IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTY OF ARUSHA]

AT ARUSHA

CRIMINAL APPEAL NO. 81 OF 2022

(C/F Criminal Case No. 128/2020 Babati District Court)

ANDREA KAHAWA.....APPELLANT

VERUS

THE D.P.P.....RESPONDENT

JUDGEMENT

3 & 6 October, 2022

KOMBA, J

The appellant, Andrea S/O Kahawa was charged and convicted of the offence of rape contrary to sections 130(1) (2)(e) and 131(1) both of the Penal Code, [Cap 16 R.E 2002, now R.E. 2022] by the District Court of Babati at Babati (the Trial Court). It was alleged by the prosecution that on 02/08/2020 at Kisesa along Babati in Manyara Region, the appellant did have carnal knowledge of a 10 years old girl, who, for the sake of hiding her identity, will hereinafter be referred to as the victim or PW2. The appellant pleaded not guilty to the charge and after a full trial he was convicted of the charged offence and sentenced to 30 years imprisonment. Aggrieved by the said decision he file appeal to this court.

Before I proceed, an account of what led to the appellant's conviction albeit in brief, will be helpful. In proving the charge against the appellant, the prosecution paraded five witnesses and had two exhibit. Apart from the victim (PW3), other three witnesses were Juma Kokota (PW1 victims' father), Kesia Juma (PW2), Osaward S/O Benson (PW4) and WP 5594 D/CPL Levina (PW5). The prosecution did also rely on two exhibits, namely; a Police Form Report (PF3) and sketch plan which were tendered in evidence as PI and P2 respectively. The appellant was a sole witness in his defence.

PW3's testimony was to the effect that, on 02/08/2020 She was grazing cattle and she felt thirst and informed PW2 that she is going to the nearby house to ask for some water to drink near to the area of grazing. On her way she meets babu Andrea (appellant) who did her *tabia mbaya*, she said babu undress her clothes and underwear and babu take his penis and put to her vagina (she said this by gestures) She shouted as she was raped and it was paining.

After that action, appellant dress up and run away. She said she know the appellant because he used to *kubeba magogo* and always see him on the way to grazing. When she returned home, she informed her mother about

this situation and the mother took her to hospital. She know the appellant by name of Andrea.

There was also evidence from Osward Benson (PW4), the medical doctor, who medically examined PW3 and who tendered a PF3 as exhibit P1 and also from the case investigation officer WP 5594 D/CPL Levina (PW5) who tendered sketch plan as exhibit P2.

In his sworn defence, the appellant maintained his denial to have raped PW3. He told the trial court that he quarrels with the complainant as his duty is to take *kuni* with tractor and complainant does the same work of selling *kuni* to appellants' customers.

The learned trial court's Magistrate found the evidence given against the appellant sufficient to prove the charge. In so finding, he placed much reliance on PW3 whose evidence was found to be credible and reliable. PW3 was found a witness of truth whose evidence was the best in terms of **Saidi Ally Mkong'oto V. Republic** Criminal Appeal No. 133 of 2009 (unreported) and trial court convicted him, as said earlier, being dissatisfied, the appellant lodge this appeal with 6 grounds. I am obliged to reproduce all of the

grounds as lodged by the appellant for reasons which will be known later. Grounds are as follows; -

1. *That, the learned trial Magistrate grossly erred in law and fact to convict and sentence the appellant on a judgment which contravened the mandatory requirements section 312 (1) of CPA Cap 20 R.E. 2019 as the same has no even mandatory requirement of section 235 of CPA Cap 20 R.E. 2019 complied after the trial Magistrate found guilty the appellant and proceed to convict him, also the judgment has no any section of Law complied by the trial Magistrate in sentencing the appellant. Rather the same has only the provisions of section charged the appellant in convicting instead of section 235 of CPA and having critical and trough evaluation and determination the evidences on record. Hence the said Judgment is null and void.*
2. *That, the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant on a court proceeding which was not proper prepared and well-arranged as the same has many errors which made the whole proceedings to be null and not attractive by any court of law in convicting and sentencing the appellant.*

