IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 14 OF 2021

(Originating from Criminal Case No. 143 of 2019, in the District Court of Mwanga at Mwanga)

DASTAN RAPHAEL KIPINGU ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

MUTUNGI .J.

In the District Court of Mwanga at Mwanga the appellant Dastan Raphael Kipingu was charged with and convicted of the offence of rape contrary to **section 130 (1)(2) (e) and 131 of the Penal Code Cap 16 R.E. 2019**. He was in view thereof sentenced to life imprisonment. The particulars of the offence are such that, on 18th September, 2019 at Mangulai Village within Mwanga District in Kilimanjaro Region, the appellant herein had carnal knowledge of **AS** (true identity hidden) a girl child aged 4 years.

The appellant pleaded not guilty to the allegations hence, a full trial involving five prosecution witnesses and one defence witness was conducted.

It is on record on the material day (PW1) the victim's grandmother had gone to her farm in the company of the victim (PW2) and other children. She had gone to clear the farm ready for cultivation. The appellant had also joined them who had been taken there (day worker) to assist PW1 as was her normal routine when she needed assistance. After a few hours of working they later stopped for a short rest. Once they resumed, the appellant alleged he was still tired and needed more rest. He was thus left behind in a hut (banda) resting together with the victim and another child Elisam Shukran (2 ½ years) who were playing around.

Suddenly PW1 heard the victim crying which was quite unusual. She immediately decided to go and find out what had happened to her. To her surprise and dismay, she met the appellant running out of the hut with an open zip. She quickly shouted out for help, while at the same time chasing after the appellant. Luck was on her side, some people came out to render help including PW3 who was farming in a nearby farm. They managed to get hold of the appellant and was by then wearing a short with an open zip. On a closer look they found the short was dirtied with fresh sperms around his private parts. Getting back to the victim, she too was found with sperms and plenty of blood all over her pants. The appellant was taken to the

area chairman wherefrom he was arrested by militia men and taken to the police station. The victim was taken for medical examination and found the hymen had raptured and there was clear evidence of penetration by a blunt object. The victim had also narrated how the appellant, undressed her and consequently forced through his penis (mdudu wake) into her vagina.

On the other side of the coin, the appellant had admitted to have gone to the said area but was hired by someone else in the company of one "Mzee Mjaluo". He was later summoned by PW1 and interrogated why he had slapped the victim (PW2). This was a total surprise since he had not gone near the victim. To his further surprise, it was alleged he had raped the victim and she too was taught to state the same. This is how he was arrested and finally landed at the police station.

In the end the appellant was found guilty and convicted to life imprisonment as earlier stated in the judgment. Aggrieved by the decision of the trial court, the appellant has appealed to this court with seven grounds as hereunder: -

1. That, the prosecution side failed to prove their case beyond reasonable doubts in failing to show the distance between the farm of PW1 and PW3 in order the court to determine possibility of PW3 to apprehend the appellant.

2. That, the trial magistrate erred in law and facts in failing to consider that, there were existing grudges between the appellant and PW1 as the Appellant claimed Tshs 400,000/= for cleaning PW1's farm.
3. That, the prosecution side failed to prove their case beyond reasonable doubts in failing to show the documents which certify PW4 was qualified medical doctor.
4. That, the trial magistrate erred in law and facts in failing to consider the evidence adduced by defense side.
5. That, the prosecution side failed to prove their case beyond reasonable doubts on the ground that, the clinical officer did not testify the period which the victim was given bed rest in their hospital as it is not easy for a raped child of 4 years to move from hospital to home promptly after being examined due to injury.
6. That, the trial magistrate erred in law and facts in convicting and sentencing the appellant by relying on insufficient evidence.
7. That, trial magistrate misdirect herself in law and facts in convicting and sentencing the appellant by relying on the principle of the law that, the best evidence in sexual offences come from victim without consider that evidence should not be accepted and believed wholesale.

The hearing of the appeal was conducted by way of written submissions, the appellant appeared in person and unrepresented, while the respondent was represented by Mr. Ignas Mwinuka, learned State Attorney.

Supporting the appeal, the appellant on the first ground submitted, PW3 did not clarify the distance between his farm and that of PW1. The same was crucial since the court was to ascertain whether the distance mentioned could in the given circumstances be possible for PW3 to hear one crying out for help and immediately apprehend the appellant.

On the second ground the appellant submitted, there were existing grudges between him and PW1. PW1 was yet to pay him an outstanding payment of Tshs. 400,000/=, thus, this case has been fabricated against him as a way of solving or escaping liability to repay the debt.

The appellant went on submitting on the third ground that, in criminal proceedings, expert evidence is admissible but an expert summoned is required to prove before the court that he/she possesses such expertise. The mere fact that one had signed a PF3 is not by itself conclusive evidence that she or he is a medical expert. Such signature is to be supported with other pieces of evidence including the professional documents. The Doctor in this case had not tendered such proof.

Regarding the fourth ground, the appellant submitted, on the material date he was together with "Mzee Mjaluo" and he was ready to testify on his side. However, the said "Mzee Mjaluo" was threatened by PW1 hence could not appear before the court to support his defence. He was in the circumstances denied justice.

It was the appellant's further submission on the sixth ground that, in sexual offences the Doctor is the only person who is given authority to prove the issue of rape. In this case however, PW3 testified before the court that the victim had been raped while he had no such medical mandate.

In his last ground, the appellant submitted, the trial magistrate misdirect herself by convicting and sentencing him solely relying on the principle of the law that, the best evidence in sexual offences comes from the victim, without considering the fact that such evidence should not be accepted and believed wholesale. In the end prayed the appeal be allowed, the trial court's decision be quashed and make an order that he be released from the prison forthwith.

In reply, Mr. Mwinuka supported the conviction, sentence and argued on the first ground that, considering the appellant's defense at page 23 of the trial court's proceedings, there is no dispute that the appellant was apprehended at the scene of

crime in the presence of PW2. On the same footing there was no need of further evidence as to the distance between the farms.

Regarding the second ground on the alleged debt amounting to TZS 400,000/= which PW1 owed the appellant, the learned state Attorney submitted, from the proceedings, PW1 was not cross examined by the appellant on such claims (TZS. 400,000/=) being his wages nor did he raise the same in defence. This was purely an afterthought.

Responding to the third ground, Mr. Mwinuka submitted, PW4's oral testimony was sufficient to establish PW4 was indeed a qualified Doctor. His competency was never cross examined by the appellant after he testified, consequently cannot be raised at this stage.

On the fourth ground, the learned State Attorney submitted, glancing through page 10 of the Judgment one will find, the trial court extensively considered the appellant's defence.

On the fifth ground, Mr. Mwinuka submitted, the fact that the victim was not hospitalized after examination was a fact that was supposed to be questioned in cross examination when PW4 had testified at the trial.

On the sixth ground, the learned state attorney argued apart from the victim's testimony, the appellant was caught red

handed committing the offence. Even though PW2 had the same story and there were other witness who collaborated her evidence.

He concluded, the prosecution case was watertight and had been proved beyond reasonable doubt. He prayed the appellant's appeal be dismissed and the trial court's decision upheld.

In his brief rejoinder, the appellant reiterated his earlier submission and insisted the prosecution side had failed to prove their case beyond reasonable doubts.

I have gone through both parties' submissions, trial courts' proceedings, judgment, and I hold the pertinent issue for consideration is whether the case against the appellant was proved beyond reasonable doubt.

Starting with the 1st, 2nd and 6th grounds, where the appellant challenges PW1's testimony on three aspects. ***First***, for not showing the distance from the hut where the incident occurred to PW3's farm. ***Second***, that PW1 did not want to pay him TZS 400,000/= as farm wages hence fabricated this case against him and ***third,*** it was wrong for PW1 to allege the victim's vagina was raptured and smeared with sperms and blood while she was not a medical expert.

It is not disputed as reflected at page 23 of the trial court's proceedings that, the appellant was apprehended at the scene of crime by PW3 in the presence of PW1. The fact that PW1 raised an alarm which facilitated such arrest by whoever responded to it, be it PW3 or anybody else was not questioned by the appellant during the trial. More so, the appellant never raised doubts to show that on the material day he was not arrested at the scene of crime. In the case of **Nyerere Nyague V The Republic, Criminal Appeal No. 67 of 2010 CAT (unreported)**, the Court of Appeal held *inter alia* that: -

> *"A party who fails to cross examine the witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the court to disbelieve what the witness has said"*

On the alleged debt (Tshs. 400,000/=) the same was never raised during PW1's testimony nor the appellant's defence. Raising this fact now on appeal is a mere afterthought. The appellant is hence deemed to have accepted that he was indeed arrested for the rape.

On the issue of examination by PW1, it was as a result of the reflex action to the victim's cry. It was irrational and almost impossible for her not to examine a crying child in such circumstances. Be as it may, her observation that the victim's vagina had raptured

and smeared with blood and sperms was not conclusive. It was PW4, a clinical officer who medically examined the victim and concluded there was penetration by a blunt object. PW4 had also observed bruises and her hymen was not intact. The three aspects mentioned are therefore unmeritorious and dismissed.

Coming to the 3rd and 5th grounds which challenge PW4's professionalism. The appellant argued that PW4 neither proved his qualifications nor adduced reasons as to why the victim was not hospitalized after the examination. The court has captured before giving his testimony, PW4 identified himself as a doctor/ a medical officer who examined the victim. It is the position in the case of **Nyerere Nyague (supra)** which was further maintained in the case of **Paulo Antony .V. Republic (2016) TLS LR 37(CA)** that, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the court to disbelieve what the witness said. Since the appellant never challenged PW4's qualifications during trial, after his introduction he is estopped from doing so now.

More so, Pw4 testified on the status of the victim's genitalia after his medical examination. He clearly elaborated, the victim had her private parts penetrated through and he issued PEP to prevent her from HIV infection. In the circumstances, although PW4 did not state whether the victim was hospitalized or not, the

same did not raise doubts to the fact that, the victim was raped. In the event the two grounds crumble.

On the 4th ground, as rightly argued by the learned state attorney, the trial magistrate considered the appellant's defence as seen at page 10 of the trial court's Judgment. It was found the same did not raise any doubt. To the contrary it provided the answer that it was none other than the appellant that sexually abused the victim.

On the issue of "Mzee Mjaluo" not summoned as a witness. The record is in black and white that the defence case was adjourned three times before it was marked closed. The court did issue the witness summon to this witness but was returned signed by the V.E.O dully endorsed that he could not be found. There were all indicators that the appellant was given an opportunity to call his witness to defend him but did not show up. He never complained that his witness had been threatened by PW1. This ground has no merit.

Lastly, the appellant challenges the trial court's findings that, his conviction was merely borne out of the victim's testimony without considering the fact, such evidence should not be accepted and believed wholesale. It is my considered view that, the trial magistrate was bound to consider and believe the victim's evidence because, from the records it is clear the victim knew

the appellant and the incident had taken place in broad daylight. There was thus no room of mistaken identity. The victim (PW2), chronologically narrated how the appellant undressed her and inserted his penis into her vagina. For all intent and purposes this was the best evidence coming from the victim herself. This position is also stipulated in the case of **Mohamed Said V Republic, Criminal Appeal No. 145 of 2017, CAT** at Iringa where the Apex Court held inter alia at page 14 that: -

> *"We are aware that in our jurisdiction it is settled that the best evidence of sexual offences comes from the victim. We are also aware that under section 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for sexual offence may be grounded solely on the uncorroborated evidence of the victim. However, we wish to emphasize the need to subject the evidence of such victims to scrutiny in order for the courts to be satisfied that what they state contain nothing but the truth."*

Putting PW'2 testimony into scrutiny and the fact that the appellant was apprehended within the premises, the trial magistrate did not error in relying on her testimony. The trial magistrate was also justified since the same was supported by PW1 and PW3 who arrested the appellant at the scene of crime

as well as PW4 who examined the victim and PF3 admitted and marked "Exhibit P1". The trial Magistrate had in this case taken the wholistic approach.

The foregoing notwithstanding, the appellant's defence at the trial court and in his submission in this court, have not casted doubt on PW2's (the victim) evidence or put holes in the prosecution case. His allegations that the case is fabricated are unsubstantiated. In the upshot the prosecution had managed to prove their case beyond reasonable doubt. In view thereof, I see no reason to fault the learned magistrate's findings and decision, I dismiss the appeal for want of merit and uphold the trial court's decision.

It is so ordered.

B. R. MUTUNGI
JUDGE
31/08/2021

Judgment read this day of 31/8/2021 in presence of Appellant and Miss Grace Kabu (S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
31/8/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
31/8/2021