IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 62 OF 2020

(Arising from Serengeti District Court at Mugumu CC. No. 117 of 2020)

MAGETA MASALU @ MAGETA..... APELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

29th September and 18th October, 2021

F. H. MAHIMBALI, J.:

Mageta Masalu @ Mageta, the appellant herein was arraigned before the District Court of Serengeti at Mugumu for the offence of rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code [Cap. 16, R.E. 2002]. It was alleged by the prosecution that on the 22nd April, 2020 at Nyakitono village within Serengeti district , the appellant had carnal knowledge with one ZN (name withheld to disguise her identity) a girl aged 15 years. The matter was heard before the trial

court and the appellant upon being convicted was sentenced to 30 years imprisonment.

The material facts leading to this appeal are as follows, ZN was living with her parents together with her siblings at Nyakitono village. On the 22/04/2020 in the morning hours, she was preparing porridge and one Zawadi Kulwa Moses informed her that she was called by the appellant. She went to the appellant's house together with Zawadi. The appellant never uttered any word upon her arrival, he took her inside his room, where she found the father of Zawadi in the room. The appellant took off her clothes (undressed her) and the father of Zawadi got hold of her and the accused person had sexual intercourse with her and he used a condom. ZN felt pain as she was a virgin and she raised an alarm. Her younger sisters (Maria and Sophia) heard the alarm and they went to the appellant's house and that is when the appellant released her. This evidence of ZN was corroborated by her younger sister Maria (PW3) ,She also reported the incident to her father (PW2) when he came back from the farm at around 9:00 am. Her father went to Kulwa's house inquired of what had taken place and they began to quarrel. The appellant also denied to have committed the offence, hence PW2 reported the matter to the Village Executive Officer. ZN was

taken by PW2 to Natta Police station where they were given a PF3. At the police station they made complaint report which case was attended to by PW5 a police officer. Thereafter, ZN was taken to Natta dispensary for medical examination. At the dispensary she was attended to by PW4 a clinical officer. After attending to ZN, she reported that ZN's vagina was penetrated, there was no hymen but there was some fluids and spermatozoa. ZN had not contacted any sexually transmitted diseases and she was not pregnant. She filled the PF3 that was later tendered without any objection and admitted and marked in court as exhibit P.E.1. After completion of the investigation, the appellant was arraigned before the district court of Serengeti at Mugumu where he denied to have committed the offence, he fended for himself that on the material date he was not at his place, he was at a kiosk belonging to Peter Matwi and after having his tea he returned home but on his way to his house he was informed by James Meleleche (sub- village chairman) that he is needed at the village office. On the arrival at the village, he was told he had raped ZN, he denied to have committed the charged offence and that the case is fabricated.

The trial court then convicted and sentenced the appellant of the offence of rape. The appellant was aggrieved by this decision of the

trial court. He decided to appeal to this court vide his petition of appeal which contains four grounds of appeal. The grounds of appeal are as follows;

1. That, the trial magistrate erred in laws and fact to convict and sentence the appellant without giving a chance of right to be heard whereby the trial magistrate was depend (sic) on the only one side this was against the laws.
2. That, the trial magistrate erred in laws and facts to conviction (sic) and sentence the appellant by admitted (sic) wrong evidence which was testified by PW1,PW2,PW3,PW4 and PW5.
3. That, the trial magistrate erred in laws and fact to conviction (sic) and sentence the appellant because the one who did medical examination was not expert court was admitted (sic) wrong Exhibit PW1 (PF3) which was tendered by PW4 and was admitted by the trial court.
4. That, the trial magistrate erred in laws and fact to conviction (sic) and sentence the appellant because the trail (sic) court did not agree the defence to the appellant if was wrong or light (sic).

When this matter came up for hearing, both the appellant and the respondent were present through video link. The appellant, appeared in

person unrepresented while the respondent enjoyed the legal services of Mr. Frank Nchanilla, state attorney.

Submitting in support of his appeal, the appellant prayed for his grounds of appeal be adopted to form part of his submission and he had nothing more to add.

Objecting this appeal, Mr. Frank Nchanilla, replied on the first ground of appeal, the appellant's grief is that he was not given a right to be heard. Mr. Frank resisted this ground and he referred the court to pages 27-32 of the typed proceedings where the court complied with section 231 of the CPA, the appellant was well addressed of his rights and he utilized them very well.

