THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL No. 54 of 2021
(Originated from Resident Magistrate Court of Songwe at Vwawa in Criminal Case No. 89 of 2020)

EMMANUEL MAHELA MGALA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 7th & 28th February 2022

KARAYEMAHA, J

The appellant Emmanuel Mahela Mgala was among the three persons charged in the Resident Magistrate Court of Songwe at Vwawa, with three counts. They were all charged in the 1st count with the offence of conspiracy to commit the offence of Abduction contrary to section 384 of the Penal Code [Cap 16 R.E. 2019]. The appellant and the 2nd accused were charged in the 2nd count of the offence of Abduction contrary to section 133 of the Penal Code Cap 16 R.E. 2019. The 3rd count was preferred against the appellant only. He was charged with the offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the penal code cap 16 R. E. 2019.

It was alleged by the prosecution in the 1st count that the appellant one Emmanuel Mahela Mgala jointly and together with Noel Benson Mzumbwe and Sophia Abdala Makandi on 28th day of June 2020 at unknown time at Mlowo Township within Mbozi District in Songwe Region did conspire to commit the offence of abducting one RY (in pseudonym) a form one student at Itamba secondary school. It was as well alleged in the 2nd count was alleged that the Appellant and one Noel Benson Mzumbwe on 28th day of June 2020 at Mlowo Township within Mbozi District in Songwe Region did abduct one RY with intent to marry her. It was further alleged in the 3rd count that on 1st day of July 2020 at night time at Mlowo Township within Mbozi District in Songwe Region the appellant had canal knowledge to one RY a girl of 14 years old.

As usual, all accused persons pleaded not guilty to the charge. While the 2nd and 3rd accused persons were acquitted in the 1st and 2nd counts, the appellant was found guilty of the 3rd count of rape.

The prosecution led evidence to establish that the appellant raped RY. It all started on 28/06/2020 when Debora Kifua Tweve (PW2, RY's mother) sent RY to her restaurant to collect sugar and rice. RY left the house but before getting to the restaurant, met the appellant on the way who persuaded her to go with him to his house with an intention to

send her. The two entered inside the house and the appellant closed the door. In there, the appellant undressed his clothes and then those of RY. Thereafter, he had sexual intercourse with her by inserting a circumcised penis into her vagina. The conduct of RY untimeous return made PW2 inquisitive. She, therefore, made a follow up and saw her getting out from the appellant's house. On probing her, RY told PW2 that she was with the appellant in his house and quickly returned inside. That conduct made PW2 to close the door from outside and raise an alarm which invited many people gather at the appellant's house. The incident was reported to police where by PW3 (H.3564 D/C Ibrahim), conveyed to the scene and arrested both RY and the appellant. At police station, RY was given a PF3 and taken to hospital by her mother. The examination results (filed in the PF3) revealed that she was not raped on that day although RY testified that she was raped. Following those results, the appellant was released on bail. Meanwhile, while the appellant was in police cells, RY escaped from home leaving behind a threat that she was intending to kill herself. However, it is evident that she and went to Noel Benson Mzumbwe in compliance with the appellant's instructions who took her to Sophia Abdala Makandi. The police released the appellant on bail on condition that he had to produce RY.

On 01/07/2020, the appellant followed RY to Noel Benson Mzumbwe with a purpose of taking her home. However, he went with her to his house and slept with her there. According to RY during the night the duo had sexual intercourse twice. PW3 got information from Noel that RY was at the appellant's house. In his evidence PW3 told the court when they went to the appellant's house, they found him sleeping with RY and took them to Police Station.

In his defence the appellant denied involvement. In his long story, he concentrated on 5 aspects. The 1st aspect was on how PW2 borrowed Tshs. 25,000/= from him and a hard way to get it back. The 2nd aspect related to a story on how PW2 found a girl for him to marry and how that bore no fruits. The 3rd aspect revolved around the food he ate and failed to pay for, the eruption of misunderstandings between them, and PW2's oath to deal with him. The 4th aspect is about RY collecting Tshs. 2000/= from him at his house and leaving. He also explained how RY returned in his house, the incident of closing the door from outside, the gathering of people at his house, his arrest and his being taken to police station. The 5th aspect concerned the story on how he was released from police cell and a visit of three police officers in his house after three days seeking assistance from him to find RY. On refusal, he was

forced to accompany them to police station. On the way he found RY and PW2 in the car and cooked story that he was found with RY.

