IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 93 OF 2021

(Originating from the Resident Magistrate Court of Singida at Singida in Criminal Case No. 178 of 2020)

BARAZA ADAM .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

15/6/2022 & 07/9/2022

KAGOMBA, J

The appellant, BARAZA ADAM, being aggrieved by the decision of the Resident Magistrate Court of Singida at Singida (henceforth "trial court") delivered on 19/07/2021 which convicted him for the offence of rape C/S 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E 2019] and by which he was sentenced to serve thirty (30) years imprisonment has filed his Petition of Appeal to overturn that decision. The appeal is based on ten grounds rephrased as follows:

1. That, the trial court erred in law and fact for believing that the prosecution side proved its case beyond reasonable doubt.

2. That, the trial court erred in law and fact for not conducting "voice -dire" test for PW1, the victim contrary to section 127(2) of the Evidence Act [Cap 6 R.E 2019]. Hence conviction and sentence unlawfully entered against the appellant is unlawful as per decision in **Mohamed Sinyeye vs. Republic**, Criminal Appeal No. 57 of 2010, CAT at Arusha; **Nyasani Bichana vs. R** (1958) EA 90 and **Hassan Hatibu vs. Republic**, Criminal Appeal No. 71 of 2002.

3. That, the trial court entertained a cooked case against the appellant as there was no specific date between year 2019 and August 2020 when the alleged act occurred and the appellant was unjustly convicted under general allegation, with no specific date and time.

4. That, according to the testimony to PW2- Fadhila Mosses Maliki, the victims's mother, the victim when taken to unknown hospital on 25/8/2020 she was diagnosed with fungus and not that she was raped, hence the appellant was unjustly convicted of raping her.

5. That, the trial court erred in law in convicting the appellant for rape while the widening of the victim's vagina was due to scratching it because she had fungus as per testimony of PW2.

6. That, the testimony of PW3-Dr. Lameck Francis who examined the victim did not say in his findings that the victim was raped, but found that the victim had lost her hymen which loss could be caused by other reasons, not necessarily rape.

7. That, PW4 G.1737 DC Samson Mathias, cheated the trial court while under oath as the Doctor's report didn't indicate the victim was raped, thus his testimony was a mere hearsay which ought to have been rejected.

8. That, the prosecution side failed to tender the cautioned statement of the accused, which signifies that the case was cooked as the appellant was denied a right to comment on the allegation he was facing, hence the appellant's right to be heard was denied.

9. The trial court erred in law and fact for rejecting the accused's defence together with his witnesses, and by doing so the trial court required the appellant to prove his innocence beyond reasonable doubt, which is against the law.

10. That, the trial court erred in law and facts for non-compliance with section 210(3) of the Criminal Procedure Act, [Cap 20 R.E 2019] as all witnesses were not told their rights of their testimonies to be read over them, which is fatal according to the case of Mohamed Rashid Shembazi vs. The Republic, HC Criminal Appeal No. 22 of 2019.

Before the trial court, It was alleged that on unknown dates and month between 2019 and August 2020 at Nduguti village, within Mkalama District in Singida Region, the accused did have sexual intercourse with a girl of twelve (12) years and a standard four pupil at Ndugati Primary School. He

pleaded not guilty and after trial, the trail court was convinced by PW1-the victim's "clear account on how the accused penetrated into her vagina and had sexual intercourse with her", and that duo had sexual intercourse two twice, in December, 2019 nearby the house where the appellant saw the victim and pulled her to himself, laid her down and undressed her as he undressed his trouser and then he inserted his penis into her vagina.

Based on the above account depicted from the victim's testimony, the trial court found the appellant guilty of Rape as charged and sentenced him to 30 years' imprisonment. This was after differing with the appellant, who in his testimony refuted all the evidence of prosecution and categorically denied to have sexual intercourse with the victim. The appellant has therefore been aggrieved by the conviction and sentence pronounced against him, hence this appeal.

On the date of hearing of the appeal, the appellant was unrepresented while Ms. Patricia Nkina, learned State Attorney, appeared for the respondent. The appellant, being a lay litigant, prayed the court to adopt his Petition of Appeal, conder it and set him free.

Ms. Mkina, for the respondent opposed the appeal. She replied to the 3rd, 7th, 8th and 9th grounds of appeal jointly as they all relate to proof of the case. She submitted that the prosecution proved the case beyond reasonable doubt because the victim (PW1) in her testimony was able to properly

identify the appellant who is their neighbour in Nduguti village, Mkalama District within Singida region.

She submitted further that PW1 also testified well that she had sex with the appellant twice, she adduced evidence on penetration, how the appellant undressed her and undressed himself and then put his penis into her vagina. The learned State Attorney argued that by that testimony of PW1 the provision of section 130(4) on proof of penetration was complied with. She referred to the legal position set in **Selemani Makumba v. Republic**, (2003) T.L.R 379 that the victim is the best witness in rape cases.

Ms. Nkina further submitted that testimony of PW1 was corroborated by her mother (PW2) as well as the medical doctor who examined the victim.

I have gone through the records of the trial court, especially the testimony of the PW1- the victim and other testimonies including the defence. The issue is whether the case against the appellant was proved beyond reasonable doubt.

In this case there is no doubt that the victim was raped. Given her age, the proof by PF3 tendered by medical doctor did prove rape. However, the only evidence that links the appellant with the commission of rape is that of PW1. No one else testified to the effect of proving that it the appellant and not anybody else who raped the victim.

According to PW1, both rape incident occurred in the evening. There is nowhere in the prosecution evidence the issue of whether it was dark or there was ample light for the victim to identify the appellant.

When she was re-examined, as per page 13 of the typed proceedings she replied that there was no light.

When she was questioned by the court, she said it was her first time to have sexual intercourse. In the first incident that is alleged to happen in December, 2019 she testified that she was going to take back her school exercise to her teacher one Mbagala, at the teacher's home, and she was raped on her way back. Nowhere in evidence the prosecution showed interest to know whether that teacher was a man or a woman, and or if the teacher has boys at home who could equally be capable of raping the victim. She stated it was in the evening hours without specifying the state of light for purpose of identification. As she testified that it was her first time, her testimony doesn't show if she had troubles on walking or not after the alleged rape incidents. Apparently, it was not discovered that she was raped on that date despite of being at home during corona leave. This put question to whether it was her first time to have sexual intercourse.

While it is immaterial whether or not she had sex with the appellant for the first time, the general evidence of PW1 cast doubts to credibility of her testimony. The doubt increases with the fact that the cautioned statement of the appellant was not tendered. With such doubts on credibility

of the witness I find it unsafe and in fact very dangerous to uphold conviction without sufficient corroboration as to who actually raped the victim. For this reason, I quash the conviction and set aside the sentence. The appellant is set free forthwith.

Order accordingly.

Dated at **Dodoma** this 7th of September, 2022.

ABDI S. KAGOMBA

JUDGE