IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL CASE NO. 38 OF 2022

(Originating from the District Court of Mbarali District, at Rujewa, in Criminal Case No. 71 of 2019)

MASELE MABULA.....APPELLANT

VERSUS

REPUBLIC..... .....RESPONDENT

JUDGEMENT

Date of last Order: 13.06.2022
Date of Judgment: 18.08.2022

Ebrahim, J.

The Appellant herein MASELE MABULA was charged, convicted and sentenced at the District Court of Mbarali District, at Rujewa for two counts namely; Rape contrary to **sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2022, and impregnating a school girl contrary to section 60 A (3) of the Education Act, Cap. 353 as amended by Act No. 2 of 2016.**

It was alleged before the trial Court on the first count that on the diverse dates of November, 2018 to March, 2019 at Mwashikamile Village within Mbarali District in Mbeya Region, the appellant did wilfully and unlawfully have sexual intercourse with

one **HM** (a branded name) a pupil at Mwashikamile Primary School aged 15 years old. As for the 2nd count, it was alleged that on the diverse dates of January, 2019, at the same area the appellant did wilfully and unlawfully impregnate the said **HM** a pupil of Mwashikamile Primary School aged 15 years old.

The Appellant pleaded not guilty to both counts, hence a full trial. The prosecution paraded four witnesses including the victim who testified as PW1 and two exhibits i.e., exhibit PE1 (school attendance for standard five) and exhibit PE2 (PF3). The appellant fended for himself without calling any witness. At the end, the trial court was satisfied that the prosecution proved the case beyond reasonable doubt hence convicted the Appellant and sentenced him to serve 30 years' imprisonment on each count. The trial court ordered the sentence to run consecutively.

Aggrieved, the Appellant preferred this appeal raising six (6) grounds of appeal. The said grounds were crafted in a lay style which however, can be truncated as follows:

1. That the trial Magistrate grossly erred in law and fact when convicted the appellant while the prosecution failed to prove the charge against him.

2. That the trial Magistrate grossly erred in law and fact when convicted and sentenced the appellant by merely relying on the evidence of PW4 who did not clarify how he conducted the examination on the victim who is a female while PW4 is a male. And no DNA report was tendered.
3. That the trial Magistrate grossly erred in law and fact when convicted the appellant basing on exhibit PE1 and PE2 while their contents where not read in court after being admitted.
4. The trial Magistrate grossly erred in law and facts when it failed to note that PW1 did not mention the name of the lady whom she slept at her house on the material date.
5. That the trial Magistrate grossly erred in law and fact when it convicted the appellant basing on the hearsay evidence of PW2 and PW3.
6. That the trial magistrate did not consider the defence evidence.

At the hearing of the appeal the Appellant appeared in person without legal representation whereas the

respondent/Republic appeared through Mr. Davis Msanga, learned State Attorney.

When the Appellant was given an opportunity to argue his appeal, he prayed for the State Attorney to begin reserving his right to rejoin.

Submitting against the appeal, the learned State Attorney argued the grounds of appeal in seriatim. As to the 1st ground of appeal he argued that the trial Court properly convicted the Appellant basing on the evidence of the victim which was straight forward and was not shaken. He contended also that PW3 a school teacher corroborated the evidence of the victim that she was a standard five pupil. The learned State Attorney, relying on the case of **Edward Nzabuga vs Republic,** Criminal appeal No, 136 of 2008 CAT at Mbeya (unreported) argued that in sexual offences an accused can be rightly convicted basing on the evidence of the victim only.

Regarding the 2nd ground of appeal, the learned State Attorney stated that the trial Court did not convict the Appellant basing on the evidence of PW4 as alleged by the Appellant but the same corroborated the evidence of the victim. As to the

complaint that there was no DNA report tendered, he contended that there is no law in the land which requires the offence of rape to be proved by DNA test.

As to the 3rd ground of appeal, the learned State Attorney conceded that exhibit PE1 and PE2 were not read before the court after being admitted. He thus prayed for this court to expunge them from the record. He however argued that the evidence of PW1 (the victim) was sufficient to convict the Appellant hence the expunging of the exhibit will not render the prosecution evidence inadequate.

With regard to the 4th ground of appeal, he argued that the prosecution did not see the importance of calling the lady referred by the victim since she was not a key witness.

On the 5th ground of appeal, the learned State Attorney submitted that, even if he may concur with the Appellant that PW2 and PW3 gave hearsay evidence, the same did not form base of his conviction. According to him the two witnesses correctly narrated what they heard from the victim and they promptly reported the matter to the police.

As for the 6th ground of appeal, Mr. Msanga argued that the Appellant did not give any defence to contradict the evidence of the prosecution. He however, invited this court being the first appellate court to re-evaluate the defence evidence and reach to its own conclusion. He therefore urged this Court to dismiss the appeal.

In his rejoinder, the Appellant only prayed for this Court to consider his grounds of appeal.

