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

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**DC. CRIMINAL APPEAL NO. 21 OF 2021**

**SALUM S/O MACHIMU ..... APPELLANT**

**VERSUS**

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

(Appeal from the decision of the District Court of Mpanda at Mpanda)
(G. B. Luoga, RM)
Dated 21st day of January 2021
In
Criminal Case No. 157 of 2020

**JUDGMENT**

17/05 & 22/06/2022

**NKWABI, J.:**

The conviction and sentence to 30 years imprisonment by Mpanda District Court in Katavi region for rape contrary to section 130 (1) and (2)(e) as well as section 131 (1) of the Penal Code Cap 16 R.E. 2019 disturbed the appellant. He resorted to this appeal in this court. In the trial court, he was accused of having sexual intercourse with **MK** a girl aged 13.

The circumstances leading up to the conviction and sentence against the appellant are that in the afternoon of 21/10/2020 MK was sent to look for lambs. She was accompanied by her young sister Grace. When there, and

after they had collected all the lambs, the appellant appeared and ordered Grace to go to collect other lambs. She did not obey because they had collected all of them. The appellant chased Grace after beating her. It was after that the appellant forcefully undressed MK had had sexual intercourse with her. She sustained injuries and bled from the injuries. After what appears to be gratification, the appellant ran away directing MK not to report the incidence. MK went back home crying. She told her mother what had happened to her. After a while the appellant went there (at home) and was asked about the incidence. He was also told to send MK to hospital for treatment. On the way he was arrested and sent to a police station.

PW1 MK was sent to hospital where she was examined and treated of the injuries she had sustained. PW4, in the PF3, which is exhibit P2 opined that there was vaginal penetration and active bleeding, however, no spermatozoa were seen.

In his defence the appellant contested the account of the respondent concerning the rape incidence. He admitted he was a houseboy of the family and explained that it was since the year 2018 and that he was arrested while on the way when MK was being sent to hospital. He admitted that MK was

bleeding but denied to know the cause. He attributed his prosecution to his claiming his salary money for 12 months. He had also hens he left at the house. He said, the witnesses of the respondent told lies against him.

The trial court did not buy his defence. Instead, the trial court found that the respondent had proved the case beyond reasonable doubt. Convicted him and sentenced him to serve thirty years imprisonment. Due to this appeal, he prays this Court, quash the conviction and set aside the sentence imposed on him.

To justify his appeal, the appellant listed four grounds of appeal which are:

1. That the trial court refused to call the young sister called Grace if she was beaten and chased on the material day.
2. That the trial court erred at law by admitting the evidence of PW4.
3. That the trial Court erred at law and facts when convicted me without considering my defence.
4. That, the trial magistrate failed to prove the actual age of PW1 as there was no birth certificate tendered before the Court as an exhibit.

At the oral hearing of this appeal, the appellant appeared in person without legal representation. The respondent was duly represented by Ms. Marietha Maguta, learned State Attorney who briskly resisted the appeal.

Venturing his appeal, the Appellant remarked that, a material witness was not called to testify the other one was a hearsay witness. He asked this court to permit his grounds of appeal be considered as his submissions.

Ms. Maguta lively resisted the appeal, as such supported the conviction and sentence. Contesting the first ground of appeal she argued that the court has no duty to call a witness for a party, it is for one to ask for summons for a witness be issued. She added, the 1st ground is an afterthought.

Against the 2nd ground of appeal, Ms. Maguta contended that PW4 is a clinical Officer who filled in the PF3. PW4 found the victim with blood flowing from her private parts. She was of the strong opinion that the 2nd ground of appeal has no merit. That witness is a credible witness, she maintained. The trial court saw the demeanor of that witness. She referred me to **Goodluck Kyando v Republic, [2006] TLR 363,** (CAT) to fortify her submission on the 2nd ground of appeal.

Advancing her position on the 3rd ground of appeal, Ms. Maguta pointed out that on the 10th page of judgment on line 4, the defence was considered. Let this ground be dismissed, she quickly added.

Finally, on the 4th ground of appeal, Ms. Maguta maintained that there is no requirement of law for proof of age of victim by birth certificate. Age could be proved by parent of victim. PW2 was the mother of the victim who proved the age of the victim (PW1). That is at page 11 of court proceedings. Ms. Maguta added that there was also an affidavit as to the age of the victim. The evidence is sufficient. Let this ground of appeal be dismissed. She finally urged me, in the circumstances, the appeal dismissed as it is wanting in merit.

As the appellant had nothing in rejoinder, I straight forwardly embark on considering and determining this appeal by dealing with one ground of appeal after the other. I start with the first one in which the appellant lamented that the trial court refused to call the young sister called Grace to testify if she was beaten and chased on the material day. In his view, Grace was a material witness to be called to come to testify and prove that she was beaten up.