3. *That, the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant based on shakable, unreliable prosecution evidence, also on a case of prosecution side which was poorly investigated hence missing a lot of material witnesses summoned (call) before the trial court to testify whom were alleged to be gathered when the victim shouted after the appellant inserted his penis in the victim's vagina whom from their connection transaction equation were able to testify to the material facts.*
4. *That, the learned trial Magistrate erred both in law and fact to convict and sentence the appellant after failed to comply in proper with the Mandatory requirement of section 127 of TEA as amended as section 26 Act No. 4 of 2016 of TEA before starting to record the evidences of the witness No.2 and 3 (PW2 and PW3) who were the children of tender age. Where they were supposed to tell the truth and not lies before the court, rather the same did not do the same out of only the explanations of the court and not of the witnesses mentioned, hence their evidences should not be based by any court of law to convict and sentence the appellant.*

5. *That, the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant based on shakable, and unreliable evidence of the prosecution witness No. 4 who was a Doctor examined the victim as the said Doctor testified to examine the victim on 02/08/2020 the day where the alleged accident occurred and in his (PW4) report the Doctor testified to found only sperms in the victim's Labia Majora with the loose of hymen, but he did not testify to found ant bruises in the vagina of the victim, which thing is impossible for a child of 10 years to be raped by a male of 52 years old and not make any bruises on her vagina. Where the loosing of hymen can be caused by many objects or activities out of only inserting the penis of the appellant. Hence the penetration was not proved under section 130 (4) of the Penal Code Cao 16 R.E. 2019.*
6. *That the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant on a charge which was not proved beyond reasonable doubt and to the required standard of law.*

During hearing of this appeal, the appellant appeared in person, unrepresented, whereas, the respondent Republic was represented by Ms. Yunis Makala, learned State Attorney.

When invited to argue his appeal, the appellant adopted the grounds of appeal as listed in his memorandum of appeal and he pray this court to adopt petition of appeal as filed.

Ms. Makala intimated , at the outset, that she was not supporting the appeal. She said appellant filed six (6) grounds and she will respond chronologically starting with the first ground, she said that in the 1st ground the applicant claim on procedures that was contrary to Section 312 (i) and 235 of Criminal Procedure Act. The Section 312 (1) is about judgment to have issues analyzed, date, reason and must be signed. She said if one reads the judgment from page 6 there are issues which was analyze, Magistrate goes to evidence and explained why he convict the appellant and endorse his signature at the end, the Section was not contravened and therefore, to her opinion this ground is baseless.

The 2nd ground of appeal that proceedings was not written correctly and poorly arranged. Ms. Makala said the proceedings are in order, its written

basing in all requirements and that typo does not prejudice applicant. The 3rd ground which was about error in law because material witness was not called to testify, State Attorney base her argument on Section 143 of CAP 6 which is to the effect that provides there is no specific number of witnesses to prove certain facts, she said the victim (PW3) explained in court and prove how the rape was committed so we find this reason is baseless and she prayed the same to be disregarded.

4th ground was about the trial court convict him without considering Section 127 of Cap 6 to witness PW2 and PW3 who were children. The section cited, which is 127 (2) is to the effect that the child can give evidence but before that the child should promise not to tell lies. She submitted that at page 11 of proceedings the court satisfy itself that the child knows the importance of telling truth that's when she takes an oath and testify. Even PW3 also the Court satisfy itself that the witness knows the importance of speaking truth. She further submitted that for the taking oath, these two witnesses, they know what they were saying. Its evidence that they know duty to speak true, as provided in section 127 (2) the Court of Appeal of Tanzania in **Wambura Kiginga V. R** Criminal Appeal No. 301/2018 Mwanza (unreported) at page 9 the court analyze and interpreted section 127 evidence of a child in order

to be credence that before she testify the child must swear and that the child promise to speak truth. She said from the proceedings these two witnesses PW2 and PW3 they swear in before they testify. She further said, the same case explains that even if the child is not promise to tell truth or swear the court can proceed taking evidence when it satisfies itself that the child speaks truth. Page 15 of the same case **Wambura (supra)** Court of Appeal of Tanzania was analyzed in section 127 (6) that the court can proceed to convict applicant not only basing on section 127 (6) but regard must be taken to other section including 127 (2). Respondent submitted that the witnesses were actually credible.

