THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

(RM) CRIMINAL APPEAL NO. 61 OF 2021.

(Originating from the Court of Resident Magistrate of Njombe, at Njombe in Criminal Case No. 42 of 2021).

STEWARD s/o KOSTA @ NGOLE............................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

2nd May & 29 July, 2022.

UTAMWA, J.

In the Court of Resident Magistrate of Njombe, at Njombe (the trial court), the appellant, Steward Kosta @ Ngole was charged with the offence of rape contrary to Sections 130(1) & (2) (e) and 131(1), (3) of the Penal Code, Cap. 16 R.E 2019 (the Penal Code). It was alleged by the prosecution that, on 26th day of July, 2021 at Mwembetogwa Street, in Makambako area within the District and Region of Njombe, the appellant had carnal knowledge of F d/o G, a girl aged 1 year and seven months. For the purpose of the girl's dignity, I shall hereinafter refer to her as the

victim. The appellant pleaded not guilty to the charge before the trial court, hence a full trial.

It was the prosecution's case that on the fateful day, the prosecution witness No. 1, Tabia d/o Ramadhani (PW.1), the mother of the victim went to fetch water and left the victim alone at her house. The appellant and PW.1 had rented in the same house. On returning home, PW.1 saw the victim coming from the appellant's room while holding her pants on her hands. PW.1 then became suspicious and examined the victim's private parts. She found bruises and discharge. She then narrated the incident to Michael s/o Yakobo Aliyamtu (the PW.2), her neighbour. PW.1 then reported the matter to Makambako police station where she was given a PF.3 for the victim's medical attendance. The appellant was then arrested and taken to Makambako police station for further interrogations. Upon being medically examined, the victim was found with bruises on her private parts.

The defence by the accused was basically that, the case was concocted by PW.1 who was his lover. However, their relation ended due to the fact that he had seen the PW.1 with another man. The PW.1 was thus, discontented by the appellant's act of ending the relationship, hence the fabrication of the case against him.

Upon the full trial, and through the judgement of the trial court dated 30th August, 2021 (the impugned judgment), the appellant was convicted and sentenced to serve life imprisonment. Aggrieved by the said conviction

and sentence, he appealed to this court parading the following six grounds of appeal, which I reproduce for ease of reference:

1. That the trial magistrate erred in law and fact by not taking into account and by satisfying himself that the appellant is infected from HIV disease and transmitted the said deadly HIV disease to the victim as the appellant was not tested.

2. That, the trial magistrate erred in law by convicting the appellant basing on the contradictory and planned evidence testified by PW.1 and PW.2 who are lovers.

3. That, the element of penetration was not documentary proved by PW.3 as he failed to narrate the content of PF.3 and failed to tell the court the object or which method used to examine the victim as required by the law.

4. That, the trial magistrate erred in law and fact by convicting and sentencing the appellant based on the retracted confession by the appellant since the cautioned statement taken by PW.4 was conducted under torture, intimidated, threats and coercion.

5. That, the trial court erred in law and fact in convicting the appellant basing on uncorroborated evidence of PW.1, PW.2, PW.3 and PW.4.

6. That, the case was not proved by the prosecution beyond reasonable doubt.

Based on the above highlighted grounds of appeal, the appellant urged this court to allow the appeal, quash the conviction and sentence and set him at liberty.

At the hearing of this appeal, the appellant appeared in person throught virtual court link while in Iringa Prison. The respondent Republic was represented by Ms. Jackline Nungu, learned State Attorney. At the outset, the learned State Attorney made it clear that she did not support the appeal.

The appellant submitted that, he filed his six grounds of appeal and the PW.2 did not give any tangible evidence. He was tortured at the police station and the victim was not brought before the trial court to prove that she could not talk. He concluded by submitting that, his defence was not considered by the trial court.

In response, the learned State Attorney for the respondent submitted against the first ground of appeal that, pages 8-9 of the proceedings shows the evidence of the Doctor (PW 3) who examined the victim. He did not testify that the accused contaminated the victim with HIV. She thus, urged the court to dismiss this ground of appeal for want of merits.

As for the second ground of appeal, the learned State Attorney submitted that, PW.1 is the mother of the victim. She testified (at page 4 and 5 of the proceedings) on the way she saw the victim coming from the room of the accused holding her underpants and crying. Having seen the victim, she inspected and found her with bruises and liquid from her private parts. She then involved PW.2 who testified as shown at pages 7-8

of the proceedings. PW.2 in fact, supported the story by PW.1. It was also the evidence by PW.2 that, he got into the appellant's room and found him naked. There was thus, no any contradictory evidence between PW.1 and PW.2 as argued by the appellant in the second ground of appeal.

