THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL NO. 2 7OF 2021

(Arising from Criminal Case No. 70/2019, District Court of Biharamulo at Biharamulo)

CHRISTOPHER MAXMILLIAN---------- APPELLANT

VERSUS

THE REPUBLIC----------RESPONDENT

JUDGMENT

Date of Judgment: 08.07.2022
A.Y. Mwenda, J

In the District Court of Biharamulo District, the appellant was charged for Incest by Males Contrary to Section 158 (1) (a) of the Penal Code, Cap 16 R.R. 2019.

It was alleged in the charge sheet that on 12th day of March 2019, at mid night, at Ng'ambo village within Biharamulo District in Kagera Region accused person did have sexual intercourse with his daughter EVA D/O CHRISTOPHER, a girl aged 10 years old. Having denied the charge, the prosecutions was required to prove its case. To do so it fielded six prosecutions witnesses and one documentary exhibit which is the Victim's PF-3.

The brief account of the evidence that led to arraignment of the appellant is that the appellant was a father to the victim. They were living together in the same house at Ng'ambo village within Biharamulo District. In their house, it was the accused, the victim and the victim's two brothers who were residing in. Appellant's

wife (a mother to the victim) had, by the time of the commission of crime, travelled to Ukerewe to attend her relative' funeral (although the appellant alleged she went there as there were grudges between them following infidelity accusations against the appellant). In their home, the sleeping arrangement was that the appellant was sleeping in his own room and the children i.e. the victim and her elder and young brother were sleeping together in their separate room.

On several occasions, i.e. from 12th March 2019 the appellant, used to enter at the children's room and take the victim to his room where he raped her. It is said that during his acts, the appellant used to prevent the victim from screaming by covering up her mouth. Also, after he had raped the victim he warned her not to disclose to anybody. Despite the said warning, the victim disclosed what befell her to PW2 (a neighbor and a friend to the victim's mother) who in turn decided to report at the victim's school. The matter was then reported to the relevant authorities (Police), who issued a PF-3 and upon being medically examined it was established that her hymen was ruptured and her private parts were enlarged with signs of undergoing regular sex.

In his defense, the appellant declined any involvement in the crime. He alleged that he and his wife were not in good terms following accusations by his wife that he had an affair with one teacher who was his customer in his bodaboda business. Following the said misunderstanding his wife was urged to go back to her home village in Ukerewe so that they could be reconciled upon him following her later. He also alleged that he prevented their children from joining their mother in the

said trip as they were schooling. Further to that, he said he faced difficulties to get in touch with his wife after she had left although it was not the case with the victim as she used to communicate with her through PW2, their neighbor. In essence, the appellant lamented that the case against him is a framed up by his wife so as to acquire his properties.

Having analyzed the evidence from both sides, the trial magistrate was satisfied that the prosecution's side discharged its duty of proving the case to the standard required in criminal cases. In doing so the trial magistrate relied on the victim's evidence whom she found to be credible and reliable in that she was telling nothing but the truth.

Aggrieved by conviction meted by the trial court, the appellant appealed before this court with a memorandum containing six grounds. The said grounds read as follows and I quote:

1. That, the victim evidence was taken before the promise of telling the truth false being or not stated by the victim. (sic)
2. That, the basic ingredient of the offence viz: penis penetrating into vagina was connected to the day/date of incident while the victim's testimony was included it to the day (s) before the incident. (sic)
3. That, the victim and her evidence were satisfied as truth without the victim knowledge of truth being tested neither reasons of believing her be stated.(sic)

4. That, the medical evidence by PW4 and the PF3 was not required to corroborate the victim evidence as the PF3 was issued after the victim treatment.(sic)
5. That, the unsworn evidence of the victim was not corroborated by any other evidence to adduce the conviction of the appellant.(sic)
6. That, the defence evidence was not considered fairly while it raised further doubt of the prosecution case which was not proved beyond reasonable doubt.(sic)

At the hearing of this appeal vide virtual facility linked with Bangwe prison in Kigoma where the appellant is serving his jail sentence, the appellant appeared in person unrepresented whereas the respondent Republic was represented by Mr. EMMANUEL KAHIGI, learned State Attorney.

When invited by the Court to submit in support of his grounds of appeal, the appellant informed the court that he awaits the response by the learned State Attorney and if his appeal is opposed he would then rejoin thereafter.

In respect of the 1st ground of appeal, Mr. Emanuel Kahigi, learned State Attorney submitted that before she could testify, the victim (PW1) was subjected to an inquiry and the court was satisfied that she knew the nature of telling the truth where she was sworn thereafter. The learned State Attorney submitted further that the trial court was satisfied that with her tender age, she was telling nothing but the truth. He added that since the victim was sworn then her Oath was beyond a promise of telling the truth.

With regard to the second ground of appeal in respect of penetration, the learned Sate Attorney submitted that PW1 testified that the appellant took his male organ and inserted it into her female organ and this by itself proves penetration.

With regard to the 3rd and 5th ground of appeal the learned state attorney submitted that the said grounds were covered while he was discussing the 1st ground of appeal.

With regard to the 4th ground of appeal, the learned State Attorney submitted that the best evidence in sexual offences cases is that of the victim, whom in the present case was found credible and reliable.

In respect of the last ground of appeal the learned state Attorney submitted that the appellant's defense was considered by the trial court and his claim that it wasn't considered is baseless. He then concluded by praying this appeal to be dismissed.

In his rejoinder, the appellant submitted that in his house he was living with the victim and her two brothers. He then questioned how was it possible for him to take her from the room which they were sleeping without others being aware. He also submitted that the two other children who were sleeping with the victim were not called to testify which weakened the prosecution's case.

