IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT BUKOBA

CRIMINAL APPEAL NO 26 OF 2021

(Originating from Criminal case No. 202 of 2020 of Ngara District Court)

JOVINUS NZOGERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

30/07/2021 & 06/08/2021

NGIGWANA, J.

This is the first appeal from the District Court of Ngara at Ngara hence forth (the District Court) where the Appellant was charged with two counts: First, Rape contrary to sections 130(1) (2) (e) and 131 (1) of Penal Code Cap. 16 (R: E 2019). Second; Marrying a School Girl contrary to section 60A (1) (a) (2) of the Education Act Cap. 353 as amended by Section 22 of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016.

It was alleged on the first count that Jovinus s/o Nzogera on 27th day of June, 2020 during evening hours at Keza Village within Ngara district in Kagera region unlawfully did have carnal knowledge of one A.B.C (Identity of the child hidden) a girl aged 16 years old.

It is therefore imperative to recapitulate the brief account on evidence which led to conviction. That on 20/7/2020, PW1 one Beneth Mpagaze, a Ward Executive Officer (WEO) of Ngara Ward was informed by Keza Village

Executive Officer (VEO) one Alex Joseph that the girl A.B (hence forth the victim), a form one student at Keza had left school and got married to the appellant herein who lives at Nganza Village.

PW1, a Ward Executive Officer and the Keza VEO led the arrest of the appellant together with the victim. The victim (PW2) testified before the trial court the way she was taken by the appellant from her home to the appellant's home for the purpose of being married and when reached there and entered the appellant's house, the Appellant took off his clothes and then undressed the victim all of her clothes including underpants and having done so, inserted his penis into her vagina and went on having sex for almost 20minutes.PW2 further testified she stayed with the appellant under one roof as husband and wife for three weeks, that is to say until on 21/7/2020 when they were arrested by Village and Ward leaders and taken to Police station where PF3 was issued to the victim and eventually was attended at Rulenge Mission Hospital for examination.

It was PW3's evidence that his daughter disappeared home on 27/6/2020 he started searching for her and was therefore prompted to report the incident to her school and at the police station where he obtained RB. He further testified that the age of the victim to be 16 years old as she was born on 28th day of February 2004. PW3 confirmed the proposition of PW1 and PW2 that the victim and appellants were arrested on 21/7/2020.

PW4, a Head teacher at Kaze Secondary School testified that PW2 was a form 1B student with registration **No. 867**.He tendered the Attendance

Register Book to evidence her non-attending and being a Secondary School Student, which was admitted by the trial court as Exh. P1

PW5 was a doctor who tendered PF3 as exhibit P2 upon which he observed to have not found the hymen on the victim (PW2). His examination revealed further that he did not find sperms and neither did he find bruises in the victim's sexual intercourse organs.

After the trial court had heard all five witnesses and received two exhibits, made evaluation of evidence and finally came to its own finding of acquitting the appellant on the second count but convicted him on the first count of rape as charged. The appellant was therefore sentenced to imprisonment of thirty (30) years for the first count.

The Appellant was not amused by the trial court conviction and sentence on the first count and hence this Appeal. The Appellant filed five (5) grounds of appeal and later on filed five (5) additional grounds. The Appellant being layman, could not well craft his grounds of appeal neither was he able to elaborate his filed grounds of appeal. For purpose of clarity this court grasped the context and summarized the raised appellant's grounds of appeal into the following;

One, there was no confirmatory document to prove the age of the victim. **Two**, there was no proof of DNA to implicate the appellant in the offence of rape, **Three**, the case for prosecution side was not proved beyond reasonable doubt and among other weaknesses that there were contradictions of witnesses, the PF3 from Doctor (PW5) was ignored and the appellant was not properly identified.

As I said earlier, the appellant being layman was not able to offer explanation to the raised grounds.

