THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
DC. CRIMINAL APPEAL NO. 20 OF 2021
(Arising from the District Court of Mbarali at Rujewa in Criminal Case No. 144 of 2015)

HUSSEIN ABDRAHAMAN @ KINDAMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 17th & 20th October, 2021

KARAYEMAHA, J

Hussein Abraham @ Kindamba is currently behind the bars. He appeared in the District Court of Mbarali at Rujewa on a charges of; 1st Rape contrary to section 130 (1) (2) (e) and 131 (3) and 2nd Unlawful Wounding contrary to section 228 of the Pena Code [Cap 16 RE 2002] (herein the PC). He was found guilty, convicted and ultimately sentenced to a 30 years' imprisonment term for the 1st count and 1 year for the 2nd count. Aggrieved by the trial court's decision he has preferred this appeal. The appeal is against conviction and sentence.

The appellant's petition of appeal has raised six (6) grounds which converge to four broad points, to wit:

1. *That the prosecution case was not proved to the hilt.*
2. *That the trial court erred in law and fact when it convicted him while no witness saw him committing the offence and was not arrested at the scene of the crime.*
3. *That the victim's age was not proved.*
4. *That the trial court held in law for failing to consider his defence case.*

It was the prosecution's case that on 20/07/2017 at about 15:30 hours at Jungulutu Village within Mbarali District and Mbeya Region the appellant did wilfully and unlawfully have sexual intercourse to a two years and ten months ($2^{10/12}$) girl. To disguise her identity, I shall henceforth refer to her as "KM".

During the trial in the trial court, evidence was received showing that on 20/07/2017 when Rehema Hamis (PW1) was in the kitchen cooking, the appellant, her neighbour, visited her and asked to go with KM in order to buy her bananas. PW1 agreed and the two left together. Soon after cooking, PW1 started looking for KM. She passed at PW2's, Joel James Mlinge, to inquire. On getting a negative answer, the two left to trace the her. They went as far as Saida Abek Mwasyeke's (PW3) food kiosk who told them that she saw the appellant with the victim. In

her testimony, PW3 informed the trial court that on the material date the appellant and the victim passed at her food kiosk and bought four (4) bananas. He gave one to one customer and gave some to the victim. Shortly after, they left the appellant holding the victim's hand. Following that information PW1 and PW2 went to the appellant's house. On getting there, they found KM outside the house but the appellant was not around. They also saw the banana peels. On examining her, they discovered that she was unconscious and had sustained injuries at her neck. According to PW1 villagers converged at the scene of the crime. Women examined the victim's vagina and discovered fresh blood oozing there from. This event enraged PW1 and PW2. PW1 instantly reported the matter to police and at the same time rushed the victim to police station. The victim was given a PF3 that enabled her to undergo medical examination before Julius Njugilo (PW4), a doctor, which revealed that the victim had been penetrated by a blunt object. The appellant was apprehended at a place known as *"intek area"*. Later he was arraigned to court where he was tried, convicted and finally sentenced as hinted earlier. The decision was not to the appellant's liking, hence the decision to prefer this appeal.

The appellant constantly denied the committing the offence. It was his defence that on 20/07/2017 was visited by PW5 and Juma, the

Village Secretary at his work place and informed him that they found KM at his house. They arrested him and finally took him to Rujewa police on 26/07/2017.

At the hearing of the appeal, the appellant prosecuted the appeal on his own, whereas Ms. Zena James, learned State Attorney, represented the respondent.

Getting us under way was the appellant who submitted on ground two that out of six (6) prosecution witnesses no one saw him raping and wounding the victim. In view thereof, he urged this court to consider his grounds of appeal and acquit him.

Addressing the court on this appeal, Ms. James out rightly opposed the appeal and like the appellant started arguing ground two. She admitted that there is no evidence showing that the appellant was seen committing the offence. She submitted, however, that the case is based on circumstantial evidence. She observed further that the adduced evidence connects the appellant with the commission of the offence because it leaves no doubts.

On a complaint that the case was not proved beyond reasonable doubt, Ms. James submitted that the prosecution through PW1, PW2, and PW4 managed to prove that the victim was wounded on her neck and was penetrated. She argued further that in proving penetration

under section 130 (4) of the PC, it was less important to prove that banana peels were found at the scene of the crime. She buttressed her view with the case of ***Seleman Makumba v Republic***, [2006] TLR 384. She also stated that the appellant was the last person with the victim so he had to tell what befell on her.

Regarding the age of the victim, Ms. James dismissed the appellant's complaint on contention that PW1 informed the trial court that the victim was 2 years and ten months. In principle that was enough in proving the age of the victim's age, she insisted.

