IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 27 OF 2022

(C/F Criminal Case No. 98 OF 2021 in the District Court of Hai at Hai)

NELSON EDWARD MANDARI ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

3/8/2022

JUDGMENT

The Appellant was arraigned in the trial court with the offence of Rape contrary to section 130(1)(2) and 131 of the Penal Code, Cap. 16 R.E.2019. It was alleged that the appellant, Nelson S/O Edward Mandari on the 17th April, 2021 at or about different time at Kambi ya Chokaa Village within Hai District in Kilimanjaro Region did have sexual intercourse with one A D/O A, a girl aged 17 years old, a student of Form three at Ewang'oni Secondary School.

When the charge was read over and explained to the accused, he denied to have committed the offence. The case went for a full trial whereby at the end the appellant was found guilty of the offence, convicted with the offence of Rape contrary to section 130(1)(2) and 131 of the Penal Code, Cap. 16 R.E. 2019 and sentenced to serve a term of thirty years in prison.

The appellant is aggrieved with the decision of the trial court, conviction and sentence. He has therefore filed an appeal under the services of one Mr. Gabriel Shayo. The petition of appeal contained eight (8) grounds of appeal. I will not reproduce them here, but I will refer and mention them when dealing with the appeal.

At the hearing the appellant was present and he was also being represented by Mr. Gabriel Shayo and Ms. Mary Lucas, learned State Attorney was representing the Republic. The counsel for the appellant submitted that the appellant is appealing against the decision of the District Court of Hai dated 27th April, 2022. He stated that the appeal is against the conviction and sentence. There 7 grounds, he prayed to argue together grounds 1, 2, and 3. The 4 and 6 together. The 5 and 7 will be argued together.

The first ground of appeal is challenging the charge sheet. That shows the appellant/accused did rape the victim on 17th April, 2021 and the event occurred at Kambi ya Chokaa village in Hai District. However, time was specified. The allegation shows the appellant did rape a d/o A not Asia Idd as required in the charge sheet. The area at *Kambi ya Chokaa* is not specified in the charge sheet. The victim in her evidence says she was raped at Darajani area.

On the second ground, the court did not put properly the facts of the case. That the rape occurred at a certain time; it is not shown in the facts that the appellant is the one who raped her and that the victim has the age below 18 years old.

On the third ground of appeal, the prosecution failed to prove the offence of rape beyond reasonable doubt as per Section 14 of Cap. 6 R.E. 2019. Since the charge is defective even the evidence is contradicting.

If you look at the evidence as testified, the victim says she was raped on the 17th April, 2021 at 00:00 Hrs at Darajani. The father of the victim testified that the victim was raped at 21:00hrs on 16/4/2021. The testimony shows the rape occurred at home. PW3 Redfan E. Shoo testified that the victim was sent to the hospital for examination by her father on the 3rd May, 2021 at noon hours. This was 20 days after the alleged event. The doctor examined her and observed the fallowing: -*that he did not see sperms, there were no any bruises, the victim is not pregnant and not effected with HIV.*

The counsel for the appellant submitted that for the offence of rape to be proved, there are ingredients to be proved. In the case of **Chirstopher Raphael Mangu vs Republic, Criminal Appeal No. 222/2004 CAT – Mwanza** it was held that three things must be proved for the offence of rape; **one**, that the accused had sexual intercourse – penetration for the date mentioned; **two**, that there was penetration even if it is slight and; **three**, that it must be proved that the victim was under 18 years old

The counsel submitted that he has assessed the evidence on record. The evidence of the victim is not corroborated. There is no witness who corroborated the evidence of the victim. There is no any evidence that the appellant raped the victim on 17th April, 2021 at 00:00hrs. There is no any evidence in the District Court of Hai that the victim's age is below 18 years old.

In the evidence of PW2 AMIR IDD HASSAN, the victim's father, said his daughter(victim) was born in 2004. He doesn't remember the date and time. There is no any teacher who came from Ewang'oni Secondary School to show that the victim is the student of the said school.

The counsel for the appellant concluded by asserting that the prosecution did not prove the charge as required by the law.

On the 4th and 6th ground, the court did not conduct *voire dire* test as required in taking the evidence of the child. At page 10 of the proceedings shows, *voire dire* test was not conducted. At this point the State Attorney was quick to remind the counsel for the appellant that according to the law, *Voire dire* test is conducted to the child of tender age, which is 14 years and below. The victim in this case is 17 years old. She prayed that the counsel drops the ground which he did.

On the 5th and 7th ground of appeal, Mr. Gabriel Shayo, Advocate submitted that the appellant is complaining that the District Court erred in law for not assessing properly the evidence. This is the essence of grounds 5 and 7. The requirement to assess the evidence is per Section 312(1) of Criminal Procedure Act, Cap. 20 R. E. 2019. The court must pinpoint issues for determination. That was not done. Also, the evidence of the prosecution witnesses is contradicting. The record is clear that the testimony of PW1 and PW2 differ on the place and time.

The victim ought to have been examined within 18 hours from the time of rape. That was not done. The counsel prayed that this court quashes the

judgment of the trial court, and set aside the sentence and the appellant be released forthwith.

Ms. Mary Lucas, State Attorney submitted in reply that after reading proceedings, judgment and hearing the submission she is submitting in reply as follows: -

The first, 2nd, 5th and 7th are replied to as follows that the charge reads the offence was committed C/s 130(1)(2) and 131 of the Penal Code, Cap. 16 R. E. 2019. There is no citation of 130(2)(e) which specify the age of the victim. But that does not prejudice the appellant as the essence of the charge is in the particulars of the offence. Thus, according to Section 388(1) of CPA that is curable.

