IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

CRIMINAL APPEAL No. 16 OF 2021

(Arising from the District Court of Pangani at Pangani in Criminal Case No. 10 of 2020)

MATESO JUMA ..... **APPELLANT**

Versus

THE REPUBLIC ..... **RESPONDENT**

JUDGMENT

30.11. 2021 & 06.12.2021

F. H. Mtulya, J.:

Mr. Mateso Juma (the appellant), a twenty (20) years young man was arrested and arraigned before the **District Court of Pangani at Pangani** (the district court) in **Criminal Case No. 10 of 2020** (the case) on the famous and commonly known day of *Valentines*, 14th February in the year 2020 to answer the charge of rape contrary to section 130 (1) (2) (e) & 131 (1) of the **Penal Code** [Cap. 16 R.E 2002] (the Code).

The appellant is alleged to have committed the offence against a girl of seventeen (17) years old (the victim) on the 9th day of February 2020 at Mkalamo Village within Pangani District in Tanga Region. It was alleged in the charge against him that he had

a fight nor struggle which took its course. The prosecution story shows further that victim got back to her residence at around 16:00 hours through the back-door. Her mother (PW4) noticed the entry and got worried over where she had been for all that time and the entry through back-door. Following the concern of PW4, she decided to leave for PW1's paternal uncles, PW2 and PW3, as the victim's father was away from the residence. They all then inquired from the victim as where she had been and the victim disclosed that she was with the appellant in the bush enjoying love. It is from this story the appellant was then arrested and sent to Mkalamo Police Post and victim to Mkalamo Health Centre for medical examination.

In his defence, the appellant denied raping the victim and testified before the district court that the event was fabricated and the prosecution did not bring in court Police Form Number Three (PF3) to prove that the offence of rape was really committed against the victim. In justifying his innocence he brought in court DW2 to assist in adding evidences, but nothing meaningful was registered by him related to the allegation of rape, save for explanation that the appellant was arrested at football pitch enjoying football play in his presence.

raped the victim, a child and student schooling at Tongoni Secondary School *without her consent*. The appellant protested the charge against him hence the Republic (the respondent) marshalled a total of four (4) witnesses to establish the case in its favor whereas the appellant appeared himself (DW1) and invited Mr. Maneno Bakari (DW2) to fault the prosecution case.

In order to appreciate the background of the matter and what transpired during proceedings in the district court, a brief background of the case is important to be displayed: On the 9th day of February 2020 at around 11:00 hours, the victim was asked by her mother (PW4) to go to the water-dam to fetch water for domestic home-use. The facts registered at the district court show further that the victim in her second trip, she met the appellant who seduced her for sexual intercourse. Following the prayer of the appellant, it was stated that the dual agreed to go to a bush for hiding and business, where the appellant undressed the victim's underpants and thereafter undressed his trousers, and entered his penis in victim's private part. To the alleged facts, the dual took approximately an hour to complete the session.

According to the alleged facts, after the business of the day, the appellant assisted the victim by carrying the water on a bicycle and each took its course. The allegation shows further that neither

At the conclusion of the trial, the court found the appellant guilty as charged and sentenced him to serve thirty (30) years imprisonment and pay a compensation of Tanzanian Shillings Two Hundred Thousand (200,000/=) to the victim for the harm caused. This decision aggrieved the appellant hence preferred the present appeal in this court protesting the findings of the district court on the grounds, briefly, that:

1. *the district court erred in law and fact in convicting the appellant without evidence of a medical expert;*
2. *the district court erred in law and fact in believing the victim was a student without any proof of evidence;*
3. *the district court erred in law and fact in believing the victim was raped without satisfactory evidence;*
4. *the district court erred in law and fact in convicting the appellant through the evidence of family members only; and*
5. *the district court erred in law and fact in convicting the appellant without evidence of police officers.*

The appellant finally prayed that the appeal be allowed and he be left at liberty. When the appeal was scheduled for hearing, the appellant appeared in person without any legal representation

whereas the Republic (the respondent) enjoyed the legal mind of Mr. Joseph Makene, learned State Attorney.

