IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL CASE NO. 96 OF 2019

(Appeal from the judgement and sentence of the Resident Magistrate Court of Mbeya at Mbeya in Criminal Case No. 111/2019 dated 27.08.2019)

REPUBLIC.....APPELLANT

VERSUS

DAUD DAIMON @ MWAKABAJA..... RESPONDENT

JUDGEMENT

Date of last Order: 16.08.2021

Date of Judgment: 18.10.2021

Ebrahim, J.

The Appellant herein, the Republic has lodged the instant appeal raising two grounds of appeal as follows:

1. That, the trial magistrate erred in law by failing to properly analyse the prosecution evidence and arrive at proper conclusion.

2. That, the trial magistrate erred both in law and fact for acquitting the respondent while prosecution proved the case against him beyond reasonable doubts.

The Respondent herein was charged with two counts of rape contrary to **section 130(1), (2) (e) and 131 (3) of the Penal Code, Cap 16 RE 2002**. It was alleged by prosecution that the Respondent on 14th day of April 2019 at airport area, Ilembo Ward within the City and Region of Mbeya had carnal knowledge of one SM a 4 years old girl and SJ a 6 years old girl.

Brief facts of the case discerned from the record are that on 14.04.2019 SM was playing with her friend SJ near the Respondent's house. The Respondent firstly called SM inside his house and took her into his room where he removed her under-pant and raped her. Feeling the pain, SM started crying and it was when the Respondent stopped and let her out giving her Tshs. 100/- as a gift. The Respondent then asked her to call SJ. SJ went in to collect the money and the Respondent undressed and raped her. It was SM who told her mother what happened to them. The parents of the victims went to report to the police where they were issued with PF3 which upon medical

examination, it showed that the victims were penetrated as there was no hymen. Hence, the arrest of the Respondent.

After hearing the evidence of eight prosecution witness and the defence of the Respondent, the trial court found out that prosecution failed to prove the case beyond reasonable doubt and acquitted the Respondent. Aggrieved, the Appellant has preferred the instant appeal.

This appeal proceeded exparte following the fact that the address of the Respondent was not available in the files and even after three publications in the newspapers, the Respondent did not appear.

Submitting in support of the appeal, Counsel for the Appellant, Mr. Davis Msanga explained to the court that their case was based on the testimonies of PW2 and PW6. He said PW2 (pg 15-16) explained how the Respondent raped her and identified him and PW6 (pg 28) identified the Respondent as Baba Anna. He contended that the evidence of PW2 and PW6 was credible and there was no cogent reason to discredit it. He referred to the case of **Nebson Tete V R**, Criminal Appeal No. 419 of 2013 pg.9. He contended also that PW7(pg31) observed the

bruises on both PW2 and PW6 vaginas and there was some blood in their urine as per exhibit P1 – PF3. Referring to the case of **Selemani Makumba V R,** [2006] TLR, Mr. Msanga said that PW2 and PW6 mentioned the Respondent only. He thus urged the court to find that the trial court has erred and prayed for conviction of the Respondent and sentence him accordingly.

Reading the grounds of appeal and submission by the Counsel for the Appellant, the contentious issue in this appeal is whether the evidence adduced by the Appellant's witnesses did prove the case beyond reasonable doubt.

Cognizant of the fact that this is the first appellate court I am allowed to step into the shoes of the trial court and make evaluation and analysis of evidence as illustrated in the case of **Mzee Ally Mwinyimkuu@ Babu Seya Vs Republic**, Criminal Appeal No. 499 of 2017. In so doing, I find it apt to revisit the evidence on record.

As alluded earlier, prosecution side in proving their case called seven witnesses. The key witnesses were PW2 and PW6, the victims.

PW1, the mother of PW2 testified before the court that on 14.04.2019 she saw PW2 crying. When she asked her, PW2 responded that she has been raped by baba Anna, the Respondent. She called her husband and together with the victim went to report to the police. At the police they were given PF3 and went to the hospital where the doctor examined PW2 and discovered that she has been raped. Responding to cross examination questions, PW1 said she heard PW2 crying around 1500hrs outside the Respondent's house near their home as the Respondent is their neighbour. She admitted not to have checked PW2 on her private parts and that she could walk.

PW2, SM testified before the court that the Respondent pulled up her dress and raped her. In her own words she said "aliingiza dudu huku chini" pointing at her vagina. She testified that the she felt pain and thereafter she told her sister Magreth who then told PW1. She said the parents reported to the police and she sent her parents to the Respondent's house. She said she was also told by her friend SJ that she was raped by the Respondent. Responding to cross examination question, she said her friend SJ was raped on a different day and she also took her

