IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 101 OF 2021

(Originating from Criminal Case No. 75 of 2020 of District Court of Ngara at Ngara)

JUMA ANACLETH---------- APPELLANT

VERSUS

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

JUDGEMENT

Date of Last Order: 09/02/2022

Date of Judgment: 25/02/2022

Hon. A. E. Mwipopo, J.

Juma Anacleth, the appellant herein, was charged and convicted by the Ngara District Court for seven (7) counts of rape contrary to section 130 (1), (2) (e) and section 131(1) of the Penal Code, Cap. 16 R.E. 2002 and Sexual Harassment contrary to section 138D (1) of the Penal Code. It was alleged in the first count that the appellant on 28th February, 2020 at Mugoma Village, within Ngara District in Kagera Region, did unlawfully have sexual intercourse with AA (name of the victim is concealed) a girl aged 9 years. The particulars of the other

Counts reveals that the appellant did cause sexual harassment to six other girls aged between 10 to 12 years on the same date in the same village.

The prosecution called 7 witnesses to prove its case. PW1 and PW6 these are Mugoma Primary School teachers. PW6 evidence is that a student named AA – PW4 informed her that she was raped by appellant and PW6 informed PW1 who is the head teacher. PW1 asked PW6 to call PW1 for interrogation but PW4 was absent. On 02/03/2020 PW1 called PW4 and interrogated her where PW 4 admitted to have been raped by the appellant and mentioned other students who have been sexually harassed by the appellant. PW1 reported to Mugoma Police Station and after their statement was recorded the children were taken to Nyamiaga Hospital for examination. R.S. (her name is concealed) – PW2 a girl aged 10 years testified that in unknown day and month of 2019 she was raped by the appellant whom she knows. She didn't tell anybody about the incident until after two months were she told PW1.

Agrey Brasio - PW3, who is the father of PW4, testified that PW4 was born in 07/03/2011 and she was a student of Mugoma Primary School. He said that on 24/02/2020 he saw PW4 having difficulties to walk and when asked her she replied that she had fallen. He asked PW4's mother to check on her where PW4's mother found PW4 had bruises and she had pain when she walks. It was on Monday when he was informed by PW1 that PW4 was raped by the appellant. PW4, who is a

victim child of tender age, testified without oath after she promised the Court to tell the truth. In her testimony she stated that in the morning of 28/02/2020 while she was on her way to school the appellant called her and took her in the forest where he took his penis and inserted in her vagina. Then, PW4 wore her clothes and went to school where she told PW6 about the incident. Later on she was taken to police and to hospital.

PW5 – Clinical Officer at Nyamiaga Hospital testified that he examined 7 school girls from Mugoma Primary School on 03/02/2020 where he found only one girl with penetration signs. The child with the penetration signs is PW4 and he filed PF3 which he tendered as Exhibit P2.

The testimony of PW7 who is PW4's mother is that on 28/02/2020 during noon hours PW4 came from school and she had difficulties in walking. She interrogated her where PW4 told her that she was raped by the appellant. Thereafter they went to report to Mugoma Police Station and they later on went to Ngara Police Station to take PF3 before they took PW4 to Nyamiaga Hospital. The witness tendered clinic card – Exhibit P3 to prove that PW4 was born on 07/03/2020. This was the end of prosecution case.

The trial Court did find that the appellant has case to answer and called upon the appellant to defend himself. In his defence the appellant testified on oath and called one witness. The appellant denied to commit the offence and said that

he know nothing about the offence. DW2 testified that he was living together with the appellant. He told the Court that he never heard that the appellant raped anybody. This was the end of defence case.

Thereafter, the trial Court delivered its judgment where it convicted the appellant for the offence of rape found in the first count and acquitted him in the remaining counts of sexual harassment. The trial Court sentenced the appellant to serve life imprisonment.

Aggrieved by the decision of the trial Court, the appellant filed the present appeal against the said decision. In his petition of appeal, the appellant has raised a total of ten grounds of appeal as provided hereunder:-

1. *That, the honourable trial Court failed to direct itself and scrutinize the prosecution evidence so as to discover that the case against the appellant was fabricated one without credibility.*
2. *That, the evidence by the witness of tender age (PW2 and PW3) was defective for being admitted without applying the mandatory provision and in contravention of section 127 (2) of the Evidence Act, Cap. 6, R.E. 2019 which provides guidance therefore this evidence should be expunged from the record.*
3. *That, the judgment premising the appellant's conviction and sentencing is lacking and unsustainable for failure to comply with the statutory requirements of section 312 (2) of the Criminal Procedure Act, Cap. 20, R.E. 2019.*

