IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 151 OF 2020

(Originating from Ileje District Court in the Criminal Case No. 39/2020)

Isaya s/o Ambakisye Mtawa---------- APPELLANT

VERSUS

THE REPUBLIC ----------RESPONDENT

JUDGEMENT

Date of Last Order: 06.08.2021

Date of Judgement: 15.10.2021

EBRAHIM, J:

The Appellant herein was charged and convicted for the offence of rape **c/s 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 RE 2019.** It was alleged by prosecution that the Appellant had on the month of August 2020 at Malangali Village within Ileje District, Songwe District had carnal knowledge of a 15 years old standard seven pupil of Malangali Primary School namely WEM.

The background of the case could be well established from the evidence of the victim, PW3. She told the court that sometimes in August 2020 she told her mother that the Appellant who happened to be their neighbour had been giving her money, Tshs. 3,500/- and Tshs. 2,500/-. However, one day around 1800hrs as she was coming from the market, the Appellant forceful pulled her to the bush, undressed and had sex with her. She felt pain but did not tell anybody. She then continued to have sexual intercourse with the Appellant almost four times and they used to meet at the same place. It was until she was asked by her head teacher where she gets the money when she said that she was being given by the Appellant. Prosecution called additional four witnesses.

The defendant entered his own defence. He denied to have raped the victim. Responding to cross examination questions he said that the case has been implicated to him because it was alleged that he was the one who convinced the father of the victim to separate with his wife (mother of PW3) and that it was the mother of the victim who told her to say that she has been raped by the Appellant.

After considering and evaluating the evidence from both sides, the trial court found that prosecution side has proved its case beyond reasonable doubt and found the Appellant guilty of the charged offence. He convicted and sentenced him to serve thirty years in prison.

Aggrieved, the Appellant has come to this court raising seven grounds of appeal which can mainly be condensed into three that the case was not proved reasonable doubt, the age of the victim was not proved and that defence evidence was not considered.

This appeal was disposed of by way of written submission. The Appellant was represented by advocates Yohana Seme and Felix Kapinga; whilst the Respondent was represented by Ms. Bernadetha Thomas, learned State Attorney.

In their submission in support of the appeal, counsels for the Appellant opted to submit on the 1st and 3rd grounds of appeal together and abandoned the second ground of appeal.

Citing the case of **Horombo Elikaria Vs R**, Criminal Appeal No. 50 of 2005 that in criminal case prosecution side is required to prove

the case beyond reasonable doubt, counsels for the Appellant argued that it was quite opposite in this case. They contended the evidence of PW1 and PW2 were mere hearsay and the testimony of PW3 was too general as she did not prove penetration or what did the Appellant exactly do to her. They referred to the case of **Burundi Deo Vs Republic**, Criminal Appeal No. 33 of 2010 where the Court of Appeal held that in rape cases penetration must be proved.

Submitting on the fourth ground of appeal on the aspect of age, counsels for the Appellant referred to the cases of **Issaya Renatus Vs R**, Criminal Appeal No.542 of 2015; and the case of **Ally Rashid Vs R**, Criminal Appeal No. 540 of 2016 which held that in specific offence under **paragraph (e) of section 130(2) of the Penal Code**, age of the victim must be proved. They contended that the victim age is uncertain as PW3 did not state her age and the father of PW3 only said that PW3 is 15 years old without even saying the date she was born. They contended also that the teacher who prosecution said was told about the rape was not called to confirm that indeed PW3 was registered at her school.

Expounding further, counsel for Appellants referred to the case of **Mohamed Said Vs R**, Criminal Appeal No. 145 of 2017 (CAT-Iringa) where it was held that in sexual offence the testimony of the victim must pass the test of truthfulness. In saying so they referred to the testimony of PW3 that there was a day when she was asked by her mother on the issue relating to Mr. Isaya Ambakisye Mtawa.

Arguing the 6th ground of appeal, counsel for the Appellant stated that the evidence of PW3, PW1 and PW2 were not analysed and evaluated to see the short comings in proving the case. They cited the case of **Stanslaus Ruyaba Kasusura and Another Vs Phares Kabuye** (1982) TLR 338. In conclusion, they claimed that defence evidence was not considered- **Leonard Mwanashoka V R**, Criminal Appeal No. 226 of 2014 (CAT-Bukoba) and the case of **Hussein Iddi and Another Vs R** (1986) TLR 166. They prayed for the appeal to be allowed.

Responding, counsel for the Respondent began with the 4th ground of appeal that a parent is better positioned to know the age of his child as stated in the case of **George Maili Kemboge Vs R**, Criminal Appeal No. 327/2013(CAT) pg 5.

As for the victim statement was too general, counsel for the Respondent referred to the statement of the victim when she said she had sexual intercourse with the Appellant four times during cross examination.

