IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 66 OF 2021

(Arising from Criminal Case. No. 153 of 2020 in the District Court of Serengeti at Mugumu)

OMARY S/O JOSEPH @ TANGARA .....1ST APPELLANT

KABICHI S/O OBINYI @ OWAKA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

30th August & 30th September, 2022

F. H. Mahimbali, J.

The appellants in this case were convicted of gang rape by the trial court upon satisfaction by the prosecution evidence that the appellants committed the offence charged with. According to the charge sheet, this is an offence contrary to section 130(1), (2)(a) and section 131A of the Penal Code, Cap 16 R.E 2019.

It was alleged by the prosecution that on the 6th day of April, 2020 at Miseke village, the appellants had carnal knowledge with AB (real name withheld to disguise her identity).

The appellants pleaded not guilty to the charge. This compelled the prosecution to bring a total of four witnesses and tendered two exhibits.

In essence PW1 (the victim) testified that, on the 6th April 2020 at about 05.00pm she was on her way to Majengo where she met the appellants. The first appellant then held her by force to the bush. As she resisted, the second appellant joined force, and pulled her into the bush. While threatening her not to shout, they started beating her and then they started having sexual intercourse with her without her consent. First, was the first appellant and then followed the second appellant. As if that was not enough, after the appellant had quenched their thirsty, they powered sands into her eyes and then took her aside the road and they took their away. She was helpless for some time until almost midnight when she heard someone passing. She called for help, where then was taken to her relative and later to local leader. Later was taken to police and then hospital where she was admitted for some days before she was discharged.

Pw2 - Local leader, his testimony is to the effect that on the 7th April, 2020 mid night while asleep, he was notified of the victim being raped and sick. He got out and witnessed the victim being so weak. He

inquired from her as what befell her, she replied that the appellants had raped her. He prepared a letter referring her to police.

Pw3, Clinical officer, testified that on that day of 7th April, 2020 around 05.00 a.m, while at Nyerere DDH (Hospital- Serengeti) he received the victim being helpless. He inquired from her what was long. He then examined her vagina and labia which he established her were swollen. He then admitted her for seven days and attended her medically, and later filled PF3 which was admitted as PE1 exhibit.

Pw4 is an investigator of the case file at Police. After being assigned with police case file, he visited the hospital, examined some witnesses and proceeded with efforts of arresting the appellants. He interrogated them, and later prepared these charges.

The appellants in their testimonies denied involvement and responsibility of the said gang rape.

Upon hearing of the case, the trial court convicted the appellants and consequently sentenced each to 30 years imprisonment.

Aggrieved by both conviction and sentence, the appellants have preferred this appeal to this Court with two grounds of appeal:

1. *That the trial magistrate erred in law and fact to rely on credibility of the prosecution witnesses which were unreliable and questionable.*
2. *That the offence which the appellants were charged and convicted for were not proved beyond reasonable doubts.*

During the hearing of the appeal, for appellant was Mr. Cosmas Tuthuru learned advocate, whereas for the respondent was Ms Monica Hokororo learned state attorney.

Submitting in the first ground of appeal, Mr. Tuthuru argued that this being a charge of rape, the evidence in record has not established the ingredients of rape as charged. He alleged that, what has been stated by PW1, is so general. It cannot be said that there is rape. In buttressing his stance, he invited this Court to have a glance the decision in the case of **Akizimana Syrivester vs Republic**, Criminal Appeal No 181 of 2007, CAT at Mwanza page no 10 the Court of Appeal which insisted that for an ingredient of rape to be established, proof of penetration was very necessary.

On credence of prosecution witnesses, he contended that PW1 had not stated how she was raped by the appellants. During cross-examination, PW1 could not even clarify how she was raped. The testimony of PW3 also states very general. There cannot be credence to

such witness. Despite the fact that best evidence comes from the victim/prosecutrix, but for it to be best, its credibility should not be questioned.

With how penetration is proved, it must be done during examination in chief. See the case of **Mutasha Khamis vs Republic**, Criminal Appeal no 70 of 2016, CAT at Mbeya) at paged 16.

