THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 62 OF 2021

(Originating from Criminal Case No. 20 of 2021 at Kilwa Masoko District Court)

BURUHANI SELEMANI MBOMBO .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Muruke, J.

The appellant Buruhani Selemani Mbombo, was charged and convicted for rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code, Cap 16 R.E 2019. He was convicted and sentence to thirty (30) years imprisonment and ordered to compensate the victim Tshs. 500,000/=. Being dissatisfied, he filed present appeal raising five grounds as articulated in the petition of appeal.

On the date set for hearing, respondent was represented by Ndunguru, Senior State Attorney, while the appellant was unrepresented, he thus prayed for his grounds to be received as his submission in chief, and reserved his right to make rejoinder if any, prayer which was not objected by respondent counsel. Court then, asked learned State Attorney to submit replying grounds of appeal. Counsel for the respondent supported conviction and sentence meted by trial court. He first consolidated

grounds 1,3,4 and 5 of the main petition and grounds of the additional grounds of appeal as major complaint was failure by prosecution to prove the case beyond reasonable doubts.

Having heard both sides, grounds of appeal and gone through evidence on records, the issues is whether, there was sufficient evidence to ground conviction. The appellant was charged for an offence of rape, having carnal knowledge PW1(victim) a girl of 14 years old. The law is well settled, for a charge of statutory rape to be proved, three ingredient must be proved. First, the age of the victim, second, penetration, third, identification of the victim. In our jurisdiction, there are numbers of court decisions emphasized on the aspect that, proof of age of the victim in statutory rape is paramount important. In the case of **Isaya Renatus Vs. republic, Criminal Appeal No. 542 of 2016 (unreported)** at Tabora, Court held:-

> *"We are keenly conscious of the fact that age is of great essence in established the offence of statutory rape under section 130(1)(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 the proof of age be given by the victim, relative,, parent, medical practitioner or, where available, by the production of a birth certificate...."*

In the instant appeal, PW3 victim's father one, Revocatus Jackson Paul proved the age of the victim. At page 9 of typed proceeding he was recorded to have said:-

> **I live with five children at Nakiu. One is at Sengerema. PW1 is my daughter. PW1 was born on 01/07/2007 at Sengerema Mission Hospital. PW1 is fourteen years old I had a birth certificate, but a birth certificate of PW1 lost while we were shifting....**

The above piece of evidence of PW3 is corroborated by the evidence of PW4 Abdalhaman Mohamed a Head Teacher at Nakiu Primary School where PW1 schooled. At the trial court typed proceeding testified at page 15 that;

> **I sent the female teacher to send PW1 to the Hospital for medical examination. She was I identified pregnant. PW1 was admitted at our school with registration No 3554. The admission book bears the birth date of the pupil. PW1 was born on 01July 23, 2007 PW1 is fourteen years old.**

As to whether the victim was penetrated. It is settled that penetration however slight is sufficient to constitute sexual offence. In the case of **Omary Kijuu Vs. The Republic, Criminal Appeal No. 39 of 2005** (unreported) Court of Appeal at Dodoma at page 8 held;

> *"..... But in law, for the purposes of rape, that amounted to penetration in terms of section 130(4) (a) of the Penal Code Cap. 16 as amended by the sexual offences special provisions Act 1988 which provides: For the purposes of proving the offence of rape- penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."*

It is principally that, the best evidence in rape cases is from the victim as reiterated in the case of **Selemani Makumba Vs. Republic [2003] TLR 203** when the Court of Appeal held: -

> *"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."*

PW1 victim at page 5 of the trial court typed proceeding testified that: -

> **..... accused sister called me and told me to enter her house. Accused sister went to take the accused.**

Accused demanded sex with me I denied. Accused kicked me I fell down. Accused sister was outside. Accused frightened me that I should not shout the pastor will hear and chase him..... I had never done sexual intercourse with anybody other than accused. I got first menstrual period when I was standard six on 2020..... Accused did sexual intercourse to me on last of September 2020. I was afraid to tell my father what accused did to me.

