IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 90 OF 2021

(Originating from Criminal Case No. 240 of 20109 of District Court of Muleba at Muleba)

DAN DIDAS---------- APPELLANT

VERSUS

REPUBLIC---------- RESPONDENT

JUDGEMENT

Date of Last Order: 10/02/2022

Date of Judgment: 25/02/2022

Hon. A. E. Mwipopo, J.

The appellant namely Dan Didas was charged and convicted by the Muleba District Court for the offences of Rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code, Cap. 16 R.E. 2002. It was alleged that the Appellant on 22nd December, 2020, at Kagasha Village, within Muleba District in Kagera Region did unlawfully have sexual intercourse with one NR (the name of the victim is withheld for the purpose of protecting her), a girl aged 6 years old. After hearing of the case, where the prosecution called a total of 4 witnesses and

tendered one exhibit to wit a PF3, the trial court convicted the appellant for the offence charged and sentenced him to serve life imprisonment and twelve strokes of cane.

The appellant was aggrieved by the decision of the District Court and filed the present appeal against the said decision. In his petition of appeal, the Appellant has raised a total of nine grounds of appeal as provided hereunder:-

1. *That, the charge sheet laid at the appellant's door was fatally defective whereby the irregularity is walled on the following concepts:*
    a) *The charge sheet failed to disclose the time of the incident being contrary to section 135 (f) of the Criminal Procedure Act, Cap. 20, R.E. 2019.*
    b) *The charge sheet specified an non existing provision at establishing the punishment thereof under section 131 of the Penal Code as an outstanding provision without stating the enactment of the Penal Code Contrary to section 135 (a) (ii) of the criminal Procedure Act, Cap. 20, R.E. 2019.*
2. *That the failure of the charge sheet to specify punishment facing the appellant biasly prejudiced the appellant depriving him of his rights and position to analyse an informed defense as emphasized by the Court of*

Appeal of Tanzania at Bukoba I the case of ***Alex Medard V. Republic,*** *Criminal Appeal No. 57 of 2017, (Unreported).*

3. *That, the evidence adduced by P2 (the victim) was invalid and vogue after being admitted under non-existing provision (sic 127) of the Evidence Act, Cap. 6 R.E. 2019 instead of applying a time mandatory provision of the Evidence Act and this renders this evidence a nullity and a necessity to be expunged.*
4. *That, the Hon. trial Magistrate a strayed himself to convict the appellant resulting from failure to scrutinize the prosecution evidence as to discover the dirty game hidden in the evidence whereby a girl of six years having been sent to the appellant's premises to call him for morning tea then at the same time a police officer is at the scene ready for apprehension and this witness never appeared in Court.*
5. *That, the hon. trial Magistrate erred in law and facts to convict the appellant without any proof of D.N.A. profiling test as required by section 395A of the Criminal Procedure Act, Cap. 20, R.E. 2019.*
6. *That, the age of the victim was not proved by documented evidence so as to constitute the allegations against the appellant.*
7. *That, the relied exhibit PF3 of the victim was wrongly admitted after it was tendered by a police officer instead of the nurse who claims to have*

filled it thus defying the lawfully requirements of section 240 (3) of the Criminal Procedure Act.

8. *That, the examination by the said nurse did not reveal penetration in the victim's vagina and her evidence failed to irresistibly touch the ingredients of rape.*
9. *That, the prosecution failed to prove the case against the appellant to the required standard of law as beyond reasonable doubt.*

The appellant who appeared in person prayed for his grounds of appeal which are found in the Petition of Appeal to be considered by the court and the court to allow his appeal.

In response, Ms. Happiness Makungu, State Attorney appearing for the Respondent, supported the appeal on the ground that the typed proceeding in page 8 and 21 shows that the appellant was aged 18 years during the incident. She said that the prosecution proved their case without leaving any doubt as the victim testified after promised to tell the truth. Notwithstanding that the facts proved the case, the Appellant committed the offence while he was of 18 years of age or bellow. The Penal Code provides in section 131 (2) (a) provides that where the offence is committed by a boy who is of the age of 18 years or less he shall be sentenced to corporal punishment only if he is a first offender. But, the trial court sentenced the appellant to serve life imprisonment and twelve (12) strokes

of cane which is Contrary to the Law. Since the punishment imposed to the appellant was severe than that provided by the Law, the learned Counsel pray for the court to impose the proper sentence to the appellant.

