IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.47 OF 2022

(Originating from the District Court of Masasi at Masasi in Criminal Case No.36 of 2020)

SHAIBU RAJABU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

12/10/2022 & 19/12/2022

LALTAIKA, J.:

The appellant herein **SHAIBU RAJABU** was charged at Masasi District Court with the offence of rape contrary to Section 130(1)(2)(e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002]. He was convicted on the offence of rape and sentenced to serve thirty (30) years imprisonment term. Dissatisfied and aggrieved with both conviction and sentence hence this appeal premised on the following grounds: -

1. *The learned trial Magistrate erred in both point of law and fact to sentence the appellant without convicting him first.*
2. *The trial Magistrate erred in law and fact for convicting the appellant on rape offence while there is no proof of penetration as one of the basic ingredients of the offence.*
3. *The learned trial Magistrate erred in both in law and fact to convict and sentence the appellant on statutory rape while the age of the victim was not proved to be under 18 years as required by law.*

4. *The learned Magistrate erred in law and fact to sentence the Appellant without considering the defense evidence.*
5. *That the offence was not proved beyond reasonable doubt as required by the law.*

When the appeal was called on for hearing on 12/10/2022 the appellant appeared in person unrepresented. The respondent republic on the o and other hand was represented by Mr. Wilbroad Ndunguru, learned State Attorney. The appellant being a layman opted for the learned Senior State Attorney to start the submission so that he would come later and respond on some important issues.

Submitting on the first ground of appeal, Mr. Ndunguru contended that as per law one must provide that one is found guilty and convicted...The learned Senior State Attorney admitted that there were some defects on the impugn judgment particularly at page 11 where the trial court found the appellant "guilty of the offence of rape contrary to section 13(1),(2)(e) and 131(1) of the Penal Code [Cap. 16 R.E. 20219]".Mr. Ndunguru went further submitted that the logic is that the magistrate had gone through the entire process of conviction and sentencing as per law. To this end, the learned Senior State Attorney argued the court to step into the shoes of the trial court in order to rectify the mistakes of the lower court. To bolster his argument, he referred this court to the case of **Said Peter@ Ndira @ Said Ramadhani vs. R**, Crim Appeal 490 of 2020 CAT, Kigoma at page 6. Thus,the learned Senior State counsel argued this court to dismiss this ground of appeal.

Mr. Ndunguru submitted on the second, third and fifth grounds of appeal jointly since they both refer to a complaint of failure to prove the

offence. However, the learned Senior State Attorney contended that the offence was proved at the lower court. Mr. Ndunguru submitted that the age of the victim was proved and contended that the statement of the victim during voire dire was sufficient to prove the age. To cement his argument, he referred to the case of **Leornad s/o Sakata vs DPP**, Criminal Appeal 235 OF 2019 CAT, Mbeya whereby the Court stated that the age of the victim must not be stated with accuracy. The learned Senior State Attorney stressed that what is important is that the victim was below 18 years of age. Mr. Ndunguru submitted that in the matter at hand,the court expounded on the school of thoughts in interpreting the age of the victim.

On the same premise, the learned Senior State Attorney cited the case of **Robert Sanganya vs R**, Criminal Appeal 363 of 2019 CAT, Dar where the Court observed that mentioning the age of the victim is not proof of the same in court. That the learned Senior State Attorney submitted that the in the case at hand the victim mentioned her age as it appears at page 7 of the proceedings of the lower court. To this end, the Mr. Ndunguru contended that this court should find that the victim was a child of tender age.

Submitting on penetration, the learned Senior State Attorney argued that the penetration was proved as per testimony of the victim. Mr. Ndunguru went on and submitted that the victim notified PW2 (Neema Steven Albano) on the same day who investigated the victim and discovered that her private parts had been destroyed, bruises and seminal discharge indicating that a male person had penetrated her. In addition,

the learned Senior State Attorney submitted that the evidence of PW5 Mwajuma Twalibu Nachingulu, medical personnel proved that the victim experienced pains while being attended. He further contended that PW5 also found bruises and penetration by a blunt object as per page 6 of the proceedings of the lower court. Mr. Ndunguru also submitted that when the witnesses were testifying the appellant never cross examined on rape which mean he agreed that the child had been raped.

