

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 35 OF 2022

(Originating from Namtumbo District Court in Criminal Case No. 47 of 2022)

JUMA HASSAN ISILAH IAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 17.11.2022

Date of Judgement: 21.11.2022

U.E Madeha, J.

Before the District Court of Namtumbo at Namtumbo, the Appellant (Juma Hasani Isilahi) was charged and convicted with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code (Cap 16, R.E 2019) and he was sentenced to serve thirty (30) years imprisonment.

The Appellant was aggrieved by conviction and sentence and he has knocked the doors of this Court. He has filed five grounds of appeal which can be paraphrased as follows:-

1. *That, the trial Magistrate erred in law and fact to convict the Appellant relying on exhibits P1 and P2 while they were not read over before the court after being admitted.*
2. *That, the Trial Magistrate erred in law and fact by convict the Appellant relying on PW3's evidence which was weak and doubtful taking into consideration of her rank in the medical profession as she was a Clinical Officer on the material date. Hence, she was not competent enough to conduct such a medical examination.*
3. *That, the trial Magistrate erred in law and fact to convict the Appellant while the prosecution evidence was uncorroborated.*
4. *That, the Trial Magistrate erred in law and fact to convict and sentence the Appellant to a term of thirty (30) years imprisonment because after the court had recorded the "memorandum of agreed facts" he lied to have read and explain the matters agreed to the Appellant in his own language instead he invited him to sign the memorandum of agreed matter". In fact, that irregularity caused injustice or prejudiced the Appellant as he was considered as an adult of nineteen (19) years while he was still a child of only seventeen (17) years old during the whole trial.*

5. That, the Trial Magistrate erred in law and fact to sentence the Appellant to serve thirty (30) years imprisonment without considering the age of the Appellant as he was only sixteen (16) years old during the alleged date of commission of the offence.

Briefly, the facts of the case led by the prosecution before the trial court are as follows: PW1 is the victim's mother. The trial court called the victim by the name GJ which is not her real name. After voire dire test she testified that she was a standard six (6) pupil at Minazini Primary School and she was eleven (11) years old.

As a matter of fact, on the material date GJ informed her mother that she was raped by the accused person in the farm of Minazini Primary School. As a concerned mother she inspected GJ and found that her vagina had swollen. She reported the matter at Namtumbo Police Station where they obtained the PF3 and went to Namtumbo Medical Center for medical examination and treatment. On the same note, PW2 stated that when she was moving from the shop to buy rice, she met the Appellant (Juma Hasani Isilahi) on her way near Minazini Primary School. Suddenly, the Appellant grabbed her hand and threatened to kill her if she could dare to shout or open her mouth to scream. Notably, he took her to the school's sunflower

farm where she was ordered by the accused person to take off her skirt and her underwear. The accused also ordered her to kneel down while touching the ground. To crown it all, the Appellant forcefully inserted his penis inside her vagina.

It is a fact that, the accused after raping her, he actually ordered her to put on her clothes and never to inform her mother that is PW1 about the incident. In that regard, she went home and did the opposite by informing her mother about what had happened earlier in the school's sunflower farm that is she has been raped by Juma Hasani Isilahi, although, the victim introduced to him as Francis due to the fact she knew him before the incident.

It is worth considering that, PW1 (the mother of the victim) took her to the police station immediately. Afterwards, they went to the hospital for a medical examination. It is a fact that, PW3 informed the Court that on 22nd May, 2021 around 19:00 hours she received GJ as a patient at Namtumbo Health Center. On the same note, she was with her mother carrying a PF3 that required her to examine PW2. She examined the vagina of GJ and found that she was raped and her vagina had bruises and multiple wounds. Additionally, her cervix opened as a result her vagina lost its virginity. PW3

gave PW2 HIV prevention medicine and anti-pains. She also filled the PF3 and gave to PW1 to return to the police station. In addition, she averred that PW2 vagina and cervix were open since the vagina had been penetrated by a blunt object.

Basically, to prove the age of the victim (PW2) the prosecution tendered the Birth Certificate which was admitted as exhibit "P1". Also, the victims PF3 was tendered and admitted in Court as exhibit "P2".

During hearing of this appeal, the Appellant appeared in person while the Respondent that is the Republic was represented by none other than Hellen Chuma, the State's Attorney. The Appellant in his submission did not have many words to speak apart from asking this Court to set him free because when he was accused, he was only seventeen (17) years old.

On the contrary, Ms. Helen Chuma, the State's Attorney opposed the Appellant's appeal. In her submission, she requested to consolidate the fourth (4th) and fifth (5th) grounds of appeal and she averred that the elements of the offence of rape was proved.