Finally, the learned respondent's counsel urged this Court to pass a life imprisonment sentence under section 131 (3) of the PC because the victim was 2 years but the trial court passed a lesser sentence of 30 years imprisonment.

The appellant was expectedly terse in his rejoinder. Maintaining that he was innocent, he prayed to be set at liberty, as there was no evidence showing that he was seen at the scene of the crime.

After being exposed to these rival submissions and the evidence on record, my task now is to consider the merit or otherwise of the appeal and the grand question is whether the appeal presents any credible and compelling case for departing from the view taken by the trial court.

I have carefully considered whether there was any rape committed on PW1. On this, I shall be guided by the evidence of PW1, PW2 and PW4 as well as the PF 3 exhibit P 1 and the law.

The law on rape is very clear. Section 130 (2) of the Penal Code, makes it an offence of rape, for a male person to have sexual intercourse with a girl or woman. The law provides further under subsection (4) that the offence of rape is proved by penetration even if it is slight. It states as follows:

> *(4) For the purposes of proving the offence of rape-*
> *(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;*

It is now a common principle that true evidence must be given by the victim. This principle was emphasized by the Court of Appeal in cases of ***Seleman Makumba v Republic*** (supra) and ***Julius John Shabani v The Republic***, Criminal Appeal No. 53/2010 CAT, Mwanza (Unreported)

> *"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 woman where consent is irrelevant that there was penetration."*

It suffices to say at this moment, therefore, guided by the foregoing statutory and case law, that penetration being the necessary

ingredient must be proved beyond reasonable doubt not inferred. The evidence must be led to prove every essential ingredient of rape, be it statutory or conventional rape.

In this case the victim was 2 years and 10 months. At this age the victim could not be capable of testifying. She could not be expected to give a cogent story on what transpired. I agree with the learned State Attorney that in rape cases the victim's evidence is important as per section 127 (7) of TEA [Cap 6 RE 2019]. Nevertheless, the position in this case is different considering the age of the victim. In my considered opinion that by that age the victim had no ability to testify, even if her parents were compelled to bring her, that would not be done without causing unnecessary inconvenience.

My unfleeting review of the evidence of the PW1 and PW2 reveals that the victim was found at the appellant's house with a wound on her neck and fresh blood oozing from her vagina. The appellant neither cross examined on these facts nor defended himself on them. In principle, 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 trial court to disbelieve what the witness said. (See the case of ***Nyerere Nyague v Republic, Criminal Appeal No.67 of 2010***).

Similarly, the appellant in his defence did not dispute going with the victim to his house from PW1's house via PW3's food kiosk. In the same line, I find PW4's (Doctor Julius Njugilo) testimony credible and corroborative. It was him who attended the victim on 20/07/2017 and found her with injury on the eye and at the neck. Undisputably, on physical examination PW4 found bruises and fresh blood in her vagina. I am at this juncture solidified by the circumstantial evidence from PW1, PW2, PW3 and PW4 and the PF3 to hold that the victim was raped and wounded.

The question is which comes on the fore at this juncture is who raped her. The whole evidence on record points at the appellant. As hinted above, although there is no direct evidence going to incriminate him with the alleged offences, the Republic urged the trial Court and, of course, this Court to hold that it was the appellants who raped and wounded the victim. On this, it has solely relied on circumstantial evidence.

Our jurisdiction is replete with authorities which dictate that conviction must only be found on circumstantial evidence, if such evidence irresistibly leads to the conclusion that it is the accused, and no one else, who committed the crime. In other words, the indictable facts must not be capable of any other interpretation than that the person in

the dock is guilty of the offence charged. The case of ***Hamida Musa v Republic*** [1993] T.L.R. 123 is one of those authorities where the Court stated that:

> *"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt".*

A scrupulous review of the prosecution's evidence especially that of PW1, PW2 and PW3 offer a story which meets the legal threshold required to grounding conviction as set out in the cited decision. PW1 allowed the appellant to go with the victim for the purpose of buying her bananas. The duo bought bananas at PW3's food kiosk. Shortly, after the appellant left with the victim. Finally, the victim was found at the appellant's house unconscious. She was examined thereat and found with fresh blood which was oozing from her vagina. From the foregoing evidence, I have no flicker of doubt that the appellant was with the victim in the last minutes before being raped.

