**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 95 OF 2020**

(Originating from RM's Court of Arusha at Arusha in Criminal Case No. 217/2018)

**ANDREA BULALI..... APPLICANT**

***VERSUS***

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

**JUDGMENT**

29/4/2021 & 16/7/2021

**ROBERT, J:-**

The Appellant Andrea Bulali, was convicted and sentenced to thirty years imprisonment for charges of rape contrary to section 130(1) (2) (e) and 131 of the Penal Code, Cap 16 R.E 2002 at the Resident Magistrate's Court of Arusha. Aggrieved, the Appellant appealed to this Court challenging the decision of the trial Court.

The prosecution alleged that the appellant was married to the victim's mother and they were all living together in the same house. On the fateful day, 19th May, 2018, the victim was sent by her mother to take food to the appellant at his workplace. When she arrived there and got inside the house the appellant undressed her by force and raped her. The

event took place at Olorien area within the District of Arumeru in Arusha Region. After that, she went back home and told her mother about the incident but her mother decided to keep quiet. Later on 15th June, 2018 she told her aunt about it and the matter was eventually reported to police. After investigations, the appellant was charged and convicted of rape and sentenced to 30 years imprisonment. Dissatisfied with conviction and sentence, he preferred this appeal armed with the following grounds:-

1. *That the trial Court (Hon. Comfort RM) erred on point of law and fact for not addressing the inconsistency in the prosecution witness and ruled the benefit of doubt to the appellant.*
2. *That the trial Magistrate erred on point of law in giving out the decision without considering whether the substantive element of an offence where established.*
3. *That the trial magistrate erred on point of law and fact for not considering the evidence of expert witness as required by the law.*
4. *That the trial Magistrate erred on point of law and fact for not considering the degree of lateness of the crime report by (PW1) to the police and immediate necessary action thereafter.*
5. *That the trial court erred in law and in fact convicting the accused person against the weight and standard required by the law.*
6. *That the trial Magistrate erred on point of law and fact for not considering the Defence evidence adduced before the court.*

At the hearing of this appeal the Appellant appeared in person without representation whereas the Respondent was represented by **Mr. Ahmed Hatibu**, Learned State Attorney. Parties proceeded to argue the grounds of appeal orally.

Highlighting on the first ground, the Appellant faulted the trial Court for not addressing the inconsistency in the testimony of prosecution witnesses. He submitted that, the evidence adduced by the victim (PW2) during examination in chief was conflicting with the one given during cross-examination. He explained that in examination in chief the appellant stated that, she was alone when the appellant raped her and when she cried for help no one was around to help her therefore she went back home after the incident. However, during cross-examination she stated that, she found one person at the scene of crime who later left and that there were some people living in that house, when she cried for help, they heard the noises and went to the scene. The said people were one Colonel and Bibi Bless but she did not tell them anything about the incident. He submitted further that, during re-examination the story changed again when PW2 said no one was around the scene of crime (See page 14-16 of the proceedings). He submitted that, it was the duty of the trial magistrate to note those contradictions.

The second ground faulted the trial court on a point of law that the Hon. Magistrate gave his decision without considering whether the substantive elements of an offence were established. Submitting on this point, the appellant argued that, this is a legal point and he left it on the Court to make a determination.

Coming to the third ground, he submitted that, the trial Magistrate failed to consider the expert opinion as required by the law. He argued that, while section 130 (4) of the Penal Code insists that in rape cases there has to be proof of penetration, the Doctors testimony stated that he found the victim to have been sexually abused without saying if there was any bruises or penetration. He maintained that since the Doctor did not testify on the issue of penetration it's obvious there was no penetration.

Submitting on the fourth ground, he stated that, the trial Magistrate did not consider the extent of delay in reporting the incident. While the incident occurred on 19/5/2018 the victim reported it to her aunt on 15/6/2018, and later reported the matter to police on 17/6/2018. He also noted that, although the victim stated that she told her mother about the incident on 15/6/2018, her mother denied to have been told anything by her daughter as indicated at page 18 of the proceedings.

On the fifth ground, he stated that, since the charge was filed under section 130 (2) (e) of the Penal Code, prosecution's failure to prove the age of the victim means the case was not proved beyond reasonable doubt. He cited the case of **Andrea Francis vs Republic**, Criminal Appeal No. 173 of 2014 to support his argument.

Lastly, submitting on the sixth ground he argued that, the trial court failed to consider the defence evidence. He maintained that his evidence was corroborated with that of PW3 (Victim's mother) who testified that, on 17/5/2018 she punished the victim (Pw2) and she saw the blood oozing from the victim's mouth. PW3 testified further that, before the incident things were good between the victim and the Appellant and the victim is her daughter.