During submission of the grounds in support of the appeal, the appellant decided to abandon the third and fourth grounds and confined himself to grounds of appeal in number one, two and five. With regard to the first ground, the appellant faulted the district court's findings without evidence of a medical expert. On the second ground he stated that there was no proof anywhere that the victim was a student as alleged by the prosecution. Submitting on the fifth ground, the appellant faulted the district court conviction without there being an investigator called in the district court to testify as the case at the district court took almost three (3) months being investigated. According to the appellant, the investigator ought to have been summoned as an important witness in the case.

On his part, Mr. Makene, began by expressing the respondent's stance in opposing the appeal and briefly submitted that in rape cases, the best evidence comes from the victim. In order to justify his submission, Mr. Makene cited the authority in **Selemani Makumba v. Republic** [2006] TLR 379 contending that there was no need to call a medical expert in presence of victim's evidence. In protesting the second ground, Mr. Makene stated that

being a student or not is immaterial in rape cases of a girl victim of 17 years old. With regard to the final ground, Mr. Makene stated that there is no specific number of witnesses required to prove facts in criminal cases. In his opinion, the evidence of the victim corroborated with other testimonies are enough to prove and convict the appellant. In order to substantiate his argument, Mr. Makene cited the authority in **Yonas Msigwa v. Republic** [1990] TLR 148 and finally prayed the appeal be dismissed as it has no any merit whatsoever.

In rejoining Mr. Makene's submission, the appellant reiterated his earlier position that it is a doctor who proves rape incidents. The appellant contended further that there is no any proof of age anywhere on record to show that the girl was under the age of eighteen (18) years. In addition, the appellant complained that no investigator was summoned to testify as he was a crucial witness to appear and testify in the case.

I have gone through the grounds of appeal as well as submissions registered by both parties. First and foremost, I should begin by stating that in criminal cases, the burden of proof is on the prosecution side to prove the case against the appellant beyond reasonable doubt. The burden never shifts (see: 3 (2) (a), 110 & 111 of the **Evidence Act** [Cap. 6 R.E. 2002] (the Evidence

Act). This provision in the Evidence Act has already received a large family of precedents in our jurisdiction (see: **John Makorobela & Kulwa Makorobel v. Republic** [2002] TLR 296; **Jonas Nkize v. Republic** [1992] TLR 213; **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005).

The present appellant was charged with the provisions of section 130 (1), (2) (e) & 131 (1) of the Code, which provides that:

130 (1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions: -

(a) - (d)- (Irrelevant)

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

There are two scenarios of rape as provided under section 130 (2) of the Code, namely: first, statutory rape where the victim is under eighteen (18) years of age; and second, rape of a woman where she is eighteen (18) years of age or above. In the first

scenario, consent is immaterial but absence of consent must be established in the later scenario (see: **Amos Palanzi v. Republic**, Criminal Appeal No. 137 of 2012). In my view, the facts available on record show that the instant dispute falls under the first scenario as displayed from the particulars of the offence in the charge sheet:

> *...did unlawfully have carnal knowledge with....a girl aged 17 years old, a student of Tongoni Secondary School without her consent.*

I should state at the outset that it was wrong to put the words: *without her consent* in the present case as the victim was alleged to be under eighteen (18) years of age hence her consent in this case was immaterial. The statement found in the precedent of the Court of Appeal in **Amos Palanzi v. Republic** (supra) states:

> *The offence of rape consists of two scenarios. One is statutory rape where the victim is below 18 years of age in which case consent becomes immaterial.*

It follows therefore that the prosecution was required to prove two important elements in the present case: first, the victim was carnally known by the appellant; and second, the victim was under eighteen (18) years of age. In its judgment, the district court believed the credibility of PW1 who said she was raped by the

appellant and relied on the famous case of **Selemani Makumba v. Republic** (supra) on the victim's evidence as a base of conviction.