Moreover, she stated that the evidence given was not weak but the Appellant was convicted on the strength of the evidence given by the

prosecution side including the victim. Thus, the victim's evidence was strong enough to convict the Appellant for the offence he was charged with. For more emphasis, she cited with approval the case of **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016, in which it was held that in rape cases the best evidence to convict the Appellant is the victim's evidence.

Notably, she prayed the court to uphold the Trial court's sentence. In his rejoinder to the State's Attorney submissions, the Appellant prayed to be released from prison considering the fact that he was only seventeen (17) years old. The grounds of appeal and the submissions made by both parties in this appeal raises the following issues which are;-

1. Whether the exhibit tendered in court was read over after being admitted.
2. Whether the PF3 does not have a sufficient standard to prove the case.
3. Whether the appellant was aged seventeen (17) years old.
4. Whether the offence of rape contrary to *sections 130 (1) (2) (e) and 131 (1) of the Penal Code (Cap 16, R.E 2019)* was proved beyond reasonable doubt.

Starting with the first issue of whether the exhibits which were tendered in court were read over after admission; in fact, it is the requirement of the law that the exhibits are supposed to be read over after they have been admitted in Court. On the same note, reference was made to the case of **Samweli Kambanga v. UFK**, North West Land Appeal No. 21 of 2019, High Court of Tanzania at Kigoma, whereby it was stated that:-

'On my part, I should at the outset state that it has been clearly settled that whenever a documentary exhibit is tendered in evidence, the same must be read loud in the presence of parties to accord them an opportunity to hear its contents for their guard in defense against the document. This is both in Civil and Criminal trials.'

To add to it, reference is also made to the case of **Jumanne Mondolo v. Republic**, Criminal Appeal No. 10 of 2018 (unreported), where the Court emphasized the importance of reading a documentary exhibit after its admission.

As a matter of fact, I have carefully gone through the Court's records and come to realize that the exhibits tendered in court were P1 and P2, which were the birth certificate and the victim's PF3. Notably, the records of

the trial Court indicates that they were all read over in court after being admitted.

At this juncture, I am inclined to disagree with what was pointed out by the Appellant and I strongly concur with the State's Attorney for the Republic, who clearly stated that the exhibits "P1" and "P2" were read after being admitted. Thus, the Appellant's first (1st) ground of appeal is unfounded as a result it is hereby dismissed.

On the second (2nd) ground of appeal is concerned, that is whether the Clinical Officer is allowed to examine the victim of rape and fill the PF3, the Appellant stated that the Clinical Officer is an incompetent person to fill PF3 exhibit that is P2 he is not a doctor. According to the Appellant the General Assistant Medical Officer (AMO) or Medical Officer (MO) and a doctor above those ranks in medical practitioners are qualified to conduct such a medical examination and lastly fill the PF3. He contended that the Clinical Officer is not a qualified officer to fill in the PF3 thus, it does not have sufficient standards to prove the offence of rape.

With the foregoing, it is the view of this Court that, experts are people with special knowledge and understanding. Basically, experts are people

possessing special qualifications in the field in which they are called to opine or testify. In that case, the expert's opinion that is (PW3) is based on the testimony of a witness who observed that the victim had bruises on her vagina. To crown it all, he obtained special knowledge in the area in which he was called to opine. As a matter of fact, this issue is very similar to the question that appeared in the case of **Sospeter Ramadhani v. The Director of Public Prosecutions (DPP)**, Criminal Appeal No. 239 of 2019 in which an important issue was whether the Clinical Officer is a competent person to conduct medical examination. In deciding that issue the Court of Appeal of Tanzania cited with approval the decision made in the case of **Juma Said** (supra) in which they relied on the decision of **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016, **Julius Kandonga v. Republic**, Criminal Appeal No. 77 of 2017 and **Filbert @ Pasco v. Republic**, Criminal Appeal No. 267 of 2019 (all unreported). In **Charles Bode** (supra) the Court defined the term "Clinical Officer" to mean:

'A gazetted officer who is qualified and authorized to practice medicine. A Clinical Officer observes, interviews and examines sick and heal individuals in all specialists to document their health status and applies pathological, radiological, psychiatric, and community health techniques...'

Additionally, in the case of **Sospeter** (supra) the Court stated that;-

'PW3 in the instant case as a Clinical Officer was competent to examine PW1 as he did and established that PW1 was actually raped'.

From the foregoing, it suffices to restate that the Court has settled and made it clear that the Clinical Officer is a qualified medical practitioner authorized to conduct medical examination. I concur with the State's Attorney for the Republic that PW3 was a competent witness to examine PW2. To crown it all, I did not see anything to disregard PW3's evidence and eventually, the second (2nd) ground of appeal is unfounded and dismissed.