Opposing the appeal, Mr. Hatibu resisted the first ground by arguing that, the testimony of PW2 established that on 19/5/2018 her mother sent her to bring food to the Appellant at his work place. Upon arrival, the Appellant undressed her and had sexual intercourse with her and then threatened to beat and strangle her if she discloses anything. She cried for help but no one appeared. In her re-examination she said the same things. He clarified that, in her cross examination, PW2 said that two people went at the scene after the raping incident was over. She did not

state that she found another person and later on changed her story that she didn't as alleged by the Appellant.

On the second, third, and fifth grounds he argued that, under section 130 (1), (2), (3), (4) and (5) of the penal code, for an offence of rape to be established, a male person must have sexual knowledge with a female person against her consent. Based on the adduced evidence, the victim had established that the Appellant's penis penetrate into her vagina and she identified the Appellant as she knew him because they were living in the same house.

Further to that, he argued that according to section 130 (2) (e) of the Penal Code having sexual knowledge of a girl below the age of 18 years whether by consent or not constitutes the offence of rape. He submitted that, the case of **Andrea Francis** stated by the Appellant does not provide a different position from the one stated in the present case. The age of the victim was stated in the instant case by PW4 as required in Andrea's case.

Furthermore, he argued that, the evidence of Pw2 (victim) was corroborated by the evidence of PW5 (Doctor) who said the victim was raped though it was difficult to establish penetration as the victim was abused a month earlier. Still, the expert's opinion is not mandatory as long

as the testimony of the victim is believed by the court. (See section 127 (6) of **the Evidence Act** Cap 6 (R.E 2002) and **Seleman Makumba vs Republic**, (2006) page 384.

On the fourth ground, he stated that, the evidence of PW2 was very clear that she was raped by her step father and she was 13 years of old. She was afraid to report the incident as two days prior to the incident her step father had beaten her and inflicted injuries in her mouth. That explains why she decided to report the incident when she visited her aunt and refused to go back home. The testimony of Pw1, Pw2 and Pw3 does not indicate any conflicts that could make the victim to cook-up allegations against the appellant.

Lastly, he submitted that, there is no merit on the sixth ground since the trial court considered both the prosecution and defence evidence. He referred the Court to page 6 of the impugned Judgment in support of his submissions.

In rejoinder submissions, the Appellant reiterated what he stated in his submissions in chief and prayed for this appeal to be allowed.

Having carefully considered submissions of both parties and the records of this matter, the central questions for determination is whether

the trial court evaluated properly the evidence adduced before it and whether there was any contradiction on the evidence of the prosecution.

The Appellant alleged that the evidence was not properly evaluated based on the following grounds.

Firstly, the appellant alleged that there were contradictions on the evidence adduced by the victim of rape (PW2). With regards to this, the Court is aware that not every discrepancy in the prosecution case causes the prosecution case to flop, the prosecution case can be dismantled only where the gist of evidence is contradictory (see **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 (unreported) cited in the case of **Mzee Ally Mwinyi Mkuu@ Babu Seya vs The Republic**, Criminal Appeal No. 499 of 2017).

The question before the court is whether the alleged contradictions goes to the root of the prosecution's case. Without putting much efforts on this point, this Court finds the alleged contradictions immaterial as demonstrated by the learned counsel for the respondent. It is apparent that during cross-examination PW2 testified that upon arrival at the place which later became the scene of crime, she found one person who later left and the other two persons came later after the incident had already occurred which means during the incident no one was around as

submitted by Pw2 in examination in chief. Therefore, this court finds the alleged contradictions to be unfounded and not capable of dismantling prosecution's case.

Secondly, the appellant faulted the trial Court for failure to consider expert opinion. He argued that, the Doctor who examined the victim (PW4) did not testify to have seen bruises or penetration which means there was no penetration. However, counsel for the respondent maintained that although the Doctor said it was hard to establish penetration since the victim was abused a month prior to his examination, the victim's evidence established successfully that she was penetrated by the appellant in her vagina and she was able to identify him as they used to live in the same house.

This Court is aware that, the victim's evidence, if believed by the Court, is capable of proving penetration in sexual offences. My position is fortified by section 127 (2) of the Evidence Act, Cap. 6 (R.E 2002) and the holding in the case of **Seleman Makumba vs Republic** [2006] TLR page 384 where the Court of Appeal held that the best evidence in sexual offences comes from the prosecutrix (the victim).

However, to determine whether PW2's evidence is capable of being trusted, this Court will have to consider the third point raised in this

ground that, in evaluating evidence adduced the trial court ought to have considered the aspect of delay by the complaint in reporting the matter. The appellant argued that while the alleged incident took place on 19/5/2018 it was reported on 15/6/2018 and the victim was examined on 17/6/2018.