parents to the Respondents home on a different day. She responded also that the Respondent did not ask her to call SJ. **PW3,** the father of PW2 was told by PW1 about the ordeal. They took the victims to the hospital together with SJ's father and then the next day reported the matter to Sub- Ward chairman and they managed to arrest the Respondent and take him to the police. He testified also that the victims showed them the house of the Respondent. **PW4, a ten cell leader** testified on how the police, victims and parents of the victims went to her house and the victims showed them the room and the bed of the Respondent which he used to rape them. **PW5,** the mother of SJ told the court that she heard about the incident of rape of PW2 and her daughter on the evening of 14/04/2019. When she went home their daughter SJ told her that the Respondent also raped her. On looking at her private parts she found sperms. They reported to the police and went to the hospital. She said the victims showed the room where the Respondent raped them. She stated also that the SJ told her that they were both raped on the same day and SJ was raped twice. **PW6, SJ** another victim told the court that the Respondent raped her two times. In her words she

said "Aliingiza dudu lake huku ukeni kwangu". She said she did not tell anyone. When her mother came back in the evening she checked on her vagina and took her to the hospital. PW6 said, the Respondent also raped PW2 on the same day. Responding to cross examination question, she said when the Respondent raped her, no blood came out. **PW7, the doctor,** testified to have examined the victims on 14.04.2019 at around 2300hrs. He examined PW2 and found bruises in her vagina with no hymen. He further examined her urine and found some blood but no sperm. As for PW6, he also found no hymen, no sperm but she was found with UTI. He explained that for SM a blunt object entered her vagina and as for SJ it looked that her hymen was perforated not in a long time. He stated also that the force used to penetrate SJ was not much that was why there was no bruises as opposed to SM. He tendered PF3 for both victims which were collectively admitted as exhibit P1. **PW8,** was a police woman who investigated the case. She interrogated PW2 and PW6 who told her how they were called by the Respondent, undressed and raped them. On 18.04.2019 accompanied by chairman of the street and ten cell leader they were to the house of the

Respondent. Then they called the victims one after another who showed the same house and the bed that they were raped.

After ruling that the Respondent had a case to answer, the Respondent made his defence as DW1. In his defence, the Respondent admitted knowing the victims as they play with his children at his home. He denied rapping the victims and challenged the testimonies of PW1 and PW2 that they differ on the fact that PW2 said she told her sister about being raped. He pointed out other contradictions between the testimonies of PW6, PW5 and PW7 on the sperms found at PW6 vagina. He pointed out also that PW5 said she did not wash PW6 while PW6 said she bathed and put on nice clothes. Another discrepancy pointed out by DW1 is that the testimonies of PW4 and PW5 differs on a number of people who reported at the police station. He prayed to be set free and the court to see that the case has been implanted on him.

Going through page 5 of the typed judgement of the trial court, the magistrate directed himself on the purpose of **section 127(6) of the Evidence Act, Cap 6, RE 2019** and the fact that the child must be telling the truth. He referred to the testimony of PW1

who said that she heard PW2 crying while PW2 said that she told her sister about the rape and concluded also that it was impossible for the children of 4 and 6 years to be able to walk/ continue playing with their fellow children after the rape, hence concluded that the case was not proved beyond reasonable doubt.

Out-rightly, I am of the firm stance that the trial magistrate had put his own facts and imagination in reaching his conclusion but not according to the evidence adduced in court. When responding to cross examination questions, PW1 said that PW2 could walk. However, PW2, the victim was not cross examined at all on whether she could walk after the ordeal or not. The same happened to PW6. The trial magistrate simply applied his own assumptions on the issue and he could not tell as to may be there was any medical evidence that probably PW7 said a raped 4 years girl could not walk. I fortify my stance by the findings of the Court of Appeal in the case of **Filbert Alphonce Machalo Vs The Republic**, Criminal Appeal No. 528/2016 where after the trial judge had imported her own opinion instead of basing on the evidence before her. The Court of Appeal held as follows:

"With due respect to the learned first appellate Judge, we think it was a misdirection to dismiss the ground of appeal by the appellant, by invoking her own imported opinion instead of basing on the evidence which was before her"

Again, the jurisprudential precedents clearly states that in rape cases, the direct evidence comes from the victim. This position was well illustrated by the Court of Appeal in the case of **Victory Mgenzi@Mlowe Vs The Republic**, Criminal Appeal No. 354 of 2019 where it was held as follows:

*"**We should point out here that in sexual offences, there can be no more direct evidence than the evidence of the victim of the crime concerned.** PW1 testified first-hand how she and the Appellant had sexual intercourse three times. **Even if there is no other evidence remaining on the record, the evidence of PW1, as the victim of sexual, can still stand alone to convict without any corroboration. Sub-section (6) of section 127 of the Evidence Act, Cap 6 R.E. 2019 regards the evidence of the victim of sexual crime to be the best evidence**"* [emphasis is mine].

More-so, in rape cases penetration however slight proves the offence. That being the position therefore, I find that the trial court wrongly assumed facts in disbelieving the evidence from prosecution side.