On the issue of the Appellant's age is concerned, the Appellant stated that his age was not proved. To add to it, he stated that he was only seventeen (17) years old when he was accused and he was supposed to be sent to the Juvenile Court.

On the same note, Ms. Hellen Chuma for the Respondent denied the claims and stated that the accused admitted his personal particulars many times while in the Trial Court. **Firstly**, the charge was read in the Court, and the Appellant admitted his personal particulars including his age. **Secondly**, when the memorandum of facts were read during preliminary

hearing on the memorandum of agreed facts, he admitted his age to be nineteen (19) years old. **Thirdly**, when he was giving his defence evidence, as seen in the trial court proceedings, the Appellant stated that he was nineteen (19) years old.

The State's Attorney further submitted that the Appellant could not deny his age during the appeal while the records on his age are clear. In his rejoinder submission the Appellant continued to hold that he is seventeen (17) years old and not nineteen (19) years old and he prayed for the Court to set him free. I reckon with the state's attorney and see that the accused was required to deny the age written in the charge sheet in the Trial Court. Surprisingly, when the judgement was read the Appellant brought his Birth Certificate that was made after the conviction and strange as it may sound, the Birth Certificate was made while he was in prison that is on 25th October, 2022 while he was serving his sentence. As a matter of fact, it was after two (2) months since he was convicted and sentenced to serve thirty (30) years imprisonment.

I am of the view that, if the Appellant was a reasonable man he would have tendered the Birth Certificate during trial of the case. In that regard, the Birth Certificate should have been prepared before the trial and it would

make cheaper for the Appellant to prove that he was only seventeen (17) years old when he was charged. In that situation the ground of appeal on the age of the Appellant cannot work due to the fact that the Appellant had not presented meaningful reasons. The Appellant was required to reject his age when the charge sheet was read over to him for the first time, when the memorandum of facts was read or during trial, so that the Court could have to make determination on the accused's age. To put it in a nutshell, the fourth (4th) and fifth (5th) grounds of appeal have no merit and are hereby dismissed.

On the issue of whether the offence of rape contrary to *sections 130 (1) (2) (e) and 131 (1) of the Penal Code (Cap 16, R.E 2019)* was proved beyond reasonable doubt, as a matter of fact, the Appellant was charged with the offence of rape and the basic thing to consider rape cases is the issue of penetration in the victim's vagina.

It is worth considering that, the Clinical Officer (PW3) stated that she found bruises on the victim's (PW2) vagina. She further testified that in the victim's vagina was penetrated by a blunt object. To add to it, this evidence is linked with the victim's evidence and that of PW1, which shows that the victim immediately after the incident reported to her that she was raped by

the Appellant. Additionally, it was around 18:00 hours in the evening, thus, there was enough light to recognize the accused, who was familiar to the victim before the incident.

This Court is in the view that; **First**, the identification was clear, **second**, the evidence of the victim, who was eleven (11) years old was enough to enter the Appellant's conviction because it is the best evidence in rape cases. Reference is made in the case of **Charles Bode v. Republic** (supra). **Thirdly**, is proof of penetration, as shown under *section 130 (4) (a) of the Penal Code (Cap 16, R. E 2019)*, which states as follows:

"130 (4) (a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence".

From the evidence given by the prosecution, it is proved that, PW2 was found with bruises on her vagina and it is also PW3 testified that PW2's vagina was penetrated by a blunt object and PW1 in her sworn testimony testified that he noticed that PW2's vagina was swollen. In that sense, I agree with Ms. Hellen Chuma, the State's Attorney for the Republic that penetration was proved beyond reasonable doubt, as the victim herself

testifies that she was raped by the Appellant. To crown it all, I did not find any genuine reasons to disregard those evidences.

After passing through the prosecution's evidence, I have directed myself to consider the evidence of the defence. Looking at the defence evidence which was given before the trial Court I have found that the accused failed to raise any doubt on the prosecution evidence. The trial Court was right to enter conviction to the offence he was charged. In one of his grounds of appeal the Appellant stated that he was seventeen (17) years old, but during trial when he gave his testimony, he stated that he was nineteen (19) years old. I find that the accused failed to defend himself in relation to the issue of age. In that regard, the Appellant cannot allege that he was seventeen years at the appeal stage. Finally, I find that all his grounds for appeal have no merit and are hereby dismissed. Order accordingly.

DATED and **DELIVERED** at Songea this 21st day of November, 2022.


U.E MADEHA



JUDGE

21/11/ 2022