IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

CRIMINAL APPEAL NO 57 OF 2021

(Originating from the District Court of Iringa in Criminal Case No. 209 of 2016)

DENIS KUTIKA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Date of last order: *14/03/2022*
Date of Judgement: *15/06/2022*

MLYAMBINA, J.

In the District Court of Iringa, the Appellant, Denis Kutika was charged with the offence of rape contrary to *section 130 (1) and (2)(e) and 131 (1) of the Penal Code [Cap. 16, R. E. 2019].* It was alleged that, on 7th day of March, 2016 at Msuruti Village within the District and Region of Iringa, the Appellant had carnal knowledge of a girl aged thirteen years old. For the purposes of protecting her identity, I shall refer her as the victim or PW1.

To prove its case, the prosecution paraded three witnesses and tendered one exhibit. The Appellant relied on his evidence to defend his innocence. After a full trial, the Appellant was found guilty, convicted and sentenced to

thirty years imprisonment. Dissatisfied with the conviction and sentence, the Appellant has preferred the present appeal. In his Petition of Appeal, the Appellant raised six (6) detailed grounds of grievance, which are:

1. *That, the Trial Court erred in law and fact to convict and sentence the Appellant for the charged offence without considering that the essential elements of penetration was not proved by the prosecution side.*
2. *That, the learned Trial Magistrate erred in law and fact for failure to draw inference adverse towards the prosecution side as to why PW1 was taken to hospital but Doctor from that Hospital was not called to testify.*
3. *That, the learned Trial Magistrate misapplied the law for invoking the principle of best evidence during judgement writing without justification therein the proceedings.*
4. *That, the Trial Court wrongly held that the testimony of PW1 was corroborated by either Prosecution witnesses without taking into account that the alleged corroborative evidence do not establish and constitute the charge offence of rape.*
5. *That, the Trial Court wrongly accepted and admitted the caution statement as exhibit without considering that the same was not recorder out of time but also was admitted without being numbered as required under the law.*
6. *That, the prosecution side failed totally to prove this charge against the Appellant beyond reasonable doubts.*

The Appellant appeared in person at the hearing of the appeal before this Court. The Respondent had the services of Ms. Alice Thomas, learned State Attorney. This appeal was argued orally.

In addressing the first ground, the Appellant submitted that, there was weakness on the proof of penetration. There was no evidence of the Doctor who could prove penetration. He further argued that, the evidence was given by the sister of the victim (PW4) who did not elaborate to the Court on penetration.

Regarding to the second and third grounds, it was his further submission that the victim was taken to Hospital but the Doctor was not brought to testify. The evidence of the Doctor was important to establish whether after examination, the child was found with bruises. However, the Magistrate based on the evidence of the victim as the best evidence who was supposed to prove rape by bringing the doctor, but she did not do so.

In relation to the fourth ground, the Appellant submitted that, PW4 denied that he never raped the victim. She told the Court that it was due to anger because he refused for the victim to be taken for work. She was still a pupil.

As regards to the fifth and sixth grounds, the Appellant argued that, the caution statement was taken out of time. It was on the fourth day and the Republic never proved their case beyond reasonable doubt. Thus, he prayed for this Court to quash and set aside the conviction and sentence thereof.

In reply, Ms. Alice Thomas opposed this appeal. She argued that, there are two issues. Whether the victim was raped and whether it is the Appellant who raped her. She contended that, regarding the first issue page 9-11 of the proceedings shows that on 07/03/2016 the victim slept to her sister (the wife of the Appellant) there was a solar torch which was illuminating. She saw the Appellant coming to the room, switched off the light, went to the bed and started raping her. She was crying. Immediately came her sister with a torch. After interrogation before the Village Executive Officer (VEO), the Appellant admitted. The VEO (PW2) testified before the Court.