It was Mr. Ndunguru's submission on identification that the victim is the one who mentioned the appellant as soon after the event. The learned Senior State Attorney contended that the incident took place during the day. The learned Senior State Attorney submitted that shortly before the incident, the victim prepared food and shared with the appellant and one Mateso Rejas Mtipula (PW3). He insisted that this evidence was testified by PW3 who added that in the evening he was surprised to hear that the victim had been raped.

Submitting on the credibility of the victim, the learned Senior State Attorney contended that the lower court believed the victim and found the appellant had raped the victim. Mr. Ndunguru submitted that this court has often times referred the case of **Selemani Makumba v R** [2006] T.L.R. 379 and **Marwa Wangiti Mwita and Another v. R** [2002] T.L.R. 39 which are on credibility of witness. He contended that in the case of **Selemani Makumba** (supra) section 127(6) of the Evidence Act [Cap.6 R.E. 2002] was expounded and the Court stated that in rape offences, if the evidence of the victim is believed by the court, it is enough to warrant conviction. Furthermore, submitting on the case **Marwa Wangiti Mwita**

(supra) the court stated that where a victim can mention the suspect in the earliest time, his/her evidence can be believed.

Again, the learned Senior State Attorney submitted that the lower court's judgment had used the evidence of the witness he had mentioned, believed her and went ahead and convicted the appellant having been convinced that the evidence was sufficient. To this end, the learned Senior State Attorney submitted that the 2nd,3rd, and 5th ground of appeal have no merit and be dismissed.

Submitting on the fourth ground of appeal, Mr. Ndunguru admitted that the lower court did not analyse the evidence of the appellant. The learned Senior State Attorney argued this court to step into the shoes of the lower court as per the case of **Saidi Peter @ Ndira @Saidi Ramadhani** (supra). However, the learned Senior State Attorney submitted that this ground has no merit because the prosecution evidence was not shaken.

Before the learned Senior State Attorney conclude his part, he brought an attention to this court that at page 8 of the lower court's proceedings, it is indicated that the incident took place on 9/4/2020.He went on and argued that the charge sheet on the other hand provides that the incident took place on 2/4/2020.Mr. Ndunguru stressed that all other witnesses testified that the incident took place on 2/4/2022 as it appears on the charge sheet. The learned Senior State Attorney argued that it should be noted that it is not always easy for the victim of tender age to remember the dates correctly. He went further and argued that nevertheless the adults who testified were consistent. The learned Senior State Attorney

stressed that there is no dispute on the date of the event since the case was instituted until today when raising the same. Mr. Ndunguru contended that it is not a legal problem and whenever there are challenges in the court records, the court is empowered by section 380 of the CPA Cap. 20 R.E. 2022 to either ignore or rectify the defects. To this end, he invited this court to act accordingly and ignore the defects that do not go to the root of the matter. The learned Senior State Attorney concluded that this appeal has no merit and be dismissed.

In rejoinder, the appellant averred that his grounds of appeal be considered. In addition, he contended that he came to this court in 2021 and his appeal was reverted to the District Court of Masasi. He submitted that he went there, and the judgment was rectified. However, the appellant contended that nothing has changed since the sentence remained the same that is 30 years. To this end, the appellant prayed this court to take cognizance of his grounds of appeal since his health is challenging. He insisted that his legs are painful, and it started in 2020.The appellant submitted that he was sick before he was jailed but hard working in jail has made the matters worse.

