IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO.87 OF 2019

(Original Cr. Case No 233 of 2016 of the District Court of Nyamagana District at Nyamagana)

JABA JOHN .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

29th Sept & 13th Dec. 2022

DYANSOBERA, J:.

The Appellant in this Appeal was arraigned before the District Court of Nyamagana for the offence of rape contrary to sections 130(1)(2)(e) and 131 (1) of the Penal Code [Cap 16.R.E 2002], now R.E 2022.

The Prosecution alleged that on 18th October, 2016 at Nyakato Mahina area within Nyamagana District in the Region of Mwanza, the Appellant had carnal knowledge of one '" J'" a girl aged Seven (7) years. He denied the charge. However, at the end of the trial, he was convicted and sentenced to life imprisonment.

Dissatisfied with that decision he appealed to this court. The appeal was, however, not decided on merit as the proceeding of the trial court were nullified on account that the preliminary hearing was conducted

in contravention of the provisions of s.192(3) of Cap 20 R.E 2019. The DPP's appeal to the Court of Appeal was allowed and a hearing of the appeal de novo ordered to be conducted on the basis of petition of appeal which was filed on 29th May, 2019.

At the hearing of this appeal, Ms. Margareth Mwaseba, learned state Attorney represented the respondent, whilst appellant appeared in person, unrepresented.

On taking the stage to argue the appeal, the appellant stated that he had filed six (6) grounds of appeal in the main petition of appeal. He then added two additional grounds of appeal to make a total of eight grounds of appeal as follows:-

1. THAT, void dire test was not properly conducted as it never met the standards required in law.

2. THAT, the trial court never warn itself to the danger of of recording PW'5's evidence who neither knew the meaning of oath nor did she promise to say nothing but the truth.

3. THAT, the appellant was represented by lawyer to the capital offence as such, thus the trial was not too prejudicial to the indigent and lawman appellant.

4. THAT, the appellant was detained at Police Station over period required by law i.e from 18 October to November 24 of 2016 when arraigned in Court the Act amount to torture and oppressive.

5.THAT, the section of law charged to was unfounded further was no locus stand in law.

6. THAT, the charged offence was not proved to appellant beyond reasonable doubt thus must benefit on such.

7. THAT, the whole/entire evidence of PW 5, was unlawful admitted hence PW 5 did not promise the court to tell truth, therefore is c/s 127 (2) of the TEA (Cap 6 RE 2019)

8. THAT, the remained evidence was/is not corroborated and I dare to state that the alleged offence was not proved beyond all reasonable doubt.

The brief history of the matter is that the appellant was a shoe cobbler. According to the victim who testified as PW 5 on 18th October, 2016 at about 13.00 hours she was asked by the appellant to take her shoes to him for polishing. However, when she got into the appellant's hut, the appellant undressed her underpants and had sexual intercourse with her where she felt pain and raised a hue cry. In the

course, a certain lady arrived at the appellant's hut for shoe shimming but encountered the appellant making love to the child and raised an alarm. Some people who were witnessing a motor vehicle accident which had just happened somewhere close to the scene responded to alarm. One of them that is PW1was the mother of the child 'J' name withheld to preserve the dignity of the child). PW 1 found the Appellant's trousers down while PW 5 was sitting on the appellant's lap and the underparts was on the ground while the skirt was pulled to the appellant's chest. On seeing her, the appellant was confused and failed to release the girl. Another person was Mary Elias (PW2), who upon arrival at the scene of the crime, found the appellant dressing -up his trouser and saw the sperms on the girl's legs and her private parts.

After people converged at the crime scene, the appellant was apprehended and sent to Nyakato Police Station where No. WP 5391 Detective Corporal Janeth (PW4) was assigned to investigate the case. She interrogated the appellant who denied the allegations and thereafter, PW4 issued a PF 3 to go to the hospital for medical examination. At Sekou Touré Hospital, Dr. Dani Matari (PW3) examined the girl and found some blood in her vagina with no hymen The girl could not seat or walk properly. He concluded that the girl had

penetration however slight can prove rape. The case of **Issa Ramadhani v R**, Criminal Appeal No.409 of 2015 CAT Dodoma.

The argument that the cells leader or chairman was not called, s 143 of TEA is clear that there is no number of witnesses required to prove a fact and that in rape cases it is the victim not the rapist who is medically examined.

On the 3rd ground of appeal, there is nowhere the appellant refused to engage an Advocate and the Government has no obligation to supply a lawyer to a person charged with rape, learned State Attorney emphasized.

On the 4th ground of appeal, argued that is no evidence on the time he stayed in custody and nothing to prove that he was denied bail, the law which appellant charged was correct, penetration was proved by Pw5 and evidence was corroborated by other witnesses including eye witness and Doctor, also there was no cross examination that means he admitted contents. The court was the case of **Emmanuel Saguda v R**, Criminal Appeal No 422 of 2013 CAT was cited to cement the argument.

She insists that in rape cases elements to be proved is penetration and age of the victim, in our case the victim's father proved the age of

the victim and tendered birth certificate which was admitted as Exhibit P2. The learned Senior State Attorney was of the view that the case against Appellant was proved beyond reasonable doubt.

In rejoinder the appellant insists that his grounds be adopted.

I have considered the submissions by the parties and have found the issue which calls for determination is whether charge was proved beyond reasonable doubt.

It is position of the law in rape cases when the victim is of tender age, basic ingredients sustain conviction upon the accused person is prove of age and penetration upon the victim. In our the age of the victim was proved by Pw6 Jacob Clemence, the father of the victim by tendering the birth certificate that she was born on 16/9/2008 and was admitted as Exhibit P2. Further, as to the issue of penetration according to the trial court records, Pw3 the Doctor stated that the child had lost hymen and there were sperms on the vagina of the child. To cement PF3 was tendered and admitted as Exhibit P1.

Nevertheless, it is trite law that the best evidence is that of the victim, as stated in the case of **Majaliwa Ihemo v Republic**, Criminal Appeal No 197 of 2020(unreported).

The trial court believe Pw5's evidence though not taken under oath, her evidence was corroborated by an Eye witness (PW 1) who caught the appellants evidence got full support of evidence of red handed, the other witnesses, PW2 and PW3, also the accused person in trial he did not cross – examines the witnesses who testified against him.

It should be remarked that, the prosecution had two duties, first to prove that the offence was committed. On this aspect, the prosecution proved that the victim was aged 7 years hence under the age of 18 years. It also proved that the victim was penetrated as there was ample evidence that she was carnally known. Second, the prosecution had to prove that it is the accused who committed the offence. This, the prosecution succeeded to prove as the incident took place in the broad day light and was eye witnessed. Indeed, it was proved beyond reasonable doubt that the accused carnally knew the victim. The ingredients of the offence elucidated in the case of **George Mariki Ndengakumana v.R** Criminal Appeal No. 353/2014 CAT AT Bukoba (unreported) were proved to the required standard.

The trial court was justified to find that the case against the appellant was proved beyond reasonable doubt. The conviction was inescapable and the sentence of life imprisonment is the bare minimum prescribed by law.

The appeal fails and is dismissed in its entirety.

The Right of Appeal Explained.

W.P. Dyansobera

Judge

13.12.2022

This Judgment is delivered at Mwanza under my hand and the seal of this court on this 13th day of December, 2022 in the presence of the Appellant and Ms. Dorcas Akyoo, (SSA).

W.P. Dyansobera

Judge