Replying to the appellant's second grief that the trial court relied on wrong evidence as per the testimonies of PW1, PW2, PW3, PW4 and PW5. He resisted this ground as the appellant was charged with the offence of rape and the incidence took place during the day time. The victim was 15 years old and as per section 131(1) of the Penal Code, this is statutory rape and its main ingredients to prove it is age and penetration. He submitted that the age of the victim is found at page 12- 13 of the typed proceedings, as the victim was born on 26/2/2004, hence the age of ZN was proved. Also, the victim stated clearly on how

she was raped and the appellant did not cross examine her. It is the legal position that since he did not cross examine her, he admitted the testimony. He cited the case of **Martime Misala v. Republic,Criminal Appeal No. 428 of 2016 CAT Mbeya** at page 8 that held failure to cross examine is failure to challenge the said testimony. Hence the appellant cannot now challenge that the said testimony is wrong.

He submitted further on the second ingredient of penetration, PW1 testified very well at page 13 of the typed proceedings on how the appellant raped her. He cited the case of **Selemani Makumba v R**, where the court clearly stated in sexual offences, the best evidence comes from the prosecutrix. On the testimonies of PW2, PW3, PW4 and PW5 just corroborate the testimony of PW1.

The testimony of the clinical officer PW4 features out at pages 20-22 of the typed proceedings and corroborates the evidence of PW1.In her report, she concluded that the ZN's vagina was penetrated, there was no hymen and that there were some fluids and some spermatozoa from the prosecutrix's vagina. He concluded that due to the presence of spermatozoa, the penetration of the vagina was due to penis. She tendered the PF3 to substantiate all this.

Submitting further, he stated that the last witness was PW5 who is investigator of the case and testified what he did as the investigator in relation to this case. He interviewed witnesses and recorded their testimonies and interrogated the accused person and eventually prepared the preliminary accusations against the accused and forwarded the prosecution case file to his superior (OC – CID). Hence the testimonies of PW2, PW3, PW4 and PW5 corroborate the evidence of PW1.

On the third ground of appeal, the appellant's grief was that PW4 was not a professional / expert and it was wrong for the court to consider his evidence. The learned state attorney, objected to this ground and stated that PW4 is a clinical officer, grade II and according to the law he is a competent witness. He cited the case of **Charles Bode v. The Republic ,** Criminal Appeal No. 46 of 2016 CAT Dsm at page 16, where the same question was asked as whether a clinical officer is a qualified officer competent to conduct several medical issues and it was concluded that he/she is a competent and qualified medical personnel to testify on medical issues. He invited this court to be inspired by this decision.

Lastly on the 4th ground, the appellant's grief is that his defense was not considered by the trial court. It is Mr. Nchanilla's submission that defense evidence was well evaluated as per page 9 of the typed proceedings(paragraph 3). He went further to submit that incase it was not, this is the first appellate court and it is legally mandated to step into the shoes of the trial court and re-evaluate the whole evidence and reach a proper verdict as per the law citing section 366 (i)(a) of the CPA, Cap 20 R.E 2019. Concluding he prayed the appeal be dismissed and the sentence meted out be upheld and enhanced respectively.

Rejoining, the appellant reiterated his grounds of appeal and submitted further that there was no any justice done to him as he was prevented to call witnesses and ask questions. He also wondered whether it was possible for one to rape **while wearing a condom**. He stated also, the PW4 did not say what he used to conclude that the victim was raped. He prayed his appeal be allowed.

Having heard the rival submissions of the parties and gone through the court's records, it is this court's duty now to tackle this matter and decide if the appeal is meritorious.

The appellant's first grief is that he was not given a right to be heard. Having gone through the trial court's records it is evident that the

appellant was accorded his right to be heard. He was first invited to plead to the charge levelled against him where he pleaded accordingly, he was allowed to cross examine the prosecution witnesses and actively objected to the tendering of some exhibits.As if this is not enough, he was well addressed in terms of section 231 (2) of the Criminal Procedure Act where he accordingly replied and dully made his defense as per law. In that regard this ground is bankrupt of merits and it is dismissed.

