police and was given PF3 then went to Kitete hospital where PW3, a doctor at Kitete examined the victim and found that the victim had no hymen and seems to have been penetrated many times.

PW4, G 5869 D/C Meshack submitted that on 28/4/2019 he investigated the case of Isaya S/O Athanas and Noel S/O Gerald suspected to rape a girl of five years, he then interrogated different witnesses, later he recorded the caution statement of Isaya Athanas who admitted everything on how he raped that victim and sodomized her. The trial court was therefore convinced that the charge was proved beyond reasonable doubt, convicted the appellant on rape contrary to

section 130(1) (2)(e)and 131(3) of the Penal Code, Cap.16, and sentenced him accordingly.

During the hearing of this appeal, the respondent was self-represented while Mr. Kajiru Miraji, Senior State Attorney appeared for the Respondent.

In his submission, the appellant prayed to this court to adopt the grounds of appeal to form an integral part of his submissions.

Responding thereto, the State Attorney submitted collectively. He contended that the evidence given by the witness had weight that touches the appellant directly. He submitted that in rape cases, the best evidence comes from the victim. He further explained that the victim has clearly stated how the appellant raped her. She testified that she knows Isaya Athanas, as he works at their home as a chicken feeder. She testified that he used to enter his fingers at her vagina and anus many times.

To support his argument the State Attorney cited the case of **Seleman Makumba Vs Republic [2006] TLR 379 at pg 384** that;

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in any case of any other woman where consent is irrelevant, that there was penetration."*

He also submitted that the evidence of PW3 corroborates the evidence of PW1, a doctor who examined the victim and found that the victim had no hymen.

Nevertheless, the State Attorney conceded to this court that, the PF3 and the caution statement were not read in court. He submitted that these documents were received contrary to law. This court may expunge but the evidence is still clear. The State Attorney also conceded to this court that the charge sheet was defective. However, he was of the view that although the charge sheet was defective it did not occasion a miscarriage of justice to the accused person because the accused knew what was in court and also during cross-examination the appellant stated that he sodomized her.

He further submitted that during his defence, when he was questioned by the Public Prosecutor he agreed that he did the act. He confessed and prayed for mercy from her mother.

To substantiate his argument, the State Attorney also cited Section 388(1) of Criminal Procedure Act, Cap 20 and cited a case of **Masalu Kayeye Vs Republic 2017 (Unreported)** where the Court of Appeal observed that;

"Where particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the

offence for which he was being tried for, where the particulars of the offence gave the appellant sufficient notice about the date when offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age and where there is evidence at the trial which is recorded giving a detailed account on how the appellant committed the offence charged and thus irregularities over non-citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the Criminal Procedure Act, Cap. 20."

He then submitted that the offence is clear and enabled the appellant to fully understand the nature and seriousness of the offence he had been tried for. Hence those irregularities are curable under section 388 (1) of the Criminal Procedure Act, Cap. 20. He thus prayed the appeal to be dismissed for want of merit.

Having heard the submissions of both sides, in the course of determining these grounds, the crucial issue in this appeal is whether the appellant had raped the victim and whether the prosecution has proved their case against the appellant beyond reasonable doubts.

It is not in dispute that the Appellant was charged with statutory rape whereby consent is immaterial rather the age of the victim is of the essence and has to be categorically stated in the testimonies. The

law provides that for the accused to be convicted of statutory rape, the victim must be below 18 years of age.

As a starting point, I am in accord with the learned State Attorney that the appellant's caution statement and PF3 were not read in court which prejudiced the appellant. As rightly submitted by the State Attorney, the exhibits P1 and P2 are hereby expunged from the record. The same was discussed in the case of **Robinson Mwanjisi and three others v, Republic, Criminal appeal No. 154 of 1994 and Omari Iddi Mbezi Appeal No. 227 of 2009** (all unreported) held that;

> *"Documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission and then actually admitted before it can be read out."*

From the record of the trial court, there is no single paragraph showing whether the document was read to the party before it was admitted. In the case of **Lacki Kilingani versus Republic, Criminal Appeal No.404 of 2015,** the court held that; failure to read the contents of the documentary evidence after it is admitted in the evidence is a fatal irregularity. Hence from the above findings, the exhibits P1, P2 are expunged from the record. This ground has merit.

