IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 18 OF 2021

(Originating from Criminal Case No. 51 of 2016 in District Court of Mbozi)

Between

SHIDA SIAME ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

A.A MBAGWA, J.

This is an appeal against conviction of rape and sentence imposed by the trial District Court of Mbozi in Criminal Case No. 51 of 2016.

The appellant herein was charged, prosecuted and finally convicted of rape contrary to sections 130(2)(e) and 131(1) of the Penal Code. Following his conviction, the appellant was sentenced to thirty (30) years imprisonment.

The evidence which led to his arraignment and subsequent conviction may be summarized as follows:

It was alleged, in the charge, that the appellant Shida Siame on 21st day of April, 2016 at around 23:00hrs at Itentule village within Mbozi district in Songwe region did have carnal knowledge of one PW1 (the victim) aged 6 years. The appellant denied the allegations as such the prosecution was

compelled to parade six witnesses and one exhibit in order to prove the case. Appellant, on his part, stood a solo defence witness.

It was the evidence of the victim's mother PW3 one Luciana D/O Lucas Siame that on 21st day of April, 2016 at around 21:00hrs when she returned from her neighbour, she did not find the victim at home. She thus, raised an alarm in a bid to locate the victim. PW4, PW5 and PW6 responded to the alarm and joined the efforts in tracing the victim. All of the sudden, the appellant appeared and told PW3, PW4, PW5 and PW6 that he knew where the victim was. The appellant claimed that his devils informed him where the victim was. The appellant thus, led the group of people up to the bush where the victim was found laying. On interrogating the victim on how she went there, the victim said that she was brought there by the appellant who had sexual intercourse with her. On hearing the victim's implicating answers, the appellant took at his heels.

The victim was taken to Itaka hospital and thereafter referred to Vwawa District Hospital for medical examination. It was the testimony of PW2 Dr. Wailes Mwamlima Mwasile that up on examining the victim, she observed that her hymen was perforated. She thus filled a PF3 which she tendered in court and the same was admitted as exhibit P1.

The appellant was arrested on the following day. i.e. 24/04/2016. PW4, PW5 and PW6 testimony was consistent that upon arresting the appellant, he admitted to have raped the victim but claimed that he was drunk.

During his defence, the appellant admitted that he is the one who led the people to the bush where the victim was found. The appellant testified that

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he was assisted by his devils to locate the victim. The appellant further admitted that after showing them the victim, he ran away.

Having heard both parties, the trial magistrate was satisfied that the case was proved beyond reasonable doubt. He thus, convicted the appellant and sentenced him to thirty (30) year imprisonment.

Discontented with both conviction and sentence, the appellant has approached this court to fault the trial court's decision. He filed a petition of appeal comprising several grounds which can be deduced into the following meaningful grounds;

1. That the trial magistrate erred in law and fact by failing to consider the defence evidence
2. That the trial magistrate erred in law and fact to believe PW1 (the victim) on her age without producing birth certificate.
3. That the trial magistrate erred in law and fact by receiving and relying on the evidence of PW1 without conducting voire dire.
4. That the trial magistrate erred in law and fact by convicting the appellant without evidence from the police investigator.
5. That the trial magistrate erred in law and fact by convicting the appellant without proper identification
6. That the trial magistrate erred in law and fact to enter conviction based on weak prosecution evidence.

When this matter came for hearing, the appellant appeared in person to prosecute his appeal whereas the respondent Republic was represented by Davis Msanga, learned state attorney.

The appellant, being a layman, had nothing to submit rather he prayed the court to consider the grounds of appeal as contained in the petition of appeal and finally allow the appeal.

Mr. Davis Msanga, at the very outset, remarked that the appellant was not properly convicted according to the law. He said that the appellant was convicted without being found guilty. Further, Mr. Msanga was opined that the court ought to mention the offence and section of law under which the accused was convicted. He argued that the consequences of these defects are to remit the case file to the trial court for proper conviction. He referred to the case of **KELVIN MYOVELA VS THE REPUBLIC**, CRIMINAL APPEAL NO. 603 OF 2015, CAT at Mbeya at page 7 (Unreported) to support his contention on the appropriate course to take.

With respect to the merits of appeal, Mr. Msanga strongly resisted the appeal. He was in full support of conviction.

On the aspect of the victim's age, Mr. Msanga submitted that the law does not necessitate proof of age by birth certificate. He told the court that age can be proved by different persons including the victim herself and her parents.

Regarding the complaints that no police investigator was called, the learned state attorney said that there is no legal requirement for a police officer testify. He told the court that in the instant case the police investigator was not a material witness.

With respect to the identification of the appellant, Msanga argued that PW1 properly identified the appellant because the duo knew each other as they are uncle and daughter

On the failure to consider the defence evidence, Mr. Msanga said that the court properly considered evidence of both sides and finally found that the defence did not shake the prosecution strong evidence as clearly indicated at page 4 and 5 of the judgment.

Furthermore, the learned state attorney submitted that voire dire is no longer a requirement of law. He said that what is needed is for a child to promise to say the truth. He referred to page 7 of the proceedings and submitted that the child (PW1) promised to say the truth hence the requirement of law was complied with.

Mr. Msanga concluded that there was strong prosecution evidence hence the conviction entered by the trial court was merited.

I have gone through the grounds of appeal, submissions and the trial court record.