After considering the submissions by both sides and the record of appeal, it is clear that the Appellant was charged and convicted for the offence of rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code, Cap. 16 R.E. 2019, by the trial District Court. The learned State Attorney has supported appeal on the sentence only for the reason that the appellant was convicted and sentence to serve life imprisonment while at the time of incident the appellant was aged 18 years. The learned counsel argued that the prosecution evidence proved the offence of rape against the appellant.

In determination of the appeal, all the grounds of appeal will be considered before I consider and determine the issue of sentence. This being the first appeal, I'm aware that the Court main task is to re-evaluate the entire evidence adduced at the trial and subject it to a critical scrutiny and arrive at an independent decision on the points of appeal raised by the appellant.

I will start with the determination of the appellant's first ground of appeal that the charge sheet was defective for failure to disclose the time of the incident and for not including the provisions of the law providing for the penalty for the charged offence. Reading the respective charge sheet it provides in its statement

of the offence that the said rape offence was contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code Cap. 16 R.E. 2002. The particulars of the offence reveals that the incident took place on 22nd December, 2019 at Kagasha Village within Muleba District in Kagera Region where the appellant did unlawfully had sexual intercourse of the victim who is aged 6 years old. Section 135(f) of the Criminal Procedure Act, Cap. 20, R.E. 219 provides that the time may be provided in the particulars of the offence but it is my interpretation that the said time stated in the law is the date when the alleged crime was committed and not specific time of the date. The reason is that the date of the incident is not included in the list provided by the law.

Further, the evidence available reveal that in her testimony, PW1 and PW2 testified that the incident took place in the morning time when the appellant was called to have breakfast. This evidence proved that the appellant was not prejudiced in any way. Thus, I find this ground to be devoid of merits.

In proving the offence of statutory rape under section 130(1), (2) (e) of Cap. 16 R.E. 2018 (statutory rape), the prosecution has duty to establish the presence of ingredients of the offence which is the act of Appellant having a sexual intercourse with a girl who is below 18 years of age. Section 130 (1) of the Penal Code creates the offence of rape and it provides in subsection (2) for different descriptions of the rape offence. In subsection 130 (2) (e) the law provides for the

rape of the girl aged bellow 18 years as it was in the present case. The section reads as follows, I quote:-

> *"130.-(1) It is an offence for a male person to rape a girl or a woman. (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> > *(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

From above cited section it is important where the Appellant was charged with statutory rape to prove the age of the victim and the penetration (presence of sexual intercourse).

In the present case the age of victim was well proved by the testimony of victim's mother - PW2 that the victim was born on 29th September, 2014. As the incident took place in December 2019 it means that at the time of incident the victim was aged under 18 years. The victim's age is proved by her or his testimony, the testimony of her/his parents, relatives, medical practitioner or documentary evidence. Also the Court may make findings on the age of the victim. This was stated by the Court of appeal in the case of **Issaya Renatus V. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (Unreported), were it held at page 8 – 9 of the judgment that, I quote:-

"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen. 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. There may be cases, in our view, where the court may infer the existence of any fact including the age of a victim on the authority of section 122 of TEA....."

From above cited case, the age of the victim of statutory rape is of great essence and the same could be proved by testimony of witnesses or documentary evidence or the Court nay make inferences to the existing facts. In the present case there is sufficient evidence from PW1 that the victim was aged under 18 years when the incident occurred. Thus, the appellant's ground no. 6 has no merits.

Another important element to be proved in a charge of rape offence is presence penetration. It is a settled principal of law that the best evidence in rape cases is that of the victim. In the case of **Selemani Makumba v. Republic,** (Supra), the Court of Appeal held that:-

"True evidence of rape has to come from the victim, if an adult; that there was penetration and no consent; and in case of any other woman where consent is irrelevant, that there was penetration."

In this case, the victim's (PW2) evidence is found in page 12 of the typed proceedings. The proceedings shows that PW2 testified without oath after she promised to tell the truth to the Court. This is according to section 127(2) of the Evidence Act, Cap. 6, R.E. 2019. The section provides for conditions for taking evidence of the child of tender ages. Currently under the said section, a child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence, promise to tell the truth to the court and not to tell lies. The position was stated by the Court of Appeal in the case of **Msiba Leonard Mchere Kumwaga v. Republic**, Criminal Appeal No. 550 of 2015, (unreported).

