IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 49 OF 2021

(Originating from Dodoma District Court in Criminal Case No. 210 of 2019)

WETARO SAMWEL WETARO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

07/9/2022 & 19/10/2022

KAGOMBA, J

WETARO SAMWEL WETARO (henceforth "the appellant") is aggrieved by the decision of the District Court of Dodoma at Dodoma (henceforth "trial court") delivered on 09/11/2020, whereby he was convicted for the offence of rape C/S 130 (1) and (2) (e), as well as 131 (1) of the Penal Code [Cap 16 R.E 2002] (now R.E 2022) (Henceforth "the Penal Code). He was sentenced to serve thirty (30) years imprisonment. The appellant prays this court to allow his appeal, quash both conviction and sentence imposed and eventually set him at liberty. He also prays for any other relief this court may deem just to grant.

In his Petition of Appeal, the appellant has brought forth five (5) grounds of appeal as follows:

1. That, an Exhibit P2 did neither connect the appellant with the crime nor was he examined whether or not any "HIV" infection was discovered in PW1.

2. That, the whole case was not fair and just for being heard and decided on one side of the prosecution and under circumstances where the appellant was prejudiced contrary to section 266(2) of the Criminal Procedure Code [Cap 20].

3. That, exhibit P1 was invalid for being made under C/S so (sic) and S1 of the Criminal Procedure Code as well as 58 and 59 of the same Act although not corroborated by any extra judicial statement from Justice of the Peace.

4. That, the trial decision was based upon hearsay evidence with no any element of proof whereas the map for in flagrante delicto was not tendered without any reason.

5. That, the judgment is defective for not disclosing any section of the law which the appellant was sentenced to.

It was alleged before the trial court that on unknown date between April, 2019 to September, 2019 at Mailimbili kwa Mwatanu area, within the city of Dodoma in Dodoma Region, the appellant did have carnal knowledge of one Grace Frank, a girl of 15 years old. Based on the evidence of the victim (PW1), her father (PW2), WP 8093 DC Zawadi who investigated the

case (PW3), Proches Marandu, a Clinical Officer who examined the victim (PW4) as well as cautioned statement of accused person (exhibit P1) and PF3 (exhibit P2), the trial court proceeded to convict the appellant for the offence of rape as charged and sentenced him accordingly.

On the date of hearing of the appeal, the appellant was unrepresented while Ms. Sarah Nexius, learned State Attorney, appeared for the respondent. The appellant, being a lay litigant, prayed the court to adopt his Petition of Appeal as his submission to the court.

Ms. Nexius, for the respondent opposed the appeal. She started her reply submissions by conceding that there were defects in the proceedings and judgement of the trial court. She prayed to address the said shortfalls before tackling the grounds of appeal.

She submitted that according to the charge and records of preliminary hearing, the appellant was 18 years old and therefore under section 131(2) of the Penal Code, the appropriate punishment is corporal punishment. It was therefore her views that the sentence of 30 years imprisonment, 12 strokes of the cane plus payment of compensation to the victim was in a way excessive. The learned advocate prayed the court to consider revising the sentence imposed on the appellant, this being the first appellate court, as per decision in **Selemani Makumba V. Republic** (2006) T.L.R 385.

Ms. Nexius further conceded that while the appellant stated before the trial court that he would defend himself records shows that he never appeared before the court. That, the trial court proceeded to pronounce sentence *ex-parte*, as it is not shown in the proceedings that the appellant was taken to the court for the sentence to be read to him. Ms. Nexius was however quick to add that such a defect did not go to the rout of the case. She argued that, the fact that the appellant has appealed against both conviction and the sentence shows that he knew that he was sentenced, hence he was therefore not prejudiced. She added that the irregularity is curable under section 388 of the Criminal Procedure Act [Cap 20 R.E 2022].

Ms. Nexius further addressed yet another shortfall. She submitted that the trial court erred in admitting the cautioned statement (exhibit P1) without making an inquiry after the appellant had objected to its admission. She said, the trial court ought to have inquired to know if the statement was made by the appellant as a free agent. She cited the decision in **Masawa Jeki @ Kamanga V. Republic**, Criminal Appeal No. 253 of 2018, and learnedly prayed the exhibit to be expunged.

