IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 07 OF 2022

(Originating from the Decision of the District Court of Kisarawe at Kisarawe in Criminal Case No 12 of 2021 before M.X. Sanga -RM)

LAMECK GABRIEL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 05th September, 2022

Date of Judgment: 21st October, 2022

E.E. KAKOLAKI J.

The appellant herein, Lameck Gabriel is challenging the judgment of the District Court of Kisarawe, handed down on 17th November, 2021, in which he was convicted of offence of Rape; Contrary to section 130 (1), (2) (e) and 131(1) of the Penal Code, [Cap. 16 R.E 2019], and sentenced to thirty (30) years in jail.

It was prosecution case during the trial that, the appellant in February 2021 at different dates in Sungwi area within Kisarawe District in Coast Region, did unlawfully have sexual intercourse with MH (name withheld), a girl of 10 years old and pupil of standard III at Sungwi Primary School.The accused pleaded not guilty to the charge hence the prosecution side featured nine

(9) witnesses and relied on two exhibits, PF3 (exhibit P1) and accused cautioned statement (exhibit P2), in a bid to prove the case, while on the defence side, the appellant relied on his own testimony and had no exhibit to tender. After full trial, appellant's version was not bought by the trial court, instead it was satisfied that, the prosecution proved its case to the hilt, hence convicted and sentenced him to serve as custodial sentence of thirty (30) years imprisonment. Discontented, the appellant has knocked this court's door with a memorandum of appeal beefed with three (3) grounds of appeal, going thus:

1. *That, the learned trial magistrate erred in law and facts to convict the appellant in a case which the particulars of offence in the charge sheet is at variance with the prosecution evidence as to when the offence was committed.*
2. *That, the learned trial magistrate erred in law and facts by finding the appellant guilty relying on inconsistent and contradictory evidence of Pw1,Pw4,Pw5 and Pw7 which clearly show that a victim was examined by a doctor before the commission of an offence.*
3. *That, the learned trial magistrate erred in law and facts to hold that prosecution case was proved beyond reasonable doubt while the evidence tendered is lacking and valueless.*

It is the appellant's prayer based on the above grounds that, this Court be pleased to allow his appeal, quash the conviction, set aside the sentence and set him at liberty.

When the appeal was called for hearing, appellant appeared in person unrepresented while respondent was represented by Ms. Elizabeth Olomi, learned State Attorney. When called to address the Court on the grounds of appeal, the appellant said he has full confidence with the Court that his ground of appeal will be considered and pleaded it to allow his appeal as being a lay person had nothing to add.

On the respondent' side, Ms. Olomi submitted in support of the conviction and sentence imposed against the appellant. While admitting the fact that the charge sheet does not indicate the date in which the offence was committed as asserted by the appellant in his first ground of appeal, she was quick to respond the omission did not prejudiced the appellant hence occasion no injustice to him. She argued that, although the victim (PW1) testified at page 8 of the proceedings not to remember the date the appellant raped her, Pw2, Pw3, Pw4, Pw5, Pw6, Pw8, and Pw9 consistently clarified the offence was committed on the 25/2/2021 as it appears at pages 10 ,11 ,14, 15, and 17 of the typed proceedings. Ms.Olomi submitted that, the

variance on dates in this matter does not prejudice the appellant at all as he was arrested in flagrante delicto on 25/2/2021 raping the victim (PW1). To support her stance she cited the case of **Osward Mokiwa @Sudi Vs. R**, Criminal Appeal No. 190 of 2014 at page 16, 17 and 18, where the Court of Appeal discussed on the variance between dates and time and referred the provisions of section 234(3) of the Criminal Procedure Act, as a remedy to that omission hence the charge could not be rendered defective for that reason. Ms. Olomi pressed this court to dismiss the first ground of appeal for want of merit.

Having considered this ground and the evidence on record, I agree with the learned State Attorney's proposition that, the complained of variance between the charge and the evidence adduced by the prosecution witnesses on the date and place where the offence was perpetrated, did not in any way prejudice the appellant. The mere mentioning in the charge that, the offence was committed on different dates and place in February, 2021, in my humble view did not render the appellant unable to comprehend the nature of the offence facing him hence failure to marshal his defence. I so view for three good reasons. One, it is in the evidence of PW2, PW3, PW4, PW5 and PW6 that the offence was committed on 25th February, 2021.

