IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 89 OF 2021

(Originating from Criminal Case No. 72 of 2020 at the District Court of Kongwa)

WACTO JAPHET MEELA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

03/8/2022 & 12/10/2022

KAGOMBA, J

Vide the judgment of the District Court of Kongwa at Kongwa (henceforth "trial Court") delivered on 27/4/2021, the appellant, JAPHET MEELA, 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 2019] (now R.E 2022) (Henceforth "the Penal Code"). He was sentenced to serve thirty (30) years in jail, pay fine of Tshs. 100,000/= plus corporal punishment of six strokes.

Briefly, before the trial Court, it was alleged that on 1/6/2019 at about 06:00hrs at Songambele Village within Kongwa District in Dodoma Region the appellant did have carnal knowledge of one L D/O C, a girl of 04 years of age (PW2). After a full trial, the trial Court found that PW2 succeeded to narrate clearly how the offence was committed. Guided by the decision in

Joseph Leko vs Republic, Criminal Appeal No. 124 of 2013, CAT at Arusha (unreported), the trial court proceeded to convict the appellant for the offence of rape as charged and sentenced him, as it did.

Being aggrieved by the above said decision in its entirety, the appellant has filed his Petition of Appeal against the said decision. The appeal is based on nine (9) grounds paraphrased as follows:

1. That, the trial Court erred in law and fact for convicting the appellant while the prosecution side did not prove its case beyond reasonable doubt.

2. That, the appellant was convicted and sentenced to thirty (30) years in jail basing on procedural irregularities.

3. That, the trial Court erred in law and fact when acted on the evidence of PW1 which was invalid for having been improperly received due to the fact that, according to court proceedings, the witness neither promised to tell the truth and not to tell lies, nor did the Court examine if the witness possessed sufficient intelligence as per section 127(2) of the Evidence Act (Cap 6 R.E 2019) (Now R.E 2022). (Henceforth "the Evidence Act").

4. That, the trial Court erred in law and fact when improperly admitted PF3 in evidence, without first being read out in court loudly to enable the appellant hear what it was all about.

5. That, the evidence of PW3 was not properly scrutinized as the trial Court was not addressed on the causes of the bruises to know if the same resulted from penetration of a male organ or any other reason in view of the centrality of the proof of penetration in rape offence.

6. That, the trial court erred in law and fact by not considering the issue of contradiction on the age of the victim. That, while the Memorandum of facts stated that the offence was committed on 1/6/2019 when the victim was four years, the victim adduced her evidence in 2020 stating that she was seven years, hence uncertainty in her age. That, neither the birth certificate was tendered to prove the age nor did her mother adduce evidence as to when the victim was born.

7. That, the appellant was wrongly convicted and sentenced for lack of corroboration of the evidence from the person alleged to be a good Samaritan who rescued the victim and handed over her to her parents. That, there was no reason why such person was not summoned to support the prosecution evidence.

8. That, the trial Court erred in law and fact by not considering that the prosecution evidence was fabricated and cooked against the

appellant for the reason that the appellant was arrested a year after the commission of the offence without any reason as to the delay to arrest him, while it was alleged that the appellant hails from the same village with the family of the victim.

9. That, the appellant was convicted without his defense being considered by the trial Court.

On the date of hearing of the appeal, the appellant was unrepresented while Ms. Patricia Nkina, learned State Attorney, appeared for the respondent. The appellant, being a lay litigant, told the Court that he could not expound on the grounds of appeal, hence prayed the Court to accept the Petition of Appeal as his submission.

Ms. Mkina, for the respondent opposed the appeal. Replying jointly on the 1st and 7th grounds of appeal she contended that the prosecution did prove the offence because PW2 (the victim), who was the key witness, was able to identify the appellant who used to visit the victim's home to play cards. That, the victim also specified the time of the commission of the offence, being 1800hrs where there was enough light for proper identification of the appellant by the victim.

On the 6th ground that challenged the proof of age of the victim, Ms. Mkina submitted that testimony of the victim (PW2) that she was four (4) years of age during commission of the offence was corroborated by her mother (PW1) Christina Charles.

