IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 30 OF 2022

FLORENCE EPIMACK MAMSERY ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the District Court of Temeke at Temeke in Criminal Case No. 198 of 2020)

JUDGMENT

5th and 23rd December, 2022

KISANYA, J.:

This appeal stems from the decision of the District Court of Temeke at Temeke where the appellant, Florence Happy Mark Maseli was charged and convicted of rape contrary to section 130 (1), (2) (e) and 131(1) of the Penal Code, Cap. 16, R.E. 2002 (now. R.E. 2022). It was alleged that on diverse dates between September, 2019 and 24th May, 2020, at Mbagala Kichemchem area within Temeke District in Dar es Salaam Region, the appellant did have carnal knowledge of a 14 years old girl. For purposes of concealing the victim's identity, I shall henceforth be referring to her as the victim, MN or PW1 as the case may be.

What led to the arraignment and conviction of the appellant, as obtained from the record of the trial court, is briefly as follows. MN (PW1)

testified that she was born on 3rd March, 2005 and that she was living together with her aunty one, Fatuma Abou (PW2), as her house maid. The appellant happened to be PW2' tenant. It was the testimony of PW1 that, on 24th May, 2020, during the night, the appellant entered her room. He called and took her into his room which was next to the victim's room. PW1 further testified that the appellant undressed her and had sexual intercourse with her. The duo slept together that night. At around 4.00 am, PW1 was not found in her room. She was suspected to be in the appellant's room. Indeed, PW2 testified that to have found the appellant together with the victim. The appellant was then arrested and presented to Mturubai Police Post.

At the same time, the victim was issued with a PF3. She was taken to Mbagala Rangi Tatu Hospital where she was examined by Adda Lowasa (PW3). Upon examining the victim, PW3 opined that the victim was not found with bruises. She further opined that the victim was not a virgin and that a blunt object had entered her vagina. PW3 tendered the medical examination report (PF3) which was admitted in evidence as Exhibit P1.

On her part, WP 3884 D/CPL Agness (PW4) testified to have been assigned to investigate the matter. In so doing, PW4 recorded the appellant's cautioned statement, whereby he (the appellant) confessed to

have committed the offence. The said cautioned statement was admitted in evidence as Exhibit P3. PW4 further stated that he visited the crime scene and drew the sketch map. It was admitted in evidence as Exhibit P4.

In his defence, the appellant stated that on 14th June, 2020, his landlady asked him for some money. It was his evidence that he had no money asked for by his landlady. The appellant told the trial court that, at 0530 AM, he heard his landlady directing his daughter to enter into his bedroom. He alluded that upon the landlord's daughter entering his room, he was arrested on the ground that he was with her. The appellant stated further that his landlady had been demanding four million shillings from his relative in order to drop the case.

Having heard the evidence of both sides, the trial court found the appellant guilty as charged and went on to convict him as indicated above. At the end of the day, the appellant was sentenced to thirty years imprisonment.

Aggrieved, the appellant has preferred the present appeal. In the Petition of Appeal, the appellant raised four grounds of appeal as follows:

1. *The Trial court erred in law and in fact in failing to examine, assess and scrutinize the evidence adduced by*

both sides in respect of commission of the offence of rape thereto.

2. *The Trial Court erred in law and in fact in failing to assess and examine the evidence which indicated that the victim has consented the act as per evidence of being taken from her room to the room of the Appellant and the sexual intercourse which was conducted previously before this commission of the offence.*
3. *The Trial Court erred in law and in facts in failing to appreciate the evidence of PW3 which indicated that there were no bruises and the virgin and a blunt object had penetrated to (PW1).*
4. *The Trial Court erred in law and in fact in failing to interpret the provisions of section 130(1)(a) of the Penal Code, Cap. 16.*
5. *That the Trial Court erred in law and in fact in failing sentencing (sic) the Appellant to be in prisoned for 30 years under section 130(1) of the Penal Code, Cap. 16.*

When this appeal was called on for hearing, the appellant was present in Court. He also represented by Mr. Augustine Kusalika, learned advocate. On the other hand, the respondent Republic was represented by Ms. Yasinta Peter, learned Senior State Attorney.