Having dispassionately considered grounds of appeal, lower court record and submissions by both parties, I am inclined to determine the merits of the appeal. At the outset, I must state that what the appellant has complained, and the learned Senior State Attorney had pinpointed and submitted on it, makes this court to wonder how the trial Magistrate had implemented the order of this court in rectifying the last page of the impugn judgment. Indeed, this court before Hon. Muruke J. on 15/11/2021

remitted Criminal Case No.36 of 2020 to the trial court to rectify the last page of the judgment delivered on 04/11/2020. The order of rectification intended to see that the trial court properly convict the appellant as to the offence charged in which it found him guilty.

Surprisingly, when the trial court implemented the order of this court still the situation is worse since nothing was rectified bad enough it has created another anomaly of citing a wrong provision of law of which it found the appellant guilty of the offence of rape. At page 11 of the impugn judgment no conviction was entered by the trial court, however, it found the appellant guilty of the offence of rape contrary to section 13(1),(2)(e) and 131(1) of the Penal Code. In fact, section 13 of the Penal Code is essentially centred on the defence of insanity and not rape. Following what the trial court has done, it is important at this juncture to expound that orders of the superior court should be strictly adhered and great sense of diligence and care. Now, I think this shall be dealt in the long run after determining other the complaints of the appellant.

Therefore, the issue is whether the offence of rape against the appellant was proved beyond reasonable doubt as required by the law. According to the charge sheet it shows that the victim is ten (10) years old. Therefore, basing on that foundation it is clearly that in this case the prosecution needed not to prove consent of the victim. However, the following elements needed to be proved by the trial court. These are proof of age of the victim, proof of penetration and identification of the assailant.

As far as the third ground of appeal is concern, the appellant complained that the age of the victim was not proved to be under the age of eighteen. I am keenly conscious that the in statutory rape age of the victim is the key element which must exist in order to form the offence of statutory rape as provided under section 130(1)(2)(e) of the Penal Code. In the present case, it is true that the charge sheet shows that the victim is a school girl of ten (10) years and also the fact that PW1 introduced herself to be of 11 years old when the trial court took her personal record when it made an inquiry as to comply with section 127(2) of the Evidence Act [Cap.6 R.E. 2019] and before the victim gave her testimony. Indeed, this is not direct evidence which is required to prove age of the victim. This stance was taken by the Court in the case of **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014 (unreported) where it was stated as under:

> *"It is trite law that the citation in the charge sheet relating to the age of an accused person is not evidence.* ***Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age.***"

Similarly, in the case of **Tano Mbika v. Republic**, Criminal Appeal No. 152 of 2016 (unreported), the Court of Appeal of Tanzania stated that:

> *"Applying the above principle in the case and reasoning by* ***analogy the citations of the age of the victim in the charge sheet and before giving evidence are not part of the evidence and cannot be used to prove the age of the victim.***"

Being guided by the above authorities, the age of the victim shown in the charge sheet and in the recording of the personal particulars of the victim before she testified in court is not proof of her age. However, the Court of Appeal in the case of **Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported) the Court of Appeal stated that:-

> *"That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate. We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence."*

I have gone through the entire proceeding of the trial court and I have realised that nowhere the age of the victim was proved by either the victim when giving her testimony or in the testimonies of other prosecution witnesses or by production of the birth certificate. However, following the latest school established by the Court of Appeal through its recent decision of **Leonard s/o Sakata vs The Director of Public Prosecutions** (supra) in which the Court followed its former decision in the case of **Issaya Renatus vs Republic** (supra) that there may be cases where the court may infer the existence of any fact including the age of a victim on the authority of section 122 of TEA which goes thus:-

> *"The court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

In the present matter, I find there some circumstances such as when the trial court conducted an inquiry in complying with section 127(2) of the Evidence Act after the victim had introduced to be a child of tender age and fact that the victim is pupil of Lusanje primary school suggested that she is less than eighteen years old. In view of that observation, I am convinced that the age of the victim was less than eight years. To this end, I find the third ground is devoid of merit.