Mr. Mahona who appeared for the Republic substantiated that, what was important in the trial court was to prove the age of the victim. He cemented that PW2 at Pg7 of the typed proceedings testified that the she was born on 28/02/2004 and concluded that she was 16 years old. He made reference to the of **Karim Seif @ Slim V. R, Criminal Appeal No. 161 of 2012**, CAT at page 11 to stress that age of the victim may be proved by statement of the victim, birth certificate, Affidavit of parent or guardian and proof may be made orally or in writing. Mr. Mahona further argued that in this case at hand PW2 and PW3 proved the age of the victim orally in their testimony. To back up his stance, He referred the court to the case of **Paschal Aplonal V. R, Criminal appeal No.403 of 2016** CAT (unreported) P. 11 on the consequences of the appellant's/accused failure to cross examine the witness on the important issue. Mr. Mahona was of the effect that the appellant did not cross examine PW2 and PW3 on the age of the victim.

Mr. Mahona further submitted that another element which the prosecution had duty to prove was penetration. He submitted that PW2 as per evidence appearing in page 7 of the typed proceedings, the appellant undressed himself and undressed the underpants of the victim and took his penis and inserted it in the victim's vagina. Mr. Mahona contended that the appellant did not cross-examine the PW2 on that area revealing that he accepted such a truth.

The learned State Attorney also responded on the ground of identification that the appellant alleged that he was not identified while the PW2 testimony was to the effect that she stayed with the appellant for three weeks and also PW3 confirmed by telling the trial court that PW2 went on missing as from 27/06/2020 until 21/07/2020 when he was arrested at the appellant's home at Mganza Village with the appellant. The learned state Attorney had a conviction that the appellant was properly identified given the fact that the appellant admitted to have met the victim and gave his defense in court that he was not aware if PW2 was a student therefore the argument that he was not identified is baseless and unfounded

It was Mr. Mahona's argument that in sexual offences, the best evidence comes from the victim himself /herself and that PW2 explained the manner in which she was raped by appellant.

Concerning the ground that DNA was not conducted to ascertain whether it was the Appellant who raped the victim, the learned State Attorney submitted that it is not a legal requirement that DNA test must be conducted in order to prove the offence of rape.

Responding on the raised ground that the appellant was convicted but the specific provision was not specifically mentioned, the learned State Attorney similarly submitted that this ground is baseless as the provision creating the offence was mentioned. The State Attorney though admitted that there was an omission of the provision providing the sentence, to him that is not fatal as it was mentioned in the charge sheet and as well page 1 of the trial court judgment. Mr. Mahona submitted that, that omission is

curable under the provision of section 388 of Criminal Procedure Act Cap. 20 (R: E 2019) as it occasioned no failure of justice to the Appellant.

Responding on the contraction issues among witnesses' testimonies, the learned State Attorney opposed that there was no any contradiction which goes to the root of the matter as PW2 testified how she met the appellant and headed to the home of the appellant and finally ended having sexual intercourse. He added that the evidence of PW2 was also supported by the evidence of PW3. He therefore concluded by praying for the dismissal of this appeal for being devoid of merit.

In rejoinder the Appellant insisted that there was major contradiction since PW1 said 20/06/2020 the victim disappeared at 8 pm therefore, prays that the evidence on the record be re-assessed

I have heard the rival arguments of both sides. I have entirely and respectfully considered the grounds of appeal filed by the appellant and the entire record of this Appeal. I am now called upon to determine one major issue whether this appeal is meritorious or not. In so doing, I will be much cautious to see if the prosecution proved the offence of rape beyond reasonable doubt.

But Before I proceed to determine this appeal, I must register my concern at the outset that this is the first Appeal and therefore the duty of this court is to review the record of evidence of the trial court in order to determine whether the conclusion reached upon and, based on the evidence received, justifies a re-evaluation in relation to the referred framed issues, to see whether they were properly determined.

From the offence of statutory rape upon which the appellant was charged with, Among the vital and apparent elements which the prosecution needs to prove is penetration of the penis into the vagina of the victim and the age of the victim as well as if it was the appellant who was responsible for such act.

