IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB- REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 103 OF 2021

(Arising from criminal case No. 129 of 2020 in the District Court at Geita)

RAMADHAN SHABAN.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

23th May & 30th June, 2022

DYANSOBERA, J:.

The appellant herein is appealing to this court against conviction and sentence by the District Court of Geita in Criminal Case No. 129 of 2020. In that case, the appellant was arraigned for the offence of rape c/ss 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E.2019]. The particulars of the offence alleged that the appellant on 14th day of June, 2020 at Nyamalele within the District and Region of Geita, did have carnal knowledge of one VP, a girl aged 13 years. After a full trial, the appellant was convicted and sentenced to thirty years term of imprisonment.

Aggrieved, the appellant is before this Court on appeal armed with five complaints which are to the effect that he was convicted on the weak,

suspicious, false, incredible and uncorroborated prosecution evidence. He summarized the grounds of appeal in the fifth ground of appeal by stating that there was no sufficient evidence to prove the case against him.

At the time of hearing this appeal, the appellant who was not represented prayed to adopt his five grounds of appeal. He, however, added that the Mtaa Chairperson was not called to prove that he, the appellant, was arrested and taken to him. Further that the evidence of the victim was hearsay as her sister did not testify so as to corroborate it. The appellant further complained that the victim was not telling the truth when she told the trial court that the appellant was circumcised, a fact which is untrue. Lastly, that his defence was not considered and the prosecution case left a lot to be desired.

On her part, the respondent who was represented by Ms. Margareth Mwaseba, learned Senior State Attorney declined to support the appeal. Responding the 1st and 2nd additional grounds of appeal jointly, she contended that under section 143 of the Evidence Act, the law is clear that no particular number of witness is required to prove a fact and further that, in this case, the victim was the best witness and rape is usually committed in secrecy.

On the third ground of appeal, the learned Senior State Attorney was of the view that the learned trial Magistrate evaluated the evidence and considered the appellant's defence.

With respect to the 1st ground of appeal in the petition of appeal, it was contended on part of the respondent that the evidence against the appellant was strong and the ingredients of the charged offence were proved. As to the age of the victim, it was submitted that the victim's mother proved the age of the victim, she having been born in 2007 and that at the time of the incident she was under the age of eighteen years. Furthermore, the evidence of the victim's mother was clear that she was 13 years old and was schooling at Makuyuni Primary School.

Respecting proof of penetration, Ms. Mwaseba, referring this court at page 41 of the trial court's typed proceedings, pointed out that the victim detailed how she was penetrated and her evidence was corroborated by the doctor who medically examined her and that the appellant admitted this fact in his cautioned statement.

On the 4th ground that the evidence of the victim was relied on without being corroborated by DNA test to support the allegations that the appellant committed the offence, learned Senior State Attorney responded that there is no legal requirement to prove rape by DNA testing.

As to the appellant's complaint that the victim lied that he, the appellant, was circumcised, Ms. Mwaseba told this court that circumcision is not a disputed issue and that it is immaterial whether or not the rapist is circumcised.

With regard to the sentence, the learned Senior State Attorney argued that it was illegal as the proper sentence, according to section 131 (1) of the Penal Code is caning twelve strokes. She urged the court to intervene.

In a very brief rejoinder, the appellant insisted that it was not proved that he was circumcised.

The undisputed facts are the victim, a STD IV pupil at Makuyuni Primary School was 13 years old at the time of the incident was living by her aunt and. Her mother, PW 3 one Tatu Sultan resides at Nsumba village with her husband. According to PW 3, the victim was born in 2007. She supported her evidence by an affidavit in which it was averred that the victim was born on 2nd February, 2007 at Kakobe village in Sengerema District.

The evidence which seem to inculpate the appellant and which he is denies is that on 14th day of June, 2020 at around 1600 hours, the appellant passed at home where the victim was with her young sister one

Witness. The appellant told the victim and her young brother to accompany him to the farm to collect some pineapples. They obliged. In the said farm, the victim and her young brother picked the pineapples, peeled them and ate them. Thereafter, the appellant told them that they had to pay for the pineapples they had consumed.

As to what the appellant did to the victim, it is in evidence that he got hold of her, undressed and pulled her down. He then inserted his penis into her vagina. The victim cried loudly for help and her aunt one Tatu Sultan (PW 3) appeared and the appellant took to his heels. However, while the victim and PW 3 were on the way heading home, the appellant followed them with a stick and started flogging PW 3 who raised an alarm and a man went there to assist them and managed to arrest the appellant who was attempting to run away. The victim and PW 3 went to the ten cells leader but he was absent. The chairperson referred them to the police station where the victim recounted what had befallen her and mentioned the appellant to be her ravisher.

During cross examination, the victim maintained that the appellant was circumcised.