Ms. Mkina further submitted on how the incidence occurred as per victim's testimony and her mother (PW1). That, being left playing with her peers, one Leila and Ada, the appellant hoodwinked the victim, pretending that he wanted the victim to show him where her mother was. That, the appellant carried the victim on his bicycle and rode towards the house where the victim's mother was. However, even after being shown the said house, the appellant bypassed the house and proceeded to a *shamba* where he told the victim to pick some medicine. When the victim refused, the appellant beat her up, undressed her and told her to lie down. That, the victim being intimidated, she lied down, whereupon the appellant also undressed, picked his penis, lied on top of the victim and inserted his penis into the victim's vagina.

Ms. Mkina further told the Court that, the victim thereafter went missing and on the next day one Samaritan found her near the cemetery and took her to a place where there was a funeral, and another person brought her back home. That, when she was returned home, the victim was not walking properly and upon being examined by PW1, she was found to have blood in her vagina and the vagina was also found to be enlarged and torn towards the anus.

In her further submissions, Ms. Mkina told the Court what obtained in the evidence of the victim's mother that the victim had blood at her vagina and faeces came out. She contended that the two testimonies were sufficient to land conviction as per the section 127(6) of the Evidence Act. She also

cited **Selemani Makumba V.R** [2006] T.L.R. 379 on sufficiency of the victim's testimony in proving rape. According to Ms. Mkina, the testimonies of PW1 and PW2 was further corroborated by the testimony of PW3 Dr. Ally Yahaya who medically examined the victim and found her vagina enlarged with bruises and blood clots.

Based on the above narrative from the testimonies of PW1 and PW2 as corroborated by PW3, Ms. Mkina submitted that the prosecution satisfied the provisions of section 130(1), (2) (e) and section 131(1) of the Penal Code. Relying on section 143 of the Evidence Act, that no specific number of witnesses is required to prove a fact, Ms. Mkina submitted that there was no necessity of calling the said good Samaritan to adduce evidence because the offence was already proved.

With regard to the 2nd ground, Ms. Mkina opposed the same for a reason that in the proceedings and judgment all procedures were followed.

On the 3rd ground, which alleged existence of irregularities in recording the evidence of the victim (PW2), Ms. Mkina opposed this ground for a reason that PW2 did tell the trial Court that she would speak the truth, hence the evidence of PW2 satisfied the requirement under section 127(2) of the Evidence Act.

On the 4th ground, Ms. Mkina conceded that PF3 was not read out in the trial Court. However, she quickly added that the Medical Doctor (PW3)

was able to explain what he found when he examined the victim. She referred to section 127(6) of the Evidence Act as well as **Selemani Makumba's** case to the effect that there was enough evidence to land the conviction against the appellant.

Replying to the 5th ground, Ms. Mkina submitted that the Doctor (PW3) didn't state the cause of the bruises in the victim's vagina because he was not at the scene of the crime. She added however that the cause of the bruises was explained by the victim in her testimony.

Regarding contradiction in prosecution evidence as alleged in the 6th ground of appeal, Ms. Mkina appeared to concede that there was a difference in the age of the victim, who testified that she four (4) when raped but stated two (2) year later that she was seven (7) years. Again, Ms. Mkina was quick to add that the difference in the PW2's evidence was not fatal. Ms. Mkina submitted that the victim stated clearly that she was a child.

On the 8th ground, Ms. Mkina opposed the idea in the said ground that the case was framed up against the appellant by Police. She replied that the evidence of the victim (PW2) was corroborated by evidence of PW1 and PW3. Regarding the appellant's delayed arrest, Ms. Mkina submitted that the appellant disappeared after the incidence until when the victim saw him and pointed at him upon seeing him playing pool somewhere. She added that the victim started crying upon seeing the appellant an act that led to his dentification and arrest.

