IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 49 OF 2020

(Originating from Criminal Case No. 175 of 2018 from District Court of Mpanda at Mpanda)

MBOI S/O MARWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 07/10/ 2021
Date of Judgement: 12/11/ 2021

NDUNGURU, J

This appeal arises from the decision of the Mpanda District Court at Mpanda (henceforth the trial court). The appellant **Mboi Marwa** was arraigned in Criminal Case No. 175 of 2018 of offence of rape contrary to **section 130 (1) and (2) (e) and 131 (1) (3) of the Penal Code, Cap 16 RE 2019**. He was found guilty, convicted and sentenced to serve thirty (30) years imprisonment.

Aggrieved by the trial court decision, the appellant lodged to this court five (5) grounds of petition of appeal. These grounds are reproduced as hereunder: -

1. *That the trial court erred in point of law and fact when it convicted and sentenced an appellant while the case was not proved beyond reasonable doubt.*
2. *That the trial magistrate had grossly an incurably gone astray on the point of law and fact to convict the appellant relying on prosecution side without to consider the evidence adduced by clinical officer at Mpanda Government Hospital that he examined the victim on her private parts but there was nothing bad through this elaboration it indicative that the case is fabricated (planted)*
3. *That the learned trial court had massively lost site in point of law and fact to convict the appellant relying on prosecution side with hearsay evidence.*
4. *That the trial court failed to consider his defence testimony that a victim resembled him Amos regarding that the victim is young also as elaborated by PW2 mother of the victim that an accused is called Amos while the accused is called Mboi Marwa as indicated on the charge sheet.*
5. *That the trial court was convicted and sentenced an appellant on expense of defective (weak) charge.*

Briefly, the fact of the case was as follows; that on diverse dated between 1st day of September 2018 and 9th day of October 2018 at Makanyagio area within Mpanda District in Katavi Region the appellant did have sexual intercourse with A.A a girl aged 13 years old and a standard VI Pupil at Kashato Primary School.

The accused person was arrested and as earlier hinted charged before Mpanda District Court. After full trial he was found guilty, convicted and accordingly sentenced.

When the appeal was called on for hearing through video conference, the appellant appeared in person, unrepresented; whereas the respondent *cum* republic had the legal service of Ms. Marietha Magutta– State Attorney assisted by Mr. Kabengula, learned state attorney.

Arguing in support of his appeal, the appellant prayed for the prosecution to start arguing the appeal so as he might reply thereto.

In arguing the appeal Ms.Marietha Magutta – State Attorney submitted that the at page 9-12 of the proceedings the victim told the trial court that she was 14 years old and she was seduced by the appellant who took her to his home where they made sexual intercourse. Ms Magutta further submitted that the victim evidence was supported with the

evidence of PW2 the mother of the victim who told the trial court that she was told by the child boy of the absence of the victim; she then traced her and found her at the home of the appellant.

As regards the second ground, Ms Magutta submitted that the victim was sent to the Hospital, was found that the victim was already raped several times not the very date. The medical officer told the trial court the victim had no hymen. That for a child of 14 years to have no hymen means she was raped. She stressed that the evidence of the victim is the best evidence.

As to the third ground, Ms. Magutta submitted that PW1 told the trial court that she was raped by the appellant and such evidence is not hearsay as stated by the appellant, hence the ground is baseless.

Submitting in respect of the fourth ground, Ms Magutta stated that PW1 in his evidence named the appellant that she knew the him very well as she used to sleep to his home. She added that PW2 met PW1 at the home of the appellant. It was the victim evidence which identified the victim; thus, the ground is devoid of merit.

As to the fifth ground, Ms. Magutta was of the view that the charge was proper and the appellant did not raise such an objection before. She went on submitting that when the accused committed the offence he was

18 years, thus the accused was not required to serve 30 years imprisonment. As the 1st offender he was required to get strokes of the care. She then prayed for the sentence be corrected, the appellant be sentenced according to the law

In reply, the appellant submitted that it is the medical officer who proves penetration. He was of the position that in the absence of medical evidence rape cannot be proved. He stated in this case medical officer did not find anything relating to rape thus how can the prosecution said the rape was proved.

The appellant added that the victim's mother having got informed of rape for three days without taking any step.