On the issue that penetration was not proved, she contended that the victim identified the Appellant at the dock as the person who raped her. She referred to the case of **Nebson Tete Vs R**, (CAT-Mbeya) Criminal Appeal No. 419 of 2013 on the avoidance by the victim to use direct words like penis but she said the most important is that the intended meaning is grasped.

As for the grounds of appeal that evidence was not analysed and evaluated, she contended that the defence evidence was considered but the trial court found it to be an afterthought. She further referred to the case of **Mzee Ally Mwinyimkuu@ Babu Seya Vs Republic**, Criminal Appeal No. 499 of 2017 on the position that the first appellate court is allowed to step into the shoes of the trial court and make evaluation and analysis of evidence.

Counsel for the Respondent contended also that the evidence of PW1 and PW2 was not hearsay as they both testified on what they did. More so, PW2 reported the matter to the school authority. She argued on the fact that the mother of PW3 did not adduce evidence as not being fatal because the offence of rape can only be proved by the victim and that **section 143 of the Evidence Act** provides for no required number to prove a fact at issue. She prayed for the appeal to be dismissed.

In brief rejoinder, counsels for the Appellant reiterated their earlier submission. They distinguished the circumstances of the cited case of **Nebson Tete's case** (supra) with the facts of the instant case that in the cited case even the evidence of PW2(victim) when she said "he raped me" on its own was not enough but it was corroborated by the evidence of PW1 who found the Appellant running away while putting on his trousers. They added also that in this case it was important to call the mother of PW3 considering that she was the one who instigated the matter and she could have explained what was the reasoning for her to question PW3 about the Appellant. Her testimony would have assisted in the determination as

to whether the Appellant had bad bold with her. They also added that the testimony of PW3 was to test the truth test as she said she knows the person who has been circumcised and that she was found that her hymen has been perforated implying that she was having sexual intercourse with different people. They concluded that this case has lots of unanswered questions which leave doubt hence making prosecution case not to be proved beyond reasonable doubt.

Having gone through the rival submissions of parties, I find the contentious issue to be whether prosecution proved its case beyond reasonable doubt? And whether evidence adduced by both parties was critically analysed and evaluated?

In order to know what transpired during the trial, the recorded evidence shall shed some light.

PW1, the father of PW3 said he heard about the Appellant raping his daughter from his ex-wife. He went to report to the Head Teacher of Malangali Primary School. PW3 was called and she admitted to have been having sexual affair with the Appellant who

was giving her money and slippers. The Appellant was called and denied the allegation. However, later he asked for forgiveness from the teacher. PW1 after a week reported the matter to the WEO where the Appellant was arrested and PW3 admitted to have been having sexual intercourse with the Appellant. In-fact, the evidence that PW3 was raped by the Appellant as adduced by PW1 was from the fact that he was initially told by his ex-wife thereafter he said he was told by PW3 herself. The fact that the Appellant was called and later he asked for forgiveness was not supported by the evidence said head teacher. Therefore, the testimony of PW1 mainly based on what he has been told by either PW3 or his ex-wife. **PW2**, WEO of Malangali Ward testified that on 23.08.2020 she was called by Community Development Officer who told her that a mother of PW3 wanted to see her because her daughter has been raped. PW2 said, the said mother told her that she found her daughter with money and upon questioning her she said that she got money from the Appellant whom she was having sexual intercourse with. PW2 said the mother reported the matter to the school where she met with the school teacher and the Appellant. The Appellant

apologized. PW2 further decided to call PW3 and interrogate her in the presence of her mother, Amina Felix Makwera and Ward Education Coordinator, one Mr. Pokea Kamwela. PW2 said the PW3 said the Appellant gave her slippers and money and had sexual intercourse with her. She then called the militia man to arrest the Appellant who denied to have had sexual intercourse with PW3.

Before going further in recapitulating the testimonies of other prosecution witnesses, I have observed contradiction on the testimonies of PW1 and PW2. PW1 claims that he was the one who went to report the incident to the head teacher after being informed by his ex-wife and later on went to report to WEO who instructed militia people to arrest the Appellant. To the contrary, PW2 (WEO) testified that she was called by Community Development Officer – Amina Felix Makwera that the mother of PW3 has come to report on that her daughter has been raped by the Appellant. She said they interrogated PW3 in the presence of the victim mother and Amina Makwera. She even said that it was the mother who went to report the incident to the head teacher.

What is obvious here is that the testimonies of PW1 and PW2 do no support each other. PW1 says it was him who reported to PW2: while PW2 says it was the mother of PW3 who reported the matter to her. This is a major contradiction which puts doubts in the testimonies of both PW1 and PW2. I accordingly discard their testimonies.

