IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL NO. 99 OF 2020

(Arising from District Court of Karagwe at Karagwe in Criminal Case No. 236/2020)

DERICK ELIAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Judgment: 3.12.2021

Mwenda, J.

Before the District Court of Karagwe the appellant was charged with the offence of rape contrary to section 130 (1), (2), (e) and 131 (1) of the Penal Code. The facts of the case reveal that on 19th July 2020 at Mabira Village within Karagwe District of Kagera Region, the appellant did forcefully have carnally knowledge with the victim one Atugonza d/o Robert, a form III Secondary School girl aged 16 years.

When the charge was read to the appellant he pleaded not guilty as such, the prosecutions side was called to prove its case in a trial which involved seven (7) prosecution's witnesses and two defence witnesses, accused being one of them. The trial court having heard the evidence produced by both parties and exhibits

produced it was satisfied that the prosecution's side discharged its duty of proving its case beyond reasonable doubt. It thus convicted the appellant as charged and sentenced him to serve a term of 30 years jail imprisonment.

Aggrieved by the conviction entered by the trial court, the appellant through the services of Mr. Samwel Angelo, learned Advocate, preferred this appeal with four grounds which read as follows:

1. That the trial court erred in law to rely and use evidence of exhibit P.1 which was improperly admitted.
2. That the trial court erred in law to use evidence of PW.1 in contravention of requirement of section 127 (2) of Tanzania Evidence Act, [Cap 6 R.E 2019].
3. That the trial court erred in law when it reached judgment in breach of requirement of section 231 (1) of the Criminal Procedure Act, [Cap 20, R.E 2019], and
4. That the trial court erred in law to convict and sentence the appellant while the case was not proved to the required standard.

When this appeal was called for hearing the appellant was represented by Mr. Angelo Samwel, learned Advocate and the respondent, the republic was represented by Mr. Emmanuel Kahigi learned State Attorney. When invited to submit in support of grounds of appeal, Mr. Angelo Samwel, learned Advocate abandoned the 3rd ground of appeal and prayed to remain with the 1st, 2nd and the

4th ground of appeal. The said prayer being granted Mr. Angelo prayed start his submissions in respect to the second ground of appeal. The learned Advocate stated that the trial court erred to rely on the evidence of PW1 in violation of provisions of section 127 (2) of the Evidence Act, [Cap 6 R.E 2019].

According to him, the said section requires a witness who is a child of tender age, before testifying in court, to first promise that she will tell the truth and that promise must be recorded in the proceedings before the child start to tender her evidence. To him that was not the case with PW1. He said since PW1 was the key witness, then violation of the provisions of section 127 (2) of the Evidence Act, [Cap 6 R.E 2019] make her evidence to be as good as nothing. In support to this contention Mr. Angelo cited a case of **Geofrey Wilson vs. Republic Criminal Appeal No. 168 of 2018** CAT, page 12 (unreported). He said, if the evidence of PW1 becomes valueless then there is not any other evidence that connects the appellant with the offence he was charged with.

With regard to the first ground of appeal, the learned Advocate for the appellant submitted that the PF-3 was admitted and tendered as exhibit P.1 without availing the accused with its contents. He said further that the record are silent if the said PF-3 was read and explained to the appellant to enable him ask questions. In supporting his argument the learned advocate cited the case of **Hassan Said Twalib vs. The Republic, Criminal Appeal No. 92 of 2019**, CAT (unreported).

He concluded by stating that failure to read out the contents of the exhibit in court is a fatal irregularity which entail expunging it from the record.

With regard to the fourth ground of appeal, the learned advocate for the appellant submitted that the prosecution's side failed to prove its case to the required standard as stated by section 3 (2) of the Evidence Act, [Cap 6 R.E 2019]. He said that the prosecutions side has the duty to prove the charge against accused person beyond reasonable doubt and that the accused should be convicted on the strength of the prosecution's evidence. He supported this point by citing the case of **Christian Kaale and Another vs. Republic** [1992] TLR. 302.

The learned Advocate concluded his submissions with prayers that this appeal be allowed, conviction quashed and sentence be set aside.

On his part, the learned State Attorney for the respondent the republic commenced his submission with the first ground of appeal. The learned State Attorney conceded that exhibit P1, the PF-3 was admitted as exhibit without reading its contents to enable the appellant appreciate its content. He said that failure was fatal which renders the same to be expunged from the court's records. He however stated that even if the said PF-3 is expunged, there are other pieces of evidence to support the prosecutions' case.