I have considered the grounds of appeal, the submissions by the learned State Attorney and thoroughly gone through the record. For convenience purpose, I shall begin with the 3rd ground of appeal. The issue for determination is whether exhibits PE1 (school attendance) and PE2 (PF3) were read in court after being admitted. I hastily concur with both, the Appellant and the learned State Attorney that the same were not read. This is according to the proceedings on record. However, it follows the question as to whether the omission is fatal and may attract the court to expunge them from the record as suggested by the learned State Attorney. As a general rule where any document is tendered and admitted in court as an exhibit without being shown

or read in order to afford an opposite party chance to know its contents, such omission is fatal; see **Steven Salvatory v. Republic,** Criminal Appeal No. 275 of 2018, Court of Appeal of Tanzania at Mtwara (unreported). Nonetheless, when the evidence of the witness who tendered it was elaborating the content of it, such omission is not fatal. This is due to the reason that the purpose of reading the document is to make the opposite party to know its content and prepare his/her defence. In the case of **Chrizant John v. Republic,** Criminal Appeal No. 313 of 2015, CAT at Bukoba (unreported) it was underscored that:

> *"In the circumstance of this case however, we rush to agree with Mr. Ngole that since the Republic called PW4 Florence Kayungi, the doctor who conducted deceased's autopsy, and because the evidence of that witness capitalized on exhibit P1 and he explained in detail the deceased's cause of death, also that his advocate was given chance to cross-examine her, it cannot be accepted that the appellant was denied opportunity to know the contents of exhibit P1. ....."*

Applying the above statement in the matter at hand, PW3 a school teacher who tendered exhibit PE1 said that the victim was standard five pupil, and the exhibit was only to prove that account. PW4 testified that when he examined the victim, he observed that her hymen was perforated and she was three

months pregnant the content which was in exhibit PE2. Thus, in my concerted opinion, the Appellant was not prejudiced as he knew the content of the documentary exhibit tendered. I see no need of expunging the said exhibits from the record. This ground of appeal therefore, lacks merit and I hereby dismiss it.

Now, the complaints under the 1st 2nd, 4th and 5th grounds of appeal are interrelated, they can thus be determined on the issue whether the prosecution proved the case to the required standard. In answering this issue, considering that this is the first appellate court, I am obliged without fail to subject the entire evidence into objective scrutiny while bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses- **Charles Mato Isangala and 2 Others vs Republic, Page 5 of 17 Criminal Appeal No. 308 of 2013.**

Notably, as correctly argued by the learned State Attorney, in sexual offence like one under consideration, the best evidence is that of the victim of the offence. This is according to **section 127 (6) of the Evidence Act, Cap. 6 R.E 2022** and the Court of Appeal of Tanzania decisions in a number of cases i.e., **Seleman**

Makumba v. Republic [2006] TLR. 379; and the **Edward Nzabuga** (supra) to mention but a few.

However, it is not always the case that whenever the victim of sexual offence narrates the story on what befallen to her; she should be believed without scrutinizing and testing the same story and the truthfulness of the victim. This was underscored by the Court of Appeal of Tanzania in the case of **Mohamed Said v. Republic,** Criminal Appeal No. 145 of 2017 CAT at Iringa (unreported).

In the matter at hand, the victim who testified as PW1 told the trial court that in November, 2018 when she was coming from a ceremony, she met with the Appellant who seduced her and promised to marry her after completion of standard seven. The two i.e., the Appellant and the victim thus entered into a sexual relationship. She further said that they started having sexual intercourse at the Appellant's home and their relationship proceeded until 16th March 2019 when she was late coming from the Appellant's home. However, as the Appellant feared that the victim was a pupil, he did not let her sleep at his home. According to the victim, the Appellant took her at the home of **a certain lady**

where she slept until the next morning. That in the morning the said lady gave her Tshs. 5,000/= as a bus fare then she decided to go to her mother who resided at Songwe. The victim also told the trial court that to her mother she said that she has gone to pay her a visit. She further testified that she was later taken to a Police Station where she was availed with a PF3. The examination at the Hospital observed that she was three months pregnant. The victim insisted that it was the Appellant who impregnated her.

Conversely, it is undisputed that the only direct evidence the prosecution had in proving the case was that of the victim as narrated above. This is because other witnesses testified what they heard from others. For example, PW2 (the victim's father) told the trial Court that, when the victim did not return home on 16/3/2019 he engaged her uncle who assisted in searching her. That they got information that the victim was seen going into the house of the Appellant. When they asked the Appellant, he denied to have seen her. He further testified that later on, he received a call from the village Chairman who told him that the Appellant has confessed that he slept with the victim and he gave her fare to go to her mother.