The above piece of evidence of PW1, victim is supported with the evidence of PW2 Clinical Doctor from Masoko Health Center who examined PW1 after being taken to hospital. He testified at page 7 and 8 of the typed proceedings that: -

I remember I received a girl patient, who came from police with a PF3. I did examine her. The PF3 wanted me to examine the girl if she sexually penetrated or if she is pregnant. After examining her. I filled the PF3 I can identify, the PF3 I filled it bears my hand writing and my signature I pray to tender the PF3 as exhibit.

He testified further at page 8 of the trial court proceedings that; **After examining the victim, I identified the victim is penetrated vaginal dilation was 3 cm also the victim was pregnant with 28 weeks.**

Therefore, the evidence of PW1 and PW2 proved that victim was penetrated.

Whether accused was properly identified. It is clear from the records, PW1 explained how the incidence took place. She explained clearly how the appellant seduced and forced to do sex with her. When PW1 refused the appellant kicked her until she felt down, then the appellant raped the victim. During cross examination PW1 responded that; ***I know you I saw you at pastor home.***

Another complaint to be considered is whether the evidence of PW1 was taken according to section 127(2) of the Law of Evidence Act, Cap 6 R.E 2019. The record is clear that at the time of giving evidence the victim was at the age of 14 years. Section 127(4) of the Act, defines who is a child of tender age as follow;

> *"For the purpose of subsection (2) and (3), the expression of tender age means a child whose apparent age is not more than fourteen years."*

At the time she gave her evidence PW1 was a child of tender age, the procedure for taking her evidence was provided under section 127(2) of the evidence Act, which state that: -

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."*

In the case at hand, victim was not promised to tell the truth to the court, she was sworn. At page 4 of the typed proceeding trial court recorded as follow: -

PROSECUTION CASE OPEN

PW1, Trz d/o RJN, 14 years, Sukuma, Nakiu, pupils, Christian.

Sworn and states

Examination in chief by public prosecutor inspector Juma.

Then, the trial court proceeded recording the evidence of PW1. That was not proper procedure as I have already clarified above, but it is not fatal at all. That test alone is not enough for consideration in the determination of the evidence of a child of tender age. Other factors must be considered depending the circumstances of each case. In the case at hand, although the victim was not promised to tell the truth, her evidence is clear and direct, she managed to clarify how the appellant raped her. More so, in his

defense appellant never denied PW1 evidence. The Court of Appeal in the case of **Wambura Kiginga Vs. The Republic, Criminal Appeal No. 301 of 2018**(unreported) at Mwanza, held: -

> *"In this case we are fully convinced, that although the child did not promise to tell the truth, what she narrated was original, true and authentic. We will now proceed to the evidence particularly of the victim, PW5 and that of the appellant…."*

Court went further that;

> *"We maintain the view that although the victim did not promise to tell the truth but, she told the truth anyway. Our view is deduced from the following circumstances;* ***first****, in her evidence in chief above, the victim was sincere, where the appellant was responsible, she stated it.* ***Second****, PW1 was consistent even during cross examination as she maintained that it was the appellant who raped her.* ***Third****, before the court, on the date that his evidence was taken, the appellant never disputed any part of the victim's evidence and; fourth, the appellants defense evidence complemented that of the victim as he stated that he was sleeping inside one room with the victim."*

It is my opinion that, although the evidence of PW1 was taken in violation of section 127(2) of the Evidence Act, it did not necessarily mean that the evidence did not constitute truth or authenticity. Thus, I see no reasons to expunge the evidence of PW1 from the record. In totality, all the grounds lacks merits. This appeal has no merits, it is thus dismissed.

Z.G. Muruke

Judge

25/07/2022.

Judgment delivered in the presence of appellant in person and Kauli G. Makasi State Attorney for the Respondent.

Z.G. Muruke

Judge

25/07/2022