IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL No. 132 OF 2021

(Appeal from the Decision of the District Court of Mkuranga at Mkuranga in Criminal Case No. 182 of 2020 Lukosi Esq Resident Magistrate)

BETWEEN

SAID ABDALLAH BIN ALLY.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

MRUMA, J

Said Abdallah Bin Ally, Appellant in this appeal was the accused in criminal case no. 182 of 2020 which was in the Mkuranga District Court in Mkuranga where he was charged with the offense of rape Contrary to Section 130 (1) and (2) and Section 131 (1) of the Penal Code Chapter 16 R.E. 2019. The appellant denied the charge against him. However, after hearing the evidence of the prosecution and the defence, the District Court was satisfied that the allegations against the Appellant had been substantiated without leaving any shadow of doubt and therefore convicted the Appellant as he was charged. After convicting him, the Wilay Court sentenced him to 30 years in prison and to pay a compensation of 1000,000 shillings/= to the victim. The appellant was not satisfied with the conviction and sentence passed against him, so he has appealed to this court with the following reasons:-

1. That the trial Magistrate erred both in law and in fact by believing the testimony of PW3 which is not reliable

because it does not come to mind that a ten-year-old child could endure the penetration of a 55-year-old man's penis, without getting hurt, getting bruises, not bleeding or crying or shouting. It is also unthinkable that when the victim's mother examined her, all she heard was the smell of oil from the victim's vagina when she had just been subjected to a brutal act of rape by a 55-year-old adult man and that she did not think that the victim had been raped, but she could not explain to the doctor that she has been raped;

2. That the trial magistrate erred on the law and on the evidence by convicting the defendant in a case where the testimony was false. When PW3 told the Court that after the disappearance, he returned to his parents' house, PW2 told the Court that the victim was seen with his mother returning home and PW1 told the Court that the victim was taken from the Appellant's house.

3. That the learned Judge who heard this case erred in the law and in the evidence by convicting the Appellant based on the unreliable evidence of PW4 because there are serious doubts whether he was really a doctor because he failed to explain how he tested until he discovered that PW3's virginity had been touched and was not there and he could not to explain professionally whether the virgin was broken recently or in the past;

4. That the learned Resident judge who heard this case erred on the law and on the evidence as he denied the Appellant his right to have his evidence read in accordance with section 210(3) of the CPA and his right to ask the witnesses questionnaire questions;

5. That the learned Resident Magistrate who heard this case erred on the law and on the evidence by convicting the Appellant without the prosecution proving the case against him beyond reasonable doubt.

During the hearing of this appeal the Appellant did not have legal representation and since it is obvious that he is not a lawyer, he did not have many arguments instead he told the Court that he had appealed because he was not satisfied with the judgment of the District Court because he had not committed the offense he was accused of with it.

On the part of the Republic/Respondent it was represented by the learned State Attorney Mr. Maleko Mr. Maleko supported the conviction of the Appellant as well as the punishment given to him.

Speaking about the first reason for appeal, Mr. Maleko said that the Appellant's argument has no merit because it is now trite law that the best evidence in rape cases comes from the victim and that in this case the victim's evidence clearly explains how the Appellant called her inside and later inserting his penis into her vagina. Msomi State Attorney also explains that the victim's testimony was supported by the testimony of doctor PW4 who, after examining the victim, confirmed that she had

been raped and that according to PW4's examination, the victim was not a virgin.

A learned lawyer, the State Attorney, submitted an argument that according to article 130 (4) of the Penal Code, even a little penetration is enough to prove rape. The learned State attorney has submitted that the victim, like other witnesses, has the right to be trusted.

Speaking about the second reason for the Appeal, the Learned State Attorney has submitted that although it is true that there are contradictions in the evidence of the prosecution, but those contractions are minor and do not go to the root of the essence of the case. He said that the testimony of the victim was corroborated by the testimony of PW1, PW2 and PW3 whose testimony was to the effect that PW3 was not at home during the material time and that the Appellant admitted that he was with the victim during that time.

Responding to the third reason, the Learned State Attorney submitted that the evidence of the republic was a reliable evidence, especially the evidence of the witness PW4 and the victim himself PW3.

Responding to the fourth reason of Rufaaya Mrufani, the Learned State Attorney submitted that it is true that the trial court did not comply with the requirements of section 210(3) of the Criminal Procedure Act but it

is now settled that none compliance with the requirements of those provisions of the law is not fatal. The learned counsel cited the decision of the Court of Appeal in the case of FLANO & 4 OTHERS VS R Criminal Appeal No. 366 of 2018 at Page 15 paragraph one.