In replying to the third ground of appeal, the learned State Attorney contended that, the Doctor testified (at pages 8-9 of the proceedings), that, she medically examined the private parts of the victim and took blood samples. Moreover, the PF.3 was tendered without any objection and it was read out in court. The PF.3 showed that, penetration was proved due to bruises. She therefore prayed for the court to dismiss this ground as well.

On the fourth ground of appeal, the learned State Attorney submitted that, the appellant did not object the cautioned statement as shown at page 11 of the proceedings. In her view, the confession was thus, a good evidence against the accused. She cited a decision by Court of Appeal of Tanzania (the CAT) in the case of **Jacob Asegelile Kakune v. Director of Public Prosecution, Criminal Appeal No. 178 of 2017, CAT at Mbeya** (unreported) at Page 14 to support her contention. She thus, urged the court to dismiss this ground of appeal too.

Coming to the fifth ground of appeal, the learned State Attorney argued that, the evidence of PW.1 was supported by the evidence of PW.2 as shown in the record. Furthermore, PW.3 (i.e Yasinta d/o Shadrack, the Clinical Officer who medically examined the victim) also corroborated the evidence of PW.1 and PW.2. The PW.4 (i. e. DC. Mariam Ngalomba), the

police officer who recorded the appellant's cautioned statement (which was not objected in court) also corroborated the evidence of PW.1. On the failure by the prosecution to call the local leader as witness, the learned State Attorney argued that, Section 127(1) of the Evidence Act, Cap. 6 R.E 2019 guides that, each witness must be believed for his credibility. The law also does not set specific number of witnesses in proving a fact according to Section 43 of the Evidence Act. She therefore, prayed for the court to dismiss this ground like the preceding ones.

On the last ground of appeal, the learned State Attorney argued that, the case was proved beyond reasonable doubts as PW.1's evidence was corroborated by the evidence of PW.2 and PW.3. The PF.3 also corroborated that evidence. Furthermore, the accused confessed in his cautioned statement. In conclusion, she prayed for this court to dismiss the entire appeal.

In rejoinder, the appellant had nothing of substance to add. He only insisted on the contents of his grounds of appeal.

I have considered the grounds of appeal, the submissions by both parties, the law and the record. In determining this appeal, I test one ground after another.

On the first ground of appeal, the issue is *whether the trial court based the appellant's conviction on any evidence related to his HIV infection*. I hasten to find that, this ground lacks merit because, neither the impugned judgment nor the proceedings of the trial court bears this aspect. The PF.3 which was also admitted in evidence did not show that

the victim contracted HIV. I therefore, answer the issue posed above negatively and dismiss the first ground of appeal.

Regarding the second ground of appeal, the issue is *whether the evidence by PW.2 and PW.3 were contradictory or planed.* The circumstances of the case calls for a negative answer to this issue. This is because, a close scrutiny of the evidence of PW.1 and PW.2 shows no any contradiction between them. PW.1's evidence was to the effect that, she saw the victim coming from the appellant's room while holding her pants and crying. She then examined her vagina and observed that there were bruises and fluid discharge. She then informed the PW.2 of the incidence. PW.2 went to the appellant's room. The PW.2's evidence demonstrated that, at the material time, he got into the appellant's room and found him covered with a blanket. But, when he removed it, he saw him half naked since his trouser was put only halfway. There was thus, no contradiction or planned evidence in the testimonies of PW.1 and PW.2 so as to weaken the prosecution's case. The above issue is thus, answered negatively and the second ground of appeal is accordingly dismissed.

On the third ground of appeal, the pertinent issue is *whether according to the PF.3 penetration to the victim's private parts was proved.* In my view, the circumstances of the case do not speak for the appellant. This is because, the PW.3 (the Clinical Officer) examined the victim's private parts and filled the PF.3 that was tendered and read out in court. In the PF.3 she remarked that, the victim had bruises which constitute evidence of penetration. The appellant's allegations that penetration (as an important element of the offence of rape) was not proved, and that, the

contents of the PF.3 were not narrated by PW.3 in court, were baseless. I accordingly answer the issue negatively and dismiss the third ground of appeal.