4. *That, the trial Court fatally erred in facts and law to convict and sentence the appellant relying on insufficient evidence full of lies and contradictions where by the victim's father (PW3) stated that the incident occurred on 24/02/2020 while other witnesses claim the incident occurred on 28/02/2020.*
5. *That, the evidence adduced by the head teacher and the whole staff of Mugoma Primary School was totally incredible and unreliable whereby the deletion of action to take the victim to hospital as early as practicable is fatal omission rendering their evidence to be a nullity and never to be valued.*
6. *That, the evidence adduced by Jenina Ikwetaki (PW6) was biased and vitiative on effects that she omitted to mention the exact date of the incident and her failure to take lawful measures to secure the victim to hospital from 28/02/2020 until 05/03/2020 reveals that the incident never happened in otherwise it was planted case against the appellant.*
7. *That, the trial Court fatally erred in law and facts to convict the appellant without any eye witness even the alleged victim did not raise alarm inspite of the facts that the scenario is said to be near the school campus and the road circulation.*
8. *That, the evidence adduced by the Doctor (PW5) plus the PF3 was biased and irrelevant on point that the incident had passed a long time ago and his examination observed signs of penetration but not real rape or penetration.*
9. *That, the allegation against the appellant were primarily of rape of seven victims but the examination of the doctor made the prosecution to reverse mind and charge him for sexual harassment raising doubts in the spirit of instituting the charged offence.*

10. *That, the shortcomings, omissions and contradictions consuming the prosecution evidence could be salvaged by applying proper D.N.A. forensic profiling test and contrary is grievous doubt which need to be solved in favour of the appellant.*

At the hearing of the appeal, the Appellant who appeared in person prayed for the Court to consider all grounds of appeal in his petition. In Response, Ms. Happyness Makungu, State Attorney appearing for the Respondent, submitted on all appellants grounds of appeal. On the first ground of appeal, she said that the prosecution proved that the victim who was aged 9 years at the time of incident was raped. This is proved by the victim in page 16 and 17 of the typed proceedings. The victim soon after she arrived at school she told the teacher what happened. The court was satisfied that the victim was telling the truth that she was raped. The evidence of PW7 (victim's mother) proved that the victim was 9 years by age during the incident.

The Counsel submitted on the third ground of appeal that when convicting the appellant the court did not cite the section providing for the punishment for the offence, but the same does not prejudice the appellant in any way.

On the contradiction on the date of incident between PW3 and other witnesses, the Counsel said that the contradiction is minor and does not affect the prosecution evidence.

Then, the Counsel for the Respondent submitted on ground no.5 and 6 together. She said the evidence in record show that PW6 after she was informed by the victim about the incident she informed the head teacher who asked PW6 to take the victim to explain what happened, but the victim had already left from school. As it was on Friday, they had to wait until Monday to get explanation or interrogate the victim. This is the reason that it took sometime before the victim was taken late to hospital for examination.

On the 7th ground of appeal, she said that there was victim whom the offence was done against her. On the issue that PW5 and PF3 evidence are irrelevant, the same has no basis since the court decided not to consider them. There was no need to do D.N.A in this case due to its circumstances where the victim was examined after several days has passed.

From submissions and the record of appeal, I'm going to determine Appellant's grounds of appeal as provided in his both petition of appeal.

Commencing with determination of the 2nd ground of appeal that the evidence of PW2 and PW3 children of tender was defective for failure to apply section 127 (2) of the Evidence Act, Cap. 6, R.E. 2019, the evidence available in record shows that among the prosecution witnesses it was PW2 and PW4 who testified as child of tender years. The proceedings shows that PW2 testified when she was 10 years old and PW4 was 9 years when she testified. Thus, PW3 is not

a child of tender age as it was alleged in the petition of the appeal. PW3 is an adult aged 35 years hence his testimony need not to follow condition provided for recording testimony of child of tender age. The Evidence Act, Cap. 6, R.E. 2019, provides in section 127 (2) that 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 any lies. The same 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). The typed proceedings show in page 13 and 16 respectively that PW2 and PW4 promised the Court to tell the truth before they testified without oath. Thus, the trial Court recorded testimony of PW2 and PW4 who are children of tender ages after in accordance with provision of the law. Thus, the second ground of appeal has no merits.

The appellant's grounds no. 4, 5, 6 and 8 are on the issue of the credibility of the prosecution witnesses. In these grounds, the appellant alleged that there was contradictions in the date of incident, the teachers delayed to take victim to hospital, the Medical Practitioner examined the victim after a long time has passed hence his testimony and the PF3 was not relevant. As it was stated in the petition of appeal, there was some contradictions and omissions in the testimony of prosecution witnesses. PW3 who is PW4's father, testified that the incident took

place on 24/02/2020 while all other witnesses testified that the incident took place of 28/02/2020.