To begin with absence of finding of guilt before conviction, it is undisputed as reflected at page 5 of the judgment that the trial magistrate convicted the appellant before finding him guilty. Indeed, this was contrary to the law. See the case of **Khamis Rashad Shabani vs the Director of Public Prosecutions Zanzibar, Criminal Appeal No. 184 of 2012, CAT at Zanzibar.**

Furthermore, I have noted that the trial magistrate neither cited the section nor mentioned the offence under which the appellant was convicted contrary to the dictates of section 312 of the Criminal Procedure Act. At page 5 of the judgment, the trial magistrate simply held as follows;

'It is on the foregoing this court convict (sic) he (sic) accused person on the offence charge'

The germane question for consideration in determining this issue is whether the anomaly is fatal. In my view, the defect is not fatal as it did not occasion any injustice to the appellant. It is an error which, in my view, is curable under section 388 (1) of the Criminal Procedure Act. The case of **KELVIN MYOVELA** (supra) cited by the learned state attorney is irrelevant in this case. This is due to the fact that in **Myovela's case**, the trial court omitted to enter conviction unlike in the instant appeal where the trial court omitted to make a finding of guilt before convicting the appellant.

With respect to the complaint that the trial magistrate did not consider the defence case, I have found this ground devoid of merits. The record at page 5 of the judgment speaks against the appellant. It is clear that the trial magistrate considered evidence of both sides as he was opined that the prosecution proved the case beyond reasonable doubt and the defence evidence did not raise reasonable doubt.

Regarding the age of victim that she was six (6) years at the material time, I agree with the learned state attorney that it is necessary to prove age by birth certificate. The law is settled that the victim's age can be proved through parents, victim or birth certificate. See **Mwalimu Jumanne vs the Republic, Criminal Appeal No. 28 of 2019, CAT at Dar es Salaam** and **Isaya Renatus vs the Republic, Criminal Appeal No. 242 of 2015.**

In this appeal the victim said that she was six years old and there was no cross-examination on this important issue. As such, this is taken as proved fact and the appellant is estopped from challenging it at this juncture. This ground therefore is equally unfounded.

Further, the appellant assaulted the trial court by relying on the testimony of PW1 the victim on the ground that voire dire was not conducted. With due respect to the appellant, the voire dire test is no longer a requirement in law. What is now required is the witness' promise to say the truth. In this case at page 9 of the proceedings, the victim PW1 promised to speak the truth hence the requirement of law was met. I therefore dismiss this complaint as well.

The appellant also assailed the trial court's conviction in absence of the evidence of a police investigator. Mr. Msanga's response was that there is no requirement of law that a police investigator must testify in order to prove criminal case. I agree with the learned state attorney that it is the exclusive discretion of the prosecution to decide which witness should be paraded. What is incumbent on the prosecution is to prove the case to the required standard. See the case of **Leonard Jonathan vs the Republic, Criminal Appeal No. 225 of 2007 CAT at Arusha.**

In addition, the appellant challenged the conviction on the ground that it was predicated on improper identification and weak prosecution evidence. I have taken trouble to revisit the evidence in the course of determining this issue. PW1, the victim was very clear that it is the appellant who took her from her home to the bush and thereat he had sexual intercourse with her. Further, it is undisputed that the appellant and victim are related as uncle and daughter and knew each other before the incident. Moreover, it is the appellant who led PW3, PW4 PW5 and PW6 to where the victim was abandoned in the bush and having shown them the victim, the appellant ran away until the following day when he was arrested.

Besides, PW2, a medical doctor at Vwawa District Hospital testified that upon examining the victim she found that the victim's hymen was perforated. She filled a PF3 which was admitted as exhibit P1. However, the said exhibit P1 was not read out after admission. This means exhibit P1 is expunged from the record. Nonetheless, its contents were covered by oral account of PW2. As such, it remains that the victim's hymen was perforated. See the case of **Anania Clavery Betela vs the Republic, Criminal Appeal No. 355 of 2017, CAT** at Dar es Salaam

Moreover, there is oral confession by the appellant before PW4, PW5 and PW6 that he had sexual intercourse with the victim though he claimed that he was drunk.

In view of the foregoing, I am of unfeigned view that the appellant was properly identified by the victim and his conviction was based on the strength of the prosecution evidence. In the event, I find this appeal unfounded and consequently dismiss it. However, I have noted that the appellant was convicted of raping a girl of six years but was wrongly sentenced to thirty (30) years imprisonment. As per the dictates of section 131(3) of the Penal Code, a person who commits rape to a girl below the age of ten years is liable to life imprisonment.

I have noted that the prosecution cited, in the statement of offence, sections 130(2)(e) and 131(1) of the Penal Code. They omitted to cite sections 130(1) which is a criminalizing provision and 131(3) which is the appropriate punishment section both of the Penal Code. However, on looking at the evidence holistically, I am satisfied that the omission did not prejudice the appellant in any how as he was able to appreciate the nature of offence he was facing. It is the position of law that non or wrong citation

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of law is not fatal and may be cured under section 388(1) of the Criminal Procedure Act. See the case of **Feston Domician vs the Republic, Criminal Appeal No. 447 of 2016, CAT at Mwanza** and **Jamali Ally @ Salum Vs the Republic, Criminal Appeal No. 52 Of 2017, CAT at Mtwara.**

That said and done, it is my findings that this appeal is devoid of merits. I consequently dismiss it. I uphold conviction entered by the trial court. Further, the sentence of thirty-year imprisonment is set aside and substituted for life imprisonment in terms of section 131(3) of the Penal Code.

It is so ordered.

The right of appeal is explained.

A.A. Mbagwa
Judge
29/11/2021

Judgment delivered in the presence of appellant and Baraka Mgaya SA for the Republic this 29th day of November, 2021.

THE HIGH COURT OF TANZANIA

A.A. Mbagwa
Judge
29/11/2021