Further, it was submitted that, at page 12, PW3 testified that in the Caution Statement, the Appellant admitted. It is an afterthought to say that the caution statement was taken out of time. It is true the caution statement was not numbered. But lack of numbering does not prejudice him. More to say, she argued that, on the point that the Doctor did not adduce evidence was not necessary to prove the offence. She cited the case of **Mussa Ally**

Onyango v. The Republic, Criminal Appeal No. 75 of 2016 (unreported), in which the Court referred to the *inter alia* case of **Salu Sosana v. Republic,** Criminal Appeal No. 31 of 2003 in which the Court held:

> *We are mindful of the fact that lack of medical evidence does not necessarily, in every case mean that rape is not established where all other evidence points to the fact that it was committed.*

That, In the above case, the victim testified on how she was raped by the accused person. The later confessed to have raped the victim. The confession was made before the VEO and the Police Officer in his Caution Statement. The learned State Attorney further cited the case of **Geofrey Sichizya, v. DPP** Criminal Appeal No. 176 of 2017 Court of Appeal of Tanzania at Mbeya (unreported) at page 10, in which the Court, while referring to the case of **Posolo Wilson @Mwalyengo** stated that:

> *It is settled that on oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to find conviction against the suspect. See for example DPP v. Nuru Mohamed (1988) TLR 82.*

Additionally, she cited *Section 127 (7) of Evidence Act, [Cap 6 Revised Edition 2019],* which it states that, in criminal sexual offences, the best

independent evidence is that of the tender child or of the victim. The same has been celebrated in the case of **Wilson Musa @Jumanne v. The Republic,** Criminal Appeal No. 109 of 2018 Court of Appeal of Tanzania at Arusha, page 12, the Court made reference to the case of **Seleman Makumba v. Republic** [2006] TLR 379.

Thus, she argued that, as per the evidence of PW1, PW2 and PW3, it is no doubt that the victim was raped by the Appellant. Therefore, she prayed the conviction and sentence issued by the Iringa District Court be sustained.

In rejoinder, the Appellant, being a layperson had nothing to contribute, rather, he urged the Court to let him free.

After a due consideration of the records from the trial Court, grounds of appeal and the submission thereof from both sides this Court is of the view that the central issue capable to dispose this appeal is; *whether the prosecution side proved their case at the required standard.*

Primarily, and as a matter of principle, this Court being the first appellate Court has the duty to re-evaluate the evidence adduced during the trial and come out with the relevant prudent conclusion and failure to do so is fatal. Reference may be made to the case of **Jongoo v. Republic** [2010] 2EA 171, **Prince Charles Junior v. The Republic**, Criminal Appeal No. 250

of 2014 Court of Appeal of Tanzania at Mbeya at page 13 and **D.R Pandya v. R** [1957] EA 336. In this case, the Appellant was arraigned and convicted under *section 130 (1) and (2)(e) and 131 (1) of the Penal Code (supra).*

In deciding the issue raised above, I find it apt to reproduce the provisions in which the Appellant was charged. Section *(2)(e)* of the Penal Code, provides that:

> *Not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse.*

Also, the Appellant was charged under *section 131(1) of the Penal Code(supra)* which states that:

> *Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the Court, to the person in respect of whom the offence was committed for the injuries caused to such person.*

In the case at hand, the Respondent argued that the case was proved on the required standard to wit; beyond reasonable doubt. But the Appellant

claimed that the same was not proved as per the requirement of *Section 3(2)(a) of the Evidence Act [Cap 6 R. E. 2019]* which provides that:

> *In criminal matters, except where any statute or other law provides otherwise, the Court is satisfied by the prosecution beyond reasonable doubt that the fact exists.*

Further, in this case, the evidence which lead to the conviction of the Appellant was that from the victim (PW1) which was said to be corroborated by PW2 who was the VEO and PW3- the police officer who took the cautioned statement of the accused, now the Appellant. The victim narrated at page 10 of the typed trial Court proceedings to the effect that:

> *During the midnight, when the solar torch was lighting and illuminating the room, Denis Kutika came and switched off the solar torch. I had no underpants when I went to sleep. Denis came and laid on me. He forced his penis into my vagina, fully erected, I felt very pain and cried for help.*

From the narration above, the prosecution argued that the case was proved due to the evidence of the victim. However, I find that there is no any evidence from any witness which proved the penetration during such

rape. This made this Court to believe the evidence of PW4 the sister of the victim who narrated that the accused attempted to rape the victim.

