IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 167 OF 2021

(Appeal from the Judgment of the Resident Magistrate Court of Geita at Geita in Criminal Case No. 82 of 2021 dated 1st December 2021, by Hon. N.R. Bigirwa, RM)

BENARD MBAGAYE KISODA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

1st August & 28th October, 2022

ITEMBA, J.

In the Resident Magistrate Court of Geita at Geita on 26th February 2021, the appellant stood charged with the offence of rape contrary to **sections 130 (1) (2) (e)** and **131 (3)** of the Penal Code, Cap. 16 R.E. 2019. It was alleged in the charge sheet that on 27th January 2021, at Machinjioni area within the District and Region of Geita, the appellant had carnal knowledge with a girl of 9 years old whose name is withheld and will be referred to as victim. It is gathered from the trial court's proceedings that the appellant who was arraigned in court, vide Criminal Case No. 82 of 2021, pleaded not guilty and the court proceeded to conduct a trial. At the conclusion of the trial, the appellant was found guilty of rape and he was convicted and sentenced to a life imprisonment.

Brief facts of this case are that the victim who testified as PW1 is a 9 years old girl who was in standard 3 in a primary school. On the fateful day, the victim was sent by her mother, (PW2) to buy some cooking oil at the appellant's shop. Upon her arrival at the shop, the appellant requested the victim to enter inside the shop where he was, and she entered, while inside the shop the appellant told the victim to lie down, he took some oil, smeared on the victim's vagina and on his penis and thereafter proceeded to penetrate her. It was further alleged that after the incident the appellant gave the victim TZS 1500/= together with the cooking oil and warned her not disclose the tribulation to anyone. The victim left the scene and headed back home, along the way while crying, she met the person who inquired what happened to her, she informed that person about the incident. The said person escorted her back home where they reported to PW2, the mother of the victim. PW2 inspected the victim's vagina and found out that she had sustained bruises, her vagina was swollen and bleeding. They rushed PW1 to Mugusu police station where she was given a PF3. PW1 was taken to the hospital for examination and treatment. The appellant was arrested on 27th January 2021 and subsequently arraigned in court.

He is aggrieved by both the conviction and sentence imposed on him; and has preferred an appeal based on five grounds as follows: - **One,** the prosecution side failed to prove scientifically the commitment of an offence of rape. **Two,** the prosecution side failed to prove the allegation beyond reasonable doubt. **Three,** the prosecution failed to prove whether the accused's sperms penetrated into the victim's vagina. **Four,** all testimonies adduced in the trial court were insufficient to prove the case because they were based on hearsay evidences tendered by prosecution side, and there were no witnesses who saw the appellant committing the crime. **Five,** the prosecution evidence did not meet credibility and weight of evidence as required under Section 110 of The Evidence Act, 1967.

At the hearing before this court, the appellant prosecuted the appeal on his own, whereas Ms. Dorcas Akyoo, learned State Attorney represented the respondent. The appellant began his submissions in support of appeal by stating that he was arrested on 26.01.2022 at 20:30hrs. That the cause of his arrest was one Grace John and her child who is the victim, who went over to the appellant's shop and Grace John, who appeared drunk wanted to be given a quarter kilogram of sugar but the appellant refused as Grace John did not have enough money. That,

he took the sugar back and at that moment they started calling him "rapist", as he went on serving other customers. He further told this court that he decided to contact the Ward Executive Officer (WEO) who went over to his shop. After arriving Grace John told him that the appellant had raped her daughter, the victim. The WEO then suggested that they go to the police. That the police arrested him and took him to the station where he recorded his statement and was taken to lock-up. It was his further submission that he was taken to court on 01.03.2021 since 26.02.2021. He claimed that during the trial, the victim stated that her mother sent her to his shop at 15:00hrs while the victim's mother claimed that she sent her at 18:00hrs. He added that the medical doctor stated that he proved rape after examining the victim at 13:00hrs and that there were sperms on the victim's vagina but the sperms were never subjected to examination to prove they were from the appellant.

He further claimed that it was the victim's evidence that while still at the shop, a certain man came and she told him that "Kisoda amenifanya" and the said man after examining her vagina took her home to her mother and gave her TZS 1,500/= stating that the victim was bribed by the appellant. He complained that although he wanted the said man testify, he never did, and it was only the WEO who testified that he arrived

at the scene and called the police. He concluded his submission stating that he appealed because he did not rape the victim but he was framed up.

The respondent through Ms. Akyoo, learned Senior State Attorney, objected the appeal. Right on the outset she supported conviction and sentence. She submitted on the raised grounds of appeal and thereafter turn to the appellant's submission.