Mr. Kusalika combined the first, second and third ground and argued them together. He also combined and argued the fourth and fifth grounds together.

On the first, second and third grounds, Mr. Kusalika submitted that evidence of PW1 shows that she did not raise an alarm when the appellant fetched her from her room and when she was taken into the appellant's room. Being alive to the position that evidence of the victim needs no corroboration, he argued that the Court must be satisfied that the victim told the truth. To expound his argument, the learned counsel cited the case of **Omary Kijuu vs R**, Criminal Appeal No. 39 of 2005 (unreported).

Mr. Kusalika further contended that the victim did not tell the truth. His contention was based on the grounds that; one, PW1 could not identify the appellant because she was asleep; *two*, PW1 slept in the appellant's room and did not raise an alarm; *three,* PW1's evidence that she felt pain is contradicted by evidence of PW3 and PF3 which indicated that the victim was not a virgin and she was not found with bruises; and *four,* the PF3 is silent on whether there was penetration.

In the light of the foregoing, the learned counsel faulted the trial court for failure to assess the evidence of PW1 and PW3. It was his

argument that the doubts exhibited in the evidence of PW1 and PW2 ought to have been decided in favour of the appellant.

Mr. Kusalika next submitted on the fourth and fifth grounds which fault the trial court for considering that the victim was below 18 years old. It was his submission that the victim's age was not proved. His submission was based on the reason that during the preliminary hearing, the prosecution stated that the victim was 14 years, while PW1 testified that she was 15 years and PW2 told the trial court that the victim was 16 years old. On that account, the learned counsel implored the Court to resolve the doubt in favour of the appellant. He also prayed the appeal to be allowed.

Through Ms. Peter, the learned Senior State Attorney, the respondent resisted the appeal. With regard to the first, second and third grounds, she submitted that the victim did not testify that she was asleep when the appellant entered in her room. According to her, the victim told the court what happened on the fateful day including the fact that she slept with the appellant. Referring to page 9 of the typed proceedings, she submitted that the victim's evidence on penetration was sufficient to prove the offence. Citing the case of **Selemani Mkumba vs R** [2006]

TLR 339, she restated the principle that the best evidence in sexual offences cases comes from the victim.

As for the contention that the evidence of PW1 was not corroborated by PW3 and Exhibit P1, the learned counsel conceded that Exhibit P1 is silent on whether the victim had pain. However, she was of the view that PW3 and Exhibit P2 corroborated evidence of PW1.

Reacting to the fourth and fifth grounds on the victim's age, Ms Peter submitted that the victim was below 18 years old at the time of commission of the offence. Making reference to birth certificate (Exhibit P1), she submitted that the victim was 16 years. In that regard, the learned Senior State Attorney submitted that one of the ingredients of statutory rape was duly proved. She relied on the case of **Evod Mashauri vs R**, DC Criminal Appeal No. 48 of 2019. It was her further argument that the variance if any, did not change the fact that the victim was below 18 years old and that it was immaterial whether the victim consented to have sexual intercourse with the appellant.

In conclusion, the learned Senior State Attorney invited the Court to dismiss the appeal for want of merit.

Rejoining, Mr. Kusalika reiterated his submission in chief that the variation on the victim's age should be resolve in favour of the appellant on the account that the prosecution was not aware of the victim's age. He further reiterated his submission that Exhibit P2 did not establish penetration.

I have considered the submissions by the learned counsel for both parties. The issue for determination is whether the appeal is meritorious or otherwise.

