IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY AT MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO 115 OF 2021

(Originating from Criminal Case no 237 of 2020 in the District Court of Bunda at Bunda)

DUKE YOHANA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29th March and 29th April 2022

F. H. MAHIMBALI, J.:

There is a common Swahili saying that "tenda wema nenda zako". Meaning that after one has done a right good thing to another, its reward can be astonishing to him. He should not wait for a good return. This is the story in this case. It can suggest a different mode of treating relatives when making visit to others' homes against to what is commonly practised in African or Tanzanian known culture.

The appellant in this case is a sibling to the victim's father. They are brothers. He is a fisherman, catching fish near to the home of the victim's father. In his fishing routine, he used to spending some nights

at the home of his brother (the victim's parents) before he woke up at midnight and went fishing in the lake. As a manner of good hospitality and on short of space in the said house, he used to sleeping at the sitting room of that house whenever he paid a visit to that home for his fishing duty. The sitting room is closer to the room where the children of that family sleep.

On the date of the incident (12/12/2020), the appellant as usual was in duty of catching fish at the lake, so he visited that family. He had been there for a week. During bed time (at 20.00hrs), the children got into their room, amongst them the victim girl of this rape episode. For purposes of disguising her identity, the victim's actual name is withheld. While asleep, and the appellant left at the sitting room where used to spending his night whenever he visited there, at the mid night, the appellant woke up and slowly walked into the sleeping room of the victim girl, grabbed her, robbed her throat and hurriedly took her out to the Adventist Church building (some meters away from that home), where he raped the victim girl to unconsciousness. After he had quenched his thirsty to the satisfaction, he quitted, leaving the victim girl there that very night and unaided.

When it was morning of 12th December 2020 (next morning)

around 06.00hrs when the girl recovered her conscious, she crawled to her home and woke up her mother and reported the whole episode how the appellant raped her that night after he had grabbed her from her bed, held her throat and taken to the Adventist Church building and was raped there until when she lost her conscious and that she was left there. She had just arrived and was helpless, full of blood from her vaginal part. Her mother was then shocked, examined her child and noted how she was badly devasted into her vagina. She cried for help, whereby people had gathered including PW4 and PW5 where then she took the victim girl to police and eventually to hospital for examination and medication.

The appellant was then arrested and connected with this charge of rape where he disputed the charge. He was eventually convicted, sentenced to 30 years imprisonment and ordered to pay compensation of Tshs 500,000 to the victim girl.

During the hearing of the case, the victim girl testified as PW1 amongst the six prosecution's witnesses. She narrated how on that day her uncle (sibling to her father) had raped her after he had grabbed her from the bed and held her throat and taken her to the Adventist Church building. While there, her uncle took out his manhood and inserted it

into her vagina. She felt so much pain, and did so more than once and she lost her conscious there. She testified that, though it was night time, she had been able to identify the appellant as culprit because first, she had noted first the mosquito net of her being removed from the bed. She got up, only to find the uncle holding her torch cell and it was lit. She wanted to inquire what was wrong, she was suddenly held her throat and grabbed. While being grabbed, was then taken out to the Adventist Church where then raping episode started. When cross examined by the appellant as to why she had been able to identify the culprit being him, she replied that he is familiar to her as he frequently pays visits to that home, he being uncle her. She added that as he had lit his torch on, it was possible to make her identify him. The act of holding her throat and carrying her to that far and the raping act itself, made her to identify him very well as he is not stranger to her. She added further that he had been there for a week by then, thus, he was familiar with.

PW2, who is the mother of the victim girl, testified how the victim girl on that early morning of 12th December 2020 knocked her door seeking for help and reported that the appellant had raped her. She witnessed her bad state by then. When she examined her vagina, she

noted fresh blood tearing from it and its skin hanging. She called for help, and later took the girl to hospital after she had been given PF3 by police. She tendered the clinic card (PE1 exhibit) evidencing the age of the victim girl.

PW3 Medical attendant testified how on 12/12/2020 he had examined the victim girl. He testified that her virgina was badly perforated. He stitched it after it was badly devastated by a blunt object. He had encountered blood and bruises from the victim's vagina. He admitted the said victim for two days. He tendered PF3 as exhibit PE2.

The PW4 who is the local leader of the area testified how he visited the home of PW2 and got the news of PW1 being raped by the appellant. The rapist being the appellant who was said to be fisherman at the area, he went straight to the fishing port (mwalo) and inquired who was Duke Yohane. He then arrested him and took him to police.