On the first ground of appeal, in which the appellant complains on the absence of scientific evidence to prove the offence of rape, it was her submission that the same is not a legal requirement as according to section 127(6), the best evidence comes from the victim. She argued further that looking at PW1's evidence at page 5 and 6 of the typed proceedings, the victim has explained that it was the appellant who raped her and warned her not to report to anyone. But PW1 went on and told her mother PW2 who upon inspection found that PW's vagina was bleeding, swollen and had bruises.

Referring to the case of **Selemani Makumba vs R**, [2006] at page 379 where the Court of Appeal stated that the best evidence of rape comes from the victim, she argued that the trial court was convinced as

shown in the judgment that the victim was telling the truth thus her evidence was sufficient and there was no need of scientific evidence.

As regards the issue of PF3, the learned state attorney argued that the same was produced and admitted unprocedural as the appellant was not asked whether or not he objected the tendering of the same by a person other than the Doctor, so she prayed that the same be expunged from the records.

As for the second ground of appeal it was her strong argument that the same was indeed proved beyond reasonable doubt. That the prosecution had two duties, the first one was to prove that the age of the victim was below 10 and the second, that the victim was penetrated. She added that with respect to the first duty, the victim told the court that she was 9 years old the evidence was corroborated by that of PW2, the victim's mother. As for the issue of penetration, it was the victim's own testimony that she was penetrated by the appellant. She said "Kisoda amenifanya huku" while pointing at her private parts. She stated that using the words by the victim taking into consideration her age and tradition, it was obvious that the victim meant that the appellant raped her. The said testimony was corroborated by that of PW2 who testified that after being told by the victim what had happened to her, she

inspected her private parts only to find that the victim had indeed been penetrated. She relied on the decision in the case of **Masalu Kayeye vs R**, Criminal Appeal No. 120 of 2017 at page 16 and 17, where the court stated that different types words can be used to mean that a person or victim was raped. It was her conclusion therefore that the offence was proved beyond reasonable doubt.

In the third ground of appeal, the learned State Attorney argued that it is not a legal requirement for an accused person to be present at the time of examination of the victim of rape. It was further argued that even without such examination, the testimonies of PW1 and PW2 was sufficient to prove that the victim was raped by the appellant.

In the fourth ground of appeal, it was the respondent's reply that as per section 143 of the Evidence Act, there is no any number of witnesses required to prove an offence. That the offence of rape is done in private and the only witness is the victim, thus PW1 was enough to prove rape even without the evidence of PW2.

In the fifth ground of appeal the appellant is challenging the prosecution evidence. Replying to this ground, the learned State Attorney submitted that the prosecution witnesses were all reliable and even the trial court at page 9 of the judgment showed that it believed the witnesses

and had no any reason to doubt them. She submitted further while referring to the case of ***Goodluck Kyando vs R,*** TLR 2006 at page 363 in which the court held that every witness has a right to be believed unless there is a reason not to believe them; that this court should agree with the trial court which saw the demeanour of the said witnesses and appreciate that they were credible and the coherence of their testimonies should show that what they testified was true.

Replying to the appellant's submission, learned state attorney stated that the victim never mentioned that a person came at the shop and she told him that she had been raped, that what she testified was that she met that person while on her way back home and told him that the appellant had raped her. That although that person was never called to testify, still the evidence that was produced before the court was sufficient. As for the rest of the issues complained of in his submissions, she named them afterthoughts as the same were not included in his defence. She therefore prayed that this appeal be dismissed and conviction and sentence be upheld.

In his very short rejoinder, the appellant stated that he could not express himself before the court because he was told to answer questions only thus, he was limited from expressing himself. When asked by the

court if he knew the victim before, he stated that he did know the victim as they were neighbours and that they never had any grudges against one another. As regards the arrest on 26.02.2022 and arraignment on 01.03.2022, the state attorney responded that such delay did not prejudiced the accused. That investigation was not yet complete

From these submissions both for and against this appeal the singular question to be resolved is whether the appeal presents a credible case on the basis of which the decision of the trial court may be vacated.

I will begin by combining grounds two, four and five of the appeal which question the competence and strength of the prosecution's case. By and large, these grounds appear to suggest that the prosecution did not prove its case beyond reasonable doubt. The respondent is opposed to this contention. The learned state attorney holds the view that the victim proved that she had been known carnally, the perpetrator being none other than the appellant. The 2nd, 4th and 5th grounds will be answered jointly as they generally challenge the strength of prosecution case.

It is imperative to note that, the provisions of sections 110 and 111 of the Evidence Act require that a person who alleges as to the existence of a fact carries the burden of that proof. Regarding to criminal cases,

such burden is vested on the prosecution side. This is an ancient canon of law as highlighted in the legendary commentaries made by Sarkar on Sarkar's Laws of Evidence, 18th Edition., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by Lexis Nexis. At page 1896 of the said commentaries, the learned aptly state as follows:

> '***... the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof***. *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason …. Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...'*** (Emphasis added).