The trial court also pointed out inconsistences on the testimonies of prosecution witnesses. Beginning with the issue that the testimonies of PW1 and PW2 do not tally, PW1 said she heard PW2 crying and when asked, PW2 told her that she has been raped by the Respondent. She said when PW2 was telling her about the rape, she was with Margreth, PW2's sister. PW2 said after being raped, she told her sister Margreth who told PW1. The fact that PW1 did not say that she was first told by Margreth does not impede the fact that she heard her daughter crying outside. If at all she would have gotten out to ask her daughter who was crying after being told by Margreth. PW1 said she was with Margreth when PW2 told her that she was raped.

I am aware that the court has a duty to look into discrepancies if any so as to ascertain if they are material or not. At the same time, variation of evidence, discrepancies or contradictions of testimonies cannot be totally unexpected

particularly following shock, passage of time, age, trauma etc. That is the reason that the court is required to see whether discrepancies are explainable, curable or they create doubts which go to the root of the matter (see the case of **Mathias Bundala V R**, Criminal Appeal No. 62 of 2004 (unreported)). In this case PW2 is 4 years old and a nursery school student PW1, a mother obviously was shocked to relive the fact that her very young daughter was raped. Looking at what was termed as discrepancy, I would not term it so but rather, PW1 simply did not say that she was informed by Margreth and PW2 said she informed her. At the end of the day, PW1 was told by PW2 that she was raped by the Respondent.

As for PW6 being found with no sperm and that she said that her mother washed her whilst PW5 said she did not wash her and found sperms. Again, as alluded earlier, difference in evidence cannot be unexpected and that the best evidence comes from the victim. PW5 said she found her child with sperms and did not wash her. PW6 said her mother looked at her vagina and wash her. PW6 testified that the Respondent ejaculated on her. To use her own words, she said "*alinimwagia maujiuji ukeni kwangu na*

yaliingia ndani kwangu". Thus, the fact that initially PW6 had sperms on her vagina was evidenced by the victim. Thus, whether she was washed later by her mother hence could not be seen by a doctor, and that PW5 said she did not wash her does not preclude the fact that the Respondent penetrated PW6. Therefore, I find that the discrepancy does not disapprove rape which is the root of the matter.

Furthermore, I also find the discrepancy pointed out by DW1 on the number of people who went to the police between PW4 and PW5 as having no essence at all because each one explained how the matter was reported to the police and how both victims in the company of the police managed to show the same room and bed that the Respondent raped them on. Surely, each person would have his or her own number that he /she could remember in going to the house of the Respondent. Moreover, DW1 admitted to have been found at home by some people, members of the street and parents of the victim. He also admitted in his defence to have been told by his wife that the victims showed the room where he raped them

PW7 in his evidence proved penetration on both children and even said that in case of PW6 the force used to penetrate her was not stronger comparing to PW2 that was why there were blood in her urine.

The defence levelled by DW1 that there was misunderstanding because his duck got into the house of the parents of PW2 in 2018 does not make any sense. In considering the different versions of the testimonies of DW1 that at one time he says he knows PW2 and PW6 as they play with his children. In another instance he says he does know that his children used to play with the victims. Therefore, in considering his defence, I find no difficult in disbelieving it. Moreover, defence evidence, did shake prosecution case.

I am abreast of the position of the law that the evidence of the victim in sexual offence must not be taken as gospel truth but must pass the test of truthfulness - **Mohamed Said Vs R**, Criminal Appeal No. 145 of 2017 (CAT-Iringa). Going through the testimonies of PW2 and PW6, I see no cogent reason to doubt their credence as they both coherently explained how the Respondent called them in turns when they were playing, raped them and

gave them Tshs. 100/- as a present. Moreover, **Section 127(6) of the Evidence Act, Cap 6 RE 2019** provides as follows

> *"where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may,* ***after assessing the credibility of the evidence of the child of tender years*** *of as the case may be the* ***victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict,*** *if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."* [Emphasis added].

As stated earlier, in assessing the evidence of both PW2 and PW6, I find that they were credible witnesses and were telling the truth. Moreover, the circumstances of their ordeal was well corroborated by the testimonies of PW1, PW3, PW4, PW5, PW6, PW7 and PW8 being the people who were first hand told about

the rape by the victims, a doctor who examined the victims **(exhibit P1)**, and people who were present when the victims showed the room and the bed that the Respondent raped them on.

From the above background therefore, I agree with the counsel for the Appellant that the trial magistrate wrongly evaluated and analysed the evidence in finding that prosecution did not prove the case beyond reason doubt. To the contrary I find that prosecution proved their case beyond reasonable doubt and I allow the appeal. The decision of the trial court is hereby reversed, and I accordingly find the Respondent guilty of the charged offence and convict him of the two counts of rape **c/s 130(1), (2)(e) and 131(3) of the Penal Code** charged in Criminal Case No. 111 of 2019.

Ordered accordingly.

R.A. Ebrahim

Judge.

Mbeya

20.10.2021

Order: Following the absence of the Respondent, I accordingly issue an order of his arrest so that he can be brought to court for sentencing.

R.A. Ebrahim

Judge.

20.10.2021