Second, the appellant was arrested in flagrante delicto on top of PW1 whose evidence on that fact is corroborated by evidence of PW2, PW3, PW4, PW5 and PW6. Third, the charge in compliance with the law and provided the appellant with necessary, reasonable and sufficient information as to the nature of the offence facing him as provided under section 132 of the Criminal Procedure Act, [Cap 20 RE 2022. The said provision reads:

> *132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged*.

From the above expositions of the law, it is the statement of the specific offences with which the accused is charged with together with such particulars necessary for giving him reasonable information as to the nature of the offence charged which are mandatorily required to be stated in the charge sheet. Glancing at the faulted charge in this matter, the omission to disclose the date aside, I find the same informed the appellant of the month and place where the offence is alleged to be perpetrated to be February,

2021, at Sungwi village within Kisarawe District Coast Region. And further that, he had sexual intercourse with MH, a girl of 10 years and pupil of Sungwi Primary school, the information was sufficient enough to enable the appellant understand the nature of the offence facing him and marshal his defence. I could have held a different view on the said omission if the appellant's defence was rooted on the defence of alibi on specific dates, the defence which depends much on the exactness of the date, hence necessity of prosecution to mention specific date in the charge for the purposes of enabling the appellant to establish his defence properly. Otherwise I hold that the omission to indicate specific date in the circumstances of this case was a minor irregularity and inoffensive as it neither prejudiced nor occasioned injustice to the appellant hence curable under sections 388 and section 234(3) of the Criminal Procedure Act, [Cap. 20 R.E 2022]. See **Osward Mokiwa @ Sudi** (supra). Consequently, I find no merit in the first ground of appeal.

As regard to the second ground of appeal on inconsistent and contradictory evidence of PW1, PW4, PW5 and PW7 showing that, the victim was examined medically before the date of commission of the offence. It was Ms. Olomi's response on this ground that, there is no such contradiction or

inconsistency of evidence of the alleged witnesses. She argued, it was clearly stated by PW4 at page 14 of the typed proceedings that, he witnessed the appellant raping the victim (PW1) on 25/2/2021 before he was arrested and later on PW1 taken to police and hospital for examination the evidence which was confirmed by PW4, PW5 and PW6 who participated in his arrest on 25/02/2021. And that, PW7, the doctor testified that, he examined the victim on 26/2/2022 a day after commission of the offence and not before the commission of an offence as asserted by the appellant in his ground of appeal. Hence, she prayed the court to disregard the ground of appeal for want of merit.

I have painstakingly examined the record of appeal in the light of the appellant's ground of appeal and the respondent's submission in reply to. It is true as submitted by Ms. Olomi and as alluded to above when discussing the first ground that, apart from the victim (PW1) admitting to have forgotten the date when she was raped by the appellant, the rest of the witnesses PW2,PW3,PW4,PW5,PW6,PW8 and PW9, testified that the offence was committed on 25/02/2021. It is also in record that, PW1 was taken to the hospital by PW2 and attended by the doctor (PW7) who testified to have examined her on 26/02/2021. Every witness deserve credence unless there

are reasons for disbelieving him/her. See **Rashid Issa Vs. R,** Criminal Appeal No. 280 of 2010 (CAT-unreported). In this matter there is no reason advanced by the appellant to discredit the prosecution witnesses. Now with such clear evidence on the date in which rape was committed and the date in which examination of PW1 medically was conducted, I am satisfied that the appellant's second ground of appeal is devoid of merit hence disregard it.

Next for determination is the third and last ground of appeal where the appellant is complaining that, the trial magistrate erred in law and fact for holding that, prosecution case was proved beyond reasonable doubt while the evidence tendered is lacking and valueless. In this ground Ms. Olomi submitted that, the same is without merit as the prosecution case was proved beyond reasonable doubt. The appellant was charged of raping the child of 10 years in contravention of sections 130 (1)(2)(e) and 131(1) of the Penal Code. She argued, the victim's age was proved to be under 18 years and that there was penetration since PW1 at page 9 of the typed proceedings said was 10 years old and was a class 3 pupil by then. Her evidence was corroborated by PW2 (her father) and the doctor (PW7) at pages 10 and 22

of the typed proceedings, the evidence which the appellant never cross examined. In her view the issue of age was proved beyond doubt.