In resisting the appeal, Ms Monica Hokororo learned Senior state attorney, reacted against the first ground of appeal. She submitted that the evidence in record is clear that all witnesses were credible (page 17 of the typed proceedings). As there was sexual intercourse, that was penetration in law. She invited this Court to be guided by the decisions of the Court of Appeal in **Nkanga Dauid Nkanga vs Republic**, Criminal appeal No 316 of 2013, CAT at Mwana at page 10, **Hassani Bakari @ Mama Jicho vs Republic**, Criminal Appeal NO 103 of 2012, CAT at Mtwara (page 9-10)

She added that as per page 15 of the typed proceedings, there were proof of important ingredients of rape: penetration and force. What PW2 stated is not contradictory but rather corroboration. Reporting the incidence earliest time is an assurance of the witnesses'

reliability (**Jaribu Abdalah vs Republic.** (2003) TLR 271 and **Marwa Mangibi vs Republic** 2002 (TLR) 39).

She exemplified that, the PW1's testimony is collaborated by PW3's testimony (Doctor) and that he identified exhibit PE1 (pf3). Therefore, the argument by Mr. Cosmas Tuthuru is baseless on this issue.

She added that, as per section 131 (A) of the Penal Code Gang rape is punishable with life imprisonment. For them being sentenced to 30 years, the sentence was not appropriate. This being an appellate court, by virtue of section 366 (1) (ii) (a) of the CPA invited this Court to enhance the sentence to life imprisonment.

She rested her submission, by praying that the appeal be dismissed on conviction but on sentence, it be enhanced to life imprisonment.

In his rejoinder submission, Mr. Tuthuru insisted that as per this case, there is no proof of penetration. What the learned state attorney has submitted is to the effect that the cited case's only offered definition of sexual intercourse but not aided establishing rape.

With credibility of prosecution witnesses, it is hardly believable. In the cross-examination, there is a different story put. It is hard to believe.

On the lengthy of sentence as they didn't appeal, the Republic has no room for enhancing the same. That was all.

Having scrutinised the submissions by both sides, authorities for guidance, the evidence in record and the trial court's proceedings, the vital question is whether the appeal is meritorious. In other words, has gang rape been established as per evidence in record?

This being criminal case, the Republic has two folds responsibility: one, to prove that the offence was committed, two that it is the accused persons who committed it, (See **Mariki George Ngendakumana Vs The Republic**, Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported).

According to law, where a male person has sexual intercourse with an adult woman without her consent commits an offence called rape. This is what is provided under Section 130 (1) of the Penal code.

> *130.-(1) It is an offence for a male person to rape a girl or a woman.*

(2) A male person commits the offence of rape if he has ***sexual intercourse with a girl or a woman*** *under circumstances falling under any of the following descriptions:*

(a) not being his wife, or being his wife who is separated from him ***without her consenting to it at the time of the sexual intercourse****;*

In this case, an offence of rape involves a woman of 58 years. Therefore, an issue of consent is necessary to disapprove if rape was not committed. According to the evidence in record, it is clear that the victim was known carnally by force by the appellants (PW1 and PW3).

The law further provides that, if the offence is committed by more than one male person, then the offence is called gang rape. The same is coached in the following words:

131A.-(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.

(2) Subject to provision of subsection (3), every person who is convicted to gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape.

(3) Where the commission or abetting the commission of a gang rape involves a person of or under the age of eighteen years the court shall, in lieu of sentence of imprisonment,

impose a sentence of corporal punishment based on the actual role he played in the rape.

Coming back to the case at hand, Mr. Tuthuru is arguing that the offence with which the appellants were charged with, were not established by the prosecution. As to why it has not been established, he is submitting that for an offence of rape to stand, there must establishment that there was penetration. In this case, he submits that penetration is lacking. Revisiting the evidence, the words used by the victim (PW1) in her testimony are these:

"They pulled me into the bush and started to have sexual intercourse with me.....the first accused started to rape me and the second accused was the second" (see page 15 of the typed proceedings).