After re-reviewing the evidence in the records of the lower court, the grounds of appeal and the submissions of the State Counsel, it is my opinion that the entire appeal centers on the issue of whether or not PW1 was raped and whether the Appellant committed the offense he was accused of

I have no doubts in my mind that according to the evidence given in Court by the prosecution, the crime of rape was not proven beyond reasonable doubt in this case. In looking at this matter, the witness testimony of PW1, PW2, PW3 and PW4 is very crucial evidence in this case. Let's start with the testimony of Francis John Chimpaye (PW1) who identified himself as the victim's father. He told the Court that the victim who is his daughter always arrives home at 18.00 hours. However, on 13.8.2020 until 19:00 hours, his daughter had not returned from school. At 19:00 hours she went to complain to her teachers who told her that her daughter had left school at 16:00 hours. After being told that, he returned home and found that he had not yet arrived. when it arrived at 20:00 hours at night, his daughter returned and when he asked her where she was, she replied that she was at Saidi's place watching TV. PW1 went to Said's place to confirm if his daughter was really there and after asking the Appellant, the Appellant confirmed that the daughter was really with him. When he asked why he was with his daughter until that night? Then he left and his daughter returned home. When they got home, he asked him what happened when he was at the

Appellant's house? His daughter replied that while she was watching TV, the Appellant told her to take off her clothes and underwear, and when she took them off, the Appellant applied oil to his penis and inserted it into her vagina.

On his part, Beto Alexander Mahema (PW2) who is the younger brother of PW1, his evidence is that on that day of 13.8.2020 at 19:00 hours when he was at home, PW1 asked him if he had seen the victim, when he replied that he had not, he and his brother (i.e. PW1) and his sister-in-law, that is PW1's wife or the victim's mother decided to follow the victim to school. On the way they met the victim and when he asked him where the victim was, he replied that he was in tuition and that after tuition he met the Appellant who told him to enter his room and when he entered the appellant came with oil and took off his clothes and asked him to sit on the bed. While sitting there, the Appellant applied oil to his penis and inserted it into her vagina. After that act he gave him 500 shillings.

On the part of the victim who testified as PW3, he explained to the Court that on the day of the incident at 18:00 hours in the evening he was leaving tuition. He went to the house of "Grandpa". When Grandpa saw him, he told him "come and collect the pension". He went inside, grandfather turned on the TV and told him to sleep, he slept on the bed in the living room. Babu entered into another room and took the oil which he applied on his penis and then he inserted it into his penis and started pumping his penis into the victim's penis and then he saw the water flowing where the Appellant took a cloth and wiped it and threatened him that "If you go and say that I will kill you". PW3 told the Court that when he returned home he found his father (i.e. PW1), his

uncle (i.e. PW2) and his mother (who was not a witness in this case). When his father asked him where he was, he replied that he was with his grandfather (i.e. the Appellant), he, his Father (PW1) left and went to the Appellant where the Appellant, when asked, agreed that the victim was with him watching TV. When they returned, PW1 told his mother to examine him, the mother took him into the room and laid him on the bed and examined his private parts and asked him why his private parts smelled like oil? then he told her that the Appellant applied oil and inserted his penis into her vagina.

Now if we start with the testimony of these witnesses, there can be no doubt that it is contradictory. For example, when PW1 told the Court that after not being seen at home at 18:00 hours in the evening when he was expected to arrive, the victim arrived home at 20:00 hours at night, PW2 who was with PW1 told the Court that they met the victim on the way back home. The question to be asked here is why these two people who were all involved in the search for the victim at the same time differ in how they met the victim for the first time? Did the victim appear at home at 20:00 hours at night as PW1 said or did he meet them on the way when they were following him as PW2 told the Court? This issue is important because even if you look at the testimony of the victim himself as it is in the first paragraph of page 12 of the typed proceedings of the trial court, the victim is quoted as saying ".....I went to the house where I found him, Father, Mother and uncle at home". The question to be asked here is why these four people who were all present give different explanations on the same thing?