The controversy begins here. The prosecution believes that the appellant after committing the hyenas act left the victim at his house whereas on the other hand the appellant disputes that allegation. Perhaps before answering that question, it is important to ask a very

crucial question, whether it was possible for the appellant to leave the victim in his house unprotected or in other person's custody. Well, if the situation was so, the defence evidence would tell. Unexpectedly, the defence evidence is seriously silent about this fact. Given these circumstances, I agree with Ms. James' contention that the appellant must explain what happened to the victim. In my considered opinion since the appellant was the last person seen with the victim who was found later raped within a short time was duty bound to give explanation as to when and how he parted with the victim before the incident (see the case of ***Richard Matangule and Another v Republic***, [1992] TLR 5.)

A thorough evaluation of the evidence of PW1 corroborated by the testimonies of PW2, PW3, PW4 and PW5 left no shred of doubt in the mind of the trial magistrate and in my mind now, that it is the appellant who perpetrated the rape incident against the victim. I, therefore find nothing faulty in this reasoning.

Let me now turn to the issue of age. The appellant complained that the victim's age was not proved for wanting of the birth certificate and parental evidence. With due respect, I am of the humble opinion that this issue should not detain me much. The evidence of PW1, the mother of the victim, was cogent to ground conviction. She testified that

KM was two (2) years and ten (10) months when the incident of rape took place. This evidence was not challenged.

I am mindful of the fact that the parent is better positioned to know and state the age of his child. I am not alone in this position. In ***Isaya Renatus v Republic,*** Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (unreported) at page 8 observed that:

> *"The proof of age may be given by the victim, Relative, Parent, Medical practitioner or by production of birth certificate."*

See also the case of ***Salu Sosoma v Republic***, Criminal Appeal No. 32 of 2006 quoted with approval in the case of ***Mario Athanas Sipeng'a v Republic***, Criminal Appeal No. 116 of 2013 (both unreported).

Finally, is the complaint by the appellant that his defence evidence was not considered by the trial Magistrate. A settled principle is that the accused's defence must be considered and where a special defence is given by the accused the same must be taken into account. Failure to consider the defence is fatal to the trial or proceedings as per the case of ***James Bulow & others v Republic*** [1981] and ***Jonas Bulai v Republic***, Criminal Appeal No.49 of 2006 (unreported) and a score of other decisions have long settled the position in this area. Underscoring

further, the Court of Appeal of Tanzania in ***Jonas Bulai case*** (supra) insisted that it is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty.

In the present case, the record particularly the judgment answers the question whether the defence evidence was considered or not. I have read the trial court's judgment and noted that apart from summarizing the defence evidence the trial Magistrate went further to test it whether it displaced the prosecution case or not. The trial Magistrate observed at the 1st paragraph of page 8 of his judgment as follows, I quote:

> *"Accused person in his defense he (sic) only showed that he was arrested by the village officer and sent him at Police Rujewa. He did not dispute the evidence of prosecution side in general."*

He finally found it weak and could not disturb the cogent prosecution evidence. Basing on this discussion, I find the 4th ground of appeal wanting in merits. It is hereby dismissed.

Before concluding, Ms. James raised a legal issue of sentence imposed on the appellant. As correctly submitted by the learned State Attorney, the victim was 2 years and 10 months when the incident of rape took place. This means she was less than 10 years. In terms of

section S. 131 (3), the proper sentence for a person who raped a girl under 10 years is a life imprisonment but as per the trial court's record, the appellant was sentenced to 30 years imprisonment.

Demonstrably, in this case the punishment complained of was actually the one imposed. It will be very refreshing to observe here that under the scheme of our Criminal Procedure Act (the CPA) every accused person found guilty of committing an offence must be formally convicted as per Sections 235 (1) and 298 (3) of the Criminal Procedure Act Cap 20 R.E. 2019.Thereafter, the convicted person must be lawfully sentenced. (See ***RuzibukyaTibabyekomya v. Republic,*** Criminal Appeal No. 218 of 2011).

Essentially, the sentencing provision as per the charge sheet is section 131 (3). The provision states as follows:

> ***"131 (3) subject to the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."***

This provision provides for a maximum sentence of life imprisonment for a person who rapes a girl under the age of ten years. It is, however, my contemplation that passing a sentence is determined by the nature and gravity of the offence. Indeed, there exists a wide

choice of punishments for many offences under our penal statutes. But where the sentence is minimum, it is to be imposed as it is.

Leaning on what I have endeavoured to observe, I am destined and warranted to disturb the sentence because it is contrary to what is provided for by the law. In lieu thereof, the sentence of 30 years imprisonment is changed to life imprisonment. The new term of imprisonment commences from the date of conviction at the trial court.

In the event this Court settles to order as follows:

1. Appeal is dismissed in its entirety.
2. Appellant to serve life imprisonment.

DATED at **MBEYA** this **20th** day of **October, 2021**

J. M. Karayemaha
JUDGE