IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 60 OF 2020

(Originating from Lindi District Court in Criminal Case No.8 of 2020 before Hon. M.A. Batulaine, SRM)

SELEMANI HASSANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

26 June & 14 July, 2021

DYANSOBERA, J.:

The appellant, Selemani Hassani, following his trial by the Lindi District Court sitting at Lindi (M.A. Batulaine, SRM), was convicted on the offence of rape and sentenced to serve life imprisonment term.

Briefly, the evidence adduced at the trial was as follows: On 10.06.2011 PW1 was born by PW2 and is schooling at Joy School Mitwero Lindi at standard IV. PW2 an office attendant is residing at Wailes-Lindi neighbouring DW2 who is teacher and nephew of the appellant. On 06.01.2020 both PW2 and DW2 went at their working place as their usual conduct. While PW2 and DW2 were at work, PW1 went at DW2's house after the studies while wearing her domestic clothes to see her friend one Sophia.PW1 knocked the door and entered into the house and she met the appellant. Thus, the appellant told her to find Sophia in the rooms but at that moment the appellant was at the sitting room.PW1 went to find Sophia and when she reached on the second room, she did not find Sophia thus, she went to another room. While

inside the other room the appellant pushed PW1 and told her not raise an alarm and any disobedience would amount to slaughtering.PW1 testified that the appellant took off her clothes then removed his penis and inserted into the her vagina three times. Later on, the appellant stopped, thus, PW1 put on her underpants and went back home. At that time PW2 was at her work thus PW1 only found her two sisters who were at home. When PW2 came back home found PW1 asleep on the coach while her relatives were eating some food.PW1 did not tell PW2 anything thus she took her to her bedroom.

On 07.01.2020 PW2 made a call to her house made to wake up the victim so that she could go to school. The PW2's house made replied that PW1 was sick and her temperature was high. Thus, PW1 was brought into PW2's bedroom by the house made. PW2 touched PW1 and found that the temperature of PW1 was really high. Also, PW1 told PW2 that she had pains in her stomach and head.PW2 touched the victim at the down part of her stomach where she felt pains. Seeing that, PW2 undressed her outer clothes since PW1 did not wear her underpants.PW2 examined the vagina of the PW1 and saw some fluids. In addition, PW2 found the vagina of the PW1 to have been expanded and raptured.

The prosecution featured Dr. Fidelis Jungulu (PW3) from Sokoine Referral Hospital-Lindi who examined the victim. He said the victim's vagina was penetrated with a blunt object and her hymen was removed and there were bruises on the down part of her vagina.PW3 emphasised that the bruises did not give out blood though were fresh bruises which had happened currently. He further told the trial court that he recommended for further examination including laboratory examination.

In the laboratory examination PW1 was tested for HIV Aids, pregnancy and gonohorea (UDRL) where the results were all negative. Thereafter, PW3 filled exhibit P1.

When put to his defence, the appellant had his evidence supported by his niece called Amina Mzee Mnali who testified as DW2. DW1 disassociated himself to have been with PW1 on 06.01.2020 rather he testified that he was with his lover one Rehema Hamisi the house girl of DW2.DW1 further testified that on 07.01.2020 PW2 went at DW2's home and told him that she does not want their house girl /his lover to walk around the bars with PW1.Also, DW1 was told that there is a condition she has identified to the victim though DW1 did not know what was the condition she saw in her daughter.

Whereas, DW2 testified that on 07.01.2020 she came back home from work at 9:55pm and found a notice from the appellant left by PW2.The notice had the message that "mwambie mwalimu nimekuja kumkataa msichana wake wa kazi akome kutembea tembea na mwanangu usiku kwa mabwana zake kwenye mabaa wanakokunywa pombe huko kwa sababu mwanangu nememkuta na mazingira ya kutatanisha ambayo yaninivuruga akili." Seeing that, on 08.01.2020 DW2 warned her house girl of eighteen years to stop having relationship with a child of 10-11 years old. After the arrest of the appellant then DW2 was told by the police that her nephew had raped PW1 on 06.01.2020 at 09: 00am.When DW2 asked PW2 was told the same message which the appellant had told her before. Furthermore, DW2 told the trial court that PW2 told her that "Najua utaangaika sana pole". On 09.01.2020 while at the police DW2 was told that on 06.01.2020 in the morning the victim went at her house to find her house girl and she

did not find her. In addition, was told that the appellant had held PW1 by his hand while holding a knife and raped her at the sitting room.DW2 further testified that her house has no bed room doors but the doors of her bed rooms her covered by transparent clothes.