PW 3 supported the evidence of the victim. She recalled that on 14th June, 2020 she left home to Nsumba to do gardening. When back, she

found the victim and witness absent. She was told that the two were seen with the appellant who is the house servant of Kisigino. PW 3 then met Witness crying and running. She told PW 3 that the victim was being sexually abused. PW 3 rushed to the crime scene and saw the appellant running away. The appellant had a T-shirt on but his lower body was naked. The victim had a skirt and a T-shirt without an underwear. PW 3 took the victim back home but she was assaulted by the appellant with a stick on her head and arms. The appellant threatened to stab with a knife. PW 3 was shouting. The wife of the cells leader advised her to go the chairman. They went to the hospital via the Police Station. PW 3 identified the appellant to be the person who raped the victim.

At Nkome Dispensary, PW 2 Queen Kulwa, a clinical officer attended the victim on 15th June, 2020 at 1600 hrs. She viewed the PF 3 and medically examined the victim and found no bruises but, in her vagina, there were slippery fluid-like sperms. She identified the fluids to be the semen. In support of this evidence, PW 2 produced in court the PF 3 (exhibit P 1).

On 14th day of June, 2020 the appellant was interviewed by F. 3614 Det. Corporal Arcard and since the appellant was confessing, PW 4 recorded his statement (exhibit P 2).

In his defence, the appellant testified that he was born at Nyakanazi in 2003 and on 14.6.2020 he was at home. He was apprehended by a militiaman. The appellant denied exhibit P 2 to be his own making arguing that he was forced to sign on a paper. He refuted the evidence of the victim that he, the appellant, was circumcised. He maintained that there was no evidence indicating the victim raised an alarm during the raping act.

The learned Resident Magistrate believed the prosecution case and rejected the defence. He found that the case against the appellant was proved beyond reasonable doubt. The appellant is faulting this finding.

On my part, having carefully and meticulously subjected to scrutiny the evidence on record and finding of the lower court, I am settled in my mind that the trial court's finding that the case against the appellant was proved beyond reasonable doubt cannot be faulted as it was properly arrived at. The victim detailed how she was ravished by the appellant. Her evidence was corroborated by that of the clinical officer (PW 2) and PW 3. According to PW 2, though no injuries were found, there were semen in the victim's vagina and whitish discharge found at the genitalia of the victim. PW 3 elaborated how she found the appellant with the victim. She also stated that the victim was born on 2nd February, 2007. She was

supported in this by the affidavit she tendered in court which was admitted in evidence. The appellant's confession in his cautioned statement (exhibit P 2) recorded by PW 4 corroborated the prosecution case that the victim was carnally known by the appellant. In that statement, the appellant told PW 4 that he raped the victim in the farm where they had gone to pick the pineapples.

According to 1st, 2nd and 3rd grounds of appeal, the appellant is complaining that the prosecution evidence was week, incredible, not watertight and suspicious. In view of the analysis I have endeavored to make hereinabove, I constrained to agree with the learned State Attorney that the prosecution evidence was cogent and compelling. The appellant's defence raised no any doubt in the prosecution case. For that matter the appellant's complaints in those grounds of appeal have no basis at all.

In the fifth ground of appeal, it is the appellant's complaint that the evidence of the victim was relied on without being corroborated by DNA to support the allegations that the appellant had committed the offence. This ground also lacks any legal merit. As rightly submitted by learned Senior State Attorney, there is no requirement under the law for DNA test to be conducted in order to prove rape cases. Authorities abound on this legal position. For instance, the Court of Appeal in the case of **Aman Ally**

@ **Joka v. R**, Criminal Appeal No. 353 of 2019 (CAT Iringa) and **Christopher Kandidius @ Albino v. R**, Criminal Appeal No. 394 of 2015 (CAT-Dar es Salaam), to mention but a few, took that position.

With the above exposition, I am satisfied that the trial court properly analysed the evidence that was placed before it and came to the right decision. There is nothing to fault its finding. The appeal against conviction fails and it is dismissed.

With regard to the sentence, I think the appeal has merit. As rightly submitted by the learned Senior State Attorney, the appellant was sentenced to custodial sentence of thirty years in violation of clear provisions of the law and the sentence was therefore illegal.

Although the charge sheet indicated that the appellant was 28 years old, the record of the trial court, however, indicates that the appellant, at the time he was testifying, that is on 13.1.2021 was 18 years old. This means that on 14th day of June, 2020 when he committed the offence, he was 17 years old. Section 132 (2) (a) of the Penal Code [Cap. 16 R.E.2019] provides that:

> *'Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall-*

(a) if a first offender, be sentenced to corporal punishment only.

As said before, the appellant was sentenced to thirty years imprisonment and twelve strokes of cane. There is not dispute according to the record that the appellant was a boy aged under 18 years and was a first offender. The imposition of custodial sentence was illegal.

In the end result, I dismiss the appeal against conviction and vary the sentence by setting aside the custodial sentence of thirty (30) years term of imprisonment and confirm the sentence of corporal punishment of twelve (12) strokes of cane.

W.P. Dyansobera
Judge
30.6.2022

This judgment is delivered under my hand and the seal of this Court this 30th day of June, 2022 in the presence of the appellant and Mr. Morice Mtoi, learned State Attorney for the respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera
Judge