IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

CRIMINAL APPEAL NO. 50 OF 2021
(Originating from Criminal Case No. 163/2020 of the Resident Magistrates' Court of Bukoba)

MTASINGWA GASPAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

26th August & 31st August 2022

Kilekamajenga, J.

The appellant was convicted and sentence by the Resident Magistrates' Court of Bukoba for the offence of rape. The charge levelled against the appellant contained information alleging that the appellant raped a girl of fourteen years on 08th June 2020 at Itawa Maruku village within Bukoba Rural District within Kagera Region. After the incident of rape, the appellant was arrested and finally charged under **section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 RE 2019.** He entered a plea of not guilty prompting a full trial of the case.

This being the first appellate court, I find apposite to revisit and evaluate the evidence adduced during the trial. The evidence of the victim shows that, on 08th June 2020, she visited her brother at Itawa Village. She later visited her friend called Gisela within the same village. While leaving Gisela's house, the appellant

volunteered to escort the victim back to her brother's house. On the way, the appellant dragged the victim into a coffee farm and raped her. The victim went to her brother's house and narrated the incident to her grandmother. On 11th June 2020, she was taken to Bukoba Police Station where she was given a PF3 form and went to Kabale Dispensary for medical examination.

PW2, being the victim's mother testified that, the victim was born on 10th April 2006. She tendered a clinic card to prove the age of the victim; the card was admitted as exhibit P1. She testified further that, she went to see the victim on 10th June 2020 after receiving information about the incident. They tried to settle the matter but the Division Officer (Diwani) insisted the matter be reported to the police. She took the victim to the police station where she received a PF3 form and she took the victim to the Hospital for examination. The police who investigated the case (PW3) receive the file of this case on 16th June 2020 and the appellant was already in the police lock-up. After completing the investigation, the appellant was charged in court. PW4 who was a nurse at Kabale Dispensary examined the victim; she observed some bruises on the labia majora and saw the victim discharging some whitish mucus from the vagina. She further noticed that the victim's vagina was penetrated two days ago. She filled-in the PF3 which was admitted as exhibit P2.

In the appellant's defence, despite denying the accusation of rape, he impugned the prosecution's evidence alleging that, the victim was taken for medical examination three days after the alleged rape. He further challenged the victim's evidence arguing that, the victim did not call for help during the alleged rape.

The trial court finally convicted and sentenced the appellant to serve thirty years in prison coupled with twelve strokes as corporal punishment. The appellant approached this court for justice with the following grounds:

1. *That, the learned trial magistrate erred in law and fact to convict the appellant relying on defective evidence of PW1 (victim) being admitted in contravention of section 127(2) of the Evidence Act, Cap. 6 RE 2019.*
2. *That, the trial court failed to scrutinize the prosecution evidence and compel the prosecution side to bring the said Gisela to confirm the said allegations against the appellant.*
3. *That, the trial magistrate erred in law and fact to dismiss the appellant's defense of alb (sic) contrary to section 194(5) of the CPA Cap. 20 RE 2019 and adopted to only believe one side of the prosecution contrary to the justice administration.*
4. *That, the trial magistrate erred in law and fact to convict the appellant relying on contradicting evidence of PW1 (victim) mentioning two different places of one incident where the charge sheet mentions at Maruku village and the victim (PW1) mentions Itawa.*
5. *That, the trial magistrate grossly erred in law and fact to convict the appellant of the evidence of one party with personal interests and failed to compel other credible witness at least one neighbour who might have witnessed the incident.*

6. *That, the trial court erred to reach such decision against the appellant with no proof of the DNA profiling test.*
7. *That, the PF3 was filed very late after three days where the essential elements of rape had already been spoiled as the victim had already been washed, the PF3 was not read out aloud, so violating section 211(3) of CPA Cap. 20 RE 2019. It should be expunged out.*
8. *That, the case was not investigated by any professional officer whereby no police officer appeared in court to confirm the allegations.*
9. *That, the evidence adduced by PW1 (the victim) was doubtful contradicting with her early statements she adduced at the police station.*
10. *That, the prosecution evidence adduced in court leave a lot of doubts, the case was not proved beyond reasonable doubt.*

This court invited the appellant to argue the appeal who simply urged the court to adopt the grounds of appeal and set him at liberty. On his side, the learned State Attorney, Mr. Mwasimba objected the appeal arguing that, the court complied with the law in recording the evidence of the victim. Also, the PF3 was admitted and read in court and that the appellant never advanced the defence of alibi. He further argued that, this case had no any issue that required DNA test.

The rejoinder from the appellant revealed that, the victim was examined by an unqualified person; the nurse who examined the victim only took urine and blood samples from the victim for HIV and Malaria testing. He insisted that the case was cooked against him.

In this appeal, I find the tenth ground of appeal relevant for discussion. In his grounds of appeal, the appellant challenged the prosecution for not proving the case that the appellant actually raped the victim. However I find several flaws which might have affected the prosecution case. **First**, the rape of a fourteen years old girl is a statutory offence; its proof required the prosecution to prove the age of the victim. According to the established principles of law developed through case law, the age of the victim of the victim in rape cases may be proved either by production of a clinic card, medical doctor's report, production of birth certificate, the testimony of the parents or production of the certificate of baptism. See, the case of **Edson Simon Mwombeki v. The Republic**, Criminal Appeal No. 94 of 2016, CAT at Mwanza (unreported).