Ms. Makala opted to join ground 5 and 6 which were about proving the commission of offence beyond reasonable doubts. She confirms that they prove the offence as the applicant was facing the rape case, and in order to prove this offence under section 130 (4) of Cap 16 they were supposed to prove the age of victim and penetration. These two issues have been proved page 13 of proceedings where PW3 explained to court on material date he met appellant and explain what he did and the victim identified the appellant as the one commits the offence. The evidence of PW3 is collaborated by that of PW4 who is the Doctor who discovered that the victim lost her virgin and

find sperms in vagina. She went on telling the court that It's the trite law that the best evidence in this type of cases is from victim as in the case of **Selemani Makumba V. R** 2006 TLR 378 and that because the PW3 manage to explain how she was raped, her evidence suffices to convict the appellant.

About the age of victim Ms. Makala said they manage to prove the age at page 10 of proceedings when the PW1 said her daughter was 11 years that when the child was affected, she was 10 years. All these important ingredients have been proved and that she prays these grounds to be found non meritoriously and be dismissed. For that, she said prosecution side managed to prove the offence beyond reasonable doubt and she pray the application to be dismissed and upheld the trial court decision.

When the appellant was given a right to rejoinder after respondent finalize submission, he said he has no rejoinder but he did not commit the offence.

It is now noble duty to determine the appellant's grounds of appeal herein by closely assessing the evidence adduced before the trial court and oral submissions made by the State Attorney in this court. As regards to the 1st and 2nd ground, I will analyze them jointly as its spirit is on style of writing

proceedings and judgement. In the trial court judgement as referred by respondent of which I prove, that issues were analyzed, it has date, it provides reason for the decision and is signed. The judgement finally convicts and sentence an appellant for that matter ground 1 and 2 are answered in affirmative that judgement and proceedings were written as provided by law.

Regarding the appellant's complaint on ground no. 3, the appellant is seriously questioning why material witness were not summoned in court especially those gathered after the alarm of the victim and trial court rely on the shakable evidence. Before analyzing this ground let me reproduced the section which provide for summoning witnesses for easy of reference.

> *S. 143. Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.*

The section is clear that there is no specific number of witnesses to prove certain facts. What is needed is the side of prosecution to be satisfied that the witnesses summoned real prove the facts at issue. From the record PW3 who is the victim is seem to explain what happen between him and the victim and her evidence is collaborated by one of PW2 and PW4 who is doctor.

Additional witnesses help to clear some contradictions or to collaborate facts, in this appeal respondent decide to retained their right to summon witness. While it is known that failure to summon material witness may render prosecution evidence being questioned or doubted, in this appeal all material witness were summoned and give their evidence. It must be known that prosecutors are not bound to call any witness as was judicially demonstrated in **Republic v. Rugisha Kashinde and Sida Jibuge** (1991) TLR 178 it was stated that:

> *'The prosecution had the discretion to call or not to call someone as a witness. Where it did not call a vital reliable person without a satisfactory explanation, the court could presume that the person's evidence would have been unfavourable to the prosecution'.*

When PW3 made alarm, it is from record that she appeared PW2 whom they were together in grazing area. The one PW2 is among the witnesses who appeared in court. As PW3 testify in court, her evidence is the best and credential as was decided in the case of **Selemani Makumba V. R (supra)**. Am satisfied that witnesses paraded manage to prove the offence and that ground 3 is non meritoriously.

On fourth ground, there is great development of the law on how evidence of a person of tender age can be tendered in court. I will reproduce section regarding the evidence of tender age, section 127 of Evidence Act, CAP 6:-

> **S.** 127.-(1) *Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*
>
> *(2) A child of tender age may give evidence without taking an oath or making an affirmation* ***but shall, before giving evidence, promise to tell the truth to the court*** *and not to tell any lies.' (Emphasis supplied)*

From the wording of the above provisions, Sub section 1 enunciates that every person is competent to testify unless where the court finds the contrary by reasons of age or state of mind. Consequently, the Court must test whether the witness is competent to testify or not. That can only be done by the court by imposing some questions to the witness as observed

by the Court of Appeal in **Geoffrey Wilson V. Republic,** Cr. App No. 168 of 2018 CAT that;