To start with, I find it appropriate to point out the underlying features of the offence laid against the appellant. As indicated earlier, the charge sheet was predicated under sections 130(1) and (2)(e) and 131(1) of the Penal Code. The offence established under the said provisions cited in the charge sheet is commonly referred to as statutory rape. It is committed when a male person has sexual intercourse with a girl or woman of below 18 years. The defence that the victim consented to the act does not hold water. I am fortified by the decision of the Court of Appeal in the case of **George Claud Kasanda vs. R**, Criminal Appeal No. 376 of 2017 (unreported) where it was held that:

> *"In essence that provision (section 130(2)(e) of the Penal Code) creates an offence now famously referred*

to as statutory rape. It is termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense age is of great essence in proving such an offence."

In view of the foregoing position of law, the prosecution was required to prove two ingredients; *one*, that, the victim was below 18 years; and *two,* that the appellant had a carnal knowledge (penetration) of the victim.

In the instant appeal, Mr. Kusalika's contention in the fourth and fifth grounds of appeal is to the effect that the victim's age was not proved. At the outset, the settled position is underlined in a list of authorities of this Court and the Court of Appeal states that the evidence to prove age of the victim may be adduced by the victim, parent, relative or medical practitioner or by production of a birth certificate. [See the case of **Isaya Renatus vs R**, Criminal Appeal No. 542 of 2015 (unreported)].

In our case, the prosecution stated in the charge the offence was committed on diverse dates between September, 2019 and 24th May, 2020 when the victim was 14 years old. It was also stated during the preliminary hearing that, the victim was 14 years old. However, as rightly

observed by Mr. Kusalika, the victim (PW1) stated that she was 15 years old at the time of adducing his evidence on 18/11/2020. She testified to have been born on 3rd March, 2005. On the other hand, PW2 whose evidence was recorded on 17/12/2020 testified that the victim was 16 years old. She further stated on oath that the victim was born on 23rd March, 2004. Her testimony was supplemented by a birth certificate (Exhibit P1) which was issued by the relevant authority on 12th May, 2017 and thus, before the commission of the offence.

In view of thereof, I agree with Mr. Kusalika that the charge sheet and evidence are at variance on the victim's age. Despite the variance, it is reflected from the charge sheet and evidence that the victim was below 18 years. In the case of **Robert Sanganya vs R**, Criminal Appeal No. 363 of 2019 (unreported, the Court of Appeal was faced with the case in which the charge sheet indicated the age of victim to be 14 years, but one of the witness stated that the age of the victim was 13 years, while the victim testified that she was 14 years old. It went on holding as thus:

> *"However, it is our opinion that whether the victim was fourteen or thirteen years of age, still, she was under the age of eighteen years. Notwithstanding the variance of the age in the evidence as claimed by the appellant, such variance was inconsequential.*

Furthermore, the concern raised by the appellant after his failure to cross examine the witnesses on the age of PW1"

Being guided by the above position, I agree with Ms. Peter that the variance of age pointed by the appellant's counsel is minor. It is clear that the issue whether the victim was under the age 14, 15 or 16 years of age appearing in the charge sheet and evidence leads to the conclusion that she was under the age of 18 years. This is when it is considered that the appellant did not cross-examine PW1 and PW2 on the victim's age. For that reason, I find no merit in the fourth and fifth grounds of appeal.

In the first, second and third grounds of appeal, the appellant's counsel faults the trial court for failure to consider that the victim was incredible and that penetration was not proved.

As for the penetration, I agree with the learned Senior State Attorney that the evidence to prove the ingredient of rape was given by the victim. For clarity, her evidence is quoted hereunder:-

"… he undressed my underpants, bra, shirt and kanga he was only wearing towel and he laid me on the bed and inserted his penis into my vagina inside, he just spread his towel. I felt pain on the umbilical code and he denied me from leaving and we slept till morning…."

PW1 further testified:

> *"Mara moja nimeenda chumbani kwake na mara nyingine alinifanyia chooni" the toilet located outside."*

As it can be glanced from the above excerpt of evidence, the ingredient penetration was proved by the evidence adduced by PW1. It is on record that her evidence was not challenged by the appellant. This is so because PW1 was not cross-examined by the appellant. In the light of the position underscored in the case of **Selemani Mkumba** (supra) referred to this Court by Ms. Peter, evidence of PW1 is the best evidence to prove the offence preferred against the appellant.