The Court of Appeal in the case of **Nkanga Dauid Nkanga vs Republic,** Criminal appeal No 316 of 2013, CAT at Mwana at page 10 drew an inference of the words "sexual intercourse" or "have sex" and the like were explicated in the case of **Hassan Bakari @ Mamajicho v. Republic,** Criminal Appeal No. 103 of 2012, CAT (unreported) in which the Court said that:-

*"...it is common knowledge that when people speak of **sexual intercourse** they mean the **penetration** of the penis of a male into the vagina of a female. It is now and*

> *then read in court records that trial courts just make reference to such words as* ***sexual intercourse*** *or* ***male/female organs*** *or simply to* ***have sex****, and* ***the like****. Whenever such words are used or a witness in open court simply refers to such words, in our considered view, they are or should be taken to mean the* ***penis penetrating the vagina...*** *"[Emphasis added).*

In this case therefore, the words: *They pulled me into the bush and started to have sexual intercourse with me.....the first accused started to rape me and the second accused was the second"* sufficed a suggestion that there was penetration as per law. With this, I beg to differ with Mr. Tuthuru's old position to suit in the circumstances of this case. As per facts and evidence provided in this case, I am satisfied that by the appellants having intercourse with the victim, they had carnal knowledge with her in alternate and that meant penetration. Since best evidence in rape cases comes from the victim/prosecutrix, I have no good reasons not to believe it.

On the second bullet, Mr. Tuthuru, wants us believe that the prosecution witnesses were incredible. He contended that PW1 had not stated how she was raped by the appellants. That during cross-examination, PW1 could not even clarify more on this how she was raped. He added that the testimony of PW3 is very general. There cannot be credence to such witness.

I beg to differ with him. PW1 stated clearly in her testimony how she first met with the appellants on her way to Majengo. They pulled her into the bush, started sexual intercourse with her. That there were no words such as undressing, being put down, the appellants' male organs were inserted into her vagina should not be taken as standard words that each victim must be stating in similar words. There are several ways in which people can make expression of the same thing but in different words. Every case must be considered in its own circumstances.

It is trite law that every witness is entitled to credence and must be believed and his/her testimony accepted unless they are good and cogent reasons for not believing a witness. This is as per the case of **Mathias Bundala vs Republic** , Criminal appeal No. 62 of 2004 CAT at Mwanza where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, where the court held that:

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".*

Before I pen off, in the course of reading the trial court's records, I have encountered that the charge sheet has not fully explained the charged offence of rape. The same is worded:

"OMARY S/O JOSEPH @ TANGARA KUMARI and KABICHI S/O OBINYI @ OWAKA, on 6th day of April, 2020 at Miseke village within Serengeti District in Mara Region, had carnal knowledge with one ESTHER D/O MACHABA @ SENGERI."

The particulars of the offence miss some important ingredients of rape: age of the victim and "consent". However, in digest to the testimony of the case and what the appellants responded, I am fully satisfied that the appellants knew what they were replying and defending. Pursuant to section 388 (1) of the CPA, the omission to particularise the charge properly so as to embody the important ingredients of "age of the victim" and "consent" did not occasion injustice to the appellants as per circumstances of this case. I hereby find that as the evidence has established the age of the victim is 58 years and that there was an application of force, despite that error, the justice of the case met its proper end.

As regards to the appropriate sentence imposable to a convict of gang rape, I agree with Ms Monica that as per the inflicted sentence of 30 years was not collocative with the proper sentence as per law. This Court is now mandated to alter the sentence and substitute it with the proper sentence in view of section 366 (1) (a) (ii) of the CPA, Cap 20 R. E. 2022. That the Republic has not appealed against it, is not a reason

that we should leave it being unlawful. Since at appellate level the Court is enjoined to correct any error by the subordinate court, it can also do in sentence enhancement provided that the same is deliberated as done here through Mr. Tuthuru. Something unlawful, cannot be left to pass on the pretext that it has not been appealed against.

That said, I find this appeal being devoid of merits. It is dismissed in its entirety.

That said, appeal is dismissed. However, sentence is enhanced to life imprisonment as per law (section 131A (2) of the Penal Code, Cap 16 R. E. 2022 read together with section 366 (1) (a) (ii) of the CPA, Cap 20, R. E. 2022.

DATED at MUSOMA this 30th day of September, 2022.

F. H. Mahimbali

JUDGE

Court: Judgment delivered 30th day of September, 2022 in the presence of the Mr. Frank Nchanila, Mr. Gidion Mugoa, RMA and Appellant being absent.

Right of appeal is explained.

F. H. Mahimbali

JUDGE