This Court has always found it unsafe to convict an accused person in such unexplained delays in reporting the matter to police since the occurrence of the offence (see **Emmanuel Thomas Msemakweli vs The Republic**, Criminal Appeal No. 91 of 2019 [2020] TZHC 452; (31 March 2020) (TANZLII)). Counsel for the respondent wanted this Court to believe that the delay was caused by the victim's fear to report the incident because she was threatened by the appellant. However, the victim testified that she told her mother about the incident on the same day which her mother has denied in her testimony. Given that, the Doctor's examination failed to establish if the victim was penetrated and the reason for the delay is not clear, this Court finds that the evidence adduced leaves more questions the answers to which are not forthcoming and therefore it is unsafe to believe and convict on such evidence.

The requirement of reporting the matter as early as possible was also reiterated by the Court of Appeal of Tanzania in the case of **The Director of Public of prosecutions vs Simon Mashauri** (Civil Application No. 394 of 2017) [2019] TZCA 22; (28 February) 2019 where the Court held that;

> *"Besides that, PW1 did not report to the police station at the earliest opportune time. In that night, she took shower which was not proper in the circumstances and slept. In the next morning she went to church. The question we ask ourselves, was it a wise idea going to church instead of taking the necessary steps of reporting the rape incident to the police station. PW1 said she did not do it during that night because it was late. We think, if that was the case, reporting to the police in the following day would have been the first thing to do instead of going to church and waiting to report to PW7 first. We find her evidence to be unreliable."*

Fourthly, the appellant submitted that, as long as he was charged under section 130 (2) (e) of Cap. 16, it was mandatory for the prosecution to prove the age of the victim before his conviction. In reply, Mr. Hatibu was of the view that as long as the victim did not consent the issue of age became immaterial but he added that the age of the victim was stated by Pw4.

The offence levelled against the appellant was rape contrary to section 130(1) (2) (e) of the Penal Code and the particulars of offence shows that the offence was committed against a girl aged 13 years old.

This offence is commonly referred to as statutory rape. Unlike the offence of rape committed to the person above 18 years old, here the prosecution is duty bound to prove the age of the victim.

In the case of **George Claude Kasanda vs the DPP**, (Criminal Appeal No. 376 of 2017) [2020] TZCA 76; (27 March 2020) (TANZLII) the Court Appeal stated its position in respect of proof of age of the victim for offences committed under section 130(1)(2)(e) of the Penal Code where it stated that:-

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most 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... "*

In the case of **Mbarouk Deogratias vs Republic** (Criminal Appeal No. 279 of 2019) [2020] TZCA 1896; (16 December 2020) (TANZLII), CAT held that;

> *"Even if we were to consider the issue of age, it is now part of our jurisprudence that age may be inferred from facts other than the parent's testimony. See the case of* ***Kazimili Samwel v. Republic****, Criminal Appeal.No. 570 of 2016 (unreported)."*

In the present case, the victim (PW2) testified that she was 14 years old at the time of her testimony which means when the incidence occurred a year ago she was 13 years old. Further to that, Pw4 (investigator) said the victim was 13 years old when the incident occurred. There was no dispute with regard to the age of the victim at the trial court. I have also noted that when the appellant was given a chance to question the victim (PW2) and PW4 he never questioned them on the age of the victim. Thus, I find the age of the victim to have been well established and therefore the appellant's concern is a mere afterthought and untenable.

Fifthly, the appellant alleged that his defence evidence was not considered by the trial court while the respondent's counsel maintained that the court considered his evidence at page 6 of the trial court judgment.

Having gone through the records of this matter, it is obvious that the trial court did consider the defence evidence when arriving into the decision but was not convinced by it as manifested partly at page 6 paragraph 2 of the impugned judgment which reads:-

> *"... As I put the evidence of the prosecution and the defence on the scale of truth, that one of the prosecutions weighs more than that of the accused, I say so because there was no justified reason given by the*

*accused to show why the offence of rape should have been framed against him by his in-laws."*

Coming to the second issue of whether the prosecution proved their case beyond reasonable doubt.

It is a trite law that, the prosecution has a duty to establish a prima facie case and prove the offence against the accused beyond reasonable doubt. The same principle was repeated in the case of **Joseph John Makune vs The Republic** [1986] T.L.R 44, held;

*"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence".*

The victim's act of delaying to report the incidence has created serious doubts on the guilt of the appellant. The benefits of those doubts ought to have been given to the appellant. In the circumstances, I allow the appeal. The appellant's conviction is hereby quashed and the sentence set aside. It is hereby ordered that the appellant be released from custody forthwith unless otherwise lawfully held.

It is so ordered.

K.N.ROBERT
JUDGE
16/7/2021