IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 15 OF 2021

(*Originating from Criminal Case No 251 of 2018 of the District Court of Serengeti at Mugumu)*

JUMA S/O WAMBURA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

29th March and 29th April 2022

F. H. MAHIMBALI, J.:

The appellant Juma Wambura was charged and convicted and sentenced to serve a custodial sentence of 30 years by Serengeti District Court for an offence of rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code, Cap 16.

It was alleged by the prosecution that on the 18th September, 2018 the appellant at Masinki Village within Serengeti District in Mara Region did unlawfully have sexual intercourse with the victim girl whose name is withheld to disguise her identity as per requirement of law.

The appellant when invited to make his plea, disputed the charge and the plea of not guilty was entered. The prosecution summoned a total of seven witnesses in order to prove the charges against the appellant.

PW1, the victim girl testified that on 18.09.2018 around 19.00 hours when she was selling clothes at Moringori primary school which is a local school in Masinki village, RHOBI MWITA GENCHIRI came and took her to the appellant, who told her that she wanted to marry her. She told him to first introduce himself to her parents or else she had to go home, but the appellant told her to escort him to the road which she did and thereafter they went to the appellant's relative at Maburi. At Maburi they were given a room, slept together and in the course of the night the two had sex three times(appellant and the victim girl). The following morning they went to Mugumu at PW5 CHACHA MANTAKE JACKSON'S place till evening of 19.09.2018. They were given a room to sleep and they had sex once. In the morning (on 20.09.2018) the appellant left to Musoma where the victim girl also followed him but she did not find the appellant as promised, so she came back and slept at the appellant's relative's place. On 21.09.2018 she was given a PF3 at Kenyana police station and later she was taken to Nyerere DDH Hospital

in Mugumu for medical examinations. PW2, ALFRED SELESTINE MOHERE the father of the victim girl testified that on 18.09.2018 the victim girl did not come back from the place where she had gone for tailoring training. They got information that the girl had left with RHOBI GENCHIRI, but upon inquiring from the latter, she admitted that the victim girl had left with the appellant, although she had first denied knowing her whereabouts. His friend WANDA MARWA arrested the appellant at Kenyana primary court on 21.09.2018. The appellant was sent to Kenyana police station. PW3 ASTERIA MANGI testified that she is a tailor at Masinki village and also a trainer of the victim girl in tailoring skills. She testified that around 17.00 hours on 18.09.2018 RHOBI MWITA GENCHIRI came and left with the victim girl who did not come back although she promised to bring her back. On 21.09.2018, this witness heard that RHOBI GENCHIRI had taken the victim girl to marry her to a man. GRACE BHOKE, PW4 and the mother of the victim girl testified that the latter was born on 15.12.2001. She testified that on 18.09.2018 she came back around 18.00 hours from a funeral but the victim girl was not yet home. She called her trainer PW3 to inquire on the where abouts of the victim girl and the latter told her that she had left with RHOBI GENCHIRI but the latter had not brought her back. Then she went to the house RHOBI GENCHIRI who told her that the girl

had gone away with the son of one NYAKERI of Maburi village. Then she took a motor bike to Maburi village and met the mother of the appellant who told her that the appellant is a troublesome person and was not at home. They then set a trap, the appellant was arrested and the victim girl was brought back home by PILINYITIKA, PW4's sister. PW5 CHACHA MANTAKE JACKSON knows the appellant because he was a fellow employee at Spider Company. He testified further that on 18.09.2018 in the evening the appellant went to this witnesses' house with a girl looking for a place to sleep. Because he had two rooms, he offered him one room where in, the appellant slept with the girl and he mentioned to him the name of victim girl. On 19.09.2018, the appellant requested the witness to go to Musoma with the victim girl because he had first to go to Remung'olori and then join the two in Musoma later in the day. This witness went to Musoma with the victim girl but they did not meet the appellant there. In the afternoon they came back and later he heard that the appellant had been arrested. PW6 SABINA GHATIMARWA, a clinical officer testified that she was stationed at Nyerere DDH Hospital and on 21.09.2018 he conducted a medical examination of the victim girl and found that there was no blood or any bruises in her private parts, but she had no hymen. This witness concluded that the girl had had sexual intercourse before and she tendered EXHIBIT PEI which was

a medical examination report. The last witness was PW7 6056 WP MARIAM, a Police Officer, who stated that she is the one who took the victim girl to the hospital and also she is the one who investigated the case.

In his defense testimony, the appellant denied to have had sexual intercourse with the victim as allegedly done. He stated that on the 18th September, 2018 he was at Bunda where he went to sell finger millet. He also stated that he had a case at Kenyana Primary Court against Makori Marwa, the victim's uncle and had summons which directed that he had to attend the Court on 17th September 2018. In essence he admitted residing at Kerugeruge village in Serengeti. When cross examine as to when he had left for Bunda, he replied it was on 16th September, 2018. He had one witness to call who testified as DW2. His testimony is to the effect that, the appellant had a case before him. Though he did not recall whether it was criminal or civil, but he recollected that the appellant won it. When he visited the prison as justice of peace, he saw the appellant there charged with this case before Serengeti District Court. That was all.