There is no doubt that under this nature of statutory rape consent of the victim and knowledge of the appellant on the age of the victim afford no defense. Starting with the issue of age. There was concrete evidence regarding the proof of age of the victim. At first the victim herself testified the year which she was born that is on 28th February, 2004 which in simple arithmetic brings the total of 16 years by 2020 the year the offence was committed.

If this was not enough, the PW2's evidence was echoed by PW3's evidence, the parent of the victim, in his testimony he mentioned the year of birth and went further to mention that his child was 16 years old but also PF3 which admitted with no objection from the appellant as exhibit P2 corroborates that the victim was of 16 years old.

Going with the precedent in the Court of Appeal Authority of **Karim Seif@Salim V R** (supra) also cited by the Learned State Attorney that the age can be proved orally by the victim or the parent or guardian or any document in writing such as birth certificate and other relevant documents, it suffices in this regard to hold that the age of the victim was proved. I therefore shake hand with the State attorney and the trial court that the age of the victim was proved and therefore the first ground lacks merit.

On the second ground that there was no DNA conducted to ascertain whether it was the appellant who raped the victim. PW5, a doctor who conducted examination on the victim was of the opinion that there were no sperms found in the vagina of the victim therefore there was no specimen which could have been taken for DNA test neither as per exhibit "P2" the victim was not impregnated. On this issue of failure by Doctor's examination to have found sperms in victims vagina cannot negate the fact that the victim was raped. In **Mohamed Seleman@Nyenje vs Republic** Criminal Appeal No.108 of 2017 as rightly referred by the trial court and which I subscribe to, it was stated that "*the offence of rape is not proved by sperms in the vagina but rather by penetration however slight*"

In the same vein, DNA is not a legal requirement in proving rape where there are other evidences to prove it as rightly observed by learned State Attorney. Every case must be decided by its own facts. After all, in this case PW2 was credible to the extent that the trial court had all reasonable ground to believe her as she testified to have been raped by the appellant. The trial court rightly based on the principle enumerated in authority of **Selemani Makumba V. R** [2006] T.L.R. 379 and **Gallus Kituya VR, Criminal Appeal No. 196 of 2015** (unreported) that best evidence in rape is from the victim himself. Passing through the evidence of PW2 and evidence of PW2, it goes therefore without saying that their evidence entitled to credence and she was a witness who needed to be believed unless if there could be cogent reasons of not believing her. The available evidence does not suggest to be evidence which materially contradicted

the evidence of PW2. See the Court of Appeal decision in **Goodluck Kyando VR** [2006] TLR 363.

I therefore shake hands with the learned State Attorney that there was no evidence which materially contradicted each other or going to the root of contradicting PW1's testimony on the offence of rape. The time PW2 disappeared at her home 27/6/20 was also echoed by PW3 his parent and the date both the Appellant and the victim were arrested together at the appellant's home on 21/7/2020 as testified by PW21 was also echoed by PW1, PW4, a school Head teacher testified that the victim was not attending in a form 1B class and tendered exhibit P1, a school attendance register book.

I am entirely and respectfully constrained to hold that there was no any material contradiction on witnesses' evidence.

Concerning the issue of identification, I am inclined to agree with Mr. Mahona that the Appellant was clearly and legally identified as PW1's testimony was straight that the Appellant came at her home and took her in his home where she stayed for three weeks which brings the approximate total days, they disappeared home until they were arrested together at the Appellant's home. The Appellant did not cross examine the victim on how she did identify him rather he gave a defense which raised no doubt to the prosecution evidence which had the effect of admission as the appellant admitted to have met with the victim and blames her for not disclosing that she was a student. I concur with the learned state Attorney in the proposition that failure to cross examine the witness on an important

matter accords the credit of believing the witness testimony as true. **See Paschal Aplonal V R** (supra) as rightly relied by Mr. Mahona. I am therefore convinced that the appellant was correctly identified.