After a full trial, the trial Magistrate was satisfied that the prosecution proved the case beyond reasonable doubt. In the event, the appellant was convicted and sentenced to serve thirty (30) years imprisonment. On the other side, his co-accused persons Noel Benson Mzumbwe and Sophia Abdala Makandi were acquitted of two charges laid at their doors.

Dissatisfied with the conviction and sentence of the trial court, the appellant appealed to this court presenting two (2) grounds which, I think, can be extracted as follows:

1. That the trial court erred in law and fact by not considering the appellant's defence.
2. That the trial court erred in law and in fact for not considering that the prosecution evidence was contradictory and weak.

Wherefore, the appellant prays this court to allow his appeal.

When the appeal was called on for hearing, Ms. Beatrice Rukamilwa, learned Advocate appeared for the appellant while Mr. Alex Mwita learned State Attorney appeared for the Republic/ Respondent.

When Ms. Rukimilwa was invited to expound the 1st ground of appeal, she was emphatic that the trial Magistrate did not consider the defence evidence that the appellant that he did not know RY and PW2. She lamented further that the day the appellant was arrested there were many people but was just singled out from them all. I agree with Ms. Rukumilwa that these two aspects were not considered at all.

On this issue, a settled position is that as a matter of law, the trial court is bound to evaluate the evidence of both the prosecution and defence side before it arrives at the conclusion of the case for and against issues framed for determination. Failure to consider the defence is fatal to the trial or proceedings as per the case of ***James Bulow & others v Republic*** [1981] and ***Jonas Bulai v Republic***, Criminal Appeal No. 49 of 2006 (unreported) and a score of other decisions have long settled the position in this area. Underscoring further, the Court of Appeal of Tanzania in ***Jonas Bulai case*** (supra) insisted that it is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty.

No doubt that the foregoing settled principles lay down an emphasis on the necessity to consider the evidence adduced by both parties. In the present case, I have closely examined parties' evidence,

especially the defence evidence and realized that the same was summarized in the trial court's judgment and only one aspect was considered. As reflected from the same judgment, the trial magistrate failed to consider; 1st whether the appellant was familiar with RY and second PW2 and whether the appellant was singled out from a group of people on 01/07/2020.

Having this position, what is the way forward? Mr. Mwita proposed one. He submitted that this Court, being the 1st appellate Court, is endowed with powers to re – evaluate the evidence. I share his position. I am further reinforced by the decision of the Court of Appeal in the case of ***Aman Ally @ Joka v R***, Criminal Appeal No. 353 of 2019 (unreported) at pages 8-9 and ***Nyakwama s/o Ondare @ Okware v The Republic***, Criminal Appeal No. 507 of 2019 at page 16. The CAT observed thus:

> *"Indeed, if the task is not performed by the trial court, the first appellate court has an obligation to consider it and come to the conclusion; more so where failure to consider the appellant's defence is remarkably an issue in a given appeal."*

This has been a continued position of the law and a course I compelled to take. In the present case, I have noted from the grounds

of appeal that the complaint on the failure of the trial court to consider the appellant's defence was vividly expressed in ground one of the petition of appeal.

Recalling the issue whether or not the appellant, RY and PW2 knew each other, I am satisfied that there is strong evidence on this aspect. The Appellant's defence during the trial bears testimony that the trio knew each other. The review of the evidence reveals that the appellant was going to PW2's restaurant and having food. He was finding RY thereat. At some point in their relationship, PW2 borrowed Tshs. 25,000/= from the appellant. It is further evident that PW2 took on a task of finding for the latter a girl to marry. Therefore, the contention that he didn't know them is very weak and lacks legs to stand. Accordingly, I dismiss it.

Next is the issue whether or not the appellant was among the people who gathered at his house when he was arrested. Having reviewed the appellant's defence evidence thoroughly well, this complaint well misplaced. A digest of his defence evidence indicates that PW2 was claiming Tshs. 2,000/= being costs for food he ordered and ate. It was the appellant's defence that one day, perhaps 28/06/2020, RY was sent by her mother to get it at his house. RY collected it and

left. Shortly after, while in the bedroom, he saw RY in his house and heard the door being closed from outside. After a while both were arrested and taken to police. After RY was examined by the doctor, it was found out that she was not raped. Following those results the appellant was set free. On another occasion, which is now 01/07/2020 the police went to his house in a bid to get his assistance to find RY. When he declined to render assistance, he was arrested by police officer on allegations that he was found with RY. On the way to police, he was joined with RY and PW2 who were in the motor vehicle. They were taken to police station and finally arraigned to court. I have not learnt anything from his defence suggesting that on 01/07/2020, there were people gathering at the appellant's house and that he was among them before he was picked up. Again, there is no evidence showing that a group of boys was arrested and out of them he was pointed out. I have, however, subjected his defence to a keen examination. There is no trace of this complaint in the trial court's proceedings. In short, his assertion is baseless and has just been raised at this stage. Without much ado it is contemplated to be an afterthought.