It is his further submission that all witnesses were relatives there was no independent witness. The victim's mother identified one (rapist) by the name of Amosi. He asserted that the victim was found by the police officers out of the house which he had rented and forced to enter in and he did not know the victim, thus he prayed for the appeal be allowed.

In rejoinder, Mr. Kabengula had nothing to rejoin.

I have followed the arguments of the appellant and that of Ms Marietha Magutta and Mr Kabengula for the respondent ***cum*** republic during the hearing of this appeal. I have as well read between the lines the

appellant's grounds of complaint and the entire proceedings of the trial court.

It is trite law in sexual offences that the best evidence has to come from the victim. See the **case of Seleman Makumba versus Republic [2006] TLR 384**. In this cited case, the Court held that;

> *"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"*

Resolving the first complaint raised by the appellant that the prosecution did not prove its case beyond reasonable doubt, I am of the considered view that the victim gave a detailed account of how the appellant two times on different dates were doing sexual intercourse inserted his penis into her vagina.

When reading the testimony of the A.A no one can fault her elaboration of events and clearly, she explained how the appellant on several times went there at her home to collect rent from the tenants and how they relationship started. She stated that two times she was taken by the appellant and went to the appellant room doing sexual intercourse.

Quoting part of her narration of evidence when A.A (PW1) who is a victim in this case was testifying she had this to tell the trial court:

> ***"..... I left my relatives at home up to 10:00hrs night there after he took me inside the room where he went to bath when he came back, he told me to undress myself and he undressed himself there after he laid me on his bed where he took his penis and inserted in my vagina, he sexed me when he finished he left me on the bed and went to sleep on the floor where there was a mattress laid down....."***
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> ***..... on Sunday he came again at home where he took me again, it was at 07:00 night. Went at his home where at 10:00 night we went inside his room where he had love affairs with me. He took his penis and inserted it in my vagina....."***

With the above quoted testimony of the victim before the trial court it undisputed that, the appellant did rape the victim as the ingredient of rape

that is penetration was proved to the required standard as per the case of **Seleman Makumba** above (supra) and **section 130 (4) (a)** of the Penal Code, which reads that: -

(4) for the purpose of proving the offence of rape

(a) ***Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence***. [Emphasis added]

Another complaint of the appellant was the opinion of the witness PW5, a medical officer who opined that upon examined the victim in her private parts nothing was found. However, in that day on 10th of October 2018 where the victim was examined, the victim in her narration of testimony did not tell the court that she had sexual intercourse with the appellant rather stated to have been arrested together with the appellant while she was outside the appellant's room. That means in such day they had no sexual intercourse, therefore to prove penetration could be impossible. Thus, this court find that the opinion of a medical officer is of no merit in the circumstance as the best evidence comes from the victim of crime.

Finally, let me address another complaint raised by the appellant in his submission that witnesses who testified were relatives, thus there was

no independent witness. It has been the position of this court and the Court of Appeal that whether or not evidence of the relatives or family members could ground conviction depended on their credibility. As stated in the case of **Khatibu Kanga vs The Republic**, Criminal Appeal No. 290 of 2018, CAT at Arusha that;

> *"There is therefore nothing wrong in law, in accepting and relying on the evidence from family members, to ground a conviction, if it found credible."*

In this case, only PW2, a mother of the victim testified, other witnesses PW3 and PW4 were not related to the victim. I find no justifiable reasons to fault the decision of the trial court as regards this complaint as long as it has found their evidence was credible. Therefore, this complaint is devoid of merit.

Admittedly, the appellant when committed the offence was 18 years of age. As rightly submitted by the State Attorney Ms. Magutta, the appellant was not required to serve 30 years imprisonment. The appellant was required to get strokes as per **section 131 (2)** of the Penal Code, Cap 16 RE 2002 now RE 2019. I find that the imprisonment to serve 30 years was erroneously imposed to the appellant, thus I quash the

sentence. The fact that the appellant has already served partly of the erroneously sentence since 16th day of May 2019 I hereby set him free.

In the premise, allow the appeal to the extent as explained above. I order the appellant to be released from prison forthwith unless he held for another any lawful cause.

It is so ordered.

D. B. NDUNGURU

JUDGE

12. 11. 2021