The Appellant had another blame to the trial court that it ignored the PF3 (exhibit P2) as it had a result that there was no hymen in the victim's vagina. I can share the Appellant's concern that seeks to establish that the victim was a sexually experienced person that is why PW5 (Doctor) failed to find hymen neither to see blood stains or sperms from the vagina upon examination. However, the fact that the victim was sexually experienced and that there were no sperms found in her vagina cannot negate the proposition that the victim was raped. Of importance, the prosecution's duty was to prove penetration and they in fact proved it. Penetration need not be proved by medical examination and equally the absence of sperms in the vagina is irrelevant as it has nothing to do in proving penetration. In terms of Section 130 (4) of the Penal Code Cap 16 R: E 2019, penetration however slight is sufficient to constitute rape.

The court of Appeal of Tanzania in **Jaspin s/o Daniel @ Sikazwe V The Director of Public Prosecutions,** Criminal Appeal No. 519 of 2019 At Mbeya (unreported) when confronted with similar matter had this to say.

> *"We understand the appellant would want to over capitalize on PWl's remarks that PW2 was sexually experienced and hence his failure to see any blood stains or sperms from her vagina upon examination. Without much ado, we can only say that penetration need not be proved by medical examination neither is it true that the fact since PW2 was*

sexually experienced that negated the fact that she was raped. Equally irrelevant is the absence of sperms from PW2's vagina. In our view, the absence of sperms had nothing to do with proving penetration, for in terms of s. 130 (4)(a) penetration, however slightest is sufficient to constitute rape."

The entire arguments or grounds by Appellant hinged to challenge the decision of the trial court that generally the offence of rape against him was not proved beyond reasonable doubt but from PW1, PW3, PW4's evidence collaborated PW2's testimony and PW2's testimony alone explained what happened in the appellant's house that the Appellant undressed himself and thereafter undressed her clothes including the underpants and took his penis and inserted it into her vagina hence penetration and they stayed together for three weeks in the Appellant's home, PW2 testified that she was 16 years and as well PW3 her parent collaborated on the evidence of age and besides the Appellant himself in his testimony admitted to have met the victim but he stated that he did not know if the victim was a student.

For the purpose of not leaving any stone unturned, the appellant had a complaint that the provision upon which he was sentenced was not mentioned. It is true that the typed judgment embodies no sentence clause but in the original judgment (Handwritten judgment) in the case file there was sentence clause and provision upon which the appellant was sentenced. I think this should not detain me. This oversight is a curable irregularity as the original record supersedes the typed one and the appellant was sentenced basing on the original record upon which he gave

his mitigation which were recorded and the passed sentence was ready over to him therefore there is no way the flaw occasioned his failure of justice hence this court finds that the appellant was not prejudiced anyhow.

I am convinced that the trial magistrate in the original judgment passed the minimum sentence of 30 years as per law and the provision were mentioned.

In the event, after this first appellate court has re-evaluated the evidence afresh. I am now in a position to hold that the trial court properly determined the matter as the case was proved against the appellant beyond reasonable doubt. The trial court correctly convicted and sentenced the appellant on the offence of rape. There is no way this court can disturb the findings which led to the conviction and sentence.

This appeal is devoid of merit; therefore, it is hereby dismissed in its entirety.

It is so ordered

Right of 2nd appeal explained

E. L. NGIGWANA

JUDGE

06/08/2021

Date: 6/8/2021

Coram: Hon. Emmanuel Ngigwana, J.

Appellant: Present

Respondent: Aman Kilua, SA.

B/C: Gosbert Rugaika

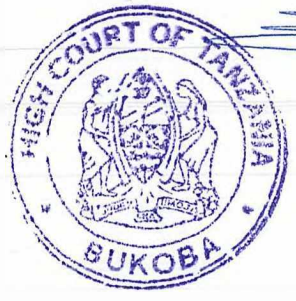
Mr. Aman Kilua SA:

My Lord the matter is for Judgment. We are ready.

Appellant:

I am ready too.

Court: Judgment delivered this 6th day of August, 2021 in the presence of the appellant and Mr. Amani Kilua, learned State Attorney for the Respondent/Republic.



E. L. NGIGWANA

JUDGE

06/08/2021