THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA

CRIMINAL APPEAL NO. 28 of 2022
(Originated from District Court of Momba at Chapwa in Criminal Case No. 99 of 2021)

ALOYCE ISAKI MBOYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 23rd May & 13th June, 2022

KARAYEMAHA, J

Before the District Court of Momba at Chapwa, the appellant Aloyce Isaki Mboya was charged with the offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2019 [henceforth, the Penal Code].

It was alleged by the prosecution that the appellant on or about 24th day of June, 2021 at about 01:00hrs at Maporomoko area, Tunduma Township within Momba District in Songwe Region unlawfully did have carnal knowledge of a girl aged 13 years a primary school who, for the sake of modesty and privacy, I shall refer to as "MM" or simply as PW2, the codename by which she testified at the trial.

The accused pleaded not guilty to the charge. In a bid to prove the charge, the prosecution lined up four (4) witnesses, namely, Agnes Amon @ Mgira (PW1), MM (PW2), WP 9476 PC Aneth (PW3) and Tunu Japhet @ Shandu (PW4). In addition, 2 exhibits, namely, MM's Clinic Card and the PF3 were tendered and admitted as exhibits PE1 and PE2 respectively.

Perhaps before going into the nitty-gritty of the appeal, it may be apt to narrate, albeit briefly, the relevant background facts leading to the appellants' arraignment. It is this: PW2's family runs a kiosk at their house. It appears each member of the family has a time to sell when others are not at home are engaged in other activities. Among the goods sold in the kiosk were the cakes which were supplied by the appellant to them. This means the appellant was familiar to the members of PW2's family. According to PW2 the appellant was seducing her when he was meeting her at the kiosk. On 23/06/2021 the two planned to meet in PW2's room. The plan was that when the appellant was ready at the house, he would throw a stone on the roof, jump the fence and PW2 would go to open her room's door. On 23/06/2021 at about 1:00hrs (night) the appellant went to PW2's room. In view of PW2's testimony in there, he touched her breasts, and no sooner had he

thrown her in bed, undressed her, than he undressing himself and inserted his penis in her vagina. The same incident repeated on 24/06/2021. This time he was caught by PW2's mother PW1. This scene occurred in the morning around 6:00hrs when PW1 went to wake up PW2 to clean the compound. Suddenly, the appellant got out of the room and passed at the gate PW1 opened to let his husband and son to enter inside. After probing, PW2 told PW1 that it was the appellant who was in her room and had had sexual intercourse with him. The incident was reported at Tunduma Police Station whereby they were given a PF3 by PW3 and took PW2 to Tunduma Healthy centre. At the healthy centre, PW2 was examined by PW4 (medical doctor) whose findings were that PW2 was penetrated. In the course of testifying PW4 tendered the PF3 which reveals that there were no bruises, no fluid and blood stains. It indicates further that there was no hymen. It however, revealed that there was evidence of penetration. After gathering evidence, PW3 formed an opinion that the appellant really raped MM. It was her opinion that triggered his arrest and arraignment before Momba District Court.

In his defence the appellant admitted to have been selling cakes to PW2's family kiosk but denied raping her. It was his defence that on

22nd June, 2021 he was not feeling well as he had headache and dizziness. On 23rd June, 2021 he could not take cakes because he was still sick and was at his house the whole day until the next morning when he felt a bit physically fit. He testified further that around 10:00hrs, he went to his friend who was operating chips business and helped him until 18:00hrs p.m. when he went back to his house to have a rest. He resumed his business on 27/08/2021.

The story staged by the prosecution definitely attracted the trial Magistrate. He eventually found the appellant guilty; convicted and finally sentenced him to serve thirty (30) years imprisonment

Utterly dissatisfied with the decision that convicted and sentenced him, the appellant took an appeal to this Court. He has raised six (6) grounds of appeal. They are as follows, I quote:

"*1. That the trial Magistrate erred in law and facts the denied for DNA test to prove and compare the sperms found in the vagina if it relates to my blood and no any connection with the matter that I was in affair with the said victim and due to that there is no direct evidence to show that I am the one who committed the said offence of rape.*