Basing on the herein above evidence, the learned trial Magistrate convicted the appellant and sentenced him to life imprisonment. Aggrieved, the appellant is before this court on appeal and has presented a total of nine grounds of appeal which are as follows: -

1. "That, the trial Magistrate erred in law and facts when she failed to consider that the victim did not tell/complain she was raped to any person. But victim mother forced her to identify the appellant after three days and not at early possible time as required by law.

2. That, the trial Magistrate erred in law and facts by failure to consider that victim did not mention accused person had raped her, the manner they identified the appellant is contradictory they mentioned different boys/men living in the neighbourhood whom they living in same street and victim mother pointed the appellant.
3. That, the trial court erred in law and facts by failure to consider that a victim is a child of 9 years old if it true, for first time inserted penis into vagina for three times. She did not feel pain and injured and still managed to walk alone and did not tell any person including her mother.
4. That, the trial Magistrate grossly erred in law for basing her conviction on contradicting testimony about whom raped the victim.
5. That the trial Magistrate grossly erred in law for convicting the appellant for the offence of rape without proof of any penetration to the victim as required proof under the law.
6. That the trial Magistrate erred in law by convicting appellant basing on the personal emotion thus women emotion rather

than basing the evidence adduced by prosecution side which failed to prove the case beyond reasonable doubts.

7. That, the trial Magistrate grossly erred in law and facts by basing her decision on extraneous matters which did not feature in the evidence adduced by the prosecution witnesses.

8. That the trial Magistrate erred in law and facts by convicting the appellant basing on the weakness of defence evidence rather than strong evidence emanating from prosecution side which prove the case beyond reasonable doubts.

9. That, the trial Magistrate grossly erred in law by giving excessive sentence which motivated by women emotion without considering the appellant mitigation of sentence. Magistrate did seek victim mother happy and congratulation from her".

When this matter was called on for hearing on 2.6.2021 the appellant had appeared in person and unrepresented while the respondent had enjoyed the services of Mr. Paul Kimweri, the learned senior State Attorney. Thus, the appellant submitted orally that he has filed nine grounds on his amended petition of appeal and had nothing useful to add.

Whereas, on the part of the respondent Mr. Kimweri responded and submitted that in the present case the crucial evidence is that of PW1 whose evidence is reflected at page 9 and 10 of the typed proceedings. The learned senior State Attorney stressed that the victim is a child of nine years whose evidence was taken in accordance with the requirement of section 127 of the Law of Evidence Act. He went further and argued that PW1 gave unsworn evidence since she promised to tell the truth. Mr. Kimweri contented that at page 10 of the typed proceedings PW1 told the trial court that "dudu" sehemu ya kukojolea which she meant to be the private parts and she further explained what

the appellant did to her. The learned senior State Attorney submitted that age can have adverse effect on the witness expression. To cement his argument Mr. Kimweri cited the case of **Hassan Bakari@MamaJicho vs. R**, Criminal Case No.102 of 2012 at page 9 and 10 where the Court was clear. Thus, the court should be taken to prove penetration which is one of the ingredients of rape.

Apart from that the learned senior State Attorney submitted that in statutory rape age must be proved and in the instant case the age was proved by PW2 that PW1 is nine years old and explained when she gave birth to PW1. Thus, Mr. Kimweri was of the view that PW2's evidence corroborated the evidence of PW1.To fortify this the learned senior State Attorney cited the case of **Andrea Francis vs. R**, Criminal Appeal No.173 of 2014 where the Court stated that in statutory rape case age must be proved by a parent, guardian or even a birth certificate. Submitting on the evidence of PW3 Mr. Kimweri was of the view that PW3's evidence is clear since he saw lacerations when he examined PW1.

Lastly, the learned senior State Attorney argued that the evidence of PW1, PW2 and PW3 sufficiently proved the offence and the defence evidence did not raise any doubt to the prosecution case thus, the trial court was justified in using that evidence to prove conviction and sentence was also legal. Also, Mr. Kimweri submitted that this appeal should be dismissed and the decision of the trial court be endorsed.

In rejoinder, the appellant denied to have committed the offence of rape and thus he prayed this court to set him free.

Having summarised the evidence and submissions of the parties as appearing hereinabove, I will determine the appeal basing on the trial court records available, grounds of appeal and the submissions by the parties. Looking at the nature of the ground of appeal I find it imperative to resolve each ground of appeal and where necessary I will consolidate them. On the first ground of appeal the appellant complained that he was convicted and sentenced while the victim did not tell or complain to any person that she was raped rather PW2 forced her to identify the appellant after three days and not at early possible time as required by law. At page 15 of the typed judgment of the trial court the learned Trial Magistrate addressed this issue of delaying to mention the appellant at the earliest opportunity by citing the case of **Marwa Wangiti Mwita vs. R** [2002] TLR 39 particularly at page 41. The learned Trial Magistrate took an account on the hours delayed by the victim to name the appellant to have raped her was contributed by threatening statement uttered by the appellant that he would slaughter her if she would have told anyone about the incident of rape. Basing on that reason the learned trial magistrate was of the view that the hours delayed to name the appellant as the rapist could not water down the prosecution case.

