IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO. 62 OF 2021

ROBERT MWAKYEMBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the District Court of Iringa at Iringa)

(Hon. S.A. Mkasiwa - PRM)

dated the 30th day of July, 2021

in

Criminal Case No. 08 of 2021

JUDGMENT

Date of Last Order: 05/08/2022 &
Date of Judgment: 10/08/2022

S. M. Kalunde, J.:

On 29.01.2021, Robert s/o Mwakyembe was charged before the District Court of Iringa at Iringa (henceforth "the trial court") with fourteen (14) counts of rape c/s 130 (1) & (2)(e); and 131 (2) & (3) of **the Penal Code Cap. 16 of the Revised Edition, 2019**. It was alleged that, on several occasions between the 31.12.2020 and 06.01.2021, the appellant did rape two girls aged 11 years. The identity of the two girls is withheld and they shall be referred as PW1 and PW3 respectively or victims collectively. The incidents took place at Mibikimitali Village (Ifunda) within Iringa Rural District, in the Region of Iringa. Upon reading the charge to him, the appellant was recorded to have pleaded not guilty. However, after full trial, the trial court convicted him of all counts and for each count, he was sentenced to serve life

imprisonment. The sentences were to run consecutively. In addition to that he was ordered to pay each of the victims the sum of Tshs. 300,000 and Tshs. 20,000,000.00 to compensate for their social, physical and psychological anguish.

The facts leading to the present are not hard to appreciate. They are as follows; on 31.12.2020 the victims, **PW1 and PW3**, were praying together. Around 17:00 HRS on their way back home they met the appellant, he asked them to go with him to his house to collect a parcel for their grandmother. Somehow the two agreed and followed the appellant to his house. When they got there the subject changed. They were made to cook dinner for the accused and themselves. Later that evening the appellant convinced them to stay with him and have sex at his house. Sometimes at night the accused had sex with the two of them separately. The next morning the accused locked the door from the outside left to earn his livelihood. He came back at night and had sex with them again. The incidents continued for almost seven (7) days between the 31.12.2020 and 06.01.2021. It was alleged that during the space the accused had sexual intercourse with the victims twice each day. On the outside efforts to locate the two victims were under way, **RACHEL SANGA (PW2)** and PW3's mother reported the matter to the village office on 06.01.2021. However, on 06.01.2021 the appellant left the door open providing an opportunity for the victims to escape. The duo left the house and hurried to PW1's grandmothers' house. They found no one and proceeded to the village office. The matter was reported to the police leading to the arrest appellant. The victims were given PF3 for medical examination. **BASID MPONDI (PW5)** a clinical officer from Ifunda RC Health Centre conducted on victims and observed

that the victims had been penetrated. The PF3 for PW1 and PW3 were admitted in evidence as **Exhibit P1** and **P2** respectively. The appellant was arrested and interviewed. During the interview he admitted having had sexual intercourse with the two victims. His cautioned statement was admitted as **Exhibit P3**.

In his defence, the appellant denied having committed the offence but admitted that he made a statement. However, he said that in his statement before the police he denied having raped the victims. He also said he did not know the two victims.

The trial court that tried the appellant found that the prosecution case was proved beyond reasonable doubt, hence the conviction. The appellant is now before this Court on an appeal. His memorandum of appeal contains three grounds of appeal as follows:

> *"1. That, the learned trial magistrate erred in law and fact to convict and sentence the Appellant a life sentence which is excessive punishment and against to the penal code when the victims were not under 10 years of age explained in such law.*
>
> *2. That, the learned trial magistrate erred in law and fact to convict and sentence the Appellant a life sentence and other counts thirty years imprisonment which were so contradicted and uncertain when the victim were the same age of 11 years of age which were clear.*
>
> *3. That, the learned trial magistrate misdirected himself to convict and sentence the Appellant without considering that it's not sense that if PW1 and PW3 raped at same time together at the same room and bed in 7 days when the examination by a doctor show that PW1 was affected of "Kaswende" and PW3 not, hence this evidence shows so contradicts and*

ambiguity if they being raped by Appellant or otherwise.

4. *That the prosecution side failed to prove the case against Appellant beyond reasonable doubts."*

Just like it was at the trial court, before this Court the appellant appeared in person and unrepresented. His memorandum of appeal has raised four (4) grounds of appeal in which simply put, he is challenging that the trial court decision for convicting him on the prosecution case that was not proved beyond reasonable doubt. In addition to that the appellant is challenging the sentence on the ground that the manifestly high given that the victims were above the (ten) years statutory threshold.