Upon consideration of the prosecution and defense case, the trial court was satisfied that the prosecution case was proved beyond

reasonable doubt against the appellant, thus accordingly convicted him for the charged offence of rape and accordingly sentenced him as stated above. Aggrieved by both conviction and sentence, the appellant has preferred this appeal to this Court armed with a total of four grounds of appeal, namely: -

1. *That the Magistrate erred in law and facts in conviction and sentenced the appellant the witness PW6 a clinical Officer testify at the court that the victim had no bruises in her vagina she had no blood and the hymen was not in fact so that clinical officer conclude that the victim had already sexual intercourse before as there was no hymen but the court did not accept the clinical officer evidence which presents during this case.*
2. *That the trial magistrate in law and fact by conviction and sentence the appellant accepting the evidence of prosecution side that has proved the case beyond reasonable doubt that I raped the victim while magistrate forget that the victim while the magistrate forget that the victim testified that as the court they slept there till morning in the night they had sexual intercourse three times without shouting for help during that mid nightly.*
3. *That, the trial Magistrate erred in law and fact to conviction and sentence the appellant without the prosecution side proved the case while the PW1 who testified at the court that the appellant have sex intercourse on 18.0.2018 and*

then was taken to the clinical officer on 21/09/2018 look of being raped and clinical officer bring no sense.

During the hearing of appeal, the appellant appeared in person hereas the respondent was represented by Mr. Frank Nchanilla, arned state attorney who resisted the appeal. The appellant on his part, prayed that this Court to adopt his grounds of appeal and consider them as his submission in support of the appeal. He thus prayed the Respondent – Republic to make reply first and if need be, he will make his rejoinder submission.

In his reply, Mr. Frank Nchanilla while resisting the appeal, submitted that with the first ground of appeal that as per PW6's testimony, that the trial court's findings is in conflict with what the PW6 had countered the observation of the appellant is misleading. As PW1 has no hymen, no blood and no bruises to her vagina does not support his position. He submitted that as per charged offence (statutory rape), what is supposed to be proved is penetration and age of the victim. Thus, penetration by male organ should not necessarily occasion blood and bruises into her vagina. However, as she had no hymen, Mr. Ncahnilla submitted that, PW6 concluded that though there were no bruises or blood into the victim girl vaginal yet she was carnally known as she had no hymen. That she was carnally known, is also the

testimony of PW1 herself. Therefore, what PW6 concluded is a corroboration to the testimony of PW1. As she was medically examined three days after the said rape, Mr. Frank submitted that the possibility of encountering bruises, semen/blood was not possible.

With the second ground of appeal, the appellant's grief is this that the prosecution's case has not been proved beyond reasonable doubt on the basis that if PW1 was raped the whole night for three times, why then did she not resist or shout? Mr. Nchanilla refuted this argument as being baseless. So long as PW1 was below 17 years, then the issue of consent is irrelevant. What is relevant is whether there is penetration and age. Pw1 being not his wife, the act committed is in law rape. He submitted this, basing on the evidence of PW1, PW4 (age of the victim). Since age of the victim girl can be established by the victim herself, parent, guardian or medical practioner, it was his firm view that, the age of the victim was well proved. As the issue of penetration is not disputed, then there was rape, he added.

On ground no 3, the appellant's grief is on the variation of date between the date of rape and date of examination. (As per page 14 and 15 of the typed proceedings). As to why her medical examination was done on 21/9/2018 and not on 18/9/2018, Mr. Nchanilla submitted that

it is because of late recovery of the victim on 21/9/2018. From that date is when this case was reported and examination done. Therefore, there was no any delay. On the other angle, he refuted argument that the same was not raised during trial if it created any doubt. Nevertheless, he amplified that the prosecution's evidence is still strong and incriminating.

Responding to the fourth ground of appeal that his defense was not considered by the trial magistrate in his judgment, he countered it basing what is featured at page 6 of the typed judgment of the trial court (last paragraph) which discussed at length the defense testimony of the appellant. Though he un-procedurally raised a defense of alibi, yet he considered it. On balance of probability and on the issue of alibi, it was considered to be weak evidence against the prosecution.

Lastly, he submitted that, in determining this appeal, the court is mandated to step into the shoes of the trial court and re-evaluate the whole cases' evidence. If that is done, he is confident that conviction will remain so. He invited the Court to do so pursuant to section 366 (1) (ii) of CPA on the powers of this court on appeal. He, thus prayed that this court to dismiss this appeal and in its place confirm conviction and maintain sentence imposed.

In his rejoinder submission, the appellant submitted that as per prosecution's case and reply by the respondent there is no clear evidence how is he implicated. He argued so, basing on the argument that why those who took the said victim girl first to link her with him have not been called to testify on behalf. On that, he considers this case as a cooked one as he had a civil claim with the victim's uncle. He relied on the testimony of DW2, the magistrate who testified for him. He thus prayed that for acquittal arguing that he was wrongly convicted on flimsy issue.