As regards ground two, the issue is whether or not the prosecution evidence was contradictory and weak. In her submission, Ms. Rukamilwa

was contented that prosecution evidence on rape was contradictory and weak. In this, Ms. Rukamilwa commenced her arguments with the aspect of age. She lamented that age of RY was not proved by the evidence apart from the mention of it that she was under 18. To her, age was to be proved by producing baptismal certificate (if Christian), any certificate in leu of baptismal certificate, if Muslim, clinic card, birth certificate. On his part, Mr. Mwita submitted zealously that RY told the trial court that she was 14 years. He referred this court to page 9 of the typed proceedings. He agreed with Ms. Rukamilwa that age may be proved by producing baptismal certificate (if Christian), any certificate in leu of baptismal certificate, if Muslim, clinic card, birth certificate. He, however, added that in terms of section 114 (2) of the Law of the Child Act, No. 13 R.E. 2019, age may be proved by the victim, parent/guardian, social welfare, etc

I agree with both counsel and mostly with Mr. Mwita on that settled position of the law because the Court of Appeal, the higher Court of our land, has consistently held that proof of age may be given by the victim, Relative, Parent, Medical practitioner or by production of birth certificate. See for instance the case of ***Isaya Renatus v Republic,*** Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora,

(unreported), ***Salu Sosoma v Republic***, Criminal Appeal No. 32 of 2006 which was quoted with approval in the case of ***Mario Athanas Sipeng'a v Republic***, Criminal Appeal No. 116 of 2013 (both unreported). Similarly, Section 114 (2) of the Law of the Child Act underscores the same position that:

> *"114 (2) Without prejudice to the preceding provisions of this section, where the court has failed to establish the correct age of the person brought before it, then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person."*

I have dispassionately, passed through RY's testimony and I am settled that she informed the trial court in her testimony at page 9 of the typed proceedings that she was 14 years and a student of at Itamba Secondary School in Makete – Njombe. My take of this is that age was proved. Therefore, Ms. Rukamilwa's assertions are baseless and are dismissed.

Ms. Rukamilwa attacked the trial Court for its failure to consider the body size of RY. She submitted that in rape cases the body size of the victim is very important. She said that given the girl's body size, the impression one could get was that she was more than 25 years old. Mr.

Mwita was very sharp in dismissing this contention. He submitted that it was weak for lack of support from the trial court's record.

In principle this Court is endowed with powers to interfere with the trial Court's findings on credibility of the witness and most importantly the victim's body size when it is raised during the trial and assessed by the trial court. However, there must be compelling circumstances on record to reassess the same. I am guided in this position by the decision of Court of Appeal at Mtwara in ***Bakiri Said Mahuru v R,*** Criminal Appeal No. 107 of 2012 (unreported) where it was observed that:

> *"The trial court's finding as to credibility of witness is usually binding on appeal court unless there is circumstances on an appeal court on the court on the record which case for a reassessment of credibility."*

Gaining inspiration from the above position of law, re-assessment of RY's body size would be a compelling factor if it traced origin in the trial court's record. A scrupulous review of the record reveals that the appellant never cross – examined RY, PW2, PW3 or PW4 on the victim's body size or raise it in his defence. It will be awkward to re-assess what was not assessed by the trial court or fault the same on this weak allegation. Therefore, this complaint is a misconception of facts, misleading and unfounded.

The other aspect complained of by the appellant is the appellant's cautioned statement (exhibit P2). Ms. Rukamilwa submitted quite strongly that by the appellant claim that he did not append his signature on it and that it was not his, it was dangerous to act on it without being corroborated. She sought aid in the decision of ***Ahmed Abdallah v R*** [1995] TLR 172 at page 7. The learned counsel connected this flaw with the failure by the prosecution to produce evidence to corroborate RY's testimony.

Responding, Mr. Mwita zealously submitted that when exhibit P2 was tendered, the appellant alleged torture but the trial court didn't make an inquiry to ascertain whether or not the statement was made voluntarily. Terming that as being an anomaly, he stated that the prosecution did not execute its duty exerted on it by section 27 (1) of the Evidence Act, Cap 6 R.E. 2019 of proving that the statement was made voluntarily. Caught in this anomaly, Mr. Mwita urged this Court to expunge it from the record.