On the 9th and last ground of appeal, Ms. Mkina conceded that the trail Magistrate didn't evaluate the appellant's evidence. She therefore urged this court, being the first appellate court, to evaluate the evidence which was not considered during trial. She wound up her opposition to the appeal by praying the Court to dismiss it on account of strength of the evidence on record. She also urged the Court to uphold the sentence too.

In his rejoinder, the appellant vehemently denied to have run away after the alleged incidence. He contended that the prosecution should have called the police officer who arrested him to adduce evidence on whether he had run away or not.

The appellant further opposed the submission that the testimony of PW2 was enough to land conviction. He argued that such evidence could be taken as sufficient only if the victim was stating the truth. He impeached her credence by showing how she fumbled on her true age. The appellant reiterated that, the testimony of PW2 was not correctly recorded as she was asked about "*Hasara za kusema uwongo*" (the disadvantage of telling lies) instead of being asked if she knew the meaning of saying the truth. For this reason, he prayed the court to expunge the testimony of PW2.

The appellant further rejoined that the PF3 has to be expunged for not being read out in court. He cited the case of **Yusuph Ngenda V. Republic**, without providing its full citation.

The appellant, being so lively during his rejoinder, further questioned the decision of the prosecution not to call as its witness the Samaritan who picked the victim from crime scene to corroborate what was stated by PW1 and PW2. He contended that the evidence of same members of the family (i.e PW1 and PW2) is not admissible in court. He emphasized that the evidence of the Samaritan was important to clarify where and how he found the victim, adding that it was not safe to trust the said Samaritan because he could as well be the culprit.

From the above rival 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, I am duty bound to subject the evidence adduced during 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.

Having gone through the proceedings and the judgment of the trial Court, and after considering the submissions made in this appeal, I have no doubt at all that the offence of rape was committed on the victim. The testimony of the victim (PW2), her mother, Christina Charles Milimo (PW1) and the medical doctor who examined the victim Dr. Ally Yahaya (PW3) proved existence of all the essential ingredients of the offence of rape, the most important of which being penetration of man's penis into the vagina of the victim, in this case PW2.

I am alive to the fact that there exists an elongated list of authorities, the case of **Selemani Makumba v. Republic** (2006) T.L.R 396, being the most celebrated, consistently holding that true evidence of rape has to come from the victim. In one of subsequent decisions, particularly the case of **Godi Kasenegala v Republic,** (Criminal Appeal 10 of 2008) [2010] TZCA 5(02 September 2010), available at www.Tanzlii.org , the Court of Appeal stated:

> *"It is now settled law that, the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give, corroborative evidence".*

However, after scrutiny of the evidence on record, I am totally lost as to how the appellant was identified to be the man who committed rape on the victim. The only evidence available to show that the appellant is the culprit is that of the victim (PW2). According to PW1 Christina Charles Milimo, the victim's mother, on 31/5/2019 at around 1800hrs, she left the victim playing with her cousins namely; Leila and Ada. Then, a man who was later identified to be the appellant, took the victim on a bicycle and proceeded to commit rape on her. Apparently, Leila and Ada, who were playing with the victim, had the opportunity to see that man. No doubt, these two children, being the victim's peers and likely to be of tender age too, would still make key prosecution witnesses as far as the identification of the culprit is concerned.

Section 127(3) of the Evidence Act allows the evidence of a child of tender age to be acted upon as material evidence to corroborate the evidence of another child of tender age, in this case the victim. Surprisingly, the two children never featured anywhere in the identification of the offender.

The only time the appellant was identified to be the culprit is when PW1 was taking back the victim (PW2) from school and passed along a group of people who were playing pool. PW1 testified that the victim worriedly pointed a finger at the appellant who was among those at a pool table and stated that he was the man who raped her. It was for the first time ever in the entire proceedings that the victim mentioned her assailant as "Kibabuu". PW1 testified that Kibabuu was known to the victim even before the incident because Kibabuu used to come to their home to play cards. In my view, this piece of evidence is significantly doubtful.