I agree with the State Attorney that the contradiction is minor and does not go to the gist of their testimonies. PW1, PW4 and PW7 all testified that the incident took place on 28/02/2019. PW6 did not state in her testimony the date when the incident occurred as it was alleged by the appellant. PW6 testified that it was on Friday when PW4 told her about the incident and that she informed PW1 about the incident. In his testimony PW1 said that he received from PW6 the information about the incident on 28/02/2020 which was on Friday. This evidence prove that PW6 received the information about the incident from PW4 on Friday 28/02/2020. The failure to name the date when she receive the information about the incident does not affect the credibility of her testimony.

PW7 testified that PW4 returned home in the afternoon of 28/02/2020 but she was walking with difficulties. After she check her private part she found that PW4 has bruises. This evidence also prove that the incident took place on 28/02/2020. Thus, the evidence available prove that the incident took place on 28/02/2020 and the PW3 testimony on the date of incident does not affect the prosecution evidence.

The reason for the delay to take the victim to hospital was stated by PW1 and PW6 that when PW6 went to look for PW4 so that they can interrogate her

they found that she has already left. As it was Friday, they had to wait for her to come to school on Monday and when she came they interrogated her, reported the incident to the police and took her to Nyamiaga Hospital for examination. The evidence from these witnesses provides sufficient explanation for the delay to report the incident to the police and to take PW4 to the hospital for medical examination. Thus, I find the ground of appeal No. 4, 5, 6 and 8 to be devoid of merits.

The evidence in record shows that after PW4 was taken to Nyamiaga Hospital, she was examined by a Clinical Officer - PW5. PW5 said in his testimony that he found sign of penetration to PW4 and he filled the report in PF3 – Exhibit P2. However, the trial Court decided not to consider PW5 testimony and PF3 for the reason that the examination was conducted after 7 days has passed since the alleged date of incident. The trial Court did not rely on that evidence in its judgment. Thus, the appellants ground of appeal No. 8 is devoid of merits.

In the third ground of appeal the appellant alleged that he was not convicted and sentenced by the trial Court in its judgment which is contrary to section 312 (2) of the Criminal Procedure Act, Cap. 20, R.E. 2019. The appellant was convicted after he was found guilty as it is shown in page 10 of the typed judgment. However, the sentence is missing in the said typed judgment. Upon perusal of the handwritten proceedings, it shows that after the appellant was convicted the

prosecution informed the Court that there is no previous criminal record of the appellant and the Court availed the appellant with opportunity to mitigate. Thereafter, the Court sentenced him to serve life imprisonment. Thus, the trial Court convicted and sentenced the appellant in accordance with the law. The failure to include the sentence in the copy of typed judgment is an omission which is minor and it does not make the said judgment to be defective as the handwritten proceedings which is the original copy contain the sentence.

Turning to 1st and 10th ground of appeal that the trial Court failed to scrutinize prosecution evidence in its judgment as result it convicted the appellant on the prosecution evidence which was not proved without leaving any doubt, the Court scrutinized and evaluated all evidence in record before it reached its decision. It is through evaluation the trial Court found that other offences were not proved save for the offence of rape. The trial Court convicted the appellant relying on the evidence of PW4. The Court was satisfied that PW4 proved that it was the appellant who raped her as the evidence of penetration and the age of victim to be below 18 years was proved. As it was rightly held by the trial Court, it is a settled principle that the best evidence in the sexual offences comes from the victim. In the case of **Selemani Makumba v. Republic**, [2006] TLR 379 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 the present case, as the appellant was charged for statutory rape under section 130 (1) and (2) (e) of the Penal Code, it was important for the prosecution evidence to prove that during the incident the victim age was under 18 years and there was penetration. The evidence from the victim – PW4 proved that the appellant inserted his penis into her vagina. She said in her re -examination that she did not scream as the appellant told her not to shout. This evidence proved that there was penetration. The age of the victim is proved by the testimony of victim's mother – PW7 who testified that PW4 was born on 07/03/2011 which means when the incident occurred she was under the age of 18 years. PW7 evidence is supported by the clinic card – Exhibit P3 which prove the date of birth of the victim – PW4 to be 07/03/2011. This means that all the ingredients of the offence the appellant was charged with were proved. For that reason, there was no need for the prosecution to conduct D.N.A. test as the appellant alleged. Thus, I'm satisfied that the prosecution proved their case without any doubt as it was held by the trial Court.

Therefore, I find the appeal is devoid of merits and I dismiss it accordingly.

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 the Respondent's counsel.

A. E. Mwipopo

Judge

25.02.2022