As regard to the ingredient of penetration Ms. Olomi contended that, PW1 gave a detailed account at page 8 of the typed proceedings on how the appellant who was known to her before, held her hand towards the bush before he laid her down forcefully, undressed her under pants and skirt and inserted his penis into her vagina. That her evidence is corroborated by the evidence of PW4 at page 14 who found the appellant read handed on top of her and removed him from the victim. The two evidence is further corroborated by the evidence of PW7 who after examining PW1 noted that, she had remains of sperms in her private parts, had her vagina swollen which to her was a clear proof of penetration of the victim's private parts. Ms. Olomi stated further that, basing on the evidence of PW1 which is the best evidence as per S.127(6) of Evidence Act [Cap 6 RE 2022] and the case of **Seleman Makumba Vs. R**,[2006] TLR 384, where the Court of Appeal said the best evidence in sexual offences comes from the victim. In this case she argued PW1 was known to the appellant before and that PW4 found him raping her, so identification of the appellant does not come into question as the offence

was committed in a broad day light. On the strength of what she submitted Ms. Olomi prayed the appeal be dismissed for want of merit.

Having considered the submission by Ms. Olomi as well as the ground of appeal under discussion it is evident to me that, for the prosecution to prove statutory rape against the child victim like PW1 had to establish three elements. One, age of the child, second, penetration however slight it is and third, the perpetrator of the offence. On the element proof of penetration and perpetrator of the offence, the Court of Appeal in the case of **Godson Dan Kimaro Vs. R**, Criminal Appeal No.54 of 2019 (CAT-Unreported, had this to say:

> *As to whether the charged offence was proved to the required standard, we would, at first, underline that the prosecution had to establish that there was penetration into the PWl's vagina and that the perpetrator of that illegal act was the appellant.*

In this matter having serenely examined the testimonies of PW1, PW2, PW4 and PW7, I agree with the learned State Attorney that, the prosecution side proved the offence beyond reasonable doubt. Starting with the ingredient of age of the victim, as rightly submitted by Ms. Olomi the submission which I embrace, the evidence of the victim herself that she was 10 years old,

corroborated by her biological father (PW2) and the doctor who examined her (PW7) that, she was 10 years old was sufficient to prove that the viction was a child when raped was of 10 years of age.

On the point penetration PW1 is on record that when the appellant took her to the bushes, forcefully undress her skirt and pants and then insert his penis in her vagina where she felt pain. Her evidence is corroborated by her uncle Pw4 who found the appellant was still on intercourse with the victim before he removed him while the two were half naked. Further to that, the evidence of PW7, the Doctor who testified to have found sperms and redish colour in PW1's vagina supported with the PF3, like the trial Court leaves this Court without a scintilla of doubt that her private parts were penetrated on that material date. As to who penetrated her is the next question to be answered.

The above raised query is easy to answer and in my opinion need not detain this Court. Going through the typed proceedings apart from the victim (PW1) mentioning the appellant as her sexual abuser, the appellant was also caught read handed by PW4 still performing the said illegal and immoral act before he was arrested on scene of crime and taken to the Sungwi village executive officer's office as also confirmed by PW6 (VEO) and later on taken to police. As the offence was committed in a broad day light and since the appellant

was found in flagrante delicto on top of PW1 by PW4, all possibilities of mistaken identity in my opinion are removed.

The appellant when defending himself interjected the defence of general denial where he denied to known the victim before and claiming that, the charge was fabricated against him resulting from the grudges held by one Shukuru against him. Like the trial Court, I find his defence weak as he did not inform the court who is Shukuru, to hold grudges with him to the extent of connecting him with such serious offence of rape. That aside the appellant never cross examined any witness on the issue of any grudges held by either the prosecution witnesses or the said Shukuru, an omission which leads this Court to believe and conclude that, his claims of being framed up in the case is nothing than afterthought. Consequently, I find the third ground of appeal is devoid of merit too as the case was proved against the appellant to the hilt.

That, said and done, I am satisfied that, I find no justifiable grounds to fault the findings of the trial court. Accordingly, this appeal is devoid of merit and I hereby dismiss it in its entirety.

It is so ordered.

Dated at Dar es Salaam this 21st October 2022

E. E. KAKOLAKI

JUDGE

21/10/2022.

The Judgment has been delivered at Dar es Salaam today 21st day of October, 2022 in the presence of the appellant in person, Ms. Gladness Senya, State Attorney for the respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

21/10/2022.