2. *That the trial Magistrate erred in law and in facts since it based on the considerable suspicious (sic) only which is not sufficient to convict me. Although the victim and her mother said that they know me (sic), but there is no evidence to prove that I am the one who committed the said offence, since PW1 (victim's mother) said before lower court that she saw me going out her daughter's room (sic) but she did not elaborate before the court that how I was looking physically (sic) that if she did saw me how was I dressed, also failed to tell the court that why (sic) she did not take action on me during the event time and let me go away. There is no truth from this witness as I was not arrested at the event area and I was arrested three days after the date of the event according to the charge sheet, and there is no point to prove that I entered the room of the victim and these witnesses knew me as I was a keki (sic) seller in their street as well as in their shop. But the lower court did not take to my side (sic) that I was a local businessman (muuza keki) I just remained wondering when I was arrested on 27/06/2021.*
3. *That the trial Magistrate erred in law and in fact as there was no any medical evidence of person who had exercise the act (sic) several times due to the fact that the two fingers was (sic) entered*

in the vagina freely and the Doctor was not adduced (sic) any evidence that I am the one who committed the said offence. Also Doctor told the court that she do (sic) not know that what have entered (sic) in the victim's vagina.

4. *That the trial Magistrate erred in law and in fact by basing on the evidence of the prosecution which was given by all prosecution witnesses since the prosecution side was not be said (sic) to have met the legal requirements by any standards as well as the case was not proved beyond reasonable doubt.*
5. *That the charge against the appellant was not proved beyond reasonable doubt since the prosecution left a lot of stones unturned.*
6. *That, the trial Magistrate erred in law and fact, for acting on medical report PF3 and as the result of his error held that the victim had been raped while a clinical officer did not take action to find out the truth that the girl was raped or otherwise, and the medical evidences (sic) wasn't show (sic) that I am the one who raped the girl and committed the said offence".*

Wherefore the appellant prays this court to allow his appeal and quash the conviction and set aside sentence imposed by the trial court.

However, on keenly looking at the grounds of appeal they mean only three grounds and will be referred to as grounds one to three. The three grounds are paraphrased as follows, that **one,** the appellant was convicted but the trial Magistrate denied DNA test to be conducted to compare sperms in the vagina and his blood, no medical evidence indicating that sperms were found in MM's vagina and relying on PF3 which does not prove that MM was raped, the subject of grounds 1, 3, and 6. **Two,** that the trial Magistrate erred in law and fact by basing conviction on suspicious evidence, subject of ground 2. **Three**, the prosecution case was not proved beyond reasonable doubt, the subject of grounds 4 and 5.

When the appeal came for hearing, the appellant appeared in person (unrepresented) while Mr. Baraka Mgaya, learned State Attorney appeared for the Republic.

Submitting on the 2nd ground which complains that PW1 failed to recognize him because he did not say how he looked physically and the clothes he dressed. The appellant argued adding that the trial court erred to consider the evidence of PW1 who said to have seen him but failed to remember the types of clothes he dressed. He further submitted that he was behind the bars for no good reasons and cogent

evidence. He held the view that the case against him was fabricated. Apart from that, the appellant did not submit on the rest of his grounds of appeal. He, nevertheless, urged this court to go through the evidence and his grounds of appeal and set him free.

In reply, Mr. Baraka Mgaya, the learned State Attorney commenced his address by resisting the appeal. He, however, argued jointly the 1st, 3rd and 6th grounds which is ground one. Responding to the complaint that there was no DNA test conducted in order to find out that the sperms found in the victim's vagina was his, Mr. Baraka submitted that rape cases are proved by penetration and if there was no consent in case of adult females. He further submitted guided by cases **Robert Andondile Komba vs. DPP**, Criminal Appeal No. 465 of 2017, Court of Appeal at Mbeya and **Mawazo Anyandwile Mwaikwaja vs. DPP**, Criminal Appeal No. 455 of 2017 Court of Appeal of Tanzania a Mbeya (both unreported) that DNA test has never been a requirement in rape cases. The learned State Attorney argued that those grounds are baseless hence be rejected.