With regard to the second ground of appeal, the learned State Attorney submitted that PW1 was not a child of tender age. He said, the records show that she was 16 years old by the time she befell on the appellants criminal act. The learned State Attorney stated that Section 127 (4) of the Evidence Act [Cap 6 R.E 2019], describes who a child of tender age is. He said by virtue of the said Section a child of tender age is the one below 14 years old.

In his submissions against the fourth (4th) ground of appeal, the learned State Attorney submitted that the prosecution side through the evidence of its witnesses proved its case to the standard required. He said PW1 testified how the accused raped her. He said further that her (PW1's) evidence was the best evidence by referring to the decision of the Court of Appeal in **Seleman Makumba vs. Republic** [TLR] 2006 at page 376. The learned State Attorney said the victim (PW1) testified how she was raped and the way the incident took place. He concluded his submission by beseeching this court to dismiss this appeal as the prosecutions side proved its case beyond reasonable doubt.

In rejoinder to the submission by the learned State Attorney, Mr. Angelo learned Advocate for the appellant submitted that if the PF-3 is expunged from the records then other pieces of evidence cannot support the charge. With regard to submission by the learned State Attorney that the victim (PW1) is not a child of

tender age, the learned Advocate for the appellant conceded and said he had nothing to respond.

In his further rejoinder, the learned advocate stated that it is not true that PW1's, PW2's and PW3's evidence is strong to build up the prosecution's case.

As for the case of **Seleman Makumba vs. Republic** (supra) cited by the learned State Attorney the learned Advocate for the appellant conceded that its position is correct but to him, failure by PW1 to report the incident to her parents broke the chain of event. He concluded that the prosecution's side failed to prove its case and he repeated to his previous prayers that this appeal be allowed.

Having summarised the facts of the case and the submissions by the counsels from both parties, the issue for determination is whether this appeal is meritorious. In order to respond to this issue this court found it pertinent to scrutinize the grounds of appeal in seriatim.

With regard to the first ground of appeal it was the appellant's counsel's submissions that the PF-3 was tendered as exhibit without its contents being read in court, I have gone through the trial court's records and found that the said allegation is true. At page 11 of the typed proceedings when PW3 recognized the PF-3 and prayed to tender it as exhibit, the court asked if the appellant had any objection. Upon reply by the appellant that he had no objection to its tendering as

exhibit, the court went on admitting and marking it as exhibit P1 without affording PW3 opportunity to read its contents. This, as was rightly pointed out by both counsels for the appellant and the republic is a fatal irregularity. The gist of reading the contents of the exhibit was emphasized in the case of **Erneo Kidilo and Another vs. The Republic, Criminal Appeal No. 206 of 2017** (unreported) where the Court of Appeal held inter alia that:

> ***"...Contents of these exhibits carry detailed facts which affect ingredients of the counts preferred against these appellants. The case of LACK KILINGANI VS. REPUBLIC (Supra) is relevant to our proposition that where an accused person pleads guilty to an offence, the obligation to read out the facts contained in the tendered exhibits goes a long way to fully appraise the accused concerned all of facts locked in the exhibits. This appraisal in light of full knowledge of facts in exhibits will enable the accused person to either accept the facts therein as true, or even reject them and change his plea to NOT GUILTY ....****"[Emphasis added].*

Applying the above stated legal position to the instant appeal since exhibit P1 was not read out in court for its contents to be heard by the appellant, then it was improper to admit it in evidence and for that reason I accordingly expunge it from records.

This position hinges on the decision of the Court of Appeal in **Steven Salvatory vs. The Republic, Criminal Appeal No. 275 of 2018** (unreported), **Jumanne Mohamed and 2 Others vs. Republic, Criminal Appeal No. 534 of 2015** and **Kurubone Bagirigwa and 3 Others vs. Republic, Criminal Appeal No. 132 of 2015** (unreported). That being said I find merits in this ground of appeal and I hereby uphold it.