PW5 who is neighbour to the PW2, testified how he knows the appellant as being relative to the father of PW1 and that he is a fisherman along lake Victoria to the nearby offshore. That whenever he came for fishing activities, he used to staying at the home of PW2 before he woke up mid night/late night for fishing in the lake. He testified that on the previous night, the appellant had slept in that house

as she saw him there.

When the trial court ruled that the appellant had a case to answer pursuant to section 231(1) of the CPA, Cap 20 R.E 2019, he testified on oath that the victim is the daughter of his brother and that on the material date he had gone there for purposes of solving a matrimonial dispute between PW2 and her husband. He added further that the said PW2 had promised to deal with him whenever he kept on inquiring for his money he had hired them. As she is indebted by him, the said case is a cooked one against him as promised byPW2. He further challenged the case on its evidence against him as being full of doubt as none caught him doing the act allegedly committed. As there were no sperms found in the victim's vagina, there was no rape committed. He further stated that considering the evidence of PW4 and PW5, there was no rape established.

In digest of the whole case, the trial court was satisfied that there was proof of the case beyond reasonable doubt. On that satisfaction, it convicted the appellant and sentenced him to serve a custodial sentence of 30 years and ordered a monetary compensation of 500,000/= to the victim girl.

The appellant has been aggrieved by this sentence, thus the basis

of this appeal to this Court. He is armed with a total of five grounds of appeal, namely: -

1. *That, the trial magistrate erred on both law and facts to convict the innocent appellant based on insufficient evidence of PW1 which was not well corroborated as required in law. Thus, uncorroborated testimony of the PW1 creates some serious doubts on legality of her averments.*
2. *That, the trial magistrate erred in law and facts by basing on the allegations of the PW1 without considering the proper identification of the offender, since it was midnight and the offender used a torch, it means it was dark therefore it was very difficult to identify the offender.*
3. *That the trial magistrate failed to evaluate the entire evidence at hand, PW1 was sleeping with her young brother aged 5 to 6, she claims that the appellant grabbed her throat, and took her to Adventist Church, it means there was a use force the act which was not recognized or witnessed by her young brother who was sleeping together in the same bed under same mosquito net. And after being raped she stayed out there until 6.00 am when she went back home, and all this time no one has noticed her missing even her young brother who was sleeping together.*
4. *That, the trial magistrate erred both in law and facts to find that PW1 was credible witness without considering many doubts to her evidence and that error leads to reach improper decision which lacks support from the records.*

5. *That the prosecution side failed to prove its case beyond all reasonable doubts*

During the hearing of the appeal, the appellant appeared in person whereas the respondent – Republic, was represented by Mr. Frank Nchanilla, learned advocate who resisted the appeal. The appellant on his part, prayed to adopt his grounds of appeal as submission in support of his appeal. He thus invited the respondent to make his reply.

In reply to the appeal as it is resisted, Mr. Frank Nchanilla learned state attorney submitted that, with the first ground of appeal, it is baseless as in sexual offences, the evidence of victim herself is sufficiently incriminating. This is well stated in the case of Selemani Makumba. He added that, as per page 6 and 7 of the typed proceedings, PW1 is a minor of 12 years (a child of tender age). As per section 127 (2) of the Cap 6 provides that a child of tender age before giving evidence must give a promise to tell truth. As per page 6, the requirement appears to have been dully complied with as per law. At page 7 of the typed proceedings, narrates the whole episode and how she had identified the appellant and that they are related. For a period of one week the appellant had been at her home. Thus, the appellant is familiar to the victim girl. Considering the manner "sexual act is done at

Zero distance, there can hardly be a mistaken of identity for a familiar person. The PW1 when met PW2, she spontaneously reported the raping by the appellant. Thus, the evidence of PW1 is well corroborated by the evidence of PW2 and PW3. PW3 - Medical attendant testified how he attended the PW1 and the manner he had seen fresh breeding from her vagina on the same date (PE2 exhibit). PW4 also corroborated the evidence of PW1 on how he arrested the appellant. The evidence of PW5 also states how the PW1 named the appellant as rapist and she witnessed that her vagina was perforated and breeding fresh.

With the 2nd ground of appeal, the appellant's grief is the issue of identification as it was the night incidence. The learned state attorney submitted that, with what PW1 had testified, the issue of recognition of the appellant comes into play. However, as the appellant is very familiar to the victim, sleeping in the same house, then recognition of the appellant was not an issue to PW1. As the sexual act is committed at zero proximity, the case of Waziri Aman does not apply in identification of sexual offenders by the victim.