In this case, the prosecution, through PW2, tendered the clinic card intending to prove that the victim was fourteen years old when she was raped by the appellant. However, a quick glimpse of the tendered clinic card reveals some disturbing features. Despite the fact that, the prosecution tendered the copy of the clinic, and there are no reasons explaining why the prosecution tendered a certified copy of the original and not the original clinic card. Nonetheless, the same card clearly shows that it was annotated to fit this case. While the victim's name in this case is Julieth Jonathan, the clinic card bears the name of Maria

Jonathan Nestory. Furthermore, there is a clear ink to edit the name of Maria to capture the name of Julieth Jonathan. In my view, this annotated card clinic ought not be admitted. Though, in absence of this clinic card, there is further evidence to prove that the victim was fourteen years old. The victim's mother testified that the victim was fourteen years old and tendered the controversial clinic card. I understand, in proving the age of the victim, the parent's testimony may have stronger evidence than that of a medical doctor. In the case of **Edward Joseph v. Republic**, Criminal Appeal No. 19 of 2009 (unreported), the Court of Appeal of Tanzania stated that:

> *'Evidence of a parent is better than that of a medical Doctor as regards the parent's evidence on the child's age.'*

In this case, the court has reached a point of questioning the credibility of PW2. She testified that, they wanted to settle the rape incident out of court but the Division Officer objected that move. This is the witness who tendered the edited clinic card to support the allegation that, the victim was fourteen years old. In my view, the evidence of PW2 ought to have accorded little or no weight and therefore unreliable. In my view, the victim's age was not substantiated and failure to prove the age of the victim vitiates the prosecution evidence and the trial court's conviction lacks legs to stand.

Second, the charge shows that, the alleged rape was committed at Maruku village. The charge was later edited to show that the offence was committed at Itawa Maruku. However, the whole prosecution evidence does not mention anything in connection with Maruku. The prosecution evidence suggests that, the victim lived at Maruku village but she visited her grandmother at Itawa village where she alleged to have been raped. Where there is discrepancy between the charge and the evidence being adduced, the contradiction must be assessed whether it goes into the root of the case. In the case of **Mathias Samwel v. Republic**, Criminal Appeal No. 271 of 2009 CAT (unreported), the court stated that:

> *'When a specific date, time and **place** is mentioned in the charge sheet, the prosecution is obliged to prove that, the offence was committed by the accused by giving cogent evidence and proof to that effect.'* (Emphasis added).

In the case at hand, Itawa and Maruku are two different places. The whole scale of prosecution evidence does not suggest whether there is place called Itawa Maruku. I find this irregularity pertinent and to have affected the strength of the prosecution evidence.

Third, the alleged rape, according to the charge and other evidence, seems to have been committed on 08th June 2020. But, the victim went for medical examination on 11th June 2020; that means three days after the alleged rape.

The PF3 form shows that the victim was found with a swollen labia majora and she seemed to discharge some whitish mucus. Definitely, the examination done after three day from the date of the alleged rape cannot reveal anything pertinent to prove rape. Even the swollen labia majora and the discharge of mucus cannot support that the same was caused by the rape committed by the appellant three days before.

Fourth, the medical examination done to the victim was conducted by a nurse something which goes contrary to the ethics and practice in the field of medicine. The duties of a nurse, among others, is to carry out instructions given by a Medical Practitioner or Doctor. He/she cannot conduct medication examination to a raped victim or perform Postmortem examination. If a nurse takes the responsibility of a medical doctor, certainly, he/she usurping the duties beyond his/her job description. Therefore, the PF3 form filled-in by a nurse suffers the consequences of being expunged from the record of the trial court.. The Court of Appeal of Tanzania was faced with the same predicament in the case of **Hamis Kayanda v. The Director of Public Prosecutions**, Criminal Appeal No. 166, CAT at Mbeya and decided that:

> *'...a nurse midwife is not a medical practitioner for purposes of medical examination reports. The court expunged exhibit P2 which a PF3 that had been prepared by the nurse. On this aspect we must follow suit, and*

without further ado we hereby expunge exhibit P6, the medical examination report dated 3rd January 2016.'

In the case at hand, in absence of the PF3 form, the prosecution evidence remains with the oral testimony of a nurse which also cannot be taken as an expert's opinion.

In conclusion, the above listed flaws leave no doubt that prosecution case was weak to sustain the conviction. I find merit in the tenth ground of appeal to the effect that the prosecution failed to prove the offence of rape against the appellant. I hereby allow the appeal and order the release of the appellant unless held for other lawful reasons. It is so ordered.

Dated at Bukoba this 31st day of August 2022.

Ntemi N. Kilekamajenga
JUDGE
31/08/2022

Court:

Judgement delivered this 31st August 2022 in the presence of the appellant and the learned State Attorney, Mr. Amani Kirua assisted by the learned State Attorney, Miss Evarista Kimaro. Right of appeal explained.

Ntemi N. Kilekamajenga
JUDGE
31/08/2022