In the entire episode, there is nowhere the victim was ever before asked by her mother (PW1), or anybody else, as to whether she knew her assailant, and who that assailant was. Never before the said identification of the appellant, at the pool table, did the victim tell her mother that the person who raped her is Wickto **a.k.a** Kibabuu, who used to go to their home to play cards.

Since, according to PW1, the house where Leila and Ada were staying was in the same neighbourhood, it was likely that Kibabuu was not a new

face to Leila and Ada. For this reason, Leila and Ada ought to know, from day one, that it was Kibabuu who took their cousin, the victim. Yet, the identification of Kibabuu or Wickto at a pool table came very late and as a surprise to both the victim and her mother. These pieces of evidence by PW1 and PW2 simply do not add up. It beats my mind to accept these testimonies as a proof, beyond reasonable doubt, of the fact that it is the appellant who raped the victim.

There is also a question about two other persons who met with the victim. These are; the person who first found the victim near the cemetery and brought her to a funeral place, and secondly, the person who took the victim back home. In his rejoinder, the appellant stated that it was important for the said Samaritan to be called to testify as to where and how she found the victim. The appellant was casting doubt that the Samaritan could as well be the suspected offender. Couldn't it be possible that one of the two Samaritans committed the rape offence? I think, reasonable doubts have been raised by the appellant in this regard. In my considered view, therefore, it cannot be said that it is the appellant, and not anybody else, who committed rape on the victim.

On the other hand, the appellant challenged the impugned judgement for not considering his defence. Ms. Mkina, the learned State Attorney, conceded on this contention and prayed this court, being the first appellate court, to subject the evidence on record to a fresh evaluation and make own conclusions. I have accordingly read the testimony of the appellant (DW1)

from page 34 to 36 of the typed proceedings. Basically, the appellant testified about his surprise arrest on 26/6/2020 while on duty and testified on how he resisted the allegation against him. He categorically denied committing the alleged offence of rape.

While, admittedly, the law is settled that the victim is the best witness in rape cases, it has to be stated that not in every case where the victim testifies that an accused person raped her, the Court shall be bound to convict the person so accused. It behooves the Court to make this clarification on account of the fact that there exists another established legal principle that each case must be decided on its own set of facts and obtaining circumstances. (See **Athumani Rashid vs. Republic** (Criminal Appeal 110 of 2012) [2012] TZCA 143 (25 June 2012).

From the foregoing re-examination of the evidence, I find that the evidence adduced by PW1 and PW2 left reasonable doubts as to whether it was the appellant and not anybody else who raped the victim. The two Samaritan who enabled the victim to return home from the scene of the crime and her two cousins; Leila and Ada were very key to clear the serious doubts cast by the appellant. It is trite law that a court can make a negative inference on prosecution case for failure to call key witnesses. (see the holding of this Court in **Hemedi Saidi V Mohamed Mbilu [1984] TLR 113).** I have demonstrated how key the two Samaritans and two cousins of the victim were indispensable. By not calling them to testify, I cannot hold otherwise than to draw an inference negative against the

prosecution that if the said potential key witnesses were to testify, they would adduce evidence to disprove the prosecution's case.

I think the trial Court erred in relying on the evidence that the appellant used to go to the victim's home to play cards, hence the presumption that the appellant knew the victim well. With respect, this was not enough. It was important for the trial Court to consider the glaring gaps in the testimonies of PW1 and PW2, particularly on the timing of identification of the appellant and the huge possibility that a person other than the appellant could have been the culprit. The trial Court was expected to make necessary inference when key witnesses were left out by the prosecution side without any plausible explanation.

For the above stated reasons, I find merit in the first ground of appeal which is sufficient to dispose the entire appeal. Indeed, the trial Court erred in law and fact in holding that the prosecution side proved its case beyond reasonable doubt. Accordingly, I allow the appeal, quash the conviction and set aside the sentence. Consequently, the appellant is set free forthwith unless he is held for some other lawful cause. Order accordingly.

Dated at **Dodoma** this 12th day of October, 2022.

ABDI S. KAGOMBA

JUDGE