IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 1 OF 2022

(Arising from Criminal Case No. 256 of 2021 of the Kahama District Court)

MADUHU TALASISI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

6th June & 15th July 2022

MKWIZU, J.:

The appellant was prosecuted in the District Court of Kahama, at Kahama for the offence of rape contrary to sections 130(1)(2)(e) and section 131(3) of the Penal Code, [Cap. 16 R. E. 2019). The particulars of the offense are phrased that on the 11th day of October 2021 during noon hours at Nyihongo Village within Kahama District in Shinyanga Region, the appellant had sexual intercourse with a girl aged two (2) years.

The background facts of the case that led to the appellant's conviction and sentence, are that, on 11/10/2021 at noon hours Finias **Sabato Philipo** (PW1) a victim's father came back home from his working place. At home, he did not find the victim. On enquiring about her whereabouts from his wife (PW2), He was informed that the victim was outside playing. PW1 said, shortly thereafter he saw the victim coming from the appellant's room (his co-tenant). The victim went straight to him saying she is hurt, pointing to her private parts mentioning the appellant as responsible for the complained pains.

Neighbors including PW4, PW5, and PW6 were called and inspected the victim's private part and found it reddish with sperms like watery material both on her private parts and the under pants that she had put on. The incident was reported to the village chairperson (PW7) and the police. PF3 was issued, and the victim was taken to Kahama Hospital for examination. A Doctor, Idd Ramadhani (PW8) examined the victim on the same day that is 11/10/2021 and according to him, the victim was in pain with bruises and sperms on her private part. The PF3 was also tendered in court as exhibit K1.

The appellant was taken to the police by the Village chairperson (PW7) on the same day. Subsequently, he was charged in court. On plea taking, he is recorded to have pleaded not guilty and maintained his stance during the trial. He was, lastly convicted as charged and sentenced to life imprisonment. He has now appealed to this Court, presenting a five grounds appeal which can safely be condensed into three main complaints on:-

i. *Failure by the trial court to follow the legal procedure to establish the appellant's culpability*
ii. *Failure by the prosecution to prove the case beyond reasonable doubts,*
iii. *That he is sentenced to an excessive sentence of life imprisonment*

At the hearing of the appeal, respondent /Republic was represented by Ms. Shani Mpumbulya, learned State Attorney and the appellant argued it unaided by counsel.

Submitting in support of the appeal, the appellant said, he only admitted to having invited the victim for food during lunch. He completely denied having any idea of what had happened to the child. He baptized the case as a frame-up accusation.

Ms. Shani countered the complaints by arguing that the prosecution case was proved beyond reasonable doubts. Her standpoints were ***one,*** that the trial court followed the stipulated procedures under sections 228 (3) and 229 of the CPA. After a plea of not guilty by the appellant, it proceeded with the trial.

Two, she said, the age of the victim and penetration, the key elements in this offence were all established. The age of the victim was proved by PW1 and PW2. They informed the court that the victim was born on 6th November 2018 and that the parents' evidence on the age of the victim is acceptable. She on this point cited the case of **Isaya Renatus V R,** Criminal Appeal No 542 of 2015(unreported). The state attorney was of the view that, the appellant's lamentation that there was no birth certificate presented is of no value as even the birth certificate is generated from the parent's information.

The learned State Attorney contended further that, the victim informed her parents of the rape incident and on inspection, it was realized that indeed the victim was raped. This fact is also supported by exhibit K1. She thus insisted that the prosecution case was proved to the tilt.

On the issue of the sentence, Ms. Shani submitted briefly that the sentence meted to the appellant is a correct one as the victim is a child below 10 years of age.

In his short rejoinder, the appellant submitted that the prosecution did not check if the sperms were his and no examination was done to prove that it was the appellant who raped the victim.

I have with enthusiasm gauged the party's submissions in line with the filed grounds of appeal plus the records. In so doing, I am guided by the principle that this being the first appellate court, it has an obligation to reconsider and evaluate the evidence on record and come to its own conclusion if need be while conscious of the fact that this court had no opportunity to observe the witnesses in the witness box.