Turning to the first ground of appeal, where the appellant stated that the PF3 (exhibit P2) didn't connect him with the crime, and that he was not examined on HIV status, Ms. Nexius found no merit in the said ground for a reason that what is important in proof of rape is penetration of accused's person into the victim's vagina. She added that since offence of this nature

are not committed in public, it's the evidence of the victim which is the best proof as per **Selemani Makumba V. Republic** (supra).

Ms. Nexius further elaborated that PW1, the victim, stated in the trial court proceedings that they were doing sex with the appellant. That, PW1 also stated that she was sleeping in the appellant's house and they were making love. Ms. Nexius submitted that such words were enough to prove that there was penetration. She cited the case of **Hassan Bakari @Mamajicho v. Republic**, Criminal Appeal No. 103 of 2012, CAT at Mtwara, where such words were explained. Ms. Nexius submitted that even if the PF3 (exhibit P2) did not show that the appellant was HIV positive, penetration was proved, and therefore the first ground of appeal is devoid of merit.

Replying to the second ground of appeal where the appellant complains that the case was not justly conducted and section 266(2) of the Criminal Procedure Code was not observed, Ms. Nexius submitted that in this type of proceedings the law has not directed District courts Magistrates to sit with assessors. It was therefore her view that the second ground of appeal also lacked merit. The third ground is about an exhibit which the learned State Attorney prayed the court to expunge. She didn't, therefore, submit on the third ground of appeal.

On the fourth ground of appeal, where the appellant complained that the evidence was hearsay and that the map was not tendered, Ms. Nexius

replied that the said ground of appeal also had no merit because none of the prosecution witness stated that there was any map drawn that would also be tendered. She said, its absence wouldn't negate the fact that the case was proved beyond reasonable doubt.

On the fifth and last ground of appeal, where the appellant stated that the judgment was defective for not mentioning the section of the law under which the sentence was based, Ms. Nexius replied that section 312 of the Criminal Procedure Act requires the court to mention the section for conviction. As regards the sentence, Ms. Nexius argued that the law does not state that the court must mention the section but requires the court to pronounce the sentence. She added that the appellant was convicted for the offence of rape and was sentenced accordingly as appearing of page 7 of the typed Judgment of the trial court. Ms. Nexius prayed the court to dismiss the appeal. she however left it to the court to consider anomaly in the sentence.

In his rejoinder, the appellant reiterated that he is not responsible for the offence of rape.

From the above submissions, the issue for determination by this court is whether the case against the appellant was proved beyond reasonable doubt. This being the first appellate court, it's the duty of this court to subject the evidence adduced in trial to a fresh examination, knowing, of course,

that the trial Magistrate had a better chance to assess the witnesses. See **Ali Abdallah Rajab V. Sada Abdallah Rajab and Others** [1994] T.L.R 132.

In rape cases, prosecution succeeds if there is proof of penetration. As the victim was under 18 years the issue of consent doe not arise. Crucially, the offender must also be properly identified, and this has not been an issue in this appeal.

In the outset I should first consider the prayer made by Ms. Nexius, learned State Attorney, to expunge the cautioned statement of the appellant (exhibit P1) which was admitted by the trial without making an inquiry after the appellant had objected to its admission. The trial court committed a clear irregularity in this aspect. I shall not be tied up by this matter, and I hereby expunge the said exhibit P1 for the reason clearly stated by the learned State Attorney.

I should also briefly comment on the other irregularities raised by the learned State Attorney. That, the trial court proceeded to pronounce sentence *ex-parte*, as it is not shown in the proceedings that the appellant was taken to the court for the sentence to be read to him. I have perused the trial court proceedings, both typed and original records, and I agree with the observation made by Ms. Nexius in this regard. The appellant was taken to the court for the sentence to be read to him. However, as correctly submitted by Ms. Nexius, such an irregularity did not occasioned miscarriage of justice as demonstrated by the appellant's act of appealing against both

the conviction and sentence. Section 388 of the Criminal Procedure Code, provides:

> *"388. Subject to the provisions of section 387,* ***no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity*** *in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied* ***that such error, omission or irregularity has in fact occasioned a failure of justice****, the court may order a retrial or make such other order as it may consider just and equitable". [Emphasis added]*

The other irregularity is on the excessiveness of the sentence. This shall be addressed in due course.