The appellant further rejoined that PW2 testified lies against him no wonder after the purported report by the victim she went to report to the victim's school instead of the reporting to village authority.

Further to that the appellant submitted that he had grudges with his wife no wonder it took three days to have him arrested after the victim alleged he raped

her. The appellant concluded his rejoinder in that his defense was not considered by the trial magistrate and prayed this appeal to be allowed.

That being the summary of submission from both sides, this court is now bound to determine this appeal. But before the evidence is put in the weighing scale, it is important to draw attention on the principle regarding the burden and standard of proof in criminal cases. In the case of JUMA MARWA & 3 OTHERS V. THE REPUBLIC, CRIMINAL APPEAL NO. 91 OF 2006, CAT (Unreported) the Court held inter alia that:

> *"It is trite law that the prosecution is required to prove the case against the appellants beyond reasonable doubts..." (emphasis added).*

While discussing the same principle, The Court of appeal in the case of MALIK GEORGE NGENDA KUMUNA V. THE REPUBLIC, CRIMINAL APPEAL NO. 535 OF 2014 (Unreported), held as follows, that:

> *"It is the principle of law in criminal cases, the duty of the prosecution's is of two folds, one to prove that the offence was committed and two that it is the accused person who committed it."*

In the present case, it clear that the prosecution's evidence hinged on the testimony of PW.1, the victim of rape. This witness having been sworn, testified on how she got raped by the appellant. In his defense, the appellant challenged her testimony in that she was coached to lie against him following the

misunderstanding between the appellant and the victim's mother who stood as PW5. The learned State attorney was of the view just like what the trial magistrate believed, that the victim was credible witness who gave the best evidence as required in offences of sexual nature. This court is mindful of the principle as stated in the case of SELEMANI MAKUMBA V. THE REPUBLIC where it was held that

"The best evidence in rape cases is that of the victim...."

Also in the case of ALLY NGOZI V. THE REPUBLI, CRIMINAL APPEAL NO. 216 OF 2018, CAT (unreported) the Court held as follows:

> *"...it is settled law that in sexual offences, the best evidence is the* ***credible account*** *of the victim who is better positioned to explain how she was raped and the person responsible. In that regard, having revisited the evidence of PW1 we are satisfied that,* ***she was a credible witness*** *and* ***coherent in testifying how she*** *was on several occasions ravished by the appellant in the forest while on her way to and from school..."*
>
> *(emphasis added)*

The take away from the Court's findings in the case of ALLY NGOZI V.THE REPUBLIC (Supra) is that in adopting the said principle, the victim witness must be credible and coherent in her testimony.

In the present matter, this court gazed at her testimony and noted the following;

One, PW1 (victim) testified that she used to sleep with her brother and young brother and that the appellant used to go into their room, take her to his room where he raped her. She said she was raped many times to the extent that she couldn't remember. During cross examination, she said her brother Ashraf and young brother Adam would come to testify if they would be called. She also added that it is true that the appellant was raping her and he used to go in their room while drunk. She said even her relatives could state that. Inference drawn from her answers is that her elder brother and young brother witnessed the incident. However, in re-examination she changed her story and stated that:

"when he came to take me my relatives were asleep,

therefore they cannot know what was going on"

With this kind of evidence this court is of the view that PW.1 was not a credible and coherent witness and there was no credence in her testimony and that being the case the prosecution's case is undoubtedly shaken.

This court also spotted doubts which shakes the prosecution's case. In her testimony, the victim (PW1) testified that at one time, her father (the appellant) entered in the room which she was sleeping with her siblings where the appellant told her to go with him. She said, she refused and told him that her mother forbade her from sleeping in his room and that after her refusal the appellant hacked her with a bush knife and then took her to his room. From this testimony it is obvious that her siblings heard their conversation but one may wonder why the prosecution failed to call them to testify bearing in mind that one of the said siblings is older

than the victim. This court is of the view that in the circumstances of this case, it was important to call the victims siblings to testify and failure to do so affects the prosecution's case. In the case of NKANGA DAUD NKANGA V. THE REPUBLIC, CRIM. APPEAL NO. 316 OF 2013, CAT, the court held inter alia that:

> *"...under Section 143 of the Evidence Act [CAP 6 R.E.2002] no amount of witnesses is required to prove a fact...But it is also the law (section 122 of the Evidence Act) that* ***the court may draw adverse inference*** *in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons, see Aziz Abdallah v. Republic (1991) TLR 71" [emphasis added].*

From the foregoing, failure to call the victim's siblings creates doubts and with regard to consequence, this court in the case of JANAS PASCHAL V. THE REPUBLIC, CRIMINAL APPEAL NO. 69 OF 2021 held inter alia that:

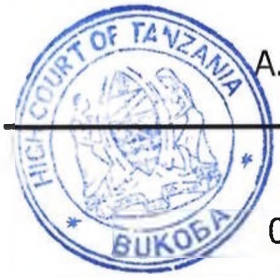
> *"...the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either prosecutions or defence creates a reasonable doubt as to the guilty of the accused person in respect of that offence.."*

In the upshot, this court finds merits in this appeal. This appeal therefore succeeds, conviction is hereby quashed and sentence is set aside. The appellant shall be

released from prison immediately unless otherwise lawfully held according to the law.

Right of appeal fully explained.

It is so ordered.



A.Y. Mwenda

Judge

08.07.2022

Judgment is delivered in chamber under the seal of this court in the presence of Mr. Christopher Maxmillian the Appellant through video conference and Mr. Emmanuel Kahigi, Learned State Attorney for the respondent.

A.Y. Mwenda

Judge

08.07.2022