IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 26 OF 2022

(Appeal from the Judgment of the District Court of Tanga at Tanga {Hon. H.A Majani, RMI} Dated 18/02/2022 in Criminal Case No.3 of 2021)

DOMINICK CONSTANCE@KAMBONA.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 07/06/2022
Date of Judgment: 01/08/2022

AGATHO, J.:

The Appellant was arraigned at Tanga District Court. He was charged with the offence of Rape Contrary to Sections 130(1)(2)(e) and 131 (1) and (2)(a) of the Penal Code [Cap 16 R.E. 2019]. It was alleged that on the 5th October, 2020 at Magomeni area within District, City and Region of Tanga the Appellant did have carnal knowledge of a girl whom we shall refer as PW2 (aged 15 years).

At the trial Court the Appellant pleaded not guilty to the charge. That prompted the prosecution to bring four witnesses to prove the

charge. The trial court was satisfied that the case against the Appellant was proved beyond reasonable doubt. It found the Appellant guilty, convicted, and sentenced him to 30 years imprisonment. Dissatisfied and aggrieved by the trial court conviction and sentence, the Appellant appealed to this court on following grounds:

(1) That, the trial Magistrate grossly erred in law and in facts for convicting and sentencing the Appellant based on a very weak evidence from the prosecution (Respondent herein).

(2) That, the case against the Appellant was not proved beyond reasonable doubt.

In prosecuting the appeal, the Appellant weas represented by learned advocate Omary Mambosasa while Respondent enjoyed the services of Ms. Donata Kazungu, learned State Attorney. It was agreed upon that the parties to dispose the appeal by way of written submissions. The schedule was thus drawn. The Appellant was required to file their written submissions on 21/06/2022; the Respondent State Attorney was set to file the reply on 05/07/2022, and the Appellant

ought to have filed his rejoinder if any on 12/07/2022 and judgment was set to be delivered on 01/08/2022.

The Appellants filed their written submissions on 15/06/2022. The Respondent's State Attorney filed her reply to the Appellant's submissions on 05/07/2022.

In disposing the appeal, the Court examined the records of proceedings at the trial Court, the submissions by the parties and the law as it is. This being the first appellate Court it is obliged to examine the evidence on record. It is entitled to re-evaluate the evidence on record and draw its own findings.

The first and second grounds of appeal are intertwined. They both focus on evaluation of evidence. Whereas the first ground of appeal is on typical evaluation of evidence, the second ground centres on standard of proof in criminal proceedings. It a requirement of the law as per Section 3(2)(a) of the Evidence Act [Cap 6 R.E. 2019] that a charge shall be proved beyond reasonable doubt.

The gist of the first ground of appeal is whether the Appellant was convicted on very weak evidence. As for the second ground of appeal

we ask whether the charge of rape was proved beyond reasonable doubt.

Along these we can add other issues: whether absence of PW2's virginity is a proof of rape; whether that proves that it was the Appellant who raped the PW2. And whether a sentence of 30 years imprisonment was proper considering that the Appellant was aged 18 years at the time the alleged offence was committed.

The first ground of appeal is to the effect that the Appellant was convicted on very weak evidence. Looking at the record of proceedings the prosecution brought four witnesses. PW1 – a mother of the victim (PW2), PW3 (police investigator) and PW4 (the medical doctor who examined PW2). On 05/10/2020 PW3 accompanied with the father of the victim and another person went to the Appellant's room. The father of PW2 told PW3 that they suspected the Appellant to have carnal knowledge of his daughter. But suspicion no matter how strong it is cannot be a base of conviction (see the case **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda v R, [2006] TLR 395**). According to PW3 (see his testimony on pages 25-26 of trial proceedings) that they went to the room of the Appellant

and knocked the door. He opened the door and they told him they want to search the house. The PW2's father went into the room, and he found his daughter, and he brought her outside the room. The PW3 and the further of the victim, took the PW2 and the Appellant to Chumbageni Police Station. The PW3 did not tell the court whether he found them having sexual intercourse. Moreover, PW2's father was never called to testify. It is unclear why. He should have brought for he is a key witness to tell what he found in the Appellant's room. Did he find having sexual intercourse. This is crucial because the Appellant was the employee of the PW2's father. It means they know each other well.

