IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT BUKOBA

CRIMINAL APPEAL NO. 40 OF 2021

(Originating from Criminal case No.189 of 2018 of Karagwe District Court (V.T.Bigambo- RM)

ELIKISAUDI DAMIAN .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

16/08/2022 & 26/08/2022
E. L. NGIGWANA, J.

In the District Court of Karagwe sitting at Karagwe hence forth (the District Court), the Appellant was charged with the offence of Rape contrary to sections 130 (1) (2) (e) and 131 (1) of Penal Code Cap. 16 R: E 2002, (now R: E 2022).

At the trial court, it was alleged that on 17/05/2018, at Kayanga area within Karagwe District in Kagera Region, the appellant did unlawfully have carnal knowledge of one N.S (Identity of the child hidden) a girl child aged 8 years old. When the charge read over and fully explained to the accused, now appellant, he denied the allegations.

After a full trial, which involved four (4) prosecution witnesses and one (1) defense witness, the trial court was satisfied that the charge had been proved beyond reasonable doubt. Consequently, the appellant was convicted and sentenced to thirty (30) years imprisonment.

Aggrieved with the conviction and sentence, the appellant knocked the doors of this court with a memorandum of appeal containing five (5)

grounds of appeal upon which he asked this court to quash the conviction, set aside the sentence and set him free. The grounds are five in number due to unnecessary repetitions. All grounds, which I see no need to reproduce them here, constitute only one ground of appeal as follows;

"That, the trial Magistrate erred in law to convict the appellant on the offence which was not proved beyond reasonable doubt."

When the matter came for hearing on 16/08/2022, it was heard through video conference owing to the reason that the appellant was at Molo Prison within Sumbawanga District in Rukwa Region. He was not represented, while the Respondent/Republic was represented by Mr. Amani Kilua, learned State Attorney.

The appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage after the submission of the learned State Attorney, if the need would arise.

Mr. Amani Kilua, learned State Attorney, conceded that the evidence adduced before the trial court was not absolutely watertight therefore, he declined to support both conviction and sentence for the following reasons; **one,** in statutory rape, one of the ingredient which must be proved by the prosecution is age. According to Mr. Amani, the age was just mentioned in the charge sheet that the victim had 8 years old, but it was never proved in court by the four witnesses including the victim's mother.

Two, the PF3 which was tendered as Exh. P1 was never read out in court after being admitted, hence urged this court to expunge it from the record. **Three,** the trial Magistrate conducted voire dire test instead of asking the

victim who was alleged to be a child of tender age to promise to tell the truth and not lies. Having heard the State Attorney's submission, the appellant had nothing to add.

Now, this being a first appellate court as far as this matter is concerned, the relevant question to be answered is whether the evidence adduced by the prosecution witnesses in the trial court was sufficient to establish the guilty of the appellant.

Describing the duty of the 1st appellate court, the Court of Appeal of Tanzania in the case of **Registered Trustees of Joy in the harvest versus Hamza K. Sungura,** Civil Appeal No. 149 of 2017 CAT (unreported) had this to say'.

"The first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

The same duty was emphasized in one of the Kenyan Case; **David Njuguna Wairimu vs. Republic [2010]** TLR where the Court of Appeal of Kenya held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is

clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

Before I dwell into the evidence adduced before the trial court, it is pertinent to state the standard of proof required in criminal case. The cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt.

Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019 provides;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists."

The High Court of Tanzania speaking through Katiti J (as he then was) in **JONAS NKIZE V.R** [1992] TLR 213 held that;

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking."

In this case, the appellant was charged under Section130 (1), (2) (e) and 131 (1) of the Penal Code.

The provision of section 130 (1) of the penal code Cap 16 R: E 2002 provides

"It is an offence for a male person to rape a girl or woman"

Section 130 (2) of the Penal Code provides;

"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following.

descriptions:

(e) *with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

Reading section 130 of the Penal Code, it is apparent that, for statutory rape upon which the appellant was charged with, among the vital and apparent elements which the prosecution must prove are;

(a) Penetration of the penis into the vagina of the victim;
(b) The age of the victim;
(c) That it was the appellant who is responsible for such act.

In the case of **Karim Seif @ Slim versus The Republic,** Criminal Appeal No. 161 of 2012, CAT (Unreported), the Court of Appeal stressed that the age of the victim may be proved by statement of the victim, birth certificate, Affidavit of parent or guardian or any proof that may be made orally or in writing.