With the third ground of appeal, the appellant's grief is this that the grabbing of the victim was done by force. He wondered how that could be done without the said incident being not known by the young

brother of the victim who is aged 5 or 6 years. Mr. Chanilla reacted that, a minor as he is for that midnight, the said boy (sibling of the victim girl and her bedmate) was deep a sleep. But as the victim girl was grabbed and her throat blocked, then it was not possible for anyone to have been alert as there was no any crying. He added that as the victim girl experienced much pain following the rape act, she became unconscious, and her vagina raptured, she could not do anything further that night until the morning of 6:00 am when she crawled to her home and instantly reported to her mother. With this, he submitted that the appellant's third grief is bankrupt of merit.

Lastly, he argued 4th and 5th grounds of appeal jointly as they are closely related. He referred what he submitted in ground no 1 and 3, is identical to what is the grief in these two grounds.

He concluded his submission by persuading the Court that the evidence of PW1 is self reliable and incriminating one. He prayed that the conviction and sentence meted out be by your court be upheld by the Court.

On his rejoinder submission, the appellant equally had nothing more, but kept on praying that on what he had stated in his grounds of

appeal, the prosecution case is weak. On that weakness, he be acquitted.

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, which is a point of fact. I boil all of them into one main ground whether considering all the prosecution's evidence, the case has been proved beyond reasonable doubt.

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 ingredients namely, penetration and age of the victim. Consent is never an issue when it comes to these provisions.

Therefore, this court will determine whether there was penetration and whether the age of the victim was established. Regarding penetration, PW1 testified at the trial court that she was grabbed, held her throat and taken to the Adventist Church building. she was then taken off her clothes and the appellant took his penis and deeped it into

her vigina. 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"*

In the case at hand the victim is the only person who was present when she was being raped, and she told the court that the appellant and had sexual intercourse with her. That is sufficient to prove penetration.

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 is 12 years and tendered clinic card that

states the victim girl was born on 8th September 2009 and the incident took place in December 2020. By the time the incident took place, she was 12 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.

On the argument that the incident took place at night time, how possible was it that the victim had identified the appellant as culprit. The testimony of the victim girl on this is very material. She is recorded to have stated the following during her testimony:

> *"... Duke Yohana was sleeping in the sitting room. He had come at our home for a week for purposes of catching fish. I know the accused well. He is that one standing here in court.....when I was asleep, I sensed someone was removing mosquito net. I woke up, I wanted to shout out but only to find Duke Yohana – Baba mdogo (uncle), where he suddenly held my throat and grabbed me from the bed and took me out to the Adventist Church.....he had a torch, he lit it on and switched off".*

With this excerpt, I am confident that as she was familiar to the appellant, she could not have mistakenly identified the appellant considering the act of taking her out from the netted bed, house and the

walking to the scene (Adventist Church) and the raping act itself which is done at zero proximity and for that much time as stated until when she lost her conscious, considering further the fact that, 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 the Adventist Church 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 before as her uncle and she identified him in court, is sufficient to hold that she recognized the appellant and there was no chance of mistaken identity.

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

Lastly, I have gone through the court's record and it is my humble view that the defence evidence was not considered at all. Going through the judgment, the trial court only evaluated and analysed the prosecution's evidence and used it to determine the case. The defence evidence was not used at all. The law is settled failure to evaluate the defence evidence is fatal and usually vitiates the conviction. See; **Nyakumwa s/o Ondare @ Okware**, Criminal Appeal no. 507 of 2019, CAT at Musoma at page 20. 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. The appellant testified on oath that on the material date he had gone there for purposes of resolving a matrimonial dispute between PW2 and her husband who is his brother. He added that, earlier he had advised his brother not to build a house at the home of PW2 (his wife). As if this is not enough, he added that, he had hired them money which they defaulted repayment. It is from the vengeance of his advice to his brother coupled with the owed money, where then the said PW2 had vowed to deal with him whenever he kept on inquiring for his money he had hired them. As she is indebted by him, the said case is a cooked one against him as vowed by PW2. He further challenged the case on its evidence against him as being full of doubt as none caught him doing the act allegedly committed. As there were no sperms found in the victim's vagina, there was no rape committed. He further stated that considering the evidence of PW4 and PW5, there was no rape established.

In totality of the prosecution's case, though the appellant's story is interesting, it has not shaken the prosecution's case in any useful point. Considering the manner, the PW1 testified, it is hard to find cooked evidence in it. Unless the said accusations concerned PW2 as victim of

rape, the appellant's story does not make any sense. I am more gripped by the testimony of PW1. What She testified truthful. The same is corroborated by the evidence of PW2, PW3, PW4 and PW5.

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 presence of Mr. Malekela, state attoeny for the respondent, Mr. Gidion Mugoa – RMA and Appellant being absent.

Right of appeal is explained.

F. H. Mahimbali

JUDGE

29/04/2022