It is unclear why the prosecution did not bring him to testify. His testimony was essential because neither PW3 did not enter the Appellant's room. Again, he could not tell if he saw them having sexual intercourse or just finished the same. Further PW1 (mother of the victim) is the one who told the father that she suspects the Appellant having sexual relationship with their daughter (PW2). Since the father is the one who went into the room the prosecution should have brought him as a witness to explain how the atmosphere was in

the Appellant's room. In the circumstance of this case the PW2's father was a material witness. Failure to call him leaves a lot to be desired. Failure to call material witness warrants the court to draw an adverse inference as held in **Wambura Marwa Wambura v R., Criminal Appeal No. 115 of 2019 CAT at Mwanza** (judgment delivered on 6th and 14th July 2022) unreported at pages 11-14. The inaction by the prosecution, to wit failure to call the material witness cannot be rescued by Section 143 of the Criminal Procedure Act [Cap 20 R.E., 2019] providing that there is no exact number of witnesses that the prosecution is required to bring to prove the charge. It means even a single witness may prove the case. However, I am of the settled view that in the case at hand the father of the victim ought to have been called as a witness to explain what he saw in the Appellant's room in the day he found him with his daughter.

Regarding the testimony of PW2 (the victim) herself, is crucial. Her testimony is found on pages 16-18 of the trial proceedings. She rejected the allegations that the Appellant raped her. She however admitted that the Appellant is her boyfriend and they had sexual intercourse on several occasions. The fact that she denied to have

been raped recant the charge against the Appellant. The Respondent State Attorney claim that the PW2 is a credible witness as per **Goodluck Kyando v R [2006] T.L.R. 363**. Hence she adduced the best evidence as stated in **Selemani Makumba v R [2006] T.L.R. 379**; that the best evidence in sexual offences comes from the victim. But as visibly seen on pages 16-18 of the trial proceedings the PW2's testimony is contradictory. While she stated that they had sexual intercourse on sexual occasions, she also said the Appellant did not rape her. This is incredible witness. Hence the principles in **Goodluck Kyando v R [2006] T.L.R. 363**; and **Selemani Makumba v R [2006] T.L.R. 379** cannot apply to the present case.

I thus decline to support the views of the Respondent State Attorney that the PW2's testimony, where she uttered the words "you did not rape me" when cross examined by the Appellant meant that she consented to sexual intercourse. If find this interpretation unwarranted because the victim was aged 15 years during the trial, and she understood or rather was aware of what she was testifying. Therefore, this Court gives plaining meaning to the words "You did

not rape me." It means that she was not raped by the Appellant. Further, the testimony that they (PW2 and the Appellant) previously had sexual intercourse on several occasions is a mere uncorroborated story. After all what PW2 testified is not gospel that is to be taken as uncontested truth. While the Court can convict an accused of sexual offence based on uncorroborated evidence of the victim, the important caveat is that such witness must be credible. This was the position of the CAT in **Mohamed Said v R, Criminal Appeal No. 145 of 2017 CAT at Iringa**, where it was held inter alia that:

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass test of truthfulness."*

The justice of Appeal again in the case of **Pascal Sele v R., Criminal Appeal Np. 23 of 2017, CAT at Tanga** held that:

> *"While we agree that the above is the correct position of the law, we hasten to say that does not mean that such evidence should be taken wholesome, believed and acted*

upon to convict the accused persons without considering circumstance of the case."

The import from the above holdings of the CAT is that the testimony of the victim in sexual offences like other evidence must be subjected to credibility and truthfulness test. The Court is barred from acting on incredible and untruthful evidence. I should restate that rape charge is proved when penetration is proved. Without proof of penetration there is no rape. I thus find the first ground of appeal to have merits.