In the present case, two things were required to be proved, namely: first, on the material date, place and time, the victim was raped; and second, she was raped by the appellant. From the record, the words of PW1 is the only piece of evidence available mentioning that the appellant had raped her on the material day. The question before this court therefore is: *whether PW1 is a credible and reliable witness to be believed in her evidence to render conviction of rape to the appellant.* The trial court found this witness to be credible and reliable to rely upon and convicted the appellant. In the precedent of **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2001, the Court of Appeal observed that the credibility of a witness can be determined in two ways: one, by way of assessing the coherence of his testimony; and two, when the testimony of the witness is considered in relation to the evidence of other witnesses in the same case.

All the prosecution witnesses summoned in the district court to testify in the case stated on how PW1 got back home through the back-door silently and informed no one about the rape incident. This means she wanted to conceal some bad behaviour that she had done, whether rape or any other misconduct. Even if I

assume there was rape incident, I have asked myself what kind of evidence was tendered in court to hold the appellant responsible for the offence of rape? Is it the testimony of PW1 alone with an argument that the victim is best positioned to testify on her rape case?

In the present case, no record of investigation was registered by a police officer, which is complained by the appellant. Similarly, no record of confession was exhibited. I am asking myself as to whether mere words of PW1 in mentioning the appellant is watertight evidence enough to sustain conviction of rape to the appellant? In the circumstances of this case, I think, the words of PW1 should have been acted upon with caution. They needed some serious corroboration to be believed by the district court.

The appellant lamented, and I think rightly so, on the absence of a medical report to prove the day of the alleged incident, PW1 was actually raped. In this case, since the words of the victim are marred with uncertainties, it was very crucial to have a support of a medical report with regard to the health condition of the victim. Although the appellant inquired about this anomaly in his defence, the proceedings show that the prosecution did not cross examine him with regard to the absence of a medical report. It is now settled practice of this court and Court of Appeal that failure of a

party to cross examine on vital facts is taken as an admission of that fact. I am fortified by the holding of the Court of Appeal in the case of **Hatari Masharubu @ Babu Ayubu vs. Republic**, Criminal Appeal No. 590 of 217, where it was stated that:

> *It must be made clear that failure to cross examine a witness on a very crucial matter entitles the court to draw an inference that the opposite party agrees to what is said by that witness in relation to the relevant fact in issue.*

There are plenty of precedents in support of the thinking and now the practice is certain and settled (see: **Sebatian Michael & Another vs. the Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018; **Damian Ruhele vs. Republic**, Criminal Appeal No.501 of 2009; and **Cyprian Athanas Kibogo v. The Republic,** Criminal Appeal No.88 of 1992).

I therefore entirely agree with the appellant that although there was evidence of the victim that she was raped by the appellant, in the present case failure by the prosecution to call a doctor who examined the victim tainted the prosecution's case with doubts which are to be resolved for the benefit of the appellant. The matter would have been different if the victim was not taken to the hospital at all. But on record there is evidence of PW4 who stated that she went to the hospital with PW1 and was examined.

However, she was silent on the examination results that was pronounced at the hospital and the medical report was neither tendered in the district court during the hearing of the case. Similarly, no medical officer was summoned to testify in the case. This, in my view, casts a lot of doubts on the prosecution case on whether PW1 was really raped.

Moving to the second ground of appeal, the appellant faults the district court for believing that the victim was a student without calling a witness such as a headmaster of the mentioned school to prove the same. On my side, I think this ground is malformed and cannot detain this court. To prove statutory rape such as in this case, it is immaterial whether the victim is a student or not. What matters is whether during the alleged incident, she was below the age of eighteen (18) years. Fortunately, the appellant in his submissions accommodated the issue of age by stating that there was no proof of age of the victim.

In law, evidence as to proof of an age can be given by the victim, relative, parent, medical practitioner, or where available, production of birth certificate (see: **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015). The age of the victim in this case was only stated by PW4 that she was seventeen (17) years of age. However, in cases like the present one, it is important to

prove the age of the victim. Proving the age means giving concrete unshakable evidence with regard to the age of the victim. Not just mentioning it like what PW4 cited during the hearing of the case. The Court of Appeal in the case of **Robert Andondile Komba v. DPP,** Criminal Appeal No. 465 of 2017 stated that:

> *...in cases of statutory rape, age is an important ingredient of the offence which must be proved. We are not prepared to hold that citing of age of the victim is akin to proving it, and it is not the first time we make such observation.*