That notwithstanding, PW1's evidence on penetration was corroborated by the cautioned statement (Exhibit P3) in which the appellant confessed to have had sexual intercourse with the victim. The relevant part of Exhibit P2 reads:

> *"Baada ya kumjibu njoo ndipo alikuja chumbani kwangu, akiwa amevaa kanga na blauzi na moja kwa moja alikaa kitandani. Ndipo nilipoamua kumlaza kitandani na kufanya naye mapenzi. Mara baada ya kumalia kufanya naye mapenzi, nilimsikia kaka yake aitwaye ADAM akiwa anamwulizia…"*

Pursuant to the record, Exhibit P3 was admitted without being objected by the appellant. Further to the above, evidence of PW3 and Exhibit P2 that the victim was not a virgin suggest that the victim was carnally known. On the foregoing findings, I am of the humble view that penetration was proved by the evidence of PW1 which was corroborated by PW3 and Exhibits P1 and P3.

Last for consideration is the appellant's complaint that victim was not credible witness. It is trite law in this jurisdiction that every witness is entitled to credence and that he must be believed and his testimony accepted unless there are good and cogent reasons for not believing him. [See the case of **Goodluck Kyando vs. R**, Criminal Appeal No. 118 of 2003 (unreported)]. The law is further settled that, in assessing the credibility of witness, the trial court's domain is limited to his demeanour. However, the veracity of the testimony of a witness may be by establishing that the witness has misrepresented the facts or has given evidence contradictory or improbable evidence. This position was stated in the case of **Shabani Daudi vs. R**, Criminal Appeal No. 28 of 2001 (unreported) where it was held that:

> *"The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness, and two,*

when the testimony of the witness is considered in relation to the evidence of other witnesses."

According to Mr. Kusalika, the victim was incredible because she failed to raise an alarm when she was taken from her room and when she was in the appellant's room. It is clear that the argument implies that the victim consented to have sexual intercourse with the appellant. Given the fact that the victim was under the age of 18 years, it is immaterial whether she consented to have sexual intercourse with the appellant. Therefore, the fact that the victim did not raise the alarm is not sufficient to find her incredible witness.

It was further argued that the victim was not credible on the account she could not identify the appellant who entered her room when she was asleep. According to the record, PW1 testified that the appellant entered in the room when she (the victim) was not in deep sleep. Although, PW1 did not testify how she identified the appellant, the appellant confessed in the cautioned statement (Exhibit P2) that he had sexual intercourse with the victim on the fateful day. Considering further that the appellant confessed that the victim was found in his room, I am of the view that the issue of identification could not arise.

It was also argued that PW1 on one hand and PW3 and Exhibit P2 on the other hand are at variance on penetration. As stated earlier, this argument is based on the contention that the victim testified to have felt pain while PW3 and Exhibit P2 show that the victim had no bruises and that she was not a virgin. It is true that the victim testified that she felt pain on the umbilical, while that fact is not reflected in the evidence of PW3 or Exhibit P2. However, PW3 did not testify to have examined the victim on the umbilical. That being the case, it cannot be said that the victim and PW3 gave contradictory evidence.

Furthermore, the victim did not state that she was a virgin before the incident. Her testimony suggested that, it was not her first time to have sexual intercourse with the appellant. The fact that the victim was not found with bruises in her vagina does not imply that there was no penetration. This is when it is considered that the law provides that slight penetration is sufficient to prove the offence of rape. Further to this, it is my considered view that PW3's evidence that the victim was not a virgin suggested that she had been carnally known. Since the victim testified to have had sexual intercourse with the appellant and as the appellant confessed to have committed the offence, I find no cogent reason to find the victim as incredible witness.

In the event, I find the appeal to have no merit and it is dismissed in its entirety.

DATED at DAR ES SALAAM this 23rd day of December, 2022.

S.E. KISANYA
JUDGE