It is evident as rightly observed by the learned State Attorney that the trial courts ignored no procedure in handling the appellant's case. The preliminary hearing was conducted immediately after the recording of the appellant's plea of not guilty followed by a full trial where parties' evidence was recorded, ruling on no case to answer was rendered defence case heard, and lastly, judgment was delivered which is now challenged before this court. This is the legal requirement stipulated by the Criminal procedure Act in a case where the accused person pleads not guilty to the charge. The first ground of appeal is therefore a misconception.

The second issue is whether the prosecution proved the case beyond reasonable doubts. It is a key principle of criminal law that it is the prosecution that has the burden of proving its case beyond a reasonable doubt. An accused only needs to raise some reasonable doubt on the prosecution case, and he need not prove his innocence. See for instance in **Mohamed Haruna @ Mtupeni & Another v. Republic**, Criminal Appeal No. 25 of 2007 (unreported, the Court of Appeal held: -

"Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

I agree with the trial court's findings and the learned State Attorney's submissions that there is sufficient evidence that left no doubt that the victim was raped and that the appellant is the person responsible.

The appellant is being accused of carnally knowing a girl aged 2 years contrary to sections 130(1)(2)(e) and section 131(3) of the Penal Code creating a rape offence where consent of the victim is irrelevant to establish such an offence, age of the victim is of great essence. The prosecution is duty-bound to establish among other ingredients, that the victim is under the age of eighteen. Accentuating on that position and who can prove the age of the victim, the Court, in the case of **Issaya Renatus vs Republic,** (supra) cited by the learned State Attorney, observed:-

"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130(l)(2)(e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent; medical practitioner or; where available, by the production of a birth certificate. We are, however, far from suggesting that proof of age must; of necessity, be derived from such evidence..."

And in **Francis Vs. The Republic,** Criminal Appeal No. 173 of 2014, CAT at Dodoma (unreported) stated that:

> *"...for a male person to be convicted of the above offence, which is sometimes referred to as "statutory rape", it must be established, first and foremost, that the victim was under eighteen years of age..."*

The court said further that:

> *"...It follows that the evidence in a trial must disclose the person's age, as it were.* ***In other words, in a case as this one where the victim's age is the determining factor in establishing the offence evidence must be positively laid out to disclose the age of the victim****" (Emphasis is mine).*

In this case, the age of the victim was well established by the prosecution. Both victim's parents were able to distinctly expose to the court the victim's birth date as 6th November 2018, meaning that she was a few months to three years during the commission of the offence. This evidence is, as rightly submitted by the learned State Attorney, enough to prove the age of the victim.

The prosecution evidence is also clear on the issue of penetration. Section 130 (4) (a) of the Penal Code, (Cap 16 RE 2019) is relevant on this point that:

> *"For the purposes of proving the offence of rape-*
> *(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;"*

Stressing on this position the Court in **Mathayo Ngalya @ Shabani v. R**. Criminal Appeal No. 170 of 2006, CAT (unreported) held:

> *"The essence of the offence of rape is penetration. For the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence."*

According to the prosecution evidence, the victim reported the rape incident to his father PW1 who invited the neigbours who together inspected the victim and found her private parts reddish with sperms in both her private parts and her underwear. This evidence was supported by PW2, the victim's mother, PW4, PW5, and PW6 all neighbors, and even the defence evidence. Testifying on this aspect, during cross-examination on page 27 of the trial court's proceedings appellant was recorded thus:

> *"Kule chumbani sm3 alikuwepo waiisema kuwa amebakwa,* ***niliona mtoto ana majimaji kwenye uke na pia yalikuwepo kwenye chupi****..." (bold is mine)*

PW8 the doctor who examined the victim on the same day testified as follows:

