IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 60 OF 2021

(C/F Criminal Case No. 213 of 2019 District Court of Mwanga at Mwanga)

KIURE ERNEST @ MZAVA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

Before the District Court of Mwanga at Mwanga (the trial court), the appellant herein was arraigned with and convicted of the offence of **Rape c/s 130 (1) (2) (e) and 131 of the Penal Code, CAP 16 R.E. 2002,** now 2019.

Before the trial court, the prosecution side successfully managed to establish that, on 8th July, 2019, at Kighare Village within Mwanga district in Kilimanjaro Region, the appellant herein did rape one **AM** (name withheld) a girl of 15 years without her consent. According to the evidence marshalled before the trial court, the unfortunate ordeal happened when the victim was fetching animal

grass (feed). She was suddenly pushed by the appellant from behind and fell down. She was unable to hear the appellant approaching the area due to her hearing impairment. The appellant went forth, undressed her and raped her against her consent. The appellant threatened to kill the victim in the event she revealed what had befallen her. After he had satisfied his lust, he ordered her to wash herself in the nearby flowing stream while he ran away. The victim (PW1) told her friend Paulina who reported the matter to the victim's guardian (PW2) a teacher living with PW1, then to the police (PW3 the Investigator), leading to the appellant's arrest. The matter then proceed with three prosecution witnesses and three defence witnesses. Ultimately the trial court found the appellant guilty and convicted him to serve thirty years imprisonment.

Aggrieved by the Judgment and sentence of the trial Court, he has appealed to this court praying the judgment and sentence be quashed and set aside by raising a total of six grounds as follows: -

1. That the trial magistrate erred in law and fact to convict and sentence the appellant thirty years

imprisonment without proof from the medical doctor beyond reasonable doubt that PW1 was raped.

2. That the trial magistrate erred in law and fact relying on PW1's evidence which lacked material corroboration hence unsound for conviction.
3. That the trial magistrate erred in law and fact in relying on contradictory evidence by the prosecution witness regarding authenticity of locus in quo where the victim was raped.
4. That the trial court erred in law and fact in convicting and sentencing the appellant without a document to prove the age of the victim or that she was a pupil at Kwamsembea Primary School.
5. That, the offence of rape and its ingredients, particularly penetration was never proved to the required standard.
6. That, penetration was neither established by testimonies of PW1, PW2 and PW3 nor was the PF3 tendered in court to prove the offence of rape.

The appeal was ordered to proceed by way of written submissions.

The appellant submitted on the 1st 2nd and 4th grounds simultaneously alleging, the prosecution had failed to prove the case against him beyond reasonable doubt. He

cited a number of cases including that of **Jonas Nkize Vs Republic (1992) TLR 213** which laid down the principle on the burden and standard of proof to be ascertained beyond any shadow of doubt by the prosecution. He argued, the trial court relied solely on PW1's evidence to prove the offence of statutory rape while the same was contradictory.

The appellant went on submitting, PW1 had testified, after she was raped, she told her friend Paulina but the said friend was never summoned in Court to testify. He averred, although in the case of **Selemani Makumba Vs Republic (2006) TLR 379** it was settled, the victim's testimony is the best evidence to prove the offence of rape, but in the case of **Mohamed Said Vs Republic, Criminal Appeal No. 145 of 2017 CAT at Iringa**, the Court of Appeal cautioned, such evidence should not be taken as gospel truth. The same must pass the test of truthfulness. He prayed this Court treats PW1's testimony with a lot of caution.

On the 3rd ground, the appellant submitted the prosecution case was tainted with contradictions. In support thereof, he explained PW3 testified, she received the respective file for investigation on 17/7/2019 but the PF3 was issued on 16th July, 2019. To the contrary the alleged

rape incident was committed on 8th July, 2019. Further he argued, PW3 did not testify on anything found at the crime scene when she visited the said scene, implying the offence of rape never took place. To put salt to the wound, a Medical Doctor was not summoned to confirm if at all the victim was actually raped.

As to the 5th and 6th grounds which were argued jointly, the appellant stated, to prove the offence of rape three things must be proved i.e. penetration, lack of consent and that it was the appellant who committed the act. He argued, in the present appeal none of the above was proved as there was no proof of penetration from the medical doctor contrary to **section 240(1) of the Criminal Procedure Act, Cap 20, R.E. 2019.** Further, the fact that there was delay in reporting the incident leaves a lot to be desired and such doubts should be resolved in his favour.

