IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT MWANZA

HC. CRIMINAL APPEAL NO. 39 OF 2022

(Appeal originating from the judgment of Sengerema District Court in Criminal Case No. 117 of 2022 before Hon. T.G. Barnabas, Esq. RM)

MAHATANE S/O CHARLES..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25th July & 30th August, 2022

DYANSOBERA, J.:

The appellant herein was charged with and convicted of rape c/ss 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap.16 R.E.2019]. Particulars of the offence alleged that the appellant, on 27th day of October, 2021 at about 22.00 hrs. at Mwabayanda village within Sengerema District in Mwanza Region, did have carnal knowledge to one ZC (not her real name), a girl of 11 years old and a STD IV primary school pupil at Mnadani Primary School. The appellant earned a sentence of thirty (30) years prison term. He was not satisfied with the trial court's decision hence this appeal.

Briefly, the facts of the case are that the victim who testified as PW 4 is a pupil and at the time of the occurrence of the alleged incident was a STD IV schooling at Mnadani Primary School. She is living at Mwabayanda village with her father one Charles Malima Kulugila (PW 3) and the appellant who is PW 3' s grandson and the son of the victim's sister. It is the prosecution case that on 27th day of October, 2021 at 2200 hrs, while PW 3 was away from home, the appellant had sexual intercourse with the victim. When PW 3 was back home, he found the appellant at home; the victim was not at home. The following morning, Mama Tabu informed PW 3 that the victim had slept at Mama Neema after she was carnally known by the appellant and could not go back home for fear that the same appellant would carnally know her again. The same information was relayed to PW 1 and PW 2. PW 5, a Doctor in Charge, Sengerema Designated District Hospital medically examined the victim on 2.11.2021, almost six days after the alleged incident. She found that the victim had lost her virginity. She filled in the PF 3 (exhibit P 1). PW 6, a teacher at Mbugani Primary School proved that the victim was a pupil at that school and testified that on 29th October, 2021 she went to school very late.

PW 7 and PW 8, police investigation officers performed different duties. While PW 7 went to the scene of the crime, PW 8 interviewed the appellant and recorded his cautioned statement (exhibit P. 4).

In his defence, the appellant denied having committed the offence and asserted that the time the victim alleged to have been raped by the appellant, the victim was at the appellant's mother. Admitting to have interviewed by the police, the appellant argued that he confessed because he was tortured and threatened that his leg would be broken.

In his judgment, the learned Resident Magistrate observed, *inter alia,* at p. 15 of the typed judgment thus: -

> 'in the case at hand this court had no any sufficient reason not to believe the evidence of the victim who is the child of tender age and satisfied that she is telling nothing but the truth as explained under section 127 (6) of the Evidence Act .....'

At the time of hearing this appeal, the appellant fended for himself while the respondent enjoyed the legal services of learned Senior State Attorney, Ms. Margareth Mwaseba. The appellant, when invited to explain on his grounds of appeal, he told this court that he had filed seven grounds

in his petition of appeal and four grounds in the additional grounds of appeal and had nothing useful to add.

On her part, the Ms. Mwaseba supported the conviction and sentence. She took us through the prosecution evidence and found all prosecution evidence credible. She explained how penetration in law is proved and the fact that the law does not make mandatory to prove rape by DNA testing. Further that under the law, no number of witnesses is required to prove any fact. According to her, the appellant was convicted on direct evidence. She concluded her submission by telling the court that the case against the appellant was proved beyond reasonable doubt.

The appellant had nothing to rejoin.

I have considered with circumspection the trial court's record and the grounds of appeal together with the submissions of both parties. I think the appeal must succeed.

One, going by the evidence and the grounds of appeal, there is nothing showing that the trial court subjected the entire evidence to an objective scrutiny in order to separate the chaff from the grain particularly where it was not clear when the appellant allegedly carnally knew the

Had the learned Resident Magistrate subjected the entire evidence to an objective evaluation, he could have found that the victim was not reliable hence the appellant's complaint that her evidence was suspect.

Two, the victim alleged that she was carnally known by the appellant five times, the fact which is not reflected in the charge sheet and the evidence. Such a variance creates doubt as to what was the actual date when the offence was committed by the appellant and whether such offence was actually committed.

In **Mathias Samweli vs.** Criminal Appeal No.271 of 2009 (unreported) the Court of Appeal observed as follows: -

> "We are of the opinion that when a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that offence was committed by the accused by giving cogent evidence and proof to that effect".

In this case, act that the appellant carnally knew the victim on that material date was not witnessed by any prosecution witness. It was, therefore, the victim's word against that of the appellant. The finding by the trial court that the evidence of the victim became more credible when

corroborated with the evidence of PW 1, PW 2, PW 3 and PW 3 who narrated and proved that the victim had sexual intercourse with the accused and that with those findings, he was satisfied that the prosecution proved the offence of rape against the appellant was, to say the least, unfortunate. The said witnesses did not eye witness the appellant carnally knowing the victim, their evidence was just a hearsay from the narration given by the victim whose version, as I have pointed out hereinabove, was suspect and unreliable.

Three, there is nothing showing that immediately after the incident the victim named the suspect at the earliest opportunity so as assure her credibility and reliability on the evidence, she adduced in the trial court.

This failure tainted her credibility and dented the prosecution case. This position was well elaborated by the Court of Appeal in the case of **Marwa Wangiti & Another v. R** [2002] TLR 39 the Court observed: -

> "The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry".

In the light of the above evaluation, I am of the settled view that the prosecution failed to discharge its duty of proving the case beyond reasonable doubt as required by the law.

In the upshot, the appeal succeeds and is allowed. I quash the conviction and set aside the sentence that was imposed against the appellant. I order his immediate release from prison unless he is being held for some other lawful cause.

It so ordered.

W.P. Dyansobera
Judge
30.8.2022

This judgment is delivered under my hand and the seal of this Court this 30th day of August, 2022 in the presence of the appellant in person but in the absence of the respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera
Judge