> *'We think the trial Magistrate or Judge can ask the witness of tender age such simplified questions which may not be exhaustive depending on the circumstances of the case as follows:*
>
> 1. *The age of the child.*
> 2. *The religion which the child professes and whether he/she understand the nature of oath.*
> 3. *Whether or not the child promises to tell the truth and not to tell lies.'*

From the answers given by the child, the court will be satisfied whether a witness is competent to testify or not. Further in the case of **Wambura Kiginga V. R** Criminal Appeal No. 301 of 2018 Mwanza [2022] TZCA 283 (13 May 2022); [2022] TZCA 283 at page 9 Court of Appeal of Tanzania interpreted Section 127(2) to mean that:-

> *'A child of tender age, which means a child of an apparent age of not more than fourteen (14) years as provided under section 127(4) of the Evidence Act, may legally give evidence if one of the two conditions is*

fulfilled. ***One****, if before testifying the child swears or affirms;* ***and two****, if he or she promises to tell the truth and not lies in the course of giving evidence. According to the position of this Court at the moment, if none of the two conditions is fulfilled and the evidence of the child is taken, such evidence is deemed to have no evidential value and it must be expunged from the record.'*

The narrated case above provides two conditions of which at least one should be adhered when a child is about to testify. In appeal at hand, reading careful record of the trial court at page 11 and page 13 victim and PW2 sworn before they give testimony in court. The court record 'sworn and state'. This means the two conditions as provided by Court are met and therefore this ground is groundless.

Ground 5 and 6 will be analysed jointly which is about proving the offence beyond reasonable doubt. This being the rape case there are two important ingredients need be proved. As submitted by Respondent among other things proof of penetration and the age of the victim is important. PW3 informed the trial court the appellant (babu) put hie penis in her private parts and during investigation semen were found in the vagina of PW3. Narration

of the PW4 who is the doctor and exhibit P1 when collaborated with the testimony of the victim suffice to show the commission of offence.

Concerning age of victim, one of witnesses summoned in were PW1 who is the father of the victim. In his testimony while in court he said his daughter was 11 years, because the offence was committed in the previous year, that mean when the offence was committed the victim was 10 years. Other issues to put into consideration includes the charge sheet which is the foundation of the crime. In this appeal the charge was well prepared in line with Section 135 of CPA an have all important ingredients. Evidence adduced are well collaborated from the PW3 who was the victim, PW2 the young sister who appeared immediately after the alarm and the PW4 the doctor. All witness produces useful information towards identification and proof of commission of an offence.

More over this court observed that respondent manage to summon credible witnesses whose evidence was and still useful in proving the offence which this court is satisfied. The appellant was properly identified by the victim as babu *kubeba magogo* and the appellant did not deny his work of *kubeba magogo* although it is written *kuni*. The process of taking records during trial

was in according the provision of law (CPA) especially the S. 210 where testimony and exhibit were correctly taken.

This legal position about proving the case was rightly stressed by the Court of Appeal of Tanzania when dealing with an appeal before it, in the case of **Nkanga Daudi VS. Republic**, Criminal Appeal No.316 of 2013 had this to say:

> *'It is the principle of law that the burden of proof in criminal cases rest squarely on the shoulders of the prosecution side unless the law otherwise directs and that the accused has no duty of proving his innocence'*

Ms. Makala who was representing Republic manage to demonstrate in two important ingredients of the offence of rape. This together with other ingredients which make the proof of commission of the offence by the appellant as identified by this court in proceedings from the trial court, demonstrate that the offence was proved and thus ground 5 and 6 are worthless.

In the end, from the circumstances of this case and analysis of all grounds I find that the prosecution side managed to prove the offence of rape. I

therefore I uphold the trial court judgment conviction and sentence and dismiss the appellant's appeal.

M. L. KOMBA

JUDGE

07 October, 2022

Right of appeal explained.

Judgement Delivered on 07/10/2022 in the presence of the Appellant and State Attorney.

M. L. KOMBA

JUDGE

07 October, 2022