As regard the second ground of appeal alleging that the trial court erred to rely on the evidence of PW1 (the victim) contrary to the requirement of Section 127 (2) of Tanzania Evidence Act, [Cap 6 R.E 2019], it is clear on record that at the time of the commission of the crime, the victim was 16 years old. As rightly pointed out by the learned State Attorney, the victim being 16 years old, her evidence did not fall under the ambit of Section (2) of the Tanzania Evidence Act Cap 6 as she fall under Section 127 (4) which reads as follows:

"S.127 (1) N/A

(2) A child of tender age may give evidence without taking oath or making affirmation but shall before giving evidence promise to tell the truth to the court and not to tell any lie.

(3) N/A

(4) "For the purpose of subsections (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years"

From the cited provisions (i.e. Section. 127 (4)), it is clear that PW1 was not a child of tender age bound by provisions of Section 127 (2) and for that matter this court finds no merits in the second ground of appeal.

As regard the fourth ground of appeal, this court considered the evidence of PW1 (the victim) PW4, PW5 and PW7 and satisfied that it is cogent and abundant to warrant conviction of the appellant. PW1 (the victim of rape) testified before the trial court how the appellant whom she knew by name and as a worker (manager) at HESHIMA BAR AND GUEST HOUSE lured her to follow him at the said Guest House. She testified that upon entering his bedroom the appellant undressed her and had sexual intercourse with her by force. This victim testified that she felt pain

during the process and her effort to shout for help failed as the sound of the radio in the bar was too loud.

It is trite law that the best witness in rape cases is the victim herself. This position was emphasized in the case of **Seleman Makumba vs. Republic (2006)** T.L.R 384 where the Court of Appeal of Tanzania held inter alia that:

> ***"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in any women where consent is irrelevant that there was penetration."***

Basing on the above authority this court is convinced that PW1's evidence prove the charge against the appellant. Furthermore, PW4 testified on how on the fateful day she saw the appellant going to the house where PW1 was residing with her parents. This witness stated that she saw the appellant and the victim going to Heshima Guest House where they entered using the back door. She further testified how she attempted to notify the victim's parents about what she saw but to no success. Again PW7, victim's mother testified how she was informed by PW4 on what transpired on the fateful day. She added that the victim is 16 years old who was born in 2004. She tendered the victim's birth certificate as exhibit without any objection from the appellant. These pieces of evidence corroborate PW1's evidence.

The learned advocate for the appellant submitted that if the PF-3 is expunged from records then the prosecution's case is weakened. This court is however of a different view. As pointed out earlier, the true evidence in rape case has to come from the victim. On top of that, it is trite law that lack of medical evidence does not necessarily mean rape is not established. In the case of **Alphonce Bisege Mwasandube vs. The Republic, Criminal Appeal No. 123 of 2018**, this court citing the case of **Musa Mohamed vs. Republic, Criminal Appeal No. 216 of 2005** (unreported) held inter alia that:

> ***"The lack of medical evidence does not necessarily in every case have to mean that rape is not established where all the other evidence point to the fact it was committed."***

Also in the case of **Fumbuka Makuliga vs. The Republic, Criminal Appeal No. 217 of 2020**, citing the case of **Seleman Makumba** (supra), **Edson Simon Mwombeki vs. Republic, Criminal Appeal No. 94 of 2016**, **Jumanne Ngondo vs Republic, Criminal Appeal No. 282 of 2010** and **Ally Ngozi vs. Republic, Criminal Appeal No. 216 of 2018** all (unreported) this court held inter alia that:

> ***"Lastly, since it is settled law that medical evidence does not prove rape, the best evidence***

is the credible evidence of the victim who is better placed to explain how she was raped and the person responsible."

Although the learned counsel for the appellant submitted that failure of the victim to report the incident on the same day of its happening broke the chain of event, this court is of the opinion that PW1 is a credible witness and her silence on what befell her, in the circumstances of this case have not shaken the prosecution's case. This is so because the type of crime committed against her is not common to enable the victim volunteer to report it immediately. The likelihood of the victim being traumatized to the extent of failing to report is so high. That being said I also find no merits with the fourth ground of appeal.

In the circumstances, I am in agreement with the argument by the learned State Attorney that the offence of rape against the appellant was proved beyond reasonable doubt. Consequently, I hereby dismiss this appeal in its entirety.

The right of appeal explained.

Order accordingly.

HIGH COURT OF TANZANIA BUKOBA

A.Y. Mwenda

Judge

03.12.2021

This judgment is delivered today in the presence of the appellant and absence of the Respondent, the Republic.

A.Y. Mwenda

Judge

03.12.2021