In the second ground, the appellant assert that no proof of penetration. I am alive that penetration is the key aspect of rape, and the victim must testify that a male sexual organ penetrated in her sexual organ. I have gone through the record of the lower court and found that PW1 (victim) testified that: "My stepfather asked me to sleep on the bed, he removed his clothes and then he took off my pant. Then my step father raped me, *niliumia, alipomaliza akanipa sabuni akaniambia nikafulie nguo..."*(at page 8 of the trial court proceeding). However, the evidence of PW2 contradicts the evidence of PW1 on how the appellant raped the victim.

PW2 was told by the victim that; "Mateso left and the accused called Asante to his bedroom he asked her to sleep in bed but she refused. But the accused took her his hand and pushed her in bed. She tried to run but his step father stopped her. His father took off his short and boxer and then raped her. She said that the accused took out Mdudu wake akamuekea kwenye tundu la uke wake."

Looking closely to the above reproduced evidence, it is clear that PW1 was not open as to how the appellant raped her. Her evidence does not describe the incident of rape rather her evidence is to the effect that she was raped. This court expected that the victim could have testified to the whole incidence which resulted into rape. Even if, it is a settled position that the best evidence in sexual offences comes the victim. See, **Seleman Makumba**(supra). This is the general rule which is subject to exceptions. The mere statement of the victim that she was raped and thereafter she experienced pain does prove penetration.

This court expected that the victim could have described the whole process of how the male organ of the appellant penetrated into her female organ as she explained to PW2. Though, PW5 testified that she discovered the victim had pain, her vagina was reddish, bruises on her vagina and her conclusion was that the victim was penetrated by a blunt object in her vagina. Still the evidence of the victim is the best to prove penetration of a male organ into her vagina.

On top of that, the evidence of the PW1 shows that she was raped on 09/04/2020 while other prosecution witnesses testified that the victim was raped by the appellant on 02/04/2020 which is the date featured in the charge sheet. I am convinced that the prosecution was in a better position to know that the victim has mentioned a different date as compared to the one appearing in the charge sheet.

I expected the prosecution could have rectified the anomaly during re-examination of the victim. Surprisingly, the prosecution kept quiet and

did not re-examine the victim on the exactly date of the occurrence of the incident. Following this inconsistence on the date on the evidence of the victim and that of other prosecution witnesses plus the charge sheet entitles this court asks if the inconsistence has gone to the root of the matter. Since the charge sheet is the foundation of the criminal case and the evidence of the victim is the best evidence in sexual offences, I am of the settled position the disparity/inconsistence has gone to the root of the matter to the extent of affecting the appellant's defence and cannot be cured by section 388 of the CPA. I could have taken a different position, if the inconsistence on the date of the commission of the offence could have been testified by a different witness and not a victim. This is because the victim is the one who knows the exact date and time of occurrence of the incident. In view of the above observation, I allow this ground of appeal.

Moreover, as submitted by Mr. Ndunguru on the fourth ground of appeal it is true that the trial court did not evaluate the defence evidence under objective analysis against the prosecution evidence. However, even if I step into the shoes of the trial court already the findings above shows that the evidence of the prosecution did not prove the case against the appellant beyond reasonable doubt. Therefore, there is no need to be detained by this ground of appeal.

In the upshot, said and done that the prosecution evidence has doubts and did not prove the case against the appellant beyond reasonable doubts. More so, since the appellant was found guilty on the wrong provision of the law and not properly convicted.

I therefore allow this appeal. I quash the illegal conviction and set aside the sentence of thirty (30) years in prison. I hereby order that **SHAIBU RAJABU** be released from prison forthwith unless he is held for a lawful cause.

It is so ordered.

E.I. LALTAIKA

JUDGE
19/12/2022

COURT:

This judgment is delivered under my hand and the seal of this court this 19th day of December 2022 in the presence of Mr. Enosh Kigoryo, State Attorney and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA

JUDGE
19/12/2022

COURT:

The right to appeal to the Court of Appeal of Tanzania is duly explained.

E.I. LALTAIKA

JUDGE
19/12/2022