IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 04 OF 2022

(From the decision of the District Court of Kyela at Kyela (Hon. P.M Barnabas, RM) in Criminal Case No. 140 of 2021)

ADAMSON MWAKASANGULE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 14//02/2022
Date of Judgement: 07/03/2022

MONGELLA, J.

The appellant 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. During the trial it was alleged that he raped a girl aged 11 years. For purposes of concealing the identity of the victim, I shall refer to her as PW1, or "the victim." The incident occurred on 21st August 2019 at about 21hours at Kilambo area within Kyela district in Mbeya region. The trial court convicted and sentenced him to serve 30 years in prison as prescribed under the law. In addition, it sentenced him to 4 strokes of the cane and ordered that he pays the victim T.shs. 500,000/- as compensation.

Aggrieved by the decision he filed the appeal at hand containing five grounds. During hearing of the appeal whereby he fended for himself, he had nothing to argue before the Court, but prayed for his grounds of appeal to be adopted as his submission. I shall therefore present the grounds as his submission as prayed.

On the 1st ground, he challenged the trial court's decision on the ground that it failed to take into account that there was no any proper identification by the victim or any witness, which could lead to his conviction. He claimed that the case was fabricated against him.

Under the 2nd ground he faulted the trial court for believing the prosecution evidence to the effect that the victim and he were familiar to each other while there was no any proof of identification by recognition.

Concerning the 3rd ground, he claimed that the trial court relied on contradictory, insufficient, and inconsistent prosecution evidence, while PW8, a medical doctor testified to have found no bruises, blood, or discharge from the victim's private parts when he examined her. He also wondered how it could be possible that a girl under 18 years of age could survive a wicked desire of an adult male without even raising an alarm or seeking for assistance as soon as possible.

With regard to the 4th ground, the appellant faulted the trial court's reliance on exhibits tendered, which were "exhibit EP1" the victim's clinic card, and "exhibit EP2" the victim's PF3, as corroborative evidence. He

argued the trial court failed to consider that the contents of the said exhibits were not read aloud before the court after being admitted.

Lastly, on the 5th ground, he claims that the case was not proved as required under the law and the trial court did not consider his defense case.

The respondent, on the other hand, was represented by Ms. Nancy Mshumbusi, learned state attorney. She opposed the appeal. Replying collectively to the 1st and 2nd grounds, she first referred the court to page 13 of the typed proceedings whereby PW1 mentioned the appellant, who is her grandfather, as her assailant. She contended that the evidence of PW1 has weight under the law as the victim explained what happened to her and would not have mistaken him with anyone else as the two knew each other for a long time. She added that the victim even mentioned the appellant before PW3 as her assailant at the earliest possible opportunity. To support her argument she referred the case of ***Chrizant John vs. The Republic***, Criminal Appeal No. 313 of 2015, in which the Court of Appeal (CAT) stated that mentioning the accused at the earliest possible opportunity is an all assurance of the credibility of that witness.

With regard to the 3rd ground, while conceding that the medical doctor testified to have found no bruises in the victim's private parts, she contended that the witness further testified that he found no hymen in the victim's private parts and the hymen appears to have been removed by a blunt object. In the premises, she argued that the doctor's testimony carries weight and corroborates that of the victim. She added that under

the law as much as penetration has to be proved, the non-finding of bruises does not render the offence unproved. She concluded that the fact that the victim was found with no hymen shows that she was penetrated.

On the 4th ground, Ms. Mshumbusi conceded to the claim that "exhibit Ep1" the clinic card, was not read after being admitted and that the same is an error under the law. In the premises she prayed for the exhibit to be expunged from the record. On the other hand however, while referring the case of ***Isaya Renatus vs. The Republic***, Criminal Appeal No. 542 of 2015 (CAT at Tabora, unreported), she argued that where the age of the child was not proved, the same can still be deduced or inferred from the case by the court. In the matter at hand, she invited the court to consider the testimony of the victim to the effect that she was a primary school student and that during *voire dire* test she stated her age.

With regard to the PF3, Ms. Mshumbusi referred the Court to page 34 of the typed proceeding and argued that the PF3 appears to have been admitted with no objection from the appellant and the same was read before the trial court.

Concerning the 5th ground, Ms. Mshumbusi conceded to the appellant's claim that the defense case was not considered. While referring to the trial court judgment, she submitted that it is seen at page 5 of the judgement that the evidence was summarised, but not analysed. On the other hand however, she prayed for the Court to analyse and consider the defense evidence as being the first appellate court it is empowered

to do so. To that effect she referred the case of ***Siaba Mswaki vs. The Republic***, Criminal Appeal No. 401 of 2019 (CAT at DSM, unreported). She nevertheless concluded that even if the defense evidence is considered by this Court it did not put any doubts on the prosecution case. She prayed for the appeal to be dismissed.

The appellant again had nothing to rejoin than to pray for his grounds of appeal to be adopted and considered by the Court and thereby set him free.

I have considered the grounds of appeal, the submission by Ms. Mshumbusi, learned state attorney, and thoroughly gone through the trial court record. In the course of deliberating on the rest of the grounds, I shall deliberate on the 5th ground under which the appellant claims that his defence evidence was not considered and that the case was not proved beyond reasonable doubt. I shall therefore analyse and consider the evidence from both sides and in the end determine as to whether the case was proved beyond reasonable doubt.