I have visited pages 28 and 29 of the trial Court's proceedings. It is apparent therein that the prosecution through PW4 asked to tender exhibit P2. The appellant objected to its admissibility alleging torture. It is further apparent that the trial Magistrate did not conduct an inquiry in a legally recommended procedure. He only invited the Public Prosecutor

to address the Court. From the parties submissions, the trial Magistrate came up with a ruling and admitted the retracted cautioned statement.

From what I gathered from the proceedings, I agree with Mr. Mwita that the same was marred with irregularity. Taking on board the decision in the case of ***Mukumbi Ramadhani Mukumbi and 4 others v. R,*** Criminal Appeal No. 199 of 2010 (unreported), the current and trite position of the law as enunciated in a long line of decided cases is that whenever an accused person raises objection to the admissibility of a confessional statement on the ground that it was not obtained voluntarily, the court is obliged to immediately stop the substantive proceedings and conduct an inquiry to determine whether the same was obtained voluntarily or not before proceeding any further with the matter. And this is done by giving parties the opportunity of calling witnesses in proof of their respective assertions and delivering a ruling on the same after taking address from them. It is not conducted, by inviting parties to make addresses/submissions. Caught in the web of irregularity, Exhibit P2, therefore, suffers a natural consequence of being expunged from the record. In the event I find the complaint on the issue of propriety of cautioned statements having merit.

Having expunged both cautioned statements the issue for consideration is whether or not the prosecution case was proved beyond

reasonable doubt. This is a rape case. The prosecution is duty bound to prove two important elements in discharging its duty of proving the case beyond reasonable doubt as was observed by the Court of Appeal in the case of ***Maliki George Ngendakumana v. R,*** Criminal Appeal No. 353 of 2014 (Bukoba) (Unreported) that;

> *"... it is the principle of law that in criminal cases the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it was the accused who committed it.*

In this case, RY explained how the incident of rape took place on 01/07/2020. She testified that the appellant took her from Noel's place with a view of taking her home but went with her to his house. She slept with him and had sexual intercourse twice during the night. In the morning while still asleep, the police went to his house. They dressed up and were taken to Mlowo Police Station. The fact that the appellant was found with RY in his house on 01/07/2020 was also testified on by PW3. The appellant did not cross-examine him on that fact implying that he accepted it to be true. Therefore, the court was warranted to base conviction on RY's evidence without any corroboration as observed by Ms. Rukamilwa as long as the same was satisfied that the witness was telling the truth. I say so because it is a settled law that the proof of

rape comes from the victim of rape. Other witnesses if they never actually witnessed the incident, such as the PW3, may give corroborative evidence. See the case ***Said Majaliwa v. R,*** Criminal Appeal No. 2 of 2020 (unreported) CAT-Kigoma.

As per the circumstances of this case, no witness witnessed RY having sexual intercourse with the appellant. Therefore, it is only RY why who is better placed to explain what transpired between her and the appellant.

I am satisfied that RY, regardless of her tender age, sufficiently proved that she was raped by the appellant who took her to his house at night on 01/07/2020 and ravished her.

As to who raped her, I am also satisfied that RY recognized the appellant since they had love affairs. This is so because RY knew him before the incident as the appellant used to go eat at her mother's restaurant and had visited him on 28/06/2020.

In view of section 127 (6) of the Tanzania Evidence Act, [Cap. 6 R.E.2019] the court is warranted to base conviction on the evidence of the victim of rape without any corroboration, as long as the court is satisfied that the witness is telling the truth. I am further of the view that it is a settled principle that in sexual offences the best evidence must come from the victim herself. See the case of ***Seleman***

Makumba v R [2006] TLR 379, ***Mawazo Anyandwile Mwaikavaja v R,*** Criminal Appeal No. 455 of 2017, ***Ally Ngozi v R,*** Criminal Appeal No. 455 of 2017and ***Said Majaliwa v. R*** (supra) (all unreported).

In this case, RY gave cogent evidence that she was raped by the appellant which was properly relied up on in convicting him.

In view of the discussion above, I find that the prosecution proved beyond reasonable doubt that RY was raped by the appellant. Consequently, I find the appeal to have no merit and I hereby dismiss it in its entirety.

It is accordingly ordered.

DATED at **MBEYA** this 28th day of February, 2022

J. M. KARAYEMAHA

JUDGE