Meanwhile, the law clearly states penetration is the important ingredient to prove the offence of rape as *per section 130(4) of the Penal Code* (supra) which states that:

> *(4) For the purposes of proving the offence of rape- (a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence...*

This requirement of the law has occasionally been strengthened by the Court of Appeal to the effect that; in the offence of rape of the child, the crucial issue to be proved in the rape case is penetration even if slightly. See through the case of **Said Majaliwa v. Republic,** Criminal Appeal No. 2 of 2020, Court of Appeal of Tanzania at Kigoma at page 7 and 14 and **Peter Sagadege Kashuma v. Republic,** Criminal Appeal No. 219 of 2019, Court of Appeal of Tanzania at Dar es-Salaam at page 10. This implies that, in any rape case especially of the girl under the age of 18 years, the prosecution side is duty bound to prove penetration.

In this case, the charge expressed that the age of the victim was 13 years. Thus, the penetration was the crucial issue to be proved but this was

not done because there was no any evidence from the medical officer. Though I am aware of the principle in the case of **Mussa Ally Onyango v. The Republic** *(supra),* I'm of firm view that this should be taken with high caution because, it is so vital and logical for the case in which a victim is a child, as in this case, the issue of penetration is inevitable.

Furthermore, I am aware that, the Appellant was charged and convicted under the provision which creates an offence now famously referred to as statutory rape. It is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent.

Moreover, an age is of great essence in proving such an offence. The prosecution is duty bound to establish among other ingredients, that the victim is under the age of eighteen so as to secure a conviction. In the case of **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported), the Court of Appeal of Tanzania observed that:

> *We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (l) (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 proof of age be given*

by the victim, relative, parent, medical practitioner or; where available, by the production of a birth certificate. We are, however, far from suggesting that proof of age must; of necessity, be derived from such evidence. There may be cases, in our view, where the Court may infer the existence of any fact including the age of the victim on the authority of section 122 of TEA which goes thus: - "The Court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Reverting to the case hand, at page 9 of the typed trial Court proceedings, the trial Magistrate only ended to note that:

PW1 being a child of tender age states as "nitasema ukweli mtupu"

In regard to that, this Court is of the view that, such was not enough to infer the age of the victim. The prosecution side was duty bound to bring the witness to prove the age of the victim so as to cover her in the statutory rape because preliminary answers and particulars asserted prior to giving evidence are not part of evidence as the same are not given on oath. Instead, they serve as general information. Reference can be made to the

case of **Simba Nyangura v. Republic**, Criminal Appeal No. 144 of 2008 and **Nalgogwa John v. Republic**, Criminal Appeal No. 588 of 2015 (both unreported). Thus, in the absence of evidence proving age of the victim, the remaining prosecution evidence could not sustain the Appellant's conviction.

Therefore, I am not convinced to order retrial in this case because it will be in the detriment of the accused, now the Appellant. This is due to the fact that, the default was that of prosecution failure to prove their case as required. Definitely, the prosecution will fill such gap. Reference may be made to the case of **Fatehali Manji v. Republic** [1966] E. A. 341 and **Selina Yambi and Others v. Republic,** Criminal Appeal No. 94 of 2013 (unreported). For instance, in the case of **Selina Yambi and Others v. Republic** *(supra)* in which the Court held that:

> *We are alive to the principle governing retrials. Generally, a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that an order should only be made where the interest of justice require.*

In the upshot, justice in this case demands that the case should not be heard afresh because it will be on the detriment of the Appellant. Consequently, the appeal is merited. The conviction and sentence meted by trial Court is hereby quashed and set aside. The Appellant be released forthwith unless lawfully held. It is so ordered.

Y. J. MLYAMBINA

JUDGE

15/06/2022

Judgement pronounced through virtual Court and dated this 15th day of June 2022 at 09:45 am in the presence of the Appellant and Senior learned State Attorney Ms. Blandina Manyanda for the Respondent. Both parties were stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal fully explained.

Y. J. MLYAMBINA

JUDGE

15/06/2022