The appellant, a layman and self-confessed illiterate person, had nothing vital to add to the contents of his ground of appeal which he requested to be adopted. He added that the trial court erred in convicting him without taking into consideration that one of the victim was diagnosed with syphilis ("Kaswende") whilst the other was not. To him it was not possible to have sex with both of the victims and only one victim to contract syphilis. He also argued that it was not possible to sleep with two victims on the same bed. The appellant complained further that the trial court erred in sentencing him to life imprisonment when the victims were above eight years. Relying on the above averments, the appellant prayed his appeal be allowed so that he can see the light of the day.

The respondent, Republic was represented by **Ms Blandina Manyanda**, learned State Attorney who hastened to notify this Court of her opposition to the appeal. She submitted that the facts on record

supported conviction as the prosecution proved the charges beyond reasonable doubt. Referring to the testimony of PW1 and PW3 the counsel submitted that the two were explain how the appellant seduced them into having sex with him and turning them into wives for the period of seven days. She cited the case of **Selemani Makumba v. R.**, Criminal Appeal No. 94 of 1999 (unreported), for the position that in rape cases true has to come from the victim themselves. However, the counsel added that in the present case the victims' story was corroborated by PW5 who examined the victims and concluded that they were penetrated.

Countering the question why one of the victims did not contract syphilis whilst the other did, Ms. Blandina submitted that whether one or both victims contracted syphilis was a biological process which did not in any way suggest that they did not have sex. She insisted that whether or not one contracts a sexually transmitted disease (STD) was not one of the elements required to prove rape. In her view rape was proved through the testimony of PW1, PW3 and PW5.

Turning to subject of sentence, Ms. Blandina admitted that the victims were above ten years, however, she added that according to section 131(1) of the Penal Code, the minimum sentence for rape was 30 years whilst the maximum was life imprisonment. In her view the sentence was apposite as the trial court considered the circumstances of the case and elected to proceed with the maximum sentence

In rejoining, the appellant, being a layperson, had nothing substantial to add. He invited that the Court to considers his defence and the grounds of appeal.

My duty now is to considerer whether, in view of the available records of appeal and submissions made by the parties, the present appeal is merited.

Having carefully considered the grounds of appeal and submissions made by the appellant it seems to me that the kernel of the appellants grievance is that the trial court erred in convicting him on a case that was not proved beyond reasonable doubt. The appellant believes that the case against him was not proved to the required standard since there were severe contradictions and inconsistencies in prosecution witness testimonies. He also that the age of the victims was not properly established.

To start with, it is on record that the appellant was convicted based on the testimony of PW1, PW2, PW3, PW4, PW5 and PW5 alongside Exhibits P1, P2 and P3. The victims, PW1 and PW3, are reportedly to have testified that on the 31.01.2020 the appellant, sort of, abducted and kept them into his house for the period of seven days, from 31.01.2020 to 06.01.2021. The testimony adds that during the period the raped them twice each day. According to their testimony, in the morning the appellant left them inside the house and locked the door from the outside. It was only on 06.01.2021 that they managed to escape after the appellant had forgotten to close the door. In her testimony PW1 is recorded to have said: ***"... we didn't meet my grandmother, thereafter she take us to the village office ...".*** The testimony of PW1 is also supported by the testimony of PW3.

The testimony of the victim was meant to be corroborated by the testimony of PW2. In her testimony, PW2 testified that when she

realized her daughter, PW3, had gone missing on 31.12.2020 she unsuccessfully attempted to report on 01.01.2021. It is in her testimony that the matter was reported to the village office on 02.01.2020. She did not find the victims until on 06.01.2021 when she met them at the village office where they were brought by the militias. In her testimony PW2 is on record to have stated:

> *"On 02/01/2021 I went to the village office and informed them where they gave me a letter, a letter aimed to assist me to get them didn't get them in the next day I get them in 06/01/2021 that was seventh day,* ***I found Neema with Mariam at the village office, they were brought there with james sanga with others.*** *"*
>
> *[Emphasis is mine]*

From the above excerpt according to PW2 the victims were taken to the village office by one James Sanga and other local militia. However, at this juncture it is worth noting that neither James Sanga nor any of the militias were called to testify. This testimony also varies with the testimony of PW1 who said she was taken to the village office but did not mention the person who took her there. PW1 and PW3 did not mention anything about the militia.