Other cases on point include the case of **Isaya Renatus v. Republic** (supra) where the Court categorically stated that:

> *We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape. In establishing the offence of statutory rape under section 130(l)(2)(e), it is a requirement that the victim must be under the age of eighteen. That being so, it is almost desirable that the* ***evidence as to the proof of age be given*** *by the victim, relative, parent, medical practitioner, or where available, by the production of a birth certificate.*

Having noted so, it goes without saying that in this case, the prosecution did not labour in proving the age of the victim so as to establish that she was indeed below eighteen (18) years of age. No

wonder they used the phrase *without her consent* in the particulars of the offence, knowing may be she was above eighteen (18) years of age, where consent is material.

Record of this appeal further shows that the appellant has expressed his dissatisfaction from the fact that all witnesses brought by the prosecution were relatives of the victim, no police officer or investigator of the incident was called to the stand. I am aware Mr. Makene replied that there is no particular number of witness required to prove a fact.

I understand section 143 of the Evidence Act on proof of facts and that there is no specific number of witnesses required to proof any facts. I am also aware of the precedent in decision in **Goodluck Kyando v. Republic** [2006] TLR 363 which held that every witness must be trusted unless there are good reasons to fault him, and I understand that the law in Evidence Act does not restrict family members to give evidence in support of rape cases and I am also conversant that the Evidence Act is silent on the need of every rape case to invite investigation authority. However, where this court finds all witnesses are from the same family with similar interest without involving investigation machinery, may consider it as a doubt in criminal cases (see: **Alex Rwebugiza v. Republic**, Criminal Appeal No. 85 of 2020). In any case, the

appellant is complaining on the quality of evidence and not number of witnesses. His doubt is on the evidences solely produced by close relatives of the victim, normal civilian persons in absence of evidence of an investigator to exhibit his findings of the three (3) months investigation period.

In the present appeal, I think the complaint registered by the appellant on relatives of the victim is genuine and in my view, the investigator of the case was a material witness to the prosecution case. Besides, the record is silent on reason why the investigator was not summoned to appear and testify in the case. The omission, with respect, entitles this court to draw an adverse inference (see: **Azizi Abdallah v. Republic** [1991] T.L.R. 71 and **Haji Bakari Hassan v. Republic,** Criminal Appeal No. 365 of 2004). In **Azizi Abdallah v. Republic** (supra) it was stated that:

> *...the general and well-known rule is that the* ***prosecutor is under a prima facie duty to call those witnesses who,*** *from their connection with the transaction in question,* ***are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown,*** *the court may draw an inference adverse to the prosecution.*
>
> (Emphasis supplied).

In the present case, it is with no doubt that the prosecution's case was not proved to the hilt. Weston, J., in the case of **Lockhart-Smith v. United Republic** [1965] 1 EA 211, stated at page 217 of the decision that:

> *Speaking generally....it is for the prosecution to prove its case beyond reasonable doubt. It cannot do this unless the evidence given by or on behalf of the accused is put into the balance and weighted against that adduced by the prosecution. The question is whether anything the accused has said or which has been said on his behalf* ***introduces that reasonable doubt which entitles him to his acquittal.***

In the present appeal there are several doubts, which I need not to repeat as I stated them in the due course. The doubts are to be resolved in favor of the appellant (see: **Mohamed Said Matula v. Republic** [1995] TLR 3; **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159B of 2017; and **Alex Rwebugiza v. Republic** (supra).

Having said so, it is obvious that the grounds of appeal raised by the appellant entitles him to his acquittal. In the event, this appeal is hereby allowed, the appellant's conviction is quashed and the sentence is set aside. I consequently order immediate release

of the appellant from prison custody unless he is otherwise lawfully held.

Ordered accordingly.

Right of appeal explained.

F.H. Mtulya

Judge

06.12.2021

This judgment is delivered in Chambers under the seal of this court in the presence of the appellant, Mr. Mateso Juma and in the presence of Ms. Elizabeth Muhangwa, learned State Attorney for the respondent.

F.H. Mtulya

Judge

06.12.2021