In the case at hand, as correctly stated by Mr. Amani; the age of the victim was not proved by PW1, PW2, PW3 and PW4 orally or by documentary evidence.

Another issue is whether there is evidence proving beyond reasonable doubt that the victim (PW1) was penetrated. As submitted by the learned

State Attorney, there is no indication that the victim (PW1) made a promise to tell the court the truth and not lies so as to comply with section 127 (2) of the evidence Act Cap. 6 R: E 2019, now R: E 2022. The former position was that, where there is complete omission by the Trial Court to correctly and properly address itself in section 127 (2) of the Evidence Act governing reception of the evidence of a child of tender age, the resulting testimony must be treated as invalid.

However, on 27/05/2022, the Court of Appeal introduced an exception to the general rule in the case of **Wambura Kiganga versus The Republic**, Criminal Appeal No. 301 of 2018 that, where the evidence is given without the promise to tell the truth, the court may still use the evidence to convict the accused if it is satisfied that what was narrated by the victim was **true, original, and authentic,** taking into account that the principle stated in the case of **SELEMAN MAKUMBA V.R Criminal Appeal no 94 of 1999 (un-reported)** that in sexual offences, true evidence must come from the victim is still intact.

In the instant case the victim's evidence was recorded in two paragraphs only. I have gone through the said two paragraphs containing the victim's evidence and found that there is nothing indicating that the evidence is true and authentic. She did not tell whether she knew the appellant before the incident and how she identified him.

Another piece of evidence is the medical evidence. Medical evidence in sexual offences is important in the sense that it can only assist the court in making a finding on the issue by considering that opinion alongside other

evidence presented before the court. Since the PF3 was not read out after being admitted, there is no way the same can remain part of the record.

In the case of **John Mghandi @Ndovo versus The Republic,** Criminal Appeal No. 352 of 2018 (Unreported), the Court of appeal of Tanzania emphasizing on the need to read out and explain the contents of the documentary exhibits had this to say;

"*We think we should use this opportunity to reiterate that whenever a document exhibit is introduced and admitted into evidence it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defense. That was not done in the matter at hand and we agree with Mr. Mbogoro that on account of the omission, we are left with no other option than to expunge the document from the record of the evidence.*"

Applying the same principle, the PF3 which was not read out in the trial court after being admitted is hereby expunged from the record. It should be noted that when the charge was read over and explained to the appellant, he denied the allegations, and during his defence, he disputed to have committed the offence. The appellant ended saying that the case against him was fabricated.

Indeed, in the circumstances of this case, it cannot be said that, the prosecution had managed to discharge its duty of proving the case beyond reasonable doubt, as the principle that the accused can only be convicted of an offence on the basis of the strength of the prosecution case, and not on the basis of the weakness of the defense case has been established a

long time ago. **See Christian s/o Kaale and Rwekiza s/o Benard versus R** [1992] TLR 302.

Before, I pen off, I would like to state that, even if it is assumed for the sake of argument, that the victim's was aged 8 years old as stated in the charge sheet, and all other ingredients have been proved, still the sentence which ought to have been imposed upon the appellant is life imprisonment as per dictates of Section 131 (3) of the Penal Code Cap 16 which provides that;

"*Subject 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"***

All said, I am constrained to allow the appeal and, respectively, quash the conviction and set aside the sentence of thirty (30) years meted against the appellant. I further order for an immediate release of the appellant from prison custody unless held for some other lawful cause. Order accordingly.

Dated at Bukoba this 26th day of August, 2022.

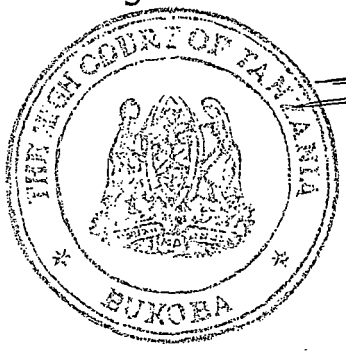
E.L. NGIGWANA

JUDGE

26/08/2022

Judgment delivered this 26th day of August, 2022 by way of video conference in the presence of the appellant who is at Molo Prison – Rukwa,

Mr. Amani Kilua, learned State Attorney for the Republic, Hon. E. M. Kamaleki Judge's Law Assistant, and Ms. Tumain Hamidu, B/C.



E.L. NGIGWANA

JUDGE

26/08/2022