Having heard the submissions of the parties and gone through the court's record, this court will now determine if this appeal has merits. In digest to the all grounds of appeal filed and argued, I find them all revolving on the issue of evidence save the last ground which purely legal but otherwise the rest are based on points of fact. I boil all of them into two main grounds. Firstly whether considering all the prosecution's evidence, the case has been proved beyond reasonable doubt and secondly whether the defense case was not evaluated.

In the case at hand, the appellant was charged under section 130 (1) (2) (e) and 131(1) of the Penal code. These provisions provide for the offence of rape committed to a girl below 18 years, it is commonly

called as statutory rape. The said offence has two importantingredients namely, penetration and age of the victim. Consent is never an issue when it comes to these provisions.

Therefore, this court will first determine whether there was penetration and whether the age of the victim was established. Regarding penetration, PW1 testified at the trial court how the appellant has sexually known her on 18/9/2018 three times and one time an the 19/9/2018. She could not resist as she was promised to be married by the appellant. The law is settled that penetration however slight is sufficient to constitute sexual offence. In the case of **OMARY KIJUU vs THE REPUBLIC**, Criminal No. 39 of 2005, Court of Appeal at Dodoma at page 8

> *"... 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"*

Regarding the age of the victim, the law is settled that such age may be proved by the victim, her parents or medical practitioner. See

Isaya Renatus vs R, Criminal Appeal No. 342 of 2015, CAT at Tabora (unreported). In the case at hand PW1 who is the victim testified in court that she was 12 years old. Her mother who testified as PW2 testified that the victim girl was born on 15/12/2001. Thus she was 17 years by them. In that regards the incident took place when she was 17 years old. Hence it is safe to state that the victim's age was proved. In fine, this court finds that the prosecution has proved the fact of age beyond reasonable doubt.

It is a well-established principle that the best evidence of a rape case comes from the victim herself, what she testified is legally convincing and holds water. This principle was well stated in **Selemani Makumba v 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***"
> [Emphasis supplied]

Also, in the case of **Godi Kasenegala vs R,** Criminal Appeal No. 10 of 2008 (unreported). In that case, the Court of Appeal held:

> *"It is now settled law that proof of rape comes from the prosecutrix herself. Other witnesses if they never actually*

witnessed the incident, such as doctors may give corroborative evidence; see for instance, ***Selemani Makumba vs Republic****,..,* ***Alfao Valentino Vs Republic****, Criminal Appeal No. 459 and 494 of 2002 (unreported). Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so. See C.D Desouza Vs B.R Sharma (1953) EAC4 41"*

In the case at hand the victim was the one who testified in court that on the material date the appellant took her to room and had carnal knowledge with her. She also identified the appellant at the dock and she knew him before. It is my humble view that the fact the victim knew the appellant had been together in the two sleeping rooms at two different occasions and well witnessed by PW3 and PW5 and on reliance of the appellants own testimony, there is no issue of any doubt of the appellant carnally knowing the victim.

With all this, the appellant's grounds of appeal on the issue of fact are devoid of any merit.

However, in stepping into shoes of the trial court, I am confident that the defense case even if evaluated and considered, cannot shake the prosecution's case. The same goes this way.

That on 16/9/2018, he had gone to Bunda District to meet

someone for some issues. He returned home on 19/9/2019. On 20/9/2018, he had to report to Kenyana Primary Court for a case against Makori Marwa who is the PW1's uncle. Then he was arrested for this rape case. He tendered court's summons for that account. He thus counters knowing the Pw1 carnally and considers the prosecution's case as only a framed one against him as revenge to his victory in the case against PW1's uncle. The fact that the appellant once had a case before Kenyana Primary Court before was somehow corroborated by DW1's testimony.

However, the issue for consideration is whether, this defense testimony on the purported alibi, challenged the prosecution's case. The trial magistrate rightly in my opinion considered the defense testimony but disregarded the same on legal basis.

It is settled law that the accused person's story need not be believed but only considered whether sufficiently raises a reasonable doubt to the prosecution's case.

In my considered view, as per trial court's finding featured at page 6 and 7 of its judgment, the appellant's defense was discussed and considered but only that it could not outweigh the prosecution's case. It was all unsupported and lacked value.

Thus in totality of the prosecution's case, since there was

penetration (PW1 and PW6) and that the victim girl was below 18 years by the time of being carnally known, she was raped in the meaning f the charged offence.

All considered, and since all grounds of appeal are devoid of merits, this court dismisses the appeal in its entirety. Conviction, sentence and monetary compensation order issued are herby upheld and confirmed.

DATED at MUSOMA this 29th day of April, 2022.

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 29th day of April, 2022 in the absence of both parties.

F. H. Mahimbali

Judge

29/04/2022