With respect to ground 2 which carries the complaint that the trial court convicted the appellant basing on suspicious evidence, the learned State Attorney submitted that the evidence relied upon to convict the

appellant was that of PW2, a victim which the appellant did not challenge during trial when invited to cross - examine her, the victim was straight in her evidence because she said how they were meeting and having sexual intercourse.

Replying in respect of ground three in which the major complaint is that the case was not proved beyond reasonable doubt, Mr. Baraka submitted that the case was proved beyond reasonable doubt because the evidence established that there was penetration. He referred this court to the case of **Mawazo Anyandwile Mwaikwaja** (supra) at in which the Court of Appeal of Tanzania recalled its earlier decision in **Seleman Makumba vs. Republic** [2006] TLR 379 in which it was stressed that in rape cases the best evidence has to come from the victim. It was his further contention that in the present case, PW2 at page 16 of the typed proceedings testified that she had sexual intercourse with the appellant two days consecutively on 23/06/2021 and 24/06/2021 and that they were having sex at night and morning when the appellant was leaving. The learned State Attorney also submitted that the appellant and the victim knew each other prior to the incident because the appellant was selling cakes to their kiosk on whole sale but what happened on 24/06/2021 is that the victim's mother

around 6:00 a.m. saw the appellant leaving PW2 room. He submitted adding that the evidence of PW2 is corroborated by the evidence of PW4 the doctor who examined her as reflected at page 18 of the typed proceedings that she was found penetrated. It was his view that that evidence is enough to prove the offence of rape facing the appellant was proved beyond reasonable doubt.

Having submitted as such, the learned State Attorney urged this court to dismiss the appeal and uphold the trial court's decision.

In rejoinder, the appellant submitted that the Doctor, who examined MM, inserted her two fingers and said they penetrated freely but did not know what penetrated her. He observed that the trial court erred to believe her because the Doctor did not say expressly that she was raped or not. He was convinced that he was implicated.

Lastly he submitted that, it is true he was supplying cakes so they knew him that is why it was easy to fabricate the case.

After both parties had submitted, this court raised *suo motto* the issue of the age of the appellant at the time he committed the offence and the appropriateness of the sentence imposed on him.

Upon taking the floor to address the court, Mr. Mgaya, submitted briefly that, Section 131(2) (a) of the Penal code Cap 16 R:E 2019 provides clearly that if a boy who is of the age of 18 years or less, rapes, if he is a first offender, be sentenced to corporal punishment only. He submitted, further, that according to the proceedings, on 30/12/2021 after the conviction of the appellant, the prosecution said that he was the first offender. Therefore, according to him, the appellant deserved a corporal punishment. In that case, he remarked, the court erred to sentence him 30 years imprisonment. Mr. Baraka Mgaya urged this court to find that the appellant was properly convicted but at the same time invited this court to set aside the imposed sentence and inflict a legally accepted sentence.

Expectedly, being a lay man the appellant had nothing useful to say in respect of the raised issue.

Having carefully considered the grounds of appeal, the submissions of the parties and the trial court's record, I have to determine two issues, first whether the appeal has merit and secondly, the appropriateness of the sentence meted out against the appellant.

The appellant's complain in the 1st ground of appeal, the subject of grounds 1, 3, and 6 is that he was convicted but the trial Magistrate

denied DNA test to be conducted to compare sperms in the vagina and his blood, no medical evidence indicating that sperms were found in MM's vagina and relying on PF3 which does not prove that MM was raped. To begin with I subscribe to his observation that the PF3 tendered by PW4 indicates categorically that MM's vagina was found with no fluid and it does not state who raped MM. Therefore, as far as PW4's evidence is concerned, it is not traced anywhere that he mentioned the perpetrator of rape. On my part, even if I subscribe to his arguments, I find them strange because it is not expected PW4 even PW1 and PW3 to prove rape. In the similar vein, the argument of DNA is equally strange and ludicrous as it is unsound. It is an established principle of the law that in rape cases, the testimony which matters the most to found conviction, is that of the victim himself (see the case of **Shija Misalaba vs. Republic**, Criminal Appeal No. 26/2011 (unreported). This is what the trial magistrate based his conviction on. He stated distinctly that medical evidence was necessary to support MM's evidence that she was raped. I agree with him gaining strength in the case of **Amos Peter vs. Republic,** Criminal Appeal No. 173 of 2004 (unreported) CAT - Mwanza. Conversely, lack and/ or failure to conduct a DNA test would do no harm to the prosecution's case either. This is because DNA test has never been a legal requirement to prove