The appellant's second complaint is that the trial court admitted wrong testimonies of PW1, PW2, PW3, PW4 and PW5. According to the court's records PW1 is the victim, PW2 is the victim's mother, who was informed by her daughter about the rape incidence. PW3 is the sister of the victim who was also informed about the rape incidence by the victim. PW4, the clinical officer told the court about his report after examining the victim and PW5 is the police officer who was assigned investigation of this case. Considering the whole case's testimony, it is very clear that the only person who is much conversant with the rape incidence is the victim herself, the rest just corroborated it.This being a rape case, the best evidence comes from the victim herself. This court is hardly allowed to interfere with the credence of the witnesses unless there are cogent reasons to do so. This is as per the case of **Mathias**

Bundala vs Republic , Criminal appeal No. 62 of 2004 CAT at Mwanza at page 12 where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, where the court held that

> *"it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".*

In the case at hand, the appellant has not established anything of cogent reason to make those witnesses discredited by the court.

Additionally, this case involves statutory rape and there are only two main ingredients to be proved which are age and penetration. The law is settled that age may be proved by the victim, her parents or medical practitioner. (See **Isaya Renatus vs R**, Criminal Appeal No. 342 of 2015, CAT at Tabora (unreported)).In this case the age of the victim was proved by her mother when she testified that the victim was born on 26/4/2004 and also the victim.

Regarding the ingredient of penetration , the law is also settled that the best evidence to prove the same comes from the victim herself. This principle was stated in **Selemani Makumba v Republic**, [2003] TLR 203 when the Court of Appeal held:

"***True evidence of rape has to come from the victim*** *if an adult, that there was penetration and no consent, and* ***in case of any other women where consent is irrelevant that there was penetration***" [Emphasis supplied]

Similar stance was stated in the case of **Godi Kasenegala vs R,** Criminal Appeal No. 10 of 2008 (unreported). In that case, the Court of Appeal held:

"It is now settled law that proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors may give corroborative evidence; see for instance, ***Selemani Makumba vs Republic****,..., **Alfao Valentino Vs Republic**, Criminal Appeal No. 459 and 494 of 2002 (unreported). Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so. See C.D Desouza Vs B.R Sharma (1953) EAC4 41"*

In this instant case, the victim stated that she was raped by the appellant and it was in the morning time. She was thus able to identify the appellant and also, she immediately told her younger sister of the

incidence. Also, when the appellant was given a chance to cross examine the victim, he did not.That means he admitted to the commission of the offence. Having stated so, this court finds that this ground is also devoid of merits and it is dismissed.

The appellant's third moan is that, the trial court erred in convicting and sentencing him as the medical examination was not done by an expert and the court admitted wrong evidence (PF3). PW4 being a clinical officer and according to the law he is allowed to examine victims, file PF3 and tender them. This court is at one with the decision cited by the learned state attorney in the case **Charles Bode v. The Republic** (supra) to inspire this court that a clinical officer is allowed to conduct medical examination. As on page 16 the CAT defined a clinical officer as a gazette officer who is qualified and authorized to practice medicine.Additionally, rape is not proved by medical evidence alone, see; **Julius John Shabani v. The Republic,** Crmininal Appeal No. 53 of 2010 at page 13. The argument that the appellant put on condom is not a bar to vaginal penetration. A penis that is insulated by condom does the same penetration equal to un-insulated penis. That said, this ground of appeal is devoid of merits and it is dismissed.

The last grief of the appellant is that the trial court did not consider his defense to find out whether it was right or wrong. I have gone through the court's record and to be specific the judgment on page 9. The trial magistrate stated that the defense of the appellant did not raise any doubt on the prosecution evidence. This court has the power to step into the shoes of the trial court and re- evaluate the evidence (see the case of **Deemay Daati and 2 Others v. Republic** [2005] T.L.R. 132). In this case, the Court had this to say on that principle: -

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and guiltyof the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact."*

Exercising that power, this court has gone through the appellant's defense that he was not at his place, he was at a kiosk belonging to Peter taking tea. This court finds this defense not plausible as he did not bring any witness to substantiate his claim. That said, it is the view of this court that this ground is bankrupt of merit and it is also dismissed.

In fine, this court finds this appeal bankrupt of merit as all grounds are unmerited. Thus, the appeal is dismissed in its entirety. Conviction and sentence meted out by the trial court is upheld and enhanced respectively.

It is so ordered.

DATED at MUSOMA this 18th day of October, 2021.

F.H. Mahimbali

JUDGE

18/10/2021