In reply thereof, Mr. Njau Senior State Attorney submitted, the case against the appellant was proved beyond reasonable doubt as PW1's testimony accurately elaborated how she was grabbed and raped by the appellant whom she knew as an electrician in their village. More so, after the appellant satisfied his lust, he asked her to wash herself in the nearby stream and threatened to kill

her had she told anyone of the incidence. Since the victim was 15 years old, Mr. Njau argued, the issue of consent becomes immaterial. She was otherwise a child in terms of **section 4(1) of the Law of the Child Act 2009, Cap 13 R.E. 2019**.

It was Mr. Njau's further argument that, the utmost important ingredient to be considered in this case was penetration, which according to **Selemani Makumba's case (supra)** it is proved by the victim. Thus, the trial magistrate did not error in finding the appellant guilty of the offence charged. Pressing on the age factor, Mr. Njau argued, during the trial, the appellant neither contested nor cross examined PW1 on the authenticity of her age which draws an inference that, he accepted those facts. More so, even though the medical doctor was not summoned during trial, the same did not contravene section 240 (1) of CPA as no medical report was submitted which required clarity from the Medical Doctor.

The learned Senior Attorney went on explaining, the prosecution did not summon the medical doctor since they did not consider him capable of giving credible evidence. The same goes to Paulina, the victim's friend, was not summoned as her evidence would have been

hearsay hence of little evidential value. This is the reason the trial magistrate relied solely on PW1's testimony to convict the appellant.

Lastly, Mr. Njau submitted, the contradiction as to who reported the matter between the victim and Paulina, was of little significance and does not disrupt the root of the case and to this end he cited the case of **Mohamed Said Matula Vs Republic [1995] TLR 3**. He lastly prayed this appeal be dismissed for want of merit. There was no rejoinder.

I have given due consideration to the submissions made by both parties and the trial court's record, I will now proceed to determine the grounds of appeal as they appear.

Starting with the 1st ground regarding lack of medical doctor's evidence to ascertain whether the victim was raped, the law is clear and the Court of Appeal decisions are at one that, the best evidence in sexual offences comes from the victim herself/himself. On the same vein, there being lack of medical proof one cannot disregard other evidence before the court. In the case of **Ally Mohamed Mkupa Vs. The Republic, Criminal Appeal No. 2 of 2008 (CAT Unreported)** as cited in the case of **Julius John**

Shabani Vs. The Republic, Criminal Appeal No. 53 of 2012, CAT at Mtwara (unreported) it was held *inter alia* that;

> *"It is true that PF3 (Exhibit P.1) would have supported the commission of the offence. But rape is not proved by medical evidence alone. Some other evidence may also prove it"*

Also in the case of **Salu Sosoma Vs. Republic, Criminal Appeal No. 31 of 2006 CAT-MWZ (Unreported)** the Court of Appeal, had this to say;

> *"...likewise, it has been held by this court that lack of medical evidence does not necessarily in every case have to mean that rape is not established where all other evidence point to the fact that it was committed."*

In the present case, there is overwhelming evidence by PW2 (the Guardian), PW3 (the Investigator) coupled with that of PW1 (the victim) which was sufficient to prove the charges of rape against the appellant.

This brings me to the 2nd ground regarding the trial court's reliance on PW1's sole testimony to enter conviction. Part of the victim's evidence reads;

*"On 08/07/2019 at 16hrs I was in the farm, fetching animal grasses when accused person came behind me I have ears problem, I don't hear properly so I suddenly found myself on the ground as he came behind me and took my shoe and throw it away. He said if I tell anyone he will kill me, he took off my pant and he inserted his 'chululu' {penis} in my 'uchi'-vagina *victim pointing where penis was inserted* when he finished he told me to wash myself in stream passing in the farm and I did while he run away."*

The above narration clearly shows how the victim was sexually abused though the appellant denies to have committed the offence. He alleged the case had been fabricated against him since he had grudges with the village leaders accusing him being on the opposition. Unfortunately there is no evidence to prove the same. The appellant neither elaborated on the alleged grudges nor challenged the victim's credibility as to why she would have fabricated such serious claims against him. In the case of **Omari Ahmed Vs. Republic [1983] TLR 52** it was laid down that;

"The trial court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a re assessment of their credibility".