Indeed, I see no reason to depart from the findings of the learned Trial Magistrate on the reason which caused the victim not to name the appellant at the earliest opportunity. According to the records of the trial court it is clear that the victim is the child of a tender age whose ability to name the appellant was impaired by the threat from the appellant. I have revisited the evidence of PW1 and PW2 and I see no where the appellant cross examined either of the two on the failure of the victim to

name him at the earliest opportunity. On that regard, I am of the settled view that the learned Trial Magistrate rightly resolved this issue since reliability of the evidence of PW1 depended on the other factors of the credibility of witnesses and corroboration of the evidence. Thus, I see this ground of appeal lacks merit hence, dismissed.

Regarding the second ground of appeal, I see no merit on it at all since the victim mentioned the appellant to have raped her. This is vividly seen at page 10 of the typed proceedings of the trial court. However, it was PW2 who asked the PW1 to name the person who raped her but on the process of trying to grasp the right person who did the forbidden act PW2 tried to name names of all men who lives nearby her house. Fortunately, the victim denied them but eventually she named the appellant who lives with DW2 to have raped her. According to the evidence of PW2, she did not name the names of men who lives nearby her house during the hearing at the trial court. I wonder why the appellant is complaining on the manner he was named by PW1. Also, I find no contradiction of the persons named. As I have stated earlier that the victim only named the appellant though in the process of inquiring PW2 tried to name different names of men living around her so as to know who had done an evil and immoral thing to her daughter. Also, I find this ground has failed hence dismissed.

Apart from that, on the third ground it is clear from the PW2 evidence that PW1 was born on 10.06. 2011.The substituted charge sheet featured that the victim was nine years something which PW2 proved as a parent of PW1.As rightly cited by the learned senior State Attorney the case of **Andrea Francis vs. The Republic** (supra) whereby the Court amplified at page 5 that: -

"In other words, in a case such as this one where the victim's age is the determining factor in establishing the offence evidence must be positively laid out to disclose the age of the victim. Under normal circumstances evidence relating to the victim's age would be expected to come from any or either of the following: -the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc."

In the present case the evidence of PW2 as a biological mother of PW1 had proved that at the commission of the offence PW1 was nine (9) years old the evidence which was not disputed by the appellant during cross examination to PW2 something which connotes that the appellant had conceded to it. Thus, I see no reason why the learned trial Magistrate ought not to believe the evidence of PW2 regarding determination of the age of the victim was true. Also, I differ with what the appellant is asserting that "for first time inserted penis into vagina for three times. She did not feel pain and injured and still managed to walk alone and did not tell any person including her mother".

According to the evidence of PW1 which apparently shows that after being raped by the appellant she experienced pains on her stomach and head. The evidence which was corroborated with the evidence of PW2 as seen at page 13 of the typed proceedings that PW1's body temperature was high and had pains on her stomach and head. Besides, PW1 did not testify that for the first time the appellant did insert his penis into her vagina but she testified that the appellant put his penis into her vagina three times and thereafter the appellant stopped thus she put on her underpants and lastly, went back home.

Surely, I so no reason to be detained by the appellant's assertion which is just an afterthought thus this ground falls short of merit hence dismissed.

As to the fourth ground of appeal, I find no contradictory testimony as to whom raped the victim. The record is very clear as to the evidence of PW1 which is reflected at page 10 of the trial court proceedings where she only mentioned the appellant as the person who raped her on 06.01.2020 in the evening hours at the house of DW2.That piece of evidence was corroborated with the evidence of PW2 as seen at page 13 of the trial court typed proceedings.