PW3 stated at the citation of her particulars by the magistrate that she is 15 years old. She testified how the Appellant used to give her money and one day she took her into the bush and had sex with her. She said she had sexual intercourse with the Appellant four times but did not tell anyone. She testified further that one day she was called by the head teacher who asked her if she had money of which she agreed and said that she got it from the Appellant. The Appellant was called but denied to have been giving PW3 money and PW3 was asked by the teacher to go to the class. Responding to cross examination question, PW3 said that the Appellant had sex with her when she first gave her Tshs3,500/-. However, going by PW3 testimony in chief, she said that at first the Appellant gave her Tshs 3,500/- and another day he gave her Tshs. 2,500/- and it was on another day when he asked to have sexual intercourse with her. It

shows here therefore that, PW3 was not coherent in her testimony and was not telling the truth on when exactly the Appellant had sex with her. More so, according to the testimony of PW3, when she was interrogated by the head teacher, it was only her and the Appellant who were present. She did not say anything about WEO, her mother or her father. Again, she said she does not recall what she told her mother and there was a day when her mother asked her issues relating to Mr. Isaya Ambakisye Mtawa. She said she told her mother the Appellant used to cut her hair at the saloon and he was the one who bought her slippers. Responding to further cross examination questions, she said she could tell the difference between a circumcised and un-circumcised person. **PW4,** clinical officer, testified to have attended PW3 while accompanied by her mother, social welfare officer and woman police. She examined PW3 and found that her hymen had been perforated and she did not see bruises or blood. She said the victim told her that she was 15 years old and she tendered PF3 which was admitted as **exhibit P1. PW5** was the police officer who conducted the investigation. According

to her testimony, she was only told by PW3 about being raped by the Appellant.

On his part, the appellant denied the offence and said that she had bad blood with the mother of PW3 who believed that it the Appellant who contributed to her marriage breakdown with PW1. Hence, she taught PW3 to implicate her.

The first issue now comes as to whether prosecution case was proved to the hilt. Being a sexual offence case, I am abreast to the position of the law that the best evidence comes from the victim. Nevertheless, one must be cautious that the same should not be taken whole sale without passing truthfulness test as clearly observed by the Court of Appeal in the cited case of **Mohamed Said Vs. R, (Supra)** where Justice Kitusi observed thus:

> *"We think that it was never intended that* ***the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the truthfulness****. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general and section 127(7) of Cap 6 in particular*

and such compliance will lead to punishing of the offenders only in deserving cases". [Emphasis is mine]

Moulding the above observation of the Court of Appeal with our instant case, I find it apt to analyse firstly the testimony of PW3 to see as to whether it passes the test.

Going by the testimony of PW3 above, she said that she did not remember what she told her mother but her mother started to ask her about the Appellant. It was when she told her mother that, the Appellant bought her slippers and had been giving her money. She said the Appellant for the first time gave her Tshs. 3,500/- and another day Tshs. 2,500/-. Then when she met her at some day around 1800hrs it was when he asked to have sexual intercourse with her. Responding to cross examination questions, she said the day she was given Tshs. 3,500/- by the Appellant it was the day the Appellant had sexual encounter with her. This is a contradiction from her testimony in chief. More-so, looking at the testimony of PW3, there is no any foundation as to what happened or what did the mother observe from her that led her to straight ask about the Appellant?

Why would the mother ask about the Appellant while PW3 had not told anybody that she was having sexual encounter with him? This brings doubt as to what is the motive behind for the mother to ask about the Appellant which later led to the allegations that the Appellant raped PW3.

Again, much as in sexual offences the primary evidence is that of the victim, still the testimonies of other witnesses who instigated and reported the offence cannot be underestimated in looking at the whole picture in a bid of proving the offence as required by the law. As observed earlier on, the testimony of PW1 contradicts with the testimony PW2. More-so, their testimonies also contradict with the testimony of PW3 because she said she was only called by the head-teacher named Ms. Isabela Adam Kamendu and later on the teacher called the Appellant. After the teacher had asked the Appellant she was told to go back to the class. She never mentioned the presence of PW1, PW2, or her mother. I would not imagine that she would not tell if either her mother or PW1 or even PW2 was present when she was interrogated by her teacher. Unfortunately, in corroborating that PW3 admitted before the teacher that she was

raped by the Appellant, the said teacher was not called to give evidence. Her evidence would have shed some light as to whether it was true that PW3 told them that the Appellant raped her. This discrepancy leaves a lot to be desired in so far as the instigation of this case is concerned. At this juncture, I discard the testimonies of PW1and PW2. I also give little weight to the testimony of PW3 as her testimony was contradictory on when the Appellant is alleged to have started having sex with her.

The testimony of PW5 is mainly on what she was told by PW3 and she did not conduct any further investigation and come out with her own observation.