Concerning the fourth ground of appeal, the issue is *whether the trial court wrongly relied upon the cautioned statement.* The appellant's complaint under this ground of appeal is untenable. This is because, during the trial, as shown in the proceedings, when PW.4 prayed to tender the cautioned statement, the appellant did not object it. It was thus, admitted in evidence and read over in court. He did not also cross-examine the PW.4 on the said statement. Furthermore, he did not raise any concern on the use of force or torture in procuring the cautioned statement. This ground therefore, is an afterthought. It is trite law that failure by a party to cross-examine a witness on a matter, implies that, the fact has been admitted by that party. This has been the position in a number of decisions by the CAT; see for example, in the case of **Paul Yusuf Nchia v. National Executive Secretary, Chama cha Mapinduzi & Another, Civil Appeal No. 85 of 2005** (unreported) where the CAT held that

> "As a matter of principle a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

Moreover, in the cautioned statement the appellant clearly narrated what had happened on the day of the incidence. He freely admitted that he had raped the victim. The courts have consistently pointed out that, the very best of witnesses is an accused who confesses his guilt provided that the confession is free from the remotest taint of suspicion; see for example, in the case of **Mohamed Haruna @ Mtupeni and Another v. Republic,**

Criminal Appeal No. 259 of 2007, CAT at Tabora (unreported). In the present case, the appellant did not raised any suspicion as he did not challenge the voluntariness of his cautioned statement.

I therefore, answer the issue under this ground negatively that, the trial court did not error in relying upon the cautioned statement. I hence, dismiss the fourth ground of appeal.

The appellant's complaint in ground number five raises the issues of *whether the evidence of PW.1, PW.2, PW.3 and PW.4 were uncorroborated* and *whether the failure to call the Ten Cell leader as the prosecution witness was fatal.* In my settled opinion, the two issues can be considered together as follows: The appellant's complaints under this ground are clearly weak. This is so because, it has been held in a number of cases that, what matters is not the number of witnesses, but the weight of the evidence tendered in court. This is the spirit embodied under Section 143 of the Evidence Act. It provides that, no particular number of witnesses shall, in any case be required for the proof of any fact. These provisions were underlined in various precedent including **Yohanes Msigwa v. Republic [1990] TLR 148, Gabriel Simon Mnyele v. Republic, Criminal Appeal No. 437 of 2007** (unreported) and **Godfrey Gabinus @ Ndimbo and 2 Others v. Republic, Criminal Appeal No. 273 of 2017** (unreported).

Besides, the evidence by the above named witnesses needed no corroboration since they were adduced by competent witnesses. They also

supported the prosecution case sufficiently. I thus, answer both issue posed above negatively and overrule the fifth ground of appeal.

The sixth and last ground of appeal hatches an issue of *whether the prosecution proved the case against the appellant beyond reasonable doubts before the trial court.* In my view, the prosecution's evidence was watertight since it did not leave any reasonable doubt as to the guilt of the appellant. All the ingredients of the offence of rape were established. It is a principle of law that in cases of rape related to girls with the age like that of the victim in the case at hand, consent is irrelevant. What must be proved is that there was accused's penis penetration, however slight it was. This position was highlighted in the case of **DR. Moses Norbert Achiula v. Republic, Criminal Appeal No. 63 of 2012, CAT** (unreported). The other ingredient to prove is the age of the victim. In the case at hand, PW. 3 (the Clinical Officer) testified in proof of the penetration albeit, a slight one due to the bruises she found on the victim's private parts.

Another important ingredient to prove was the age of the victim. The PW.3 also testified that, the victim was of only one year and 7 months of age. This fact was also corroborated by her mother (the PW.1).

Those proved two elements (of penetration and age) sufficed to prove the offence under discussion, being what is commonly known as statutory rape.

The general evidence against the appellant in the case at hand also shows that, it was him who had committed the rape under discussion. This

is because, as observed earlier, the evidence by the PW.1 (the victim's mother), PW.2, PW.3 (and her PF.3), the PW.4 and the cautioned statement pointed finger to the appellant as the rapist. In the case of **Magendo Paul & Another v Republic (1993) TLR 219,** the court held that;

> "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed"

The appellant also complained that the victim was not brought before the trial court to prove that she could not talk. In my view, this complaint could not weaken the case for the prosecution. This is because, there was other sufficient evidence that linked the appellant to the commission of the rape. Moreover, the evidence from the mother of the victim (PW.1) that the victim was a girl of one year and seven months, and was unable to talk sufficed to prove the fact that the victim could not talk. Furthermore, the PW.3 (the doctor who examined the victim) also testified that she was only one year and seven months. The first page of the PF.3 also indicates so.

Besides, it has been held in various decisions of the CAT that, conviction can be sustained independent of the evidence of the victim. In the case of **Haji Omary v Republic, Criminal Appeal No. 307 of 2009, CAT at Arusha** (unreported) for example, the child-victim did not testify for the reason of tender age. Again, like in this case there was no finding made as to the incompetency of the child-victim to testify. The court held:

> "The law recognizes that there are instances where the charge may be proved without victims of crimes testifying in court. Take murder for

> example where the victims are deceased. Senility, tender age or decease of the mind may prevent a victim from testifying in court (See Section 127 of the Evidence Act) but this does not mean that a charge cannot be proved in the absence of the victim's testimony. In this case the victim was a four years old child. He was indeed a child of tender age. Though we agree that ideally the reason for the non- taking of the testimony of the victim should have been entered on record however such failure neither weakened the case for the prosecution nor resulted in a failure of justice".