Coming to the fifth ground of appeal, I have also see no merit on it since the prosecution evidence via the evidence, of PW1 proved that she was penetrated by the appellant. For the interest of justice and ease reference I going to reproduce and excerpt of the piece of evidence of PW1 which proved penetration as seen at page 10 of the trial court typed proceedings as follows:

> "akatoa dudu lake la kukojolea alafu akanifanya, alitia dudu lake kwa kukojolea kwangu. Aliingiza dudu lake kwa kukojolea kwangu mara tatu"

In that respect, I join hands with the learned senior State Attorney had submitted the term 'dudu' as referred by PW1 means a male private part that is a penis. Likewise the term "kukojoa kwangu means a vagina or female private part. For more elaboration the current development of the interpretation of section 130(4) of the Penal Code accord the victim of alleged rape not to graphically describe how the male organ was inserted into her female organ.This has been discussed in the length of cases

by the Court of Appeal but now I am only interested with the decision in the case of **Joseph Leko v. Republic**, Criminal appeal No. 124 of 2013 where the Court instructively observe:

> "Recent decisions of the Court show that what the court has to look at is the circumstances of each case including cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. The reason is obvious. There are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina.
>
> This is because of cultural restrictions mentioned and related matters. The cases of **Minani Evaristi v. R**, CRIMINAL APPEAL NO. 124 OF 2007 and **Hassani Bakari v. R**, CRIMINAL APPEAL NO./03 OF 2012 (both unreported) decided by this Court in February and June 2012 respectively are some of the recent development in the interpretation of section 130(4) (a) of the Penal Code."

Therefore, in the present case PW1 told the trial court the appellant "akatoa dudu lake la kukojolea" means a penis.PW1 went on and testified further that "alafu akanifanya,alitia dudu lake kwa kukojolea kwangu. Aliingiza dudu lake kwa kukojolea kwangu mara tatu" which means that the appellant inserted his penis into PW1's vagina three times. Basing on that evidence I am inclined not to depart from what the Court had observed as to the regard of the new development and construction of section 130(4)(a) of the Penal Code. The sentence uttered by the victim as quoted above signifies that she was penetrated

by the appellant whose object was regarded as a blunt object by PW3. Therefore, that piece of evidence of PW1 which was corroborated with the evidence of PW2 and PW3 has shown that PW1 was penetrated by the appellant. In light of that argument, I find this ground with no merit hence, is dismissed.

The sixth and seventh grounds of appeal are worthless since the appellant failed to assist this court to show which part of the impugned judgment is tainted with personal emotions or woman emotions of the learned Trial Magistrate. In addition, the appellant failed to disclose to this court during hearing of this appeal the matters which he considered to be extraneous and not featured in the evidence of the prosecution witnesses. On the basis of that argument, I find no merit on these two grounds hence they are dismissed.

Coming to the eight ground the appellant is complaining to have been convicted on the weakness of his defence evidence and not on the strength of the prosecution evidence. Indeed, this complaint has necessitated this court to revisit the impugn judgment of the trial court with a close eye. At page 18 of the judgment of the trial court, the learned trial Magistrate had warned herself not to be tempted by the defence weakness in testing proof by the prosecution and to signify this the learned trial magistrate cited the case of **Saasita Mwanamaganga vs. R**, Crim. Appl. No.65 of (2005) [2009] CAT at Mtwara. In addition, from page 19-22 of the impugned judgment the learned trial Magistrate analysed and evaluated the evidence of the defence viz a vis the prosecution evidence objectively. The evidence of DW1 and DW2 was evaluated objectively as to how it created doubts to the prosecution case. Among other things which the learned trial Magistrate observed

and found to have watered down the strength of the defence evidence against strength of the prosecution evidence are the falsehood statements of DW1 during hearing of his defence evidence. Also, failure to call a material witness called Rehema Hamisi who could support the evidence of DW1 and DW2.Being guided by the case of **Hussein Idd and Another vs. Republic** [1986] TLR 166 where the Court observed that: -

> "It was a serious misdirection on the part of the trial judge to deal with prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."

Being guided by the above principle this court is satisfied that the trial court did not convict the appellant on the weakness of his defence evidence rather was convicted on the strength of the prosecution evidence. Thus, I find this ground has failed too hence is dismissed.

As to the last ground of appeal which the appellant has complained that his mitigation factors were not considered by the learned Trial Magistrate when she passed sentence against the appellant. It is apparent clear that the appellant aired out two mitigation factors of being the first offender and being depended by his family hence, he requested for lenient sentence which the trial court did not consider at all due to the fact that punishment of rape where the victim is under the age of ten years shall on conviction be sentenced to life imprisonment. This is a prescribed statutory punishment where leniency is not deserved to the convict. With due respect, I beg to differ with the appellant that there is no where the learned trial Magistrate was influenced by her emotions. Thus, I find this ground has no merit at all hence, it is

dismissed.

Generally speaking, the appeal by the appellant has no merit. It stands dismissed.

It is so ordered.

W.P. Dyansobera

JUDGE

14.7.2021

This judgment is delivered under my hand and the seal of this Court on this 14th day of July, 2021 in the presence of the appellant in person and unrepresented and Mr. Paul Kimweri, the learned senior State Attorney for the respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

JUDGE