Looking at the evidence of PW2 above, it is apparent that all are based on hearsay. He did neither see the victim at the Appellant's home nor did he hear the Appellant confessing. Nevertheless, his evidence is contradicting with that of the victim. When the victim said that she slept at the home of a certain lady whom also gave her fare, PW2 said that he was told that the victim slept at the Appellant's home and it was him who gave her fare.

Notwithstanding the hearsay and contradicting evidence of PW2, the Appellant complained in the 4th ground of appeal that the prosecution did not call the lady mentioned by the victim. According to Mr. Msanga for the Republic, the lady was not an important witness. Nonetheless, in my view she was. This is because the said lady would have given evidence to cure the contradiction between the victim and PW2 on where did the victim sleep on the material date. The lady also would have proved that indeed the victim was going to the appellant's home and that on the fateful day i.e on 16th march, 2019 the victim came from the Appellant home and slept at her home. The trial court would also be satisfied on the relationship between the lady

and the victim and the Appellant because it is not appealing for a stranger (a lady) to host a child (the victim) whom she did not know where she was coming from. Therefore, failure by the prosecution to call that important witness left much to be desired. It creates doubt if truly the victim was having sexual intercourse with the Appellant. It is also doubtful if on the material date the victim was at the Appellant's home considering the defence by the Appellant denying to know the victim or to have seen her. For real, such reasonable doubt would have been cleared by the crucial evidence of the said lady. In-fact, even the fact that the said lady is unknown creates reasonable doubt as it can as well be that there is no such lady (imaginary) otherwise at least her name would have been known.

Moreso, it is the law that failure by the prosecution to call a material witness, the court is entitled to draw an adverse inference against prosecution. The principle of adverse inference finds its basis on an assumption that the evidence which could be, and is not produced would, if produced, be un-favorable to the person who withholds it. The Court of Appeal of Tanzania had an occasion to elaborate on the circumstances under which that

principal applies in the case of **Aziz Abdalla V.Republic** [1991]TLR 71 where it was observed that:

> *"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution side".*

In the instant case, the prosecution did not state that the unnamed lady! was out of reach.

Other evidence of the prosecution side was that of PW4 (doctor). In my view, PW4 gave expert opinion which does not necessarily prove the case of rape. See the observation in the case of **Mawazo v. DPP,** Criminal Appeal No. 455 of 2017 (CAT at Mbeya (unreported)), also in **Edward Nzabuga** (supra) where the Court quoted a statement with approval that:

> *"..... An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.*

Though I could note the undisputed fact that the victim was pregnant, there is no further prove that it was the Appellant who impregnated her. In that regard, owing to the above findings that the prosecution evidence left much to be desired, I have come to

a different view with the trial Court. In my concerted view, the prosecution did not prove the case beyond reasonable doubt.

I have remained with the 6th ground of appeal, on that ground the issue for determination is whether the defence evidence was considered by the trial Court. I have gone through the impugned judgment. Indeed, the trial Court did not consider the defence evidence but neglected it and perhaps (not approving it) because it was only one sentence, quoted as:

"I did not commit an offence and I did not know the victim."

Notwithstanding one sentence defense testimony, I have in mind of the law in criminal cases that, it is not a duty of the accused to prove his/her innocence; see the case of **Mohamed Said Matula v. Republic [1995] TLR 3**. Nonetheless, I have already made my finding above that the prosecution did not prove the case beyond reasonable doubt.

Before I come to the final verdict of this appeal, I find it very crucial to make an important observation on the sentence meted against the Appellant. This is because, as per the law, the

sentence was unlawful considering the age of the Appellant at the time of commission of the offence.

From the proceedings on record, i.e., the particulars of the Appellant in the Charge Sheet and his citation at the time of giving his defense, it shows that he was 18 years old.

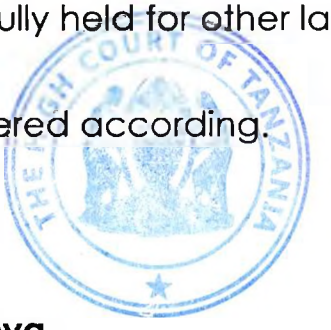
Section 131 (2) of the Penal Code, Cap. 16 R.E 2022 provides that:

> *(2) Notwithstanding the provisions of any law,* ***where the offence is committed by a boy who is of the age of eighteen years or less****, he shall-*
>
> *(a) if a first offender, be sentenced to corporal punishment only; (b) if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;*
>
> *(c) if a third time and recidivist offender, he shall be sentenced to five years with corporal punishment.* (Emphasis added).

It was said in aggravating facts that the Appellant was a first offender. Therefore, he was liable to be sentenced to corporal punishment only. The sentence of 30 years imposed by the trial Court was thus, unlawful.

At the final result, I hereby allow the appeal, quash the conviction and set aside the sentence. I also order for the immediate release of the Appellant from custody unless otherwise lawfully held for other lawful cause.

Ordered according.



R.A. Ebrahim
JUDGE.

Mbeya
18.08.2022