The legal position just highlighted above was also underlined in the cases of **Abdallah Elias v. Republic, Criminal Appeal No. 115 of 2009, CAT** (unreported), **Issa Ramadhan v. Republic, Criminal Appeal No. 409 of 2015, CAT at Dodoma** (unreported) and **Fuku Lusamila v Republic, Criminal Appeal No. 12 of 2014, CAT at Tabora** (unreported).

In the light of the above, I find that, the appellant's complaint that the victim child was not brought before the trial court to prove that she could not talk baseless.

The appellant's defence that the case was concocted by PW.1 for their terminated love could not thus, shake the prosecution case in anyway. The PW.2 and 4 could not also have told lies to the court against him for no reason.

Due to the above reasons, the issue posed above is affirmatively answer that, the prosecution in fact, proved the case against the accused beyond reasonable doubts, hence the dismissal of the sixth ground of appeal.

In his submissions, the appellant also complained that his defence was not considered by the trial court in testing his guilt. This however, was

not among the grounds of appeal listed above. I would have thus, neglected it. However, the learned State Attorney did not object the course taken by the appellant in introducing this complaint at the stage of hearing the appeal. She did not also make any reply against it on the veracity or otherwise of the complaint. I will thus, for purposes of promoting fair trial to both sides, consider that complaint.

Two issues arise under this complaint. These are:

i) *Whether the trial court in fact skipped the defence case* and;

ii) If the answer to the first issue will be affirmative, then *what are the legal consequences for the omission*?

Regarding the first issue, it is clear, according to the impugned judgment that, the trial magistrate narrated both the prosecution and defence evidence (from page 1-4 of the typed impugned judgement). Nonetheless, in determining the issue of "whether the victim was raped by the appellant" (framed at page 5 of the typed version of the impugned judgment), the trial magistrate considered only the prosecution evidence and convicted the appellant. The trial court did not thus, consider the appellant's defence as rightly complained by the appellant, hence the positive answer to the first issue. This finding attracts the examination of the second issue under this heading.

I now test the second issue posed above. In my settled opinion, the legal remedy to the irregularity just highlighted above, under the circumstances of the case, is for this court, as the first appellate court to get into the shoes of the trial court and re-evaluate the evidence afresh by

inter alia, considering the defence case; see the decision by the CAT in the case of **Abdallah Seif v. Republic, Criminal Appeal No. 122 of 2020, CAT at Dar es Salaam** (unreported).

I have evaluated the prosecution case as demonstrated above. The defence by the appellant was as demonstrated earlier, that, this case was fabricated by PW.1 for the grudges due to their terminated. However, as I observed previously, such defence could not shake the above discussed strong prosecution evidence. This is because, the PW.1's evidence was, as shown earlier, credible. It was also supported by the evidence form the PW.2, the PW.3, the PW.4, the PF.3 and cautioned statement of the appellant himself. All these pieces of evidence pointed that, the victim had actually been raped and the rapist was none other than the appellant. His defence was not thus, capable enough to raise any reasonable doubts in his favour. If anything, he only raised remote and fanciful possibilities which do not in law, exonerate him from liability as per the **Abdallah Seif case** (supra). In deciding the **Abdallah Seif case** the CAT followed the case of **Chadrankant Joshubhai Patel v. Republic, Criminal Appeal No. 13 of 1998** (unreported) which also took inspiration from the English case of **Miller v. Minister of Pension [1974] 2 All ER 372.**

It follows thus, that, even if the trial court considered the defence case, it could not have arrived into a different decision from the one it made in the impugned judgment. The complaint by the appellant that his defence was not considered is thus, also ineffective like the grounds of appeal he had originally lodged in this court.

Owing to the foregoing reasons I find that, the appellant was rightly convicted and sentenced. The appellant's appeal against conviction and sentence is therefore, devoid of merits. I accordingly dismiss it in its entirety.

JHK UTAMWA

JUDGE

27/06/2022

29/06/2022

CORAM; S. M. MKASIWA, Ag. DR.

Appellant: present.

For Respondent; Mr. Alex Mwita, Senior State Attorney.

BC; Gloria, M.

Court; Judgment delivered today this 29th June, 2022 in the presence of Mr. Alex Mwita, Senior State Attorney, for the respondent and the appellant in person.

S. M. MKASIWA

Ag. DEPUTY REGISTRAR

29/06/2022.