rape. see the cases **Mawazo Anyandwile Mwaikwaja vs. DPP**, Criminal Appeal No. 455 of 2017, Court of Appeal of Tanzania at Mbeya (unreported) at page 21 that and **Robert Andondile Komba vs. DPP**, Criminal Appeal No. 465 of 2017 Court of Appeal of Tanzania at Mbeya (unreported) at page 15. In **Robert Andondile Komba** (supra) the CAT stated in no uncertain terms that, I quote:

> *"Proof by DNA test is neither a legal requirement nor the practice in our jurisdiction. Many a culprit would walk scot free if that were the case, in our view, and suggestion by the appellant is impractical."*

In case like the instant one, all that the law requires is proof of penetration as per section 130 (4) of the Penal Code and the best evidence on that has to come from the victim.

Before dwelling on the 2nd ground of appeal let me first deliberate on the 3rd ground which combines the 4th and 5th ground of appeal in which the complaint is that the case was not proved beyond reasonable doubt as required by law. While I agree that the principle of the law is that in the criminal cases the prosecution has a duty of proving the case beyond reasonable doubt, the question that comes to the fore at this juncture is whether the same failed to discharge that duty. As stated

earlier above, the testimony which matters the most to found conviction is that of the victim herself. In **Seleman Makumba vs. Republic** [2006] TLR 379, the Court of Appeal held as follows:

> *"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 women where consent is irrelevant that there was penetration."*

A similar position was restated in **Godi Kasenegala vs. Republic,** CAT - Criminal Appeal No. 10 of 2008 (unreported) wherein it was stated:

> *"It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors may give corroborative evidence".*

See the case of **Shija Misalaba vs. Republic,** CAT - Criminal Appeal No. 26 of 2011 (unreported); **Kalebi Elisamehet vs. The DPP**, CAT - Criminal Appeal No. 315 of 2009 (unreported); **Selemani Makunge vs. Republic**, CAT - Criminal Appeal No. 94 of 1999 and **Ramadhani Samo vs. Republic**, CAT - Criminal Appeal No. 17 of 2008 (unreported).

In the instant case PW2 testified that on 23/06/2021 the two planned to meet in PW2's room. On 23/06/2021 at about 1:00hrs (night) the appellant went to her room. In view of PW2's testimony while in the room he touched her breasts, threw her in bed and undressed her. After undressing himself, he inserted his penis in her vagina. The same repeated on 24/06/2021. This time he was caught by PW2's mother PW1. The scene occurred in the morning around 6:00hrs when PW1 went to wake up PW2 to clean the compound. Suddenly, the appellant got out of the room and passed at the gate PW1 opened to let his husband and son to enter inside. After probing, PW2 told PW1 that it was the appellant who was in her room and had sexual intercourse. This evidence in my view is enough to proclaim that the appellant committed the offence. In view thereof, the prosecution proved that MM was raped and the rapist was the appellant.

Relying on the MM's evidence corroborated by that of PW1 and PW4, I am inclined to hold that the appellant's contention on this limb of appeal is baseless and deserving no better than a dismissal.

Let me now turn to the 2nd ground, which is the subject of ground two which faults the trial Court for basing conviction on suspicious evidence. Mr. Baraka pointed out that the complaint is baseless because

PW2 explained well that it was the appellant who raped her. He added that the appellant didn't cross-examine her on this crucial issue. As hinted earlier on in ground three, the record of the trial court shows that, the trial court grounded its conviction on the evidence of PW2 (the victim), it was not a suspicious evidence. The trial court properly relied on PW2's evidence basing on the principle that the best evidence came from MM as per **Selemani Makumba** (supra). The other testimonies of PW1, PW3 and PW4 were simply corroborative to PW2's testimony because it is only the latter who is better placed to tell what penetrated in her vagina and who did that. Furthermore, the appellant is not to complain. This is because when he was given a chance to question PW2 and test her veracity, he did not question the crucial part of her evidence that he entered in her room and had sexual intercourse on 23/06/2021 and 24/06/2021 at night and morning when he was leaving. The failure by the appellant to seize the opportunity to cross-examine on this important fact compels me to invoke the reasoning in **Nyerere Nyague vs. Republic**, CAT - Criminal Appeal No. 67 of 2010 (unreported). The Court of Appeal resolved that:

> *"As a matter of principle a part who fails to cross examine a witness on a certain matter is deemed to have accepted*

that matter and will be stopped from asking the trial court to disbelieve what the witness said."