On the other hand, **FESTA KISWAGA (PW4)** narrated a different story. In her testimony she said that on the morning of 06.01.2021 PW2 went to the office to report about her daughter who had gone missing for seven days. She enquired why PW2 had not reported the matter earlier. Thereafter she gave PW4 to secure a help of local militia in locating her daughter. Part of her testimony reads:

> *"On 06.01.2021 in the morning I was in the office. One Rahel Sanga came complaining her daughter one*

Mariam lost for seven days. I asked her why she didn't inform us. ***She said that she thought she will be back as it happens so previously.***

She said that she had information that her daughter is at the house of Mwakyembe. I wrote a letter and directed my militia to follow up in that home. ***In the afternoon she came such with Mariam and Neema and told me that they were in the house of Neema's grandmother."***

[Emphasis is mine]

Looking at the testimony of PW2, PW3 and PW4 one notices some clear inconsistencies and contradictions in their testimony. **First**, PW2 was not telling the truth as to when she reported the matter to the village office. In her testimony she is quoted to have said that she reported the matter on 02.01.2021. Having reported the matter, she was given a letter to trace the victims. She added that she could not find them until the 06.01.2021 when she found them at the village office. This piece of evidence is in direct contradiction with that of PW4 who testified that PW2 reported the matter to her office on 06.01.2021. **Secondly**, PW2 and PW4 contradict each other how the victims got the village office. PW2 testimony is that the victims were taken to the village office by one James Sanga and other local militia. The said James Sanga and the other militia were not called in to testify. PW5 on the other hand, contends that it was PW2 who took the victims to the village office. However, PW1 and PW3 do not say who took them to the village office. They even do not mention that it was PW2 who took them to the village office.

Thirdly, and perhaps most important, I am of a considered view that, the contradicting story between PW2 and PW4 on when the matter was reported raises the question on whether the victims were in fact

missing for seven days between 31.12.2020 and 06.01.2021. I say so because, apparently, PW2 did not provide any reasons why she did not report the matter to any person at an earliest possible time before the 06.01.2021. One wonders how a concerned mother would not report the disappearance of her daughter for six days and only to resurface and raise the disappearance when the said victims had appeared. I must also say that having examined the records, beside the oral testimony of PW1 and PW3 there is not any other piece of evidence demonstrating that PW2 reported the disappearance to any person or any authority until 06.01.2021. If really the two girls had gone missing why wasn't the matter reported to the police or the village authority on time? PW4 also said when PW2 brought the victims to the village office they were coming from PW1 grandmothers, house. These are various contradicting versions of the story. In my view, in absence of credible evidence on record that the victims were missing for seven days, it was unsafe for the trial court to conclude that they had been abducted by the appellant for the entire period between 31.12.2020 and 06.01.2021, let alone that they had been raped every day during that period.

If there is no concrete proof that the victims disappeared for seven days, it is inconceivable to make a finding that they were actually raped every day during the six days they were reportedly missing. It would also appear that one of the victims, PW3, had a tendency of disappearing and going back home the next day. This is according to the uncontroverted evidence of PW4. Even if the victims really disappeared for six days it was not sufficient to suspect that they were living with the appellant. It is well settled that suspicion alone is not a sufficient ground to warrant conviction.

In my considered view, the above cited contradictions and inconsistencies, considered in totality of evidence, are not minor. They are serious because they go to the root of the matter as they left a lot of unsewered questions and hence creating doubts as to whether the prosecution side proved its case beyond reasonable doubt. It is surprising that despite all the pointed inconsistencies and irreconcilable contradictions, the trial tribunal found that PW1, PW2, PW3 and PW4 were reliable and telling the truth.

I will now revert to the question of the age of the victims. In terms of the Penal Code, the general rule is that sexual intercourse is lawful or unlawful depending on whether or not there is consent from the female complainant. The law, under section 130 (2) (e) of the Penal Code, is very particular that for statutory rape, which the appellant was charged, whether or not the victim consents to the sexual intercourse is immaterial as long as the victim is below the age of eighteen years. In **Rutoyo Richard vs Republic** (Criminal Appeal 114 of 2017) [2020] TZCA 298 (16 June 2020): the Court of Appeal (Lila, J.A.) stated:

> *"As rightly argued by the learned State Attorney, the appellant was charged with the offence of rape under section 130 (1) (2) (e) and 131 (1) of the Penal Code. That section creates an offence of rape committed against a girl of the age of eighteen (18) and less now termed as statutory rape. Under that section, therefore, age of the victim is of great essence. For that offence to stand, it must be proved that the victim is eighteen or below. Times without number, this Court has demonstrated that need and casted that duty on the prosecution who, in our criminal jurisprudence is, imperatively obliged to prove the charge beyond all reasonable doubt. On this, we are grateful to Ms. Choghoghwe on her concession that, in the instant case, the prosecution did not completely lead any evidence tending to prove the age of the*

victim. The cited case of ***George Claude Kasanda vs The DPP*** *(supra) clearly illustrated that settled position of the law."*

The position of the law is also well settled that to establish the age of the victim there must be cogent evidence relating to age from the victim form the parent, close relative, close friend, teacher in which she was schooling or any person who knew well the victim was required. (See **Rutoyo Richard vs Republic** (supra) and **Elia John vs. Republic**, Criminal appeal No. 306 of 2016 (unreported).

