IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

CRIMINAL APPEAL NO. 60 OF 2021
(Originating from Criminal Case No. 211/2020 of Muleba District Court)

ANOLD BWANEGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

08th July & 12th August 2022

Kilekamajenga, J.

The appellant was charged in the District Court of Muleba with the offence of rape contrary to **Section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 RE 2019**. The charge against the appellant shows that, on 27th December 2020, at Katobago village within Muleba District in Kagera region, the appellant raped a child of five years old. When the appellant entered a plea of not guilty the prosecution was ready to prove the case beyond reasonable doubt that the appellant, and not any other person, committed the alleged rape. PW1 (the mother of the victim) informed the Court on what transpired on the date of the alleged rape. She testified that, on 27th December 2020, she was attending to his farm which is just 15 footsteps from the house. She left the victim and the appellant in the house. Later, her younger child called Akram went to the farm and informed PW1 that the appellant and the victim were having sex. She rushed to the house and found the appellant dressing-up the victim with pants. PW1

asked the appellant on what happed but there was no response. She checked the victim and she was bleeding. The appellant thereafter ran away and was apprehended at Bihanga village and taken to Muleba police station. She further testified that the appellant raped the victim at the sitting room. To prove the victim's age, PW1 tendered a clinic card which was admitted as exhibit PE1.

PW2 (victim), after promising to tell the truth, testified that the appellant raped her at the sitting room when her mother was outside the house. She did not scream because the appellant was armed with a knife. The evidence of the clinical officer (PW3) who examined the victim shows that, on 28th December 2020, he received the victim. Upon examination, he discovered some bruises at the vulva. The inner part of the vagina (hymen) was undisturbed. In his observation, it seems a blunt object was trying to penetrate the victim's vagina but failed. PW3 filled-in the PF3 form which was admitted as exhibit PE2.

In his defence, the appellant denied raping the child but he was arrested for assaulting his brother's wife (PW1) but later charged for rape. He further alleged that, he was in conflict with his brother's wife over the house which was left by his parent. As the appellant does not want to surrender the house to his brother, this case was maliciously framed against him.

The trial Court believed the prosecution evidence and the appellant was convicted and sentenced to life imprisonment. Being disgruntled with the decision of the trial Court, the appellant approached this Honourable Court for further justice. He moved this Court with a petition of appeal containing eight grounds which were haphazardly framed as follows:

1. *That, the charge sheet on the appellant's door was fatally defective and confusing the appellant charging (sic) him under section 130(1)(2)(e) and 131(1) of the Penal Code whereas the claimed victim is five years being contrary (sic) to section 135(a)(ii) of the Criminal Procedure Act, Cap. 20 RE 2019.*
2. *That, the omission rendered (sic) to the charge sheet (sic) failure to specify the punishment for the alleged rape deprived the appellant a good position to prepare an informed defence as underscored in the case of Alex Medard versus Republic Criminal Appeal No. 571 of 2017 of Tanzania Court of Appeal at Bukoba.*
3. *That, the evidence by the victim is lawfully a nullity (sic) for being admitted without preceding a voire dire test thus violating section 127(2) of (the amended laws) The evidence Act, Cap. 6 RE 2019 (sic).*
4. *That, the Hon trial magistrate vitiated himself and condened justice (sic) to undermine such professionalised evidence (sic) by a clinical officer who disclosed no penetration on the victim (sic).*
5. *That, the Hon. Trial magistrate erred in law and fact to reach such decision without considering the appellant's defence evidence.*
6. *That, the Hon. Trial court erred in law and fact to convict the appellant without proof from the DNA profiting test (sic).*

7. *That, the judgement is fatally defective for failure to disclose the sentence imposed on the appellant and he was incarcerated of his right to mitigation (sic) and the right to appeal were not administered to the appellant as the law requires.*
8. *That, the prosecution side did not prove the case to the required law standard (sic), that's to say, beyond reasonable doubt.*

Before this Court, the appellant appeared in person. As he alleged to be illiterate, he urged the Court to consider his grounds of appeal and thereafter rested his case. The learned State Attorney, who appeared for the respondent objected the appeal insisting that, the case was proved beyond reasonable doubt. He argued further that, the age of the victim was proved, the victim named the appellant and there was penetration sufficient to support to the offence of rape. He bolstered his argument with the cases of **Ally Mkombozi V. Republic, Criminal Appela No. 07 of 2007,** CAT at Arusha (unreported); **Omary Kijuu v. The Republic, Criminal Appeal No. 39 of 2005,** CAT at Dodoma (unreported).

Though it was difficult to comprehend the grounds of appeal, I however considered them and found the eighth ground worthy consideration. On this ground, the appellant argued that the prosecution failed to prove the case beyond reasonable doubt. The analysis of this ground prompted my consideration of the law under which the appellant was charged. As already

stated the appellant was charged under **Section 130 (1) (2) (e) and 131 (1) (1) of the Penal Code**. However, **section 130 (4) (a) of the Penal Code** provides a vital element in the offence of rape. The section provides that:

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

Now, what may be gleaned from the above provisions of the law is that, the offence of rape may only stand where penetration may be proved. Even a slight penetration is sufficient to prove the offence of rape. In the case of **Omary Kijuu** (*supra*) the Court of Appeal remarked that:

> *"Thus the doctor's observation coupled with PW2's evidence on how those bruises came there, that is, they were caused by a male organ, amounted to penetration and capable of proving the offence of rape."*

In other words, the presence of bruises suggesting that the accused's penis was trying to enter the victim's vagina is sufficient to sustain the act of rape. While I am obliged to comply and follow the above established principle of the law, in my view, the presence of such bruises alone is not sufficient to sustain a conviction on the offence of rape unless coupled with other relevant evidence. Every case must be decided based on the available evidence.

In the instant case, the prosecution case relied on the evidence of PW1, PW2 and PW3. The evidence of PW3 who was a clinical officer confirmed the presence of bruises on the outer part of the victim's vagina. However, he was content to state that, there was no penetration. In my view, there is no cogent evidence to suggest that the bruises were the result of the appellant's penis trying to penetrate the victim's vagina. This is the only aspect which raises doubt on the prosecution's case. As already hinted earlier on, the appellant and the victim's father are battling for a family house left by their parents. These two people are living in one house and the appellant is not willing to vacate the house. As a result, the antagonism has paved way to animosity between the appellant and the victim's mother (PW1). This fact which evidently appears in the defence and also enlightened by the victim who confirmed to know the appellant even before the incident, was not controverted by the prosecution. Now, this being the case, the reasonable doubt could be on the possibility of PW1 causing such bruises on the victim's vulva. Reasonably, the appellant could not have attempted to rape the victim in a sitting room while the victim was just fifteen footsteps away from the house.

Furthermore, the rape is alleged to happen in the presence of the victim's young brother who, despite informing PW1 on the alleged rape, was not called to testify in Court. Rape cases being such serious offences should be carefully tried. The

accused should only be convicted after clearing all the possibilities of malicious planting a case. In this case, I find doubt raised by the appellant on the prosecution case. Based on this reason therefore, I find the prosecution failed to exhaust all the elements of rape and therefore failed to prove the case beyond reasonable doubt. I allow the appeal and order the released of the appellant from prison unless held for other lawful reasons. It is so ordered.

Ntemi N. Kilekamajenga
JUDGE
12/08/2020

Court:

Judgment delivered this 12th August 2022 in the presence of the learned State Attorney, Mr. Amani Kirua and the plaintiff present in person. Right of appeal explained.

Ntemi N. Kilekamajenga
JUDGE
12/08/2020