In consequence, I hold that the complaint that conviction base on suspicion is baseless and is dismissed.

Having found that the grounds of appeal are baseless and therefore dismissed, as I hereby do, my attention is now tuned to the issue raised by this court *suo motto* regarding the inappropriateness of the sentence meted out against the respondent.

It is quite clear that, upon conviction, the appellant was sentenced to a term of thirty (30) years imprisonment. The conviction of 30 years assumed that the appellant was an adult of above eighteen years of age. This was done by the trial court without making reference to the charge sheet, admitted in court on 02/07/2021. Page 2 of the charge sheet contains particulars of the accused person which clearly indicate that at the time of commission of the offence and arraignment in court, the appellant was 18 years old. These facts ought to have transferred the trial court's attention to section 131 (2) (a) of the Penal Code and pass a fitting sentence that takes cognizance of the appellant's age as correctly observed by Mr. Baraka. This he did not do.

In **Masanja Charles vs. Republic**, Criminal Appeal No. 219 of 2011 (unreported), the Court of Appeal restated principles that the trial court ought to be mindful of, when passing a sentence. These principles are emphasized the fact that a sentence would be considered irregular and unlawful:

- *Where the sentence is manifestly excessive or is so excessive as to shock,*
- *Where the sentence is manifestly inadequate,*
- *Where the sentence is based upon a wrong principle of sentencing,*
- *Where the trial court overlooked a material factor,*
- *The period the appellant had been in custody pending trial.*

The superior Court was quite categorical that sentencing is a sole discretion of the trial court and the appellate court can only interfere these principles are not conformed to. It held:

> *"We have cautioned ourselves and be mindful of the well settled principle that we should not interfere with the discretion exercised by a trial court while imposing a sentence except where it is apparent that the circumstances show that the trial court acted upon a wrong principle or erred both in law and factual analysis leading to the imposition of a manifestly excessive sentence."*

As I labour to get the sense of what may have befallen the trial magistrate as to indulge in this anomaly, I get the feeling that may be, the trial court had doubts about the appellant's age. If this feeling makes sense, the best recourse that he had was to call for evidence which would establish the appellant's age, thereby settling the matter before he proceeded to pronounce the sentence. This is a fortified position in our country and decisions to that effect are not paltry. In **Emmanel Kibona & Others vs. Republic** [1995] TLR 241 (CAT) it was held that:

> *"Evidence of a parent is better than that of medical doctor as regards that parent's child's age. Where age can't be assessed accurately the benefit of doubt must be given to the accused."*

Thus, if the trial Magistrate was still in doubt with respect to the appellant's age, the benefit of that doubt ought to have been accorded to the accused person who is now the appellant.

Since the trial Magistrate's sentence defied the principles, choosing instead to walk the route of excessiveness, this court is justified, under section 388 of the Criminal Procedure Act [Cap 20 RE 2019] to interfere with his discretion and set aside the sentence. Setting aside of the

sentence would require me to substitute it with an appropriate sentence which, in terms of section 131 (2) (a) of the Penal Code (Supra) which dictates that the appropriate sentence is corporal punishment because as Mr. Baraka submitted the appellant was the 1st offender. I note, however, that corporal punishment is a penalty of a lesser degree than a five-month and 13 days prison term that he has so far served since he was sentenced. I am of the considered view that the prison term so far served, by far, exceeds the pain of corporal punishment and it adequately covers what I would order in substitution.

Consequently, I set aside the sentence and order that the appellant be set free with no other punishment in respect of his conviction, unless he is detained for other lawful reasons.

It is so ordered.

DATED at **MBEYA** this **13th** day of **June, 2022**

J. M. KARAYEMAHA
JUDGE