In the instant case, both PW1 and PW3 said they were 11 years and students. PW2 stated that the victim was 11 years; and besides PW1's testimony, there was no witness who was called in to confirm on the age of PW1. However, given that the credibility of the testimony of PW1, PW2, PW3 and PW4 has been called into question due to their inconsistencies and contradictions, it cannot be said that the age of the victims was established to the required standard. The position in the authorities cited above supports a conclusion that the offence of statutory rape cannot stand where the age of the victim, which is one of the fundamental constituents of the offence, is not proved.

It is also on record that in its decision, another piece of evidence heavily relied on by the trial court was Exhibit P3, the cautioned statement of the accused which was tendered into evidence by **G.3122 PC Paul (PW6)**. The statement was recorded on 07.01.2021 from around 16:37hrs and 17:48hrs. In accordance with section 50(1) if **the Criminal Procedure Code, Cap. 20 R.E. 2019** the period available for interviewing suspect is the period within four hours commencing at the

time when he was taken under restraint in respect of the offence. The section reads:

> *"50.- (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say,* ***the period of four hours commencing at the time when he was taken under restraint in respect of the offence;***
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended."*

In the present case the appellant was arrested by the militia on 06.01.2021 and taken to Ifunda Police Station. He stayed at the police station up to around 16:37 when he was interviewed. We are not informed what happened between the time of arrest to the time when he was interviewed. The law stipulated above requires that the accused be interviewed within the period of four hours commencing from the time when he was taken under restraint. In the present case, that requirement went not complied. I am satisfied that, had the learned trial magistrate considered these circumstances it could not have accorded considerable weight on the said statement. Admitting the said document when it was recorded out of the prescribed and conferring it with the weight such as that which was conferred denied the appellant fair trial.

Before I conclude, I find myself constrained to comment on the question of identification which seemed to have informed the decision of the trial court. In its finding, the trial court was satisfied that, after leaving the appellants house, the victims positively identified the appellant at the earliest possible time to their relatives. However, the

records do not support this conclusion. As pointed out above, it is not even clear who was the first person the victims met after allegedly escaping from the appellant's house. Their story is that they went to PW1's grandmothers' house and they were taken to the village office. It is not clear who took them to the village office. It is unfortunately that the relatives, to whom the appellant was identified to by the victim, were not brought before the court to testify.

In her testimony PW2 said they were taken to the village office by John Sanga and others whilst PW4 said they were taken by PW2 who found them at PW1 grandmothers' house. However, we are told that at the village office they were able to name the appellant. It is also on record that, at one point, PW2 said she confronted the appellant about her missing daughter and that the appellant denied. However, she did not report her suspicion to the village authority or take initiatives to verify whether her child was with the appellant. I am not saying that she did not do much or that she should have exceeded her imagination. All I am saying is that her conduct and testimony leaves a lot to be desired. In light of the circumstances, I have explained here in, there is a reasonable doubt that the appellant could have been arrested based on suspicion. But, as has on several occasions being stated, suspicion alone is not sufficient to bring a charge, let alone convict the accused person.

It would appear that the trial court also relied on dock identification of the accused person by the victims. However, given the inconsistencies on how the accused was initially identified and in absence of an identification parade dock identification carries minimal weight. It was therefore unsafe for the trial court to confirm its decision based on dock identification.

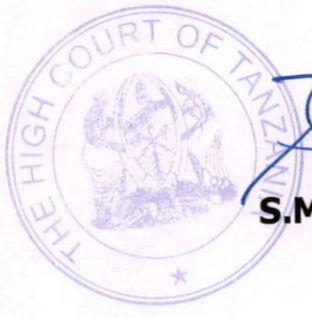
I am aware that the prosecution bares the duty to call the relevant witnesses they find convenient to prove their case. I am also alive that there is no rule compelling the prosecution to call a specific number of witnesses or a particular witness so speak. However, the prosecution has to parade key witnesses and present evidence to establish the charges against the accused person. I do not think this duty was properly discharged. For example, if the victims were able to explain the incident to the relative, there was no reason why the said relatives could not testify. Similarly, it the victims were taken to the village office by one John Sanga or any other militia, the said individuals should have testified to confirm this narrative.

All said and done, it is my finding that the offence of rape was not proved against the appellant. The protracted doubts in the prosecution case should be resolved in favour of the appellant.

In the event and for those reasons, I allow the appeal. Consequently, I order the appellant's immediate release unless his continued stay in prison is for another lawful ground.

It is so ordered.

DATED at **IRINGA** this **10th** day of **AUGUST, 2022.**



S.M. KALUNDE

JUDGE