Regarding the defective charge sheet; as rightly submitted by the State Attorney, I am also in accord with the respondents as he cited

section 388(1) of the Criminal Procedure Act, Cap 20 and cited the case of **Masalu Kayeye Vs Republic, Criminal Appeal No. 120 of 2017 (Unreported)** where the Court of Appeal held that;

> *" Where particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the offence for which he was being tried for, where the particulars of the offence gave the appellant sufficient notice about the date when offence was committed, the village where the offence was committed, the nature of the offence , the name of the victim and her age and where there is evidence at the trial which is recorded giving a detailed account on how the appellant committed the offence charged and thus irregularities over non-citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the Criminal Procedure Act, Cap. 20."*

Guided by that principle I'm of the view that although the charge sheet was defective it did not occasion a miscarriage of justice on the part of the accused person because the accused person knew what was in court and also when asked if he had questions to PW1, he stated that he had no question but he sodomized her. Hence those irregularities are curable under section 388 (1) of the Criminal Procedure Act, Cap. 20.

Now addressing the remaining issue whether the prosecution proved the case beyond the required standard.

I should state prior that I am aware that the best evidence in sexual offences is that of the victim. This is as per the decisions of courts made in **Selemani Makumba Vs. Republic [2006] T.L.R 379, Wiston Obeid Vs. Republic, Criminal Appeal No. 23 of 2016,(Unreported).**

The State Attorney submitted that the evidence given by the victim had a weight that touches the appellant directly. The court has examined the records of the court and noted that the victim pointed to the appellant although there were two accused persons on the dock; this is what the victim said and I quote;

> *"I know Isaya Athanas, as he works at our "Analisha Kuku", he used to enter his fingers at her vagina and anus for many times I also know Noel Gerald, she pointed him" he is living at the nearby house at Mama Alex home, he never raped me nor entering his penis at my vagina."*

Guided by the principles of the Court of Appeal in the case of **Ryoba Mariba @ Mungare v R; Criminal Appeal No. 74 of 2003, (unreported)** where the Court of Appeal held that;

> *"It was essential for the Republic to lead evidence showing that the complainant was raped."*

The victim elucidated further on how she was raped by the appellant and what transpired at the scene of the crime. Even though the exhibits P1 and P2 have been expunged from the records of the court, another piece of evidence that corroborates the evidence of PW1 is that of PW3, the medical doctor who examined the victim and did not find "hymen."

Also, the court noted that during the cross-examination by the State Attorney the appellant admitted that "*I only raped her only one time and I apologized to her mom;*" likewise PW1 during cross-examination, the appellant stated that he had no question but he sodomized her because of Satan. This also proves beyond reasonable doubt that the accused person raped the victim. Applying the principle in the case of **Paulo Maduka and 4 others vs. Republic, Criminal Appeal No. 110 of 2007 (unreported)** and section 27 (1) and section 28 of Tanzania Evidence Act, Cap 6 [R.E 2019] that;

> *"The best evidence in a criminal trial is a voluntary confession by an accused person himself or herself. "*

Therefore it is my considered view that this case was proved as to its standard.

For the foregoing reasons, the appeal must fail. In the event, the same is hereby dismissed for want of merit.

Order accordingly.

A.A.BAHATI

JUDGE

30/7/2021

Judgment delivered under my hand and seal of the court in the chamber, this 30th day July, 2021 in the presence of both parties.

A. A. BAHATI

JUDGE

30/07/2021

Right of appeal fully explained.

A. A. BAHATI

JUDGE

30/07/2021