I find the 1st and 2nd grounds being similar, as also observed by Ms. Mshumbusi. They both relate to identification of the appellant by the victim. I shall therefore collectively deliberate on them. The appellant challenges the conviction and sentence against him claiming that he was not identified by the victim. He faulted the trial court for believing the victim's testimony that the two were familiar to each other. It is on record that the victim and the appellant are granddaughter and grandfather and used to stay together. This fact was also stated by the appellant

himself during cross examination. PW1 and the appellant further testified to have been left alone at home by the victim's grandmother. In the circumstances, the question of identification lacks relevance.

In addition, PW1 testified that the appellant called her from the kitchen where she was sleeping and told her to go to his room. After the act, PW1 ran immediately to PW3 and told her about the incident whereby she mentioned the appellant as the culprit. I agree with Ms. Mshumbusi that she mentioned the appellant at the earliest possible opportunity, which assures her credibility. See: ***Marwa Wangiti Mwita & Another*** [2002] TLR 39; ***Bakari Abdallah Masudi v. Republic***, Criminal Appeal no. 126 of 2017 (CAT, unreported); and ***Jaribu Abdallah v. Republic*** [2003] TLR 271. These grounds of appeal are found to lack merit and are dismissed.

On the 3rd ground, the appellant claims that the prosecution evidence was contradictory, insufficient, and inconsistent. He as well banked on the evidence of PW8 who stated that he found no bruises in the victim's private parts when he examined her. To start with the claim of contradictory, insufficient and inconsistent evidence, first of all, the appellant has not explained in which way the prosecution witnesses adduced contradictory evidence.

The best and reliable evidence was given by PW1 who stated that the incident of 21st August 2020 was the second. She stated clearly that the appellant called her to his room and raped her while her grandmother had gone to attend a funeral. On his part, the appellant did not in fact deny committing the offence even where the militiamen went to arrest

him. He specifically said that he kept quiet when asked about the incident. This was also testified by PW4, his neighbour. What he stated in his testimony is only the manner in which he was arrested and taken to the police station. The law is trite to the effect that the best evidence in rape cases comes from the victim, so long as the court finds the witness credible. See: See: ***Alfeo Valentino v. Republic***, Criminal Appeal, No. 92 of 2006 (unreported) and ***Shimirimana Isaya and Another v. Republic***, Criminal Appeal, No. 459 of 2002 (unreported); ***Aman Ally @ Joka vs. The Republic***, Criminal Appeal No. 353 of 2019. I find no fault in the trial court's observation on the credibility of PW1's testimony.

With regard to the claim that PW8 found no bruises when examining the victim, just like the learned state attorney, I also agree with the victim that PW8 testified to have found no bruises. However, lack of bruises does not negate the occurrence of rape. The law is very clear that penetration however slight suffices to commission of rape and thus the issue of bruises is no longer material. **Section 130(4)(a) of the Penal Code [Cap 16, R.E. 2002]** provides that "*penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence.*" Besides, as argued by Ms. Mshumbusi, PW8 testified that she found the victim's hymen perforated showing that she was penetrated. This ground is dismissed as well for lack of merit.

On the 4th ground, the appellant challenges the trial court's consideration of exhibits EP1 and EP2 for not being read after being admitted. I shall start with exhibit EP2, the PF3. As argued by Ms. Mshumbusi and vivid on

record, the PF3 was admitted with no objection from the appellant. The same was read before the court. The claim is therefore unfounded.

With regard to exhibit EP1, the clinic card, it is true that when the same was admitted it was not read. It is thus expunged from the record. On the other hand however, I find that the clinic card was relevant in proving the age of the victim. Given the fact that the offence the appellant was charged with was statutory rape whereby proof of age of the victim is paramount. Though not stated clearly, I believe the essence of challenging exhibit EP1 by the appellant is connected to challenging proof of age of the victim. Generally, the law provides that age of the victim can be proved by a birth certificate, clinic card, parent, guardian, relative, medical practitioner, or victim.

Faced with a similar situation in the case of ***Isaya Renatus vs. Republic*** (supra) cited by Ms. Mshumbusi, the CAT ruled that apart from being proved through birth certificate, parent, relative, guardian, medical practitioner, or victim, the age of the victim can as well be proved through consideration of other facts in the case. The Court reached that position in consideration of section 122 of the Evidence Act. Specifically the Court stated:

> *"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 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 case under our consideration there was evidence to the effect that, at the time of testimony, the victim was a class five pupil at Twabagondozi primary school. Furthermore, PW1 was introduced into the witness box as a child of tender age, following which the trial court conducted voire dire test. Thus, given the circumstances of this case, it is, in the least, deducible that the victim was within the ambit of a person under the age of eighteen."

In the matter at hand, the age of the victim was not specifically proved in evidence. However, the victim and PW5, who is her biological father, testified that the victim was a standard four pupil at Njisi primary school. Before testifying, the trial court noting that the victim was 11 years old, as stated in the charge, procured her promise to tell the truth after satisfying itself that she did not understand the nature of oath. In the premises and in consideration of the position settled in the case of ***Isaya Renatus vs. Republic*** (supra), it can be deduced that PW1 was under eighteen years of age when testifying before the trial court. In the circumstances, even

though the clinic card has been expunged from record, the age of the victim has been ascertained to be below eighteen years.

In consideration of my observation while deliberating on the grounds of appeal hereinabove, I find that the case was proved beyond reasonable doubt by the prosecution. In his defence, the appellant never raised any doubts on the prosecution case. The appeal is therefore found to lack merit and is dismissed. The conviction and sentence passed by the trial court is upheld with the exception of the 4 strokes of the cane, which is hereby quashed in consideration of the victim's age.

Dated at Mbeya on this 07th day of March 2022.

THE HIGH COURT OF TANZANIA

L. M. MONGELLA

JUDGE