Turning to the main issue for my determination in this appeal, the conviction for the offence of rape is proved, if the victim is under the age of 18, where proof of penetration is made.

From the testimony of the victim, PW1 Grace Frank Goliam, recorded from page 12 to 14 of the trial court proceedings, the appellant was known to her and they started love relationship, the appellant used to take PW1 to his house, where they used to "make love" and they did it many times. She

couldn't remember how many days they made love. PW1 testified further that she did sleep at the appellant's house once. There is nowhere in the testimony of the PW1 where she directly mentioned about penetration of the appellant's penis into her vagina. The words she consistently used is the pharse "make love". The question is whether making love is the same as having sexual intercourse.

The on-line *Oxford English Dictionary* defines the phrase "make love" as to "have sexual intercourse". It therefore follows that the love making is about having sexual intercourse which entail penetration of penis into vagina. This concept is supported in **Hassan Bakari @Mamajicho V. Republic** (Supra) which was cited to this court by the learned State Attorney. The Court of Appeal, deliberated on this concept of "sexual intercourse" on page 10 of its typed judgment as follows:

> *"there are circumstances, and they are not few, that witnesses or even the court would avoid using such direct words as penis or vagina and the like, for obvious reasons including but not restricted to that person's cultural background; upbringing; religious feelings; the audience listening; the age of the person, and the like. These restrictions are understandable, given thje circumstances of each case.* ***Our considered view is that, so long as the court, the adverse party or any intended audience grasps the meaning of what is meant then, it is***

sufficient to mean or understand it to be the penetration of the vagina by the penis".

Guided by the above decision of the Court of Appeal, I feel safe to form a view that the testimony of PW1, as shown above, revealed that by "making love" with the appellant many times, she obviously meant having repeated sexual intercourse with him, and ipso facto, there was penetration of the appellant's penis into her vagina. As consent is immaterial in this case where the victim was below 18 years, the offence of rape was accordingly proved. For this reason, the trial court's decision to convict the appellant for the offence of rape.

The trial court, however, wrongly stated that the appellant was being convicted for rape under section 235 of the Criminal Procedure Act. The charge section and the convicting section for that purpose were correctly stated in the charge as well as in the other parts of the trial court's judgment. Such an error, as correctly submitted by Ms. Nexius, does not invalidate the judgment nor the conviction, as per section 388 of the Criminal Procedure Act.

The trial court upon conviction went to invoke the sentence for rape provided for under section 131(1) of the Penal Code, [Cap 16 RE 2022]. Ms. Nexius raised the attention of this court to the misdirection which was committed by the trial court. She left the matter to the court to determine proper sentence. Apparently, the trial court having correctly convicted the

appellant for the offence of rape misdirected itself on sentencing. The proceedings show that the appellant, at the time he committed the offence, he was 18 years. It appears that this fact was not duly considered by the trial Court. The Penal Code provides different sentences for offenders under different circumstances. It provides as follows:

> *"131.-(1) Any person who commits rape is,* ***except in the cases provided for in the renumbered subsection (2),*** *liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.*
>
> *(2)* ***Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall- (a) if a first offender, be sentenced to corporal punishment only"****.[Emphasis added].*

As the appellant had not exceeded 18 years, the appropriate sentence is that provided under sub-section (2) above. The appellant is liable for corporal punishment only. For this reason, the sentence imposed on the appellant of 30 years imprisonment, 12 strokes of the cane plus payment of compensation to the victim was indeed excessive. I therefore invoke the

revisionary powers of this Court under section 366 (1)(a)(ii) and (1)(b) of the of Criminal Procedure Act [Cap 20 RE 2022] and section 43(1) the Magistrates Courts Act [Cap 11 RE 2019] to vary the sentence accordingly. The appellant shall be liable for sentence of corporal punishment only.

In the upshot the appeal is party allowed and the sentence is hereby varied whereby the appellant shall be liable for corporal punishment of 12 strokes of the cane only. Order accordingly.

Dated at **Dodoma** this **19th** day of **October, 2022**

ABDI S. KAGOMBA

JUDGE