PW4 (medical doctor) in her testimony found on pages 29 – 20 of trial Court proceedings, she told the trial Court that did see neither bruises nor seamen on the PW2's vagina. She simply stated that she inserted her two fingers in the PW2's vagina and they went through, and she found that the victim was not virgin. These findings of PW4 are also found in the exhibit P1 (PF3) – medical examination report. I am of the view that it is common knowledge that there are many ways through which a girl's virginity may be lost. It is not limited to sexual intercourse. Even riding a bicycle may lead to loss of virginity. Consequently, loss of virginity is not a proof of penetration.

Therefore, the testimony of PW4 did not assist in establishing that the PW2 was raped by the Appellant.

Turning the issues whether delay to take the victim for medical examination was justifiable, we examine the record on proceedings. The incident is alleged to have been committed on 5th and 6th of October 2020. The Appellant was arrested on 6th of October 2020, and the medical examination was conducted on 10th October 2020. The prosecution witnesses did not explain why such delay. In rape cases time is of essence especially time for conducting medical examination. The PW2 (the victim) was taken to Bombo Hospital on 10/10/2020. There is four days unexplained delay. It is doubtful if after lapse of four days bruises and seamen if any could be seen. Indeed PW4 could not find any bruises in PW2's vagina but surprisingly she concluded that there was penetration because there was no hymen and she was not virgin. This does not prove that the PW2 was raped by the Appellant. I am of the settled view that the charge of rape was not proved beyond reasonable doubt. For that reason, I find the second ground of appeal to have substance.

For sake of academic argument and as obiter dictum, the Respondent State Attorney was of the view that the charge was proved beyond reasonable doubt, which I do not agree with, and to her the problem was on the illegality of the sentence imposed on the Appellant (aged 18 years when the offence was alleged to be committed in October 2020). The learned State Attorney suggested that the Court should dismiss the appeal but allow set aside the sentence entered by the trial Court and substitute it with corporal punishment as required by Section 131(2)(a) of the Penal Code [Cap 16 R.E. 2019].

Assuming that the Appellant was found guilty and hence the proper sentence is corporal punishment, but he has been in prison for six months serving the improper sentence. If this Court orders that he be sentence de to corporal punishment which is rather lenient sentence compared to the amount of time he spent in prison that is he will have served both six months and corporal punishment. In my view, and as was rightly held by the CAT in **Mng'ao Yohana Chacha v R., Criminal Appeal No. 244 of 2020 CAT at Musoma** (judgment delivered on 10 June 2022) the Appellant ought to be immediately released as he has served six months in prison. He does

not deserve another sentence such as corporal punishment. Thus, I would have ordered his immediate release from despite his appeal being dismissed.

But since the rape charge was not proved beyond reasonable doubt, I allow the appeal, quash the conviction, and set aside the sentence passed on the Appellant. I proceed to order his immediate release from prison unless otherwise continue to be held for other lawful reasons.

DATED at **TANGA** this 1st Day of August 2022.

U. J. AGATHO
JUDGE
01/08/2022

Date: 01/08/2022

Coram: Hon. Agatho, J

Appellant: Present

Respondent: Kusekwa (State Attorney)

B/C: Zayumba

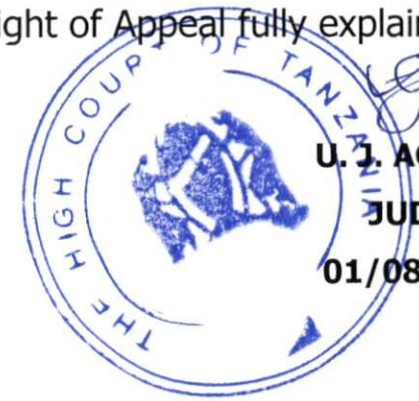
Court: Judgment delivered by the Hon. Beda Nyaki, Deputy Registrar on this 1st day of August, 2022 in the presence of Appellant and Kusekwa State Attorney for the Respondent's.

U. J. AGATHO

JUDGE

01/08/2022

Court: Right of Appeal fully explained.



U. J. AGATHO

JUDGE

01/08/2022