Now if you go back to check what happened after the victim arrived home, PWI told the Court that after the victim explained what was done to him in front of the Appellant

They went to the Village Chairman's office and since he was not there they went to the ten cell leader (member of ten houses) who gave them a letter to go to Vikindu Police Station where they were given PF3. On his part, PW2 gave evidence similar to that given by PW1 except that he and the victim explained that they were with the Appellant all that time until he was arrested when they arrived at the police station and were left there. PW1 did not explain why he avoided mentioning that all that time they were going to the village chairman's office, to the ten cell leader (Member of ten houses) and the police. I have wondered why PW1 did not touch on the cooperation shown by the Appellant before his arrest, I realized that he felt that if he did so he would be helping the Appellant to appear that he had not committed the crime he is accused of because if he had done it he would not have joined the accusers all over there. This, in my opinion, is evidence whose intention was not to help the court to do justice, but it is evidence intended to ensure that the accused is convicted. That can't be right. Article 107 A (1) of the Constitution of the United Republic of Tanzania states that the Court is the Authority for the final decision on justice. The Constitution does not say that the Court is the only Authority to grant justice, but it is the final authority to decide on justice. This means that all other organs of the state, including the citizens, have a constitutional duty to do justice, but when there is a dispute about who has the right, then the Court, after hearing the parties, should make a final statement about the right that

was disputed. In that logic, prosecutors and defense lawyers all have the duty to do justice and when they dispute between themselves about justice, then help the court to see and do justice by presenting before it the facts that they have about the matter so that the court can give a just decision. Government Prosecutors are not responsible for ensuring that they get a conviction and defense lawyers have no responsibility before the law and before God to ensure that they get an acquittal for the defendants who defend them in Court. The responsibility of these parties is to present the facts they have to the Court in accordance with the law and to help the Court achieve true justice. Many convictions and acquittals should not be a criterion for promoting lawyers or judges.

If the Republic had the objective intended by Article 107 A (1) of the Constitution, and saw that there was sufficient evidence to show that the Appellant had committed rape, then it would help manage the investigation in this case so that the important elements are investigated and lead the witnesses to give uncontradictory evidence as was the case in the case this. It is a strange thing that not even the investigator of this case was called to testify nor any policeman who was involved in one way or another. If you think about the case in detail, you cannot believe that it is a case in which the defendant was facing an offense that could send him to prison for life. It is a case whose handling from investigations, arresting, prosecution and trial shows that it is more of a family case than a case in which the accused was facing one of the most serious offenses with a serious penalty.

Regarding the argument of whether the victim was raped or not, in convicting the District Court Judge, he focused more on the testimony of the victim and the testimony of the Doctor who performed the medical examination on the victim. The judge believed the testimony of the doctor who said that after examining the victim he found that there was penetration. The doctor told the court that the labia minora and labia majora were swollen and that the victim was not a virgin. The details of the oral evidence largely do not reflect what he wrote in PF3 (Exhibit P1). In Exhibit P1, the witness has only explained that the victim had no bruises on the genitals and tests for sexually transmitted diseases, including HIV, showed negative and that he did not have a hymen. PW4 did not write anything about Labia Manora and/or Labia Majora that he mentioned in his oral evidence nor did he say anything about penetration. In my opinion, the Doctor, being an expert in his area, has the duty to explain to the Court how he examined the patient and the results of his examination. It was also his duty to explain to the court in soft and plain language what he had discovered. For example, it is difficult for a person who is not a doctor to know the meaning of the words Labia Manora and Labia Majora without getting a detailed explanation from the doctor and in this case PW4 and thus apply it to the relevant law to reach the conclusion that the offense has been proven or not. In the same way, it is not enough to tell the court that the victim is not a virgin, so she has been raped without explaining whether the only thing that can give virginity is rape or even other things such as sports and/or children's exercises cannot remove virginity. In serious charges like this, all the important elements of the crime charged must be investigated and come up with the truth that will

help the Court to do justice. Cases of this nature are not cases to be conducted lightly as if they are family issues. In analysing evidence in these kinds of cases our courts must be realistic and see things in their reality. For instance had the trial court considered the age of the victim and that of the Appellant it would have asked itself if in the reality of human nature a child of 10 years could have sexual intercourse with a 53 years old man without getting even a bruise and that after act she got up wore her underwear and walk away without any problem! In the normal state of human nature that cannot be possible.

In the event I find merit in the Appellant's appeal which allow. I quash the conviction and set aside the sentences passed against him. I order for immediately release of the Appellant unless for any other lawful cause he is held.

Order accordingly,

A.R. Mruma

Judge

27. 9. 2022

Dated at Dar Es Salaam this 27th day of September 2022.