THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL APPEAL NO. 49 OF 2021

(Originating from Katavi Resident Magistrates' Court in Criminal Case No. 123/2020)

BENARD COSMAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 13th May, 2022

Date of Judgment: 26th July, 2022

NDUNGURU, J

Being aggrieved by the decision of the Resident Magistrates' Court of Katavi at Mpanda (trial court) where he was prosecuted and sentenced to serve thirty (30) years imprisonment after being found guilty of the offence of rape contrary to section 130 (1) 2 (e) and 131 (1) of the Penal Code [Cap. 16 R. E. 2002], the appellant filed this appeal to this court consisting of four (4) grounds of appeal.

A brief background of the offence is that on the 03rd day of September, 2020 at Nsemulwa area within Mpanda District in Katavi Region, the appellant did have sexual intercourse with one girl SN (victim) aged 10 years old whose name is concealed in protection of her dignity.

Appellant's grounds for appeal where as follows here under;

1. That, the trial Magistrate erred at law by convicting the appellant based on contradictory evidence adduced by the prosecution witnesses.
2. That, the trial Magistrate erred at law by frustrating the appellant's efforts to call his wife to give evidence despite his request to call his wife to adduce evidence.
3. That, the trial Magistrate erred at law and fact by convicting the appellant for the offence of rape whose ingredients were not proved as required by law.
4. That, the trial Magistrate erred both at law and fact by convicting the appellant on a case which was not proved beyond reasonable doubt.

When the appellant was invited to argue his grounds of appeal on the hearing day, he appeared in person and he prayed for this court to adopt to his grounds of appeal as drafted in his Petition of Appeal.

In his submission, the appellant started submitting for the 4th ground. He argued that the expert witness did not prove that there was penetration, no sperms were found in the vagina of the victim, that the witness never testified on the presence or absence of bruises or penetration and sperms, he referred this court to page number 04 of the trial court's judgment.

He proceeded by submitting on the 2nd ground that, he requested the trial court that his wife be summoned but the court denied. He insisted that the evidence of the victim was that his wife found him raping the victim but the court denied his wife to be called as a witness for defence.

He then submitted for the 1st ground that the evidence was contradictory. That the expert witness did not prove penetration nor presence of sperms while the victim said he ejaculated. Again, he referred this court to page 04 of the trial court's typed judgment.

He lastly submitted on the 3rd ground that, the explanation he had made on other grounds has covered the 3rd ground of appeal, and

therefore he prays for his appeal to be allowed and the judgment of the trial court be quashed.

The respondent was represented by Mr. Simon Peres learned Senior State Attorney, as he responded to the submission made by the appellant he argued that his side supports the judgment of the trial court, meaning they resist this appeal, and he submitted that he will argue the grounds of appeal as they are on the Petition of Appeal.

He started by arguing on the 1st ground that there is no contradiction in the prosecution evidence. He added, PW1 testified on the way she was raped by the appellant. He stressed that, the victim was the only witness who was in the best position to explain the way she was raped and that is now the position of the law that the best evidence comes from the victim herself.

Mr. Peres added that, the victim (PW1) reported the incidence to PW2 immediately. That she then was sent to the hospital where she was attended by PW4 (Medical Officer). In his statement (PW4), Mr. Peres said, at page 14 of the proceedings, PW4 testified that he had seen bruises into the vagina of the victim. He furtherly argued that, such evidence corroborated the evidence of the victim and that there is no

any contradiction, and therefore prays for this ground to be dismissed for its devoid of merit.

The learned Senior State Attorney argued on the 2nd ground that it was not the duty of the court to procure the witness (wife) of the appellant. He insisted that it was the role of the appellant to procure his witness. He added, the wife felt shy to testify on what she saw. Therefore, Mr. Peres prayed for this ground to be dismissed.

Mr. Peres argued the 3rd and 4th grounds together that, by reading the testimony of PW1, PW4 and Exhibit PE2 (PF3), such evidence is sufficient to prove that the appellant raped the victim. He cited Section 130 (1) of the Penal Code (R.E. 2019) which clearly states that rape cases to the child below 18 years of age, the only ingredient is penetration, however slight it might be. He added that, such evidence can only be obtained from the victim herself. In her testimony Mr. Peres said that she told the court what had transpired and that her evidence was corroborated by the testimony of PW4 the medical officer who examined her, but he however stressed that even if the evidence of PW4 was not absent, still the evidence of the victim alone sufficed to prove rape. He referred this court to the case of **Mawazo Anyandwile Mwailewaja vs DPP Criminal Appeal No. 455 of 2017** CAT

(unreported) at page 21-22, and also the famous case of **Seleman Makumba vs Republic (2006) TLR 369.** Mr. Peres insisted that with all that he submitted, his side believes the case against the appellant was proved and that he prays for this appeal to be dismissed.

In rejoinder, the appellant submitted that if the victim can testify on her own what is the need of expert witness? He added that, he told the court that he had his witness who was his wife but she was pregnant, and that he asked the court to give him a chance of calling her after deliverance but the court denied. He insisted that the case was not proved beyond reasonable doubts, he prays for his appeal to be allowed.