> *"Nilifanya uchunguzi kwanza nilimkagua maungo yake kwa nje na kufanya vipimo. Nilimchunguza sehemu za siri za uke, alikuwa amevimba na alikuwa na michubuko na alikuwa namajimaji pia tulienda kuyachinguza maabara. Kwenye majimaji yaligundulika kuwa ni mbegu za kiume(shahawa) na epithelcell, lakini hakugundulika kuwa na maambukizi.Hivyoniligundua kuwa ameingiliwa na hata alikuwa ukishika uke wake analia alikuwa na maumivu"*

I find the prosecution's witnesses credible more so because even the defence evidence is in support of this version of the story. This evidence proves nothing other than penetration followed by an ejaculation by the person who penetrated his male organ into the victims' private parts. The

court is therefore convinced that penetration for purposes of proving rape was established to the required standard.

The crucial question is, was it the appellant who raped the victim? The evidence on the record is also clear on this point. It is undisputed that, when complaining of being hurt, the victim was coming from the appellant's house, and she mentioned the appellant as responsible. This evidence was given by PW1 and PW5 who testified to having seen the victim coming from the appellant's house at the material time. Their evidence was also supported by the appellant himself who admitted having spent time with the victim eating food in his house. While disputing to have raped the victim, the appellant in his evidence said, he invited the neighbors for food, the victim got in and ate the food. Appellant said he slept and therefore did not know when exactly the victim got out just to be told later that he had raped the girl. His evidence on this goes thus:

> *"Tarehe 11/10/2021 nilltoka kazlni mimi ni mllnzi, nilifika nyumbani asubuhi, siku hiyo nilikuwa nahama kutoka chumba cha nje kuingia cha ndani. Nilikuwa napikia nje huku nafanya kazi za ndani. Muda wa saa nane niliwakaribisha majirani zangu chakula. Yule mtoto alikuja ndani hivyo alıkula kile chakula*
>
> *Nilipomaliza kuia nililala sikujua mtoto alitoka saa ngapi kabla sıjaenda kazini baba mtoto alinıita nilipoenda akanipa taarifa kuna tukio mtoto alikuwa yopo ndani, imekuwaje, nilimwambia kuwa ni kweli mtoto alikuwa kwangu na aliondoka."*

The defence evidence supports the prosecution's case on where the victim was shortly after the alleged rape. The victim and the appellant knew each other. They were neighbors staying in one house. The

evidence is also clear that the offence was committed during noon time. And the two, that is appellant, and the victim had stayed together for some time from when the victim was invited for food to when she came out of the appellant's room to report the "hurting incident" to her father. Confirming this, during cross-examination appellant said:

> *"Wakati mtoto anaondoka sikumuona* ***sikumbuki muda gani baba yake alifika , ila ni masaa yale yale****. Aliniita nikaenda kwake* ***nilikuwa nimevaa boksa****..."*

I do not find any possibility of mistaken identity by the victim and /or Pw1 and the neighbors around the scene. The evidence points to the appellant, and nobody else as the person responsible.

At the hearing of this appeal, the appellant told this court that this is a frame-up case for he had no idea of what had happened to the victim. I have as well-considered these submissions. I think this defence which was not given as evidence at the trial court is an afterthought. The appellant had clearly testified to have no grudges with the victim's family leaving the court without evidence upon which to believe that he was malevolently incriminated. I, therefore, do not find merit in this point.

The last point is on the sentence. As hinted above, the appellant is among other sections charged under section 131(3) of the penal code. This section prescribes an appropriate sentence for a person convicted of raping a child below 10 years of age. The section reads:

> *"131(3) Subject to the provisions of subsection (2),* ***a person who commits an offence of rape of a girl under the age***

of ten years shall on conviction be sentenced to life imprisonment."

The victim is a girl below 10 years old. The imposed sentence of life imprisonment is therefore legal and needs no interference.

Consequently, the appeal is dismissed in its entirety.

Dated at **Shinyanga**, this **15th** Day of **July** 2022

E.Y. Mkwizu
Judge
15/7/2022

COURT: Right of Appeal explained.

E.Y. Mkwizu
Judge
15/7/2022