It was reiterated later by the East African Court of Appeal in an old case of ***Ramanlal Trambaklal Bhatt v. Republic*** [1957] E.A. 332, wherein it was guided thus:

'Remembering that the onus is always on the prosecution to prove its case beyond reasonable doubt.'

This requirement was further highlighted in ***DPP v. Peter Kibatala***, CAT-Criminal Appeal No. 4 of 2013 (DSM-unreported), in which it was held:-

'In criminal cases, the duty to prove the charge beyond reasonable doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt.'

Rape is an offence that is provided for under section 130 (1)(2) and (4) of the Penal Code which states as follows:

'(1) It is an offence for a male person to rape a girl or a woman.

(2) ***A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:***

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

(3) n/a

(4) For the purposes of proving the offence of rape-

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and

(b) evidence of resistance such as physical injuries to the body are not necessary to prove that sexual intercourse took place without consent. (Emphasis added).

Based on the above cited provisions, it is clear that indulging in a prohibited sexual intercourse, and knowledge of the relationship by the accused person constitute key ingredients of the offence of rape. This position of the law was cemented in the celebrated case of ***Selemani Makumba*** (Supra), in which the Court of Appeal of Tanzania held:

> ***"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent*** *and in case of any other woman where consent is irrelevant that there was penetration."* (Emphasis supplied.)

The testimony of PW1 the victim of the alleged, laid bare how the appellant indulged in sexual with the victim. Her testimony set the matter in motion when she was quoted, at page. 5-6, of the trial proceedings saying as follows;

'I went to the accused's shop to by some cooking oil. At the shop, I found the accused in the shop, the accused told me to enter into his shop to collect a bottle of some cooking oil. I entered into the shop while inside the shop the accused hold my hand, we were only two in the shop. The accused pulled me down, I laid down on my back. The accused undressed his trouser, he also undressed me, he oiled my vagina with some oil also he took some oil and oiled his penis then kisoda inserted his penis into my vagina.'

PW1 being a child of tender age, the trial magistrate examined her and she recorded that she was satisfied with PW1's intelligence and that she understands the duty to speak the truth and she promised to speak the truth (see page 5 of the typed proceedings). This piece of evidence was corroborated by the testimony of PW2, the mother of the victim whose account of facts is gathered from page 11 and 12 of the proceedings. She testified as follows:

'…I took the victim in the room, I checked her vagina, she had a swollen vagina, had bruises, also her vagina was bleeding. The victim informed me that the accused Kisoda took her in the shop and had sexual intercourse with her.'

The prosecution's testimony demonstrated, as well, that the appellant was not a stranger to the victim, she knew him as they are living in the same neighbourhood. It is my conviction that, the totality of these testimonies succeeded in proving the appellant's blameworthiness beyond reasonable doubt, and I find no reason to doubt or reverse the trial court's reasoning. I dismiss these grounds of appeal.

In grounds one and three, the appellant has decried the trial court's admission of prosecution's evidence without undertaking scientific proof. The respondent's counsel argues that there is no such requirement under the law. She embraces the view that the court can solely rely on the victim's testimony to ground conviction. I am in agreement with the counsel's averments, at page 5 and 6 of the proceedings as I have stated earlier the victim informed the trial court what transpired on the fateful day. Provisions under Section 127 (6) of the TEA (Supra), as rightly cited by the respondent's counsel is to the effect that:

> *'Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as*

the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.'

Relying on the above provisions, I hold that the prosecution case was proved beyond reasonable doubt. PW1's testimony showed how the appellant perpetrated the offence of rape. Therefore the 1st and 3rd grounds have no merit. As regards the oral submission of the appellant, much as they were not part of his grounds of appeal, they are not supported by any evidence in record as PW2 did not mention anywhere that she sent PW1 to shop at 18:00hrs. As for the rest of submission they were never mentioned during trial hence they remained to be afterthoughts.

I have also noted, in the course of composing this judgment that there are contradictions between PW1 and the chargesheet on the date of the commission of the offence. While the chargesheet mentions 27th day of January, 2021, PW1 mentions 27th day of December, 2021. Considering that PW2 testimony is in accordance with the chargesheet and that the date mentioned by PW1, does not look realistic as by that

date the judgment of the trial was already issued. However, I find this irregularity a curable under s. 388 of the Criminal Procedure Act, as it did not occasion any injustice on the appellant.

In the upshot of all this, I find the appeal barren of fruits and, as such, I dismiss it. I uphold the conviction and sentence passed by the trial court.

It is so ordered.

Right of appeal duly explained.

DATED at **MWANZA** this 28th day of October 2022.

L. J. ITEMBA

JUDGE