In the instant case, the trial court found the evidence of PW1 credible. Hence, this Court cannot at this stage say otherwise. There are no circumstances which force the Court to re-assess her demeanour and credibility. These two grounds therefore fail.

The foregoing reasoning applies to the 4th ground of appeal regarding the victim's age, where as per the charge sheet shows she was 15 years when the incident occurred. More so, during trial the evidence shows she was 15 years old residing at Kighare with her guardian and a primary school pupil of Kwamsembea Primary School. In view thereof this fact was never an issue before the trial court. The appellant neither cross examined the victim nor her guardian on this fact. Further PW3's testimony (a police officer) who investigated the case narrated, the victim was 15 years old when the incident occurred. In the case of **Nyerere Nyague Vs. The Republic, Criminal Appeal No. 67**

of 2010 CAT (unreported), Court of Appeal held *inter alia* that;

> *"a party who fails to cross examine the witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the court to disbelieve what the witness has said"*

Since the age of the victim was not questioned from the very beginning, I am convinced in the circumstances surrounding this case, there was no need of more proof as the above evidence sufficed. This ground lacks merit and is hereby dismissed.

I will analyse the 3rd, 5th and 6th grounds jointly as they all are centred on the issue, whether the offence against the appellant was proved at the required standard. I am alive of the long standing principle in our criminal jurisdiction that the main ingredient in proving any sexual offence is penetration. This position is fortified in a number of cases including that of **Ally Mkombozi Vs. Republic, Criminal Appeal No. 227 of 2007, CAT (unreported)**, where the Apex Court had this to say: -

> *"The essence of rape is penetration, however light is sufficient to constitute sexual intercourse necessary to the offence"*

The Court of Appeal has also emphasized in a number of its decisions that rape is normally conducted in secrecy so the best evidence in rape cases comes from the victims themselves. In the instant appeal, the victim was 15 years old when she was raped by the appellant whom she personally knew as the electrician in their village, and she reported the incident immediately thereafter. Although the appellant denied to have committed the offence and even brought up the defence of *alibi* that he was not present when the incident occurred, the same cannot be given weight. I say so because prior notice has to be given before the defence of *alibi* is staged as provided for by **section 194 (6) of the CPA (supra)** that;

> *"Where the accused raises a defence of alibi without having first furnished the prosecution pursuant with this section, the court may in its discretion accord no weight of any kind to the defence."*

In the case of **Kubezya John Vs. Republic, Criminal Appeal No. 488/2015, the Court of Appeal**, sitting at Tabora, quoted with approval the case decided by the Supreme Court of Uganda, the case of **Kibale Vs. Uganda (1999) 1 E.A at page 148**, in which it was held that;

"A genuine alibi is of course, expected to be revealed to the police investigating the case or to the prosecution before trial. Only when it is so done can the police or the prosecutions can verify the alibi. An alibi set up for the first time at the trial of the accused is more likely an afterthought than genuine one."

The Court in **Kubezya John Vs. Republic (supra)** noted the provisions of subsection 6 of Section 194 of CPA and said;

"Provided that subsection 6 of the provision give the court discretion to accord no weight to such defence if it wishes. It was therefore the duty of the trial court to see whether or not, in its discretion, it should accord no weight to the defence of alibi by the appellant or not"

According to the above authorities, it is clear that, the court can invoke its discretion to either accord weight or not to the accused's defence of *alibi*. In the appeal at hand, the appellant alleged that, it was not possible for him to be at the crime scene at Kighare while he was at Usangi working. However, since his defence, was not given under notice, the respondent did not have room to rebut the same hence the trial court did not error in not according

weight to the appellant's defence and I hereby find it was an afterthought. As already noted earlier in the judgment the victim had eloquently elaborated how after dropping on the ground, the appellant undressed her and inserted his penis into her vagina. Further, it would seem the appellant was mindful of the scene of crime, after PW3 testifying she had gone and visited the area. For all purposes and intent this was not an issue neither does it prove statutory rape. In rape cases what is paramount is the act of penetration. I thus conclusively find the grounds have collapsed.

For the foregoing reasons, I find the conviction of the appellant was deserving, the appeal has no merit and is dismissed in its entirety. The trial Court's decision is hereby upheld.

It is so ordered.

B. R. MUTUNGI
JUDGE
17/02/2022

Judgment read this day of 17/02/2022 in presence of the Appellant and Mr. Innocent Njau (S.S.A) for the Respondent.

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RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
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