IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 121 OF 2020

(Appeal from the decision of the District Court of Arusha at Arusha Criminal Case No. 15 of 2019)

BARAKA KIVUYO..... APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

23rd August & 22th October, 2021

MZUNA, J.

The appellant Baraka Kivuyo is currently serving 30 years imprisonment upon conviction for the offence of rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code Cap. 16 by the Arusha district court (the trial court).

It was alleged that on 8th day of May, 2019 at Siwandeti- Mianzini ya Juu in the city, district and the region of Arusha, the appellant did have sexual intercourse with a girl known as PWI (name withheld to hide her identity) aged sixteen years old contrary to the law.

The prosecution evidence led by PW1, alleged that on the material date the appellant picked her and offered her a motor cycle lift when she was heading back home from tuition (a Physics subject re-seater). Upon arriving at the river they crossed on foot leaving a motor cycle somewhere. Then the

appellant started to touch her body, then he laid her down, undressed her skinny tight and underwear and then inserted his penis into her vagina. He left. Upon arriving home, she looked dirty. She disclosed the ordeal to her mother and father (PW2 Nicodems Tsere). The matter was reported to the Police on the same day leading to medical examination by Dr Emmanuel Masanje Manyonyi who tendered PF3 exhibit P1. PW4 WP 4733 Cpl Zamda investigated the case.

The appellant was arrested and then charged in court. In his defence where the appellant testified undefended, he denied the commission of the offence. The trial court believed the evidence, convicted him and sentenced him.

Aggrieved, he is now appealing to this court on the following grounds;

1. *That the district court magistrate erred in law when she convicted and sentenced the appellant on the alleged offence of rape which was not proved beyond reasonable doubt and which was not committed by the appellant.*
2. *That the Honourable Magistrate erred in law and fact in convicting and subsequently sentencing the appellant in absence of evidence to that effect.*

In this appeal Mr. Duncan Oola, learned Advocate serviced the appellant while Ms. Akisa Mhando State attorney appeared for the respondent Republic. The appeal was argued orally. In arguing grounds of appeal, both counsels submitted on both grounds jointly.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt.

Essentially Mr. Duncan capitalised his submission on the fact that the record of the trial court show that it was recorded *NIL* after the prosecution witnesses had testified. According to him, *NIL* connotes that the appellant did not cross examine the prosecution witnesses and therefore he was denied the right to be heard. To fortify his submission, he referred this court to the case of **EXD 8656 CPL Senga S/o Idd Nyembo & 7 Others vs The Republic**, Cr. Appeal No. 16 of 2018 (unreported). Mr. Duncan further argued that, according to the medical report PW1 was not a virgin. Therefore, she probably might have had sexual intercourse with another person and that the exhibit tendered by PW3 was not tested.

Arguing against, Ms. Mhando contends that the charge was proved beyond reasonable doubt. That, PW1 was aged 17 years and the offence was a statutory rape. She cited the case of **Robert Andondile Komba vs D.P.P**, Cr. Appeal No. 465 of 2017 on proof of age that PW2 proved her age as 17 years. She touched as well on the issue of identification that despite the fact that the offence was committed during night hours still, PW1 described the appellant as their neighbour. That she mentioned his name and the job which the appellant was doing. Ms. Mhando goes on submitting that PW1 was

also able to mention the appellant soon after reporting home on the same day.

On the issue of denying the appellant the right to be heard, Ms. Mhando submitted that he was given such chance during cross examination but he did not ask any question. That he failed to exercise his right. She also cited the case of **EXD 8656 CPL Senga S/o Idd Nyembo & 7 Others vs The Republic** (supra) to show that the court record cannot lightly be impeached. To buttress her point, Ms. Mhando referred this Court to the case of **Jacob Manyani vs The Republic,** Cr. Appel No. 558 of 2016 (unreported) at page 17 which held that failure to cross examine witnesses on certain matter is deemed to have accepted and will be estopped to ask the court to disbelieve what the witness testified.

In rejoinder Mr. Duncan reiterated his submission in chief and added further that the case of **Jacob Manyani vs The Republic** (supra) is distinguishable to the circumstance of this case. I commend the learned counsels for the well reasoned submissions. As above noted, the question which remains is whether the charge was proved to the required standard of proof.

According to PW1 and Exhibit P1, there was forced penetration in the female organ (vagina) though exhibit P1 apart from saying "evidence of

forceful penetration noted" do not say type of weapon used. Based on what PW1 said, it was a male organ. PW3 says there were bruises;

> *"We examined the private part of the victim, (Vagina) I found bruises on the upper and the right part, of the vagina."*

In the case of **Nebson Tete vs. Republic**, Criminal Appeal No. 419 of 2013 CAT at Mbeya (unreported) the Court held that;

> *"This piece of evidence was sufficient to prove that there was penetration and/or forceful sexual intercourse, in terms of section 130 (4) (a) (Supra). The penetration of the male organ into the female organ, is an essential element, however slight, it may be"*

The evidence of PW1 and PW3 are crystal clear that there was penetration and the person who raped PW1 is none other than the appellant. The evidence of PW1 reads;

> *"He started touching my body, we were walking. We reached somewhere. He laied (sic) me down, undressed my skinny tight and underwear then raped me. He penetrated his private part (penis) to my vagina. I felt pain, we were only two. After he finished he left."*

It was at about 19.00Hrs. However, there are factors favouring accurate identification because the appellant and PW1 knew each other (her neighbour), had time to talk, boarded a motor cycle and went together for some distance coupled with the fact that the appellant had a mobile phone which illuminated torch light when they walked crossing the river. She immediately reported to her parents after the misfortune which cements her

credibility and reliability. As well submitted by Ms. Akisa Mhando, there is no mistaken identification.