Counsel for the Appellants have insisted that age of the victim as essential element in proving statutory rape was not proved. Counsel for the Respondent in relying on the case of **George Maili Kemboge (supra)** based on the principle that a parent is better placed to know the age of his child. She further relied on the fact that the Appellant did not cross examine on the issue.

With respect, this is criminal case of which prosecution is required to prove the case beyond reasonable double. It follows therefore that in proving the elements of the offence, it is the duty of prosecution to prove the same irrespective of the fact that the accused asked questions or not. That obligation never shifts. Moreover, this court has already discarded the testimony of PW1 for containing major contradictions and inconsistences.

Counsels for the Appellant have relied on the cases of **Issaya Renatus(supra) and Ally Rashid(supra)** in cementing the stance that where accused is charged with statutory rape, prosecution must prove age of the victim.

In this case, the age of the victim was recorded by the trial magistrate at the citation only. PW3 herself did not testify on her age. PW4, clinical officer said she was told by PW3 that she was 15 years old and so was the testimony of PW5. Nevertheless, as the jurisprudential law requires as elaborated by the Court of Appeal in the cited case of **Issaya Renatus(supra) and Ally Rashid(supra)** which I fully subscribe, where the offence is statutory rape, proof of

age of the victim is crucial as it the important element forming the charged offence.

The absence of such crucial piece of evidence raises doubt considering the victim was not a child of tender age. In a similar vein a Court of Appeal had in the case of **Francis Vs. The Republic**, Criminal Appeal No. 173 of 2014, CAT at Dodoma (unreported) stated that:

*"...for a male person to be convicted of the above offence, which is sometimes referred to as "statutory rape", **it must be established, first and foremost, that the victim was under eighteen years of age**. Once that is established consent would be immaterial for purposes of the provision.* (Emphasis is mine).

The court further said that:

> *"With respect, it is trite law that the **citation in a charge sheet relating to age of an accused person is not evidence. Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age**. It follows that the evidence in a*

trial must disclose the person's age, as it were. ***In other words, in a case as this one where the victim's age is the determining factor in establishing the offence evidence must be positively laid out to disclose the age of the victim"*** (Emphasis is mine).

I fully subscribe to the sentiments of the Court of Appeal as per my reasoning above. Further-more as correctly observed by the Counsel for the Appellant, there was no evidence from even the said head teacher to prove that PW3 was indeed a student and the register exhibit that she was 15 years of age.

Counsels for the Appellant have also raised an issue that the testimony of the Appellant was not considered. In so arguing, they also brought up the fact that PW3 mother asked her about the Appellant and the Appellant's defence that he had bad blood with PW3's mother. They relied on the case of **Stanslaus Ruyaba Kasusura and Another VS Phares Kabuye (supra)** where it was held thus:

"It is the duty of the trial court to evaluate the evidence of each witness as well as

his credibility and make finding of the contested facts in issue"

Counsel for the Respondent was of the views that the trial court evaluated the evidence of the Appellant but found out that it was an afterthought.

Appellant raised the defence that PW3 mother was angry with him because she thought he was the one who was behind the separation between her and PW3's father. Therefore, she used PW3 to plant a case on him. Looking closely at it, evidence of PW3 shows that her mother one day asked him about the Appellant and it was when she told her that the Appellant was giving her money. What the court was not told as I have stated earlier on, the foundation of that talk in so far as the Appellant was concerned. Why would the mother of PW3 simply start to ask PW3 about the Appellant? Surely, there is more story than meet the eye! What is the story behind or if there was no such envisioned story, the mother of PW3 testimony would have shed some light but there was none.

It follows therefore that, in this case there is apparent discrepancy on the testimony of the victim and even between the

victim and other witnesses. There were also discrepancies on the testimonies between PW1 and PW2 as well as crucial questions that raises doubt were not answered or clarified to remove other hypothesis in the mind of the court. Most of all, the issue of age of victim was not proved to the required standard. As intimated earlier, since age is an important element in establishing the offence of statutory rape which the appellant has been charged with, failure to prove such important aspect renders the offence unproved to the required standard by the law.

Consequently, I find merits in this appeal and I allow it. I therefore order the immediate release of the appellant from prison unless otherwise lawfully held.

Ordered accordingly

R.A. Ebrahim
Judge

Mbeya

15.10.2021

Date: 15.10.2021.

Coram: P. D. Ntumo – PRM, Ag-DR.

Appellant: Present in Ruanda Prison via virtual court.

For the Republic: Miss Sarah – State Attorney.

B/C: Gaudensia.

Court: Judgement has been delivered virtually while the appellant was in Ruanda Prison and Miss Sarah, learned State Attorney for the Republic Physically in open chambers this 15th day of October 2021.

THE HIGH COURT OF TANZANIA

P.D. Ntumo - PRM

Ag- Deputy Registrar

15/10/2021

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA