IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 55 OF 2022

(Appeal from the decision of the District Court of Ilala at Kinyerezi by Hon. C.N Laizer-RM dated 16th day of June 2021)

NORVART KAVISHE MUDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

26th September & 5th October, 2022.

MWANGA, J.

The appellant above named was charged and convicted of Rape Contrary to Section 130(1) and (2)(e) of the Penal Code, Cap. 16 [R. E. 2019]. According to the prosecution, between 15th July, 2019 to 20th July, 2019 the appellant while at Majohe area at Gongolamboto within Ilala District, Dar es salaam Region did have carnal knowledge with a 15 years old girl. He was then sentenced to 30 years imprisonment. The appellant being dissatisfied with the decision of the district court appealed to the high court on the following grounds;

1. That, the trial court erred in law and fact in convicting and sentencing the appellant for the offence which did he did not commit.
2. That, the trial court erred in law and fact in convicting and sentencing the appellant while the case against him was not proved to the

required standard of proof in criminal cases. i.e beyond reasonable doubt).

3. That, the trial court erred in law and fact in convicting and sentencing the appellant by relying on victim's evidence and on absence of any strong corroborating evidence from eye witness (direct evidence).
4. That, the trial court erred in law and fact in convicting and sentencing the appellant without considering that no any neighbours who testified before the trial court that the victim was at appellant place.
5. That, the trial court erred in law and fact in convicting and sentencing the appellant relying on evidence of PW1 and PW2 while there was no testimony of the medical doctor who prepared a medical report and that the PF3 was not tendered to prove that the victim was raped.
6. That, the trial court erred in law and fact in convicting and sentencing the appellant while the prosecution failed to tender birth certificate in trial court as exhibit in order to prove the age of victim.
7. That, the trial court erred in law and fact in convicting and sentencing the appellant without considering that the case was planted to the appellant.

8. That, the trial court erred in law and fact in convicting and sentencing the appellant basing on incredible, contradictory and tenuous evidence of prosecution witnesses.
9. That, the trial court erred in law and fact in convicting and sentencing the appellant basing on evidence which do not corollate with the chargesheet.
10. That, the trial court erred in law and fact by failing to comply with Section 231 of the Criminal Procedure Act.

The fact that these grounds of appeal looks more or similar, the same are summarised as follows;

Firstly, that conviction and sentence against the appellant was based entirely on the evidence of PW.1 and PW.2.

Secondly, that in sexual related trials the best evidence is that of a victim. In arguing this ground of appeal, the appellant raised doubts as to the credibility of PW1 and PW2 on the following areas; **One**, If the allegations of rape and sodomy were correct, why the offence of sodomy was not reported and chargesheet amended to include the same rather than waiting to be raised in court during the hearing. **Two,** that PW2(victim) would not

have slept in the appellant room ' accompany of her assailant for three (3) days. **Three,** what ctim of rape and sodomy to remain silence at all times while at appellant place being forced to have sexual intercourse and how she managed to keep her mouth shut at all times. **Four,** he questioned the act of the appellant remained locked inside the appellant place for three days. **Five,** under those circumstances the victim would not have shared the same room and most likely the same bed with the appellant for three days and without escape or tell neighbours of what the appellant had done to her. **Six,** that such horrible criminal acts would have been reported to the neighbours who were in the vicinity of the appellant place. **Seven,** PW1 and PW2 were not credible witnesses and their evidence should not have been relied upon to enter conviction.

Thirdly, that the age of the victim was not proved, neighbours were not called to testify in court, PF.3 was not tendered nor the doctor who prepared the same was not called to testify. In support of his grounds of appeal, he cited the case of **Majaliwa Ihemo V. R,** Criminal Appeal No.197 of 2020 (unreported) at page 11 to 17

By way of reply, the supported both conviction and sentence of the trial court and argued grounds number 1, 2, 3, 4, 5 and 6 of the petitions of

appeal together and grounds number 1 and 2 of the additional grounds separately. The learned State Attorney stated that in proving the offence of rape under section 130(1) and (2) (e) of the penal code, one has to prove that there was penetration and that the victim is below the age of 18years. The learned State Attorney cited the case **William Ntumbi V. The Republic,** Criminal Appeal No 320 of 2019 at page 16. (unreported) concerning penetration as one of the ingredients of the offence of rape. In the current case, the learned State Attorney referred page 18 of the typed proceedings where the victim stated that;

'Appellant had canal knowledge with me against the order of nature and intercourse'.

The learned State Attorney submitted that the term intercourse is clearly that the appellant penetrated the victim. Looking at this ground of appeal, as rightly held by the appellant it is not explained as to why the charge of unnatural offence which is even more serious was not preferred against the appellant. This question was only raised during the hearing, hence reduce credibility of the victim.

The learned State Attorney also joined hand with the appellant on the principle that in sexual offences the best evidence is that of the victim. She

put emphasise in the case Of **Wambura Kiginga V. The Republic**, Criminal Appeal No. 301 of 2018(unreported) at page 27, the court of appeal made reference to the case of **Selemani Makamba V. The Republic** {2006} TLR 379 where it was held that:-

> ***'The true evidence of rape has come from the victim, if an adult, that there was penetration and consent, and in case of any other woman where consent in irrelevant, that there was penetration'.***

With the above observation, it is true, that throughout the proceedings, there was no evidence of PF3 or the testimony of the medical doctor who prepred the same. In the circumstances, one would expect at least the testimonies of a medical doctor who prepared the report or the PF3 be tendered in evidence so as to corroborated the issue of penetration. It is my view that, absence of either of the two, this court has to rely solely on the evidence of the victim (PW3).

The victim is saying the appellant penetrated her (sexual intercourse and unnatural offence). But in the charge against the appellant, the unnatural offence is nowhere indicated. Ordinarily, a prudent man would expect the same to be included in the charged sheet. Also, it is true that

even a single witness can conclusively lead to the determination of a case, however in this case, where the victim accepted to be driven by the appellant back to her aunt place in Buguruni, it seriously it leaves a lot to be desired. In her own words at page 18 of the typed proceedings she states; -

> ***'The driver returned to his place at night and I asked him to take me back home. He accepted and took me to my aunt after three (3) days. The driver told me that he met my parents -my mother, father and aunt at Gongolamboto, and they wanted to know whenever he took me, at that time I was still at his place. Having heard that my parents took RB and they were searching for me, the driver decided to take me back to my aunt's place. At my aunt's place I afraid to get inside; my aunt came outside and started to ask where I was coming from that my parents have been searching me. I told her that there is a driver of bodaboda who took me to his place-residence.....my aunt told me to go home. I complied ...'***

PW2(victim) did not explain to the trial court as to why; **first,** she did not even complain to her aunt of what happened to her for the past three days. **Second,** why she accepted again to be carried by the appellant who did horrible things for the past three days. **third,** why she did not tell the appellant to take her back to her parent's home instead of her aunt's place.

Indeed, evidence of PW2(victim) needed corroboration of either from medical doctor or PF3 so prepared and or even a neighbour who witnessed the saga. Under such circumstances, the credibility of the prosecution witnesses was questionable. I agree with the learned State Attorney that age of the victim had been proven by PW1 who is the mother of the victim and stated at page 9 of the proceedings that the victim is 15years old. Therefore, appellant contention that the prosecution did not tender birth certificate to prove the age of the victim is of no merits. Proof of age may be by parents, medical practitioners and where available by birth certificate. This was so stipulated in the case of **William Ntumbi V. Republic,** (supra) at page 11 and in the case of **Wambura Kiginga V. The Republic** (supra) at page 20. In the case at hand PW 1 is a parent hence competent witness to prove age of victim.

Having said that, this appeal deserves to be **Allowed**. Therefore, **Appeal is Allowed.** The appellant **NOVART KAVISHE MUDI** is hereby discharged forthwith, unless he is otherwise lawfully held.

It is so ordered

H. R. MWANGA

JUDGE

06/10/2022

ORDER:

Judgement delivered in Chambers this 06 day of October, 2022 in the presence of the appellant and the learned State Attorney for the Respondent.

H.R. MWANGA

JUDGE

06/10/2022