Another question which follows is what is the effect for the appellant's failure to cross examine the prosecution witnesses and failure to challenge the tendering of an exhibit. As a matter of fact, the records of the trial court clearly shows the word *Nil* at the time the appellant was asked to cross examine PW1 and other prosecution witnesses. According to Mr. Oola, this means he was denied the right to be heard. That the magistrate ought to have said something on this anomaly. Ms. Mhando on the other hand says he relinquished his right and therefore cannot later complain.

This court has been referred to the case of **EX-D 8656 CPL Senga S/o Idd Nyembo & 7 Others vs The Republic** (supra) to show that the right to be heard cannot be done away. In that case, the issue concerned lumping together of the appellants (who were more than one) during cross examination and or tendering exhibits P1, P2, P3, P4, P5, P6, P7 and P8 without recording the answer for each appellant during trial save for those who were represented. The court at page 14 remarked that:-

> *"There was no procedural fairness to the parties...Granting each party any opportunity (sic) to be heard in the record embraces the principles of natural justice and addresses every question of fairness of the procedure or due process. Thus granting some parties the right to be heard while*

denying others such right may be broad enough to include the rule against bias, since a fair hearing must be unbiased..."

The above cited case of **EX-D 8656 CPL Senga S/o Idd Nyembo & 7 Others vs The Republic** (supra) is distinguishable to the case under consideration because in the present case, the appellant was alone and was given chance to cross examine and or say whether he objected the tendering of the exhibits. I tend to agree with Ms. Mhando the learned State Attorney, based on the case of **Jacob Manyani vs The Republic** (supra) that:-

"It is a trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as silence is tantamount to accepting its truth."

(The cases of Cyprian Athanas Kibogoyo v. Republic, Criminal Appeal No. 88 of 1992 and Hassan Mohamed Ngoya v. Republic, Criminal Appeal No. 134 of 2012 (both unreported) were followed and applied).

The appellant was given chance to cross examine all witnesses and even raise objection during tendering of an exhibit (PF3) but opted not to do so. It means his silence is deemed equal to accepting the truth. He cannot complain at the appeal stage that he was denied the right to be heard, though he was 23 years by then. This ground fails.

The question which calls for determination is whether age of the victim was proved. Ms. Mhando has insisted that PW1 said was 17 years (meaning at the time of rape she was 16 years) I have taken a look on the issue of

proof of age. PW2, father of the victim said that PW1 was aged about 17 and 18 years as of 19th June 2020 when he testified. The PF 3 (exhibit P1) alleged she was aged 16 years as of 8th May 2019 when the offence was committed. Even if Ms. Mhando says PW2 said PW1 was 17 years, the position is that the evidence of PW2, a Primary School teacher, who could have proved her age, is not certain on the exact age more so, when was she born? The court was not abreast on that vital defect. The often remarked slogan that the best evidence in sexual offence comes from the victim has now been settled that such evidence should not be taken as *"a gospel truth"*.

It was held in the case of **Mohamed Said v Republic**, Criminal Appeal No. 245 of 2017, CAT at Iringa (unreported) that:-

> *"We think that* ***it was never intended that the word of the victim of sexual offence be taken as a gospel truth but that her/his testimony should pass the test of faithfulness.*** *We have no doubt that justice in case of sexual offence requires strict compliance with rules of evidence in general and S 127 (7) of Cap 6 in particular and that such compliance will lead to punishing the offender only in deserving cases."* (Emphasis mine).

The record shows she had completed her form four examination and was a re-seater. It was held in the case of **Robert Andondile Komba vs D.P.P** (supra) at page 18 that:-

"...in cases of statutory rape, age is an important ingredient of the offence which must be proved. We are not prepared to hold that citing of age of the victim is akin to proving it..."

The court insisted that such proof cannot be based on the evidence from the PF3 or during conducting *voire dire* examination of the victim.

PW2 never gave explanation what he meant by saying she was aged 17 to 18 years. There is "no detail of that age" such that it could be said she was below 18 years at the time of the alleged rape. The benefit of doubt should be resolved in favour of the appellant.

In conclusion therefore, the charge which was of statutory rape was not proved beyond reasonable doubt. The appellant be released from prison forthwith unless otherwise lawfully held. Appeal allowed.

M. G. MZUNA,

JUDGE.

22nd October, 2021.