Ms. Maguta who argued the appeal for the respondent was not persuaded by the ground of appeal as well as the assertions by the appellant on this ground of appeal. She was of the firm view that the trial court had no duty to call a witness for a party, it is for one to ask for summons for a witness be issued. She further stated that, the 1st ground is an afterthought.

The first ground of appeal will not detain me much. It is trite law that there is no specific number of witnesses required to prove a fact. This is as per **Masudi Amlima vs. Republic [1989] TLR 25** (HC):

> *"... that was a single witness. The trial magistrate believed him. There is no law requiring that more than one person should be required to prove the fact that the appellant was seen coming out of the house. The evidence of pw3 Fabian was sufficient to prove that fact." S. 143 Evidence Act."*

Therefore, the complaint by the appellant on the first ground of appeal is unmerited. That is for the reason that PW1 was sufficient witness to testify on the fact that her young sister was beaten up by the appellant so that she could pave way for an opportunity for the appellant to have sexual gratification on PW1. I also accept the view of Ms. Maguta that ordinarily, it

is not the duty of the Court to prove or call witnesses for either side. This ground of appeal crumbles to the ground.

The next ground of appeal for my consideration and determination is the complaint that the evidence of PW4 was wrongly admitted. PW4 is the medical practitioner who examined PW1 and tendered the PF3 which was admitted as exhibit P2. His evidence does not prove that the appellant is the one who raped the victim of the offence but it serves as corroboration to the evidence of PW1. That position was stressed in **Hangwa William v Republic,** Criminal appeal no 117 of 2009 (CAT) Mwanza (unreported) the Court said:

> *"The evidence of the victim is the primary evidence; the other pieces of evidence could only come in as corroboration."*

See also **Selemani Mukumba v Republic,** Criminal appeal no 94/1999 CAT at Mbeya:

> *"True evidence of rape has to come from the victim. If an adult, that there was penetration and no consent and in case of any other woman where consent is irrelevant that there was penetration. That was a penetration and since she had*

*not consented to the act that was rape notwithstanding that no doctor gave evidence and no PF3 was put in evidence."*

The second ground of appeal lacks any merit, it is dismissed.

I now determine the 3rd complaint maintained by the appellant. It is that his defence was not considered. I accept Ms. Maguta's argument that the appellant's defence was considered by the trial court at page 10 of the typed judgment. It was dismissed because the appellant did not cross-examine PW2 on his alleged wage claims. I am in agreement with the trial court. Further, even if the trial court had not considered the defence, this court has power to consider it and come to its own conclusion. The current position of our law is that that anomaly if any is not fatal. This is because, the appellate court has the power to appraise the evidence on record and come to its own conclusion. For that position of the law see, **Jafari Musa v. DPP, Criminal Appeal No. 234 of 2019,** CAT (unreported) it was stated that:

*"We have considered this ground and the arguments thereon. We wish to begin by appreciating that, in the past, failure to consider a defence case used to be fatal irregularity. However, with the wake of progressive jurisprudence brought by case law, the position has*

*changed. The position as it is now, where the defence has not been considered by the courts below, this Court is entitled to step into the shoes of the first appellate court to consider the defence case and come up with its own conclusion."*

The last ground of appeal by the appellant is to the effect that the trial magistrate failed to prove the actual age of PW1 as there was no birth certificate tendered before the Court as an exhibit. Ms. Magutu contended that that is not the requirement of law as such this ground of appeal is without merit. I agree because I am fortified by **Jafari Musa v DPP,** Criminal Appeal No. 234 of 2019, CAT, (unreported):

*"If we may move a step further for completeness the proof of age particularly in sexual offences as expounded by case law, is proved by either production of the victim's birth certificate or may come from the victim herself/himself, relative, parent, medical practitioner, a teacher, close friend or any other person who knows the victim – See* ***Elia Johum v. Republic,*** *Criminal Appeal No. 306 of 2016; and* ***Issaya Renatus v. Republic,*** *Criminal Appeal No. 542 of 2015 (both unreported).*

There is ample evidence from PW2 that MK was born on 18/05/2007 in her testimony in court. There is also the affidavit (exhibit P1) in respect of the birth of MK. As such the complaint by the appellant that the victim's age was not prove is baseless. It is dismissed.

Finally, having deliberated this appeal as I have shown above, I find the appeal wanting in merits. It is dismissed. Conviction and sentence are upheld.

It is so ordered.

**DATED** at **SUMBAWANGA** this 22nd day of June, 2022.

J. F. NKWABI

**JUDGE**