PW2 testified that the day to go to church she went to the appellant's room inviting him to take tea in their house. The appellant closed the door of his room, undressed her and inserted his penis in her vagina. The victim testified to know the appellant as uncle Mnyambo the name which was used to call the appellant. This evidence from the victim proved that the appellant penetrated the victim. The evidence by PW2 is supported by testimony of PW1 and PW3 who also saw the victim with bruises and bleeding. Despite the omission by the trial Court to inform his right to call the maker of the PF3 for examination after it was admitted, the said maker of the PF3 testified as PW3. Further, the testimony of PW2 was itself

sufficient to sustain conviction even in absence of other supporting evidence. Thus, the grounds No. 3, 6 and 7 has no merits.

The appellant alleged in ground No. 4 that the trial Court failed to evaluate the evidence to discover that the prosecution evidence was fabricated since after the victim was raped the police who was not called to testify appeared in the scene and arrested the appellant. Reading the testimony of PW1, it provides that after she found that the appellant has raped the victim she held the appellant who wanted to run away as result they started to fight. PW1 tried to get help but nobody was around and she asked the victim to call neighbours. Later on the police came and arrested the appellant. This evidence proved that the police was not at the scene during the incident and that he came after PW1 called for help. Thus, the grounds that there was fabrication has no merits.

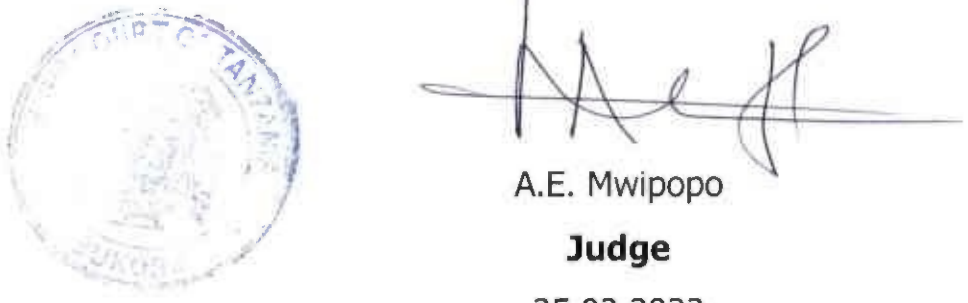
On the appellant's ground that the prosecution failed to conduct D.N.A test to prove that he was the one who raped the victim, even in absence of the D.N.A. examination result, the evidence available was sufficient to prove the offence against the appellant. Thus, there was no need for the prosecution to conduct D.N.A. examination to prove their case.

Thus, I'm of the same position as the Respondent's Counsel that the prosecution evidence proved the offence of rape against the appellant and the trial Court rightly convicted the appellant for the offence he was charged with.

The appellant was sentenced to serve life imprisonment and twelve strokes of cane for the offence. However, as it was rightly submitted by the Counsel for the Respondent, the evidence available in the record shows that the appellant was 18 years old during the incident. This is found in the facts read over during preliminary hearing at page 8 of typed proceedings and in his testimony in page 22 of the proceedings where he stated in cross examination that he is aged 18 years. Also, particulars of the accused person in the charge sheet reveals that the appellant was 18 years old when the incident occurred. The Penal Code, Cap. 16, R.E. 2019 provides in section 131 (2) (a) that where the sexual offence is committed by a boy who is of the age of eighteen years or less, he shall if a first offender, be sentenced to corporal punishment only. As the evidence available in record proves that the appellant was aged 18 years when he committed the offence and he was the first offender, the trial Court was supposed to impose the sentence of corporal punishment only and not life imprisonment as it imposed. Thus, the sentence imposed by the trial Court was against the law. The appellant has been in prison for more than one year from September, 2020 when he was sentenced to life imprisonment by the trial Court. For, that reason the appellant has already suffered enough punishment for the offence he was convicted with.

Therefore, the sentence of life imprisonment and twelve strokes of cane which was imposed by the trial Court to the appellant is hereby set aside and I

order for the immediate release of the appellant from prison otherwise held for another lawful cause. It is so ordered.



A.E. Mwipopo

Judge

25.02.2022

The Judgment was delivered today, this 25.02.2022 in chamber under the seal of this court in the presence of the Appellant and Respondent's counsel.

A. E. Mwipopo

Judge

25.02.2022