After going through the submissions from both camps, the main issue for determination of this appeal is **whether the case against the appellant was proved beyond reasonable doubts.**

In dealing with raised issue above, I will address the four grounds as raised by the appellant starting with the first ground which regards contradiction in the evidence adduced by the prosecution witnesses. I am not unsound of the principle that, in order the contradictions or inconsistencies in evidence by witnesses to be capable of vitiating the prosecution evidence such contradictions or inconsistencies must go to

the root of the case. This is the stand in a number of decisions, as it was in the case **Dickson Elias Nsamba Shapwata & Another vs Republic, Criminal Appeal No.92 of 2007**, the Court of Appeal held inter alia that;

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements.* ***The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter".***
>
> [Emphasis is Mine]

This being the 1st appellate court I should address the complained contradictions and inconsistencies. The appellant in his submission said that the expert witness testimony contradicted the victim's testimony. He insisted that the former's testimony did not prove either penetration nor presence of sperms while the latter testified that the appellant ejaculated.

Going back to the trial courts typed proceedings at page 9, PW1 the victim testified and I quote as here under;

".....the appellant found me with underwear he removed it and pushed me on the bed. He also underdressed his trouser and underwear then inserted his penis into my vagina, when he finished he left while zipping his trouser....."

On page 14 of the same typed proceedings, PW4 the medical officer testified and I again quote as follows;

".....I supposed to examine her whether she was raped or not, I discovered that she has some bruises in her vagina, then I filled PF3. As an expert the said bruises may have been caused by a blunt object including a male organ...."

In my understanding, whether there was ejaculation or not, the two witnesses have proved that there was penetration, and proof of this sort is in line with the holding made in the famous case of **Selemani Makumba vs Republic** (*supra*). I therefore find no any contradictions between the two witnesses as submitted by the appellant. Therefore, I dismiss the 1st ground of appeal for it has no merit.

Coming to the 2nd ground of appeal. During the Preliminary Hearing as seen at page 6 of the typed trial court's proceedings, the appellant had the opportunity of listing the number of witnesses that he will summon to support his defence, but at the captioned page the

number was nil. However, at page 17 of the same typed proceedings, after being found with a prema facie case, the appellant opted to defend himself under oath, and still, he did not show any signs of any other witness to support his defence. I am convinced that this ground is an afterthought, as it is not the duty of the court to summon witnesses to a case but rather the litigants themselves, as stipulated under Section 231 of the Criminal Procedure Act, Cap. 20 [R.E. 2019] (CPA).

On the typed proceedings of the trial court at page 17 the appellant was addressed in terms of Section 231 of the CPA and he responded;

"I will make a sworn statement".

This means that the appellant was given a right to call witnesses of his choice, although he himself did not mention if he has any witness to call. Nevertheless, at page 23 of the same typed proceedings, when the appellant gave his evidence, where he had mentioned his wife who was at their shop at that material time and date, he only prayed to close his defence case instead of calling his wife to testify contrary to what he had submitted earlier during the hearing of this appeal that he was denied the opportunity of calling his wife as a witness. I dismiss this ground for it lacks merits too.

The 3rd and 4th grounds will be determined together. It is trite that, the best evidence of rape comes from the victim as it was held in the case of **Selemani Makumba vs Republic** *(supra).* However, the words of the victim of sexual offence should not be taken as a gospel truth, but her or his testimony should pass the test of truthfulness. See, **Mohamed Said vs Republic, Criminal Appeal No. 145 of 2017** CAT – Iringa.

In the records of the trial court as seen on page 08, the victim underwent the test of truthfulness, and the trial court was satisfied that she was capable of testifying after promising to tell the truth and not a lie as stipulated under Section 127 (2) of the Tanzania Evidence Act, Cap 6 R.E. 2019. See **Geoffrey Wilson v. Republic, Criminal Appeal No. 168 of 2018** (unreported) and **Hamisi Issa v. Republic, Criminal Appeal No. 274 of 2018** (unreported), to mention a few.

However, the victim's testimony that the appellant inserted his penis in her vagina was corroborated by the testimony of PW4(medical officer) who testified that as he was examining the victim, he found bruises on the victim's vagina which suggests that there was penetration by a blunt object possibly a male organ. Proving penetration is an important ingredient of rape as was rightly so decided in the case of

- **Hassan Bakari vs Republic, Criminal Appeal No. 103 of 2012 at page 9** (unreported).

It is my considered analysis that the prosecution witnesses did prove the case against the appellant beyond reasonable doubts as their testimony carried the required ingredients of proving rape. I therefore dismiss the 3rd and the 4th grounds of appeal for being devoid of merits.

In this appeal, I have no slight doubt, the evidence adduced in court during trial, proved the offence against the appellant to the standard required. All four grounds raised by the appellant in this court have failed to shack and specifically pin point any relevant error committed by the trial court. As such I find no cogent reason to depart from the judgement of the trial court. I accordingly, dismiss it forthwith, consequently uphold the conviction and sentence meted by the trial court.

HIGH COURT OF TANZANIA
SUMBAWANGA ZONE

D. B. NDUNGURU

JUDGE

26/07/2022