Also, failure to mention the real name of the victim is according to law for the child. It is intended to protect the privacy of the child. Since the name will be recorded, it will leave a mark and memory on record that the child was once raped. That does prejudice the interest of the child and not the accused. On the time the event occurred, it has not been specified. It is recorded '*at or about different time*' at Kambi ya Chokaa. She submitted that in her view the charge is not defective.

The counsel contested that the Judgment of the trial court was not in accordance to the provisions of section 312(1) of the Criminal Procedure Act, Cap. 20 R. E. 2019. On the reasoning that the contents of judgment as per 5th and 7th grounds of appeal, the issues were drawn at page 4-5. Issues were raised and evidence was considered.

In the opinion of the learned State Attorney, that she supports the appeal on one ground that the Republic has failed to prove the offence beyond any reasonable doubt. This is due to contradictions in the testimony of the victim PW1. The victim's evidence lacks truth to what she testified. As it is understood in law that the best evidence in sexual offences is that of the victim as was decided in the case of ***Seleman Makumba vs Republic [2006] TLR 380***

However, the court may convict the accused relying on the evidence of the victim alone if the testimony is assessed to be truthful as per Section 127(6) of TEA Cap 6 R.E. 2019 and there must be coherence.

The evidence by prosecution is inconsistent and incoherent. At page 12 of the proceedings the evidence of the victim differs with that of her father at 16-17. The testimonies especially of the victim reduces her credibility and it is doubtful even to the commission of the offence of rape.

PW2 then at page 17 says he saw the victim and chased him/the accused. Again, he says he found the accused in the room of the victim. Therefore, the victim's evidence is doubtful. In the case of **Robert Sanganya vs Republic, Criminal, Appeal No. 363 of 2019, CAT – Dar es Salaam** (delivered on 10/2/2022) it was held that: -

> *"Where there is contradictory and inconsistent testimony then the evidence is not believable".*

In the evidence tendered there is no evidence of penetration. It is necessary to be proved as per Section 130(4) (a) of Penal Code. The victim did not

prove that and no any other witness. Even the doctor who examined the victim relied on the opinion of victim. The learned state Attorney submitted that they are therefore supporting the appeal and the appellant should be set free.

In rejoinder the counsel for the appellant, Mr. Gabriel Shayo, Advocate submitted that the Respondent has agreed that the prosecution has not proved the case beyond any reasonable doubt. The charge is truly defective as there was no citation of Section 130(2)(e) of Penal Code thus was charged with the wrong provisions. Section 312(2) of CPA requires that the provision of law to be specifically mentioned. Section 135(f) of CPA requires time to be mentioned an exact one.

The counsel therefore prayed that this court finds that the offence was not proved to the required standard and thus quash the conviction and set aside the sentence.

I have also gone through the record and heard the submission by the counsels for the appellant as well as that for the counsel for the respondent. The offence the appellant is charged with was not proved beyond reasonable doubt. For the offence of rape to be proved, there must be proof of penetration even if slight and where the victim is an adult there must be proof that there was no consent. In the case of **Nyeka Kou vs. The Republic, (Criminal Appeal No. 103 of 2006) [2007] TZCA 4(30 October 2007)** it was held that the offence of rape contrary to section 130 and 131 of the Penal Code, Cap. 16 R.E 2002 is proved by slightest penetration- in law, to have sex with a woman, even with the slightest

penetration into the woman's vagina by the male organ, without the woman's consent (where consent is relevant), is rape.

In the present case, the age of the victim is said to be 17years old. Under the circumstances, the prosecution is importing the idea that the offence alleged is one where there was no need of consent. However, that does not relieve them of proving penetration. That brings us to the evidence of PW3 Redfan E. Shao, the medical officer who examined the victim, she was sent there on the 3rd May, 2021. On the date the victim had no bruises in her vaginal walls, and her vaginal carnal was wide. She admitted to have had sexual intercourse several times and the last was on April, 2021. The victim had no sperms. However, in view of the contradicting account as pointed out by the learned State Attorney, it remains doubtful as to its veracity.

The evidence of PW1, the victim shows the appellant had sexual intercourse with her at Darajani Kambi ya Chokaa on the around 00:00hours. She also said that the appellant was her lover. He had sexual intercourse with him at appellant's friend known Loti. It is not clear, if the place named Darajani Kambi ya Chokaa is the same place where the friend to the appellant stays.

In the evidence tendered by the father of the victim, PW2 Amir Idd Hassan, the accused used to stay at his house with one Loti his friend. Then he disappeared with his daughter and a prolonged search was done until someone volunteered to show the where about of the victim and the appellant. He also testified that he found the accused with her daughter at his house at around 21:00hours.

The contradictions shown in the testimony are difficult to explain. But one my gather the story that the offence was set to do away with the appellant so that he is no longer following up PW2's daughter. What is important is that both the counsel for the appellant and the respondent have one view that the offence was not proved beyond reasonable doubt. The evidence of prosecution case is inconsistent and incoherent. In general, the offence was not proved to the required standard; it leaves a lot of doubt to whoever reads and or listens the story especially that of PW1 and PW2.

Under the circumstances I also find the appeal to have merit and allow it. The judgment and conviction of the accused (appellant) is hereby quashed; Sentence set aside. Appellant be released forthwith unless otherwise being lawfully held.

Dated and signed at Moshi this 3rd day of August, 2022

T. M. MWENEMPAZI

JUDGE

Judgement delivered this 3rd day of August, 2022 in court in the presence of the appellant, Mr. Gabriel Shayo, Advocate for the Appellant and Ms. Mary Lucas, learned State Attorney for the Respondent.

T. M. MWENEMPAZI

JUDGE