IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 06 OF 2021

(Originating from Criminal Case no. 35 of 2020 In the District Court of Hanang')

MARTINE MSENGI @ KREY NYIRAMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25/01/2022 & 31/03/2022

GWAE, J

Martine Msengi @ Krey Nyiramba, is currently behind bars. He is serving a sentence of thirty years' imprisonment after he was convicted by the District Court of Hanang' at Katesh ("the trial court"), where he was charged with the offence of rape contrary to sections 130 (1), (2) (e) and 131 (2) of the Penal Code Cap. 16 of the Revised Edition, 2002 (Code).

It was alleged by the prosecution that, on the 14th October 2019 at Endagaw-village within Hanang District in Manyara the appellant did have sexual intercourse with a girl (victim) aged three years.

Aggrieved by the conviction and sentence, he has preferred this appeal with four grounds of appeal, -namely;

1. That, the learned trial magistrate grossly erred in law and in fact when he failed to analyze and evaluate the evidence on record.
2. That, the trial court totally erred in law and in fact when it failed to notice and identify uncorroborated evidence of PW1 and PW4 respectively.
3. That, the learned trial counsel (sic) grossly erred in law and in fact when it failed to analyze and evaluate scenarios surrounding the allegations that put into conviction the appellant.
4. That, the medical examination report was flawed and hence should be struck out in favour of justice.

The brief facts giving rise to this appeal are as follows; PW1, the mother of the victim alleged that on the 14th October 2019 at around 19:00 hrs she went to buy vegetables, when coming back home, she found her daughter (victim) who informed her that, the appellant had raped her ("martin amenitomba") the victim also showed PW1 her private parts and upon examination PW1 saw sperms on the victim's pant and bruises on her vagina. PW1 furnished the information regarding the victim's ordeal to the hamlet chairman (PW2) and later on reported the matter to Endasak Police Station where she was issued with a PF3. PW1 took the victim to Endasak

dispensary where she was examined by PW4, an assistant medical officer who diagnosed bruises in the victim's vagina. PW4 tendered the PF3 in court and the same was admitted and marked as PE2. The accused was later on arrested and taken to Police Station and upon interrogation by the police officer (PW3), the appellant denied to have committed the offence against the victim.

The appellant's defence was very brief. He denied to have committed the offence stating that there was a conflict between him and the victim's mother as she used to graze in his farm.

When the matter came for hearing the appellant was represented by Mr. Jeff G. Sospeter, the learned counsel whereas the respondent/Republic was represented by Ms. Alice Mtenga, learned State Attorney. The appeal was disposed of by way of written submissions which I shall consider while disposing the grounds of appeal.

After carefully considering the grounds of appeal and the submission of the parties' counsel, I am of the formed view that grounds number 1, 2 and 3 revolve in the issue of evaluation of evidence by the trial court. In these three grounds the appellant and his counsel are found challenging the

trial court's evaluation of evidence, they have seriously complained that, the evidence of the prosecution is so contradictory particularly evidence adduced by PW1, the mother of the victim and that of PW5 (the victim) taking into account that it was recorded by the trial court that PW5 could not speak and therefore unable to testify. The appellant also questioned the testimony of PW5, a child of tender age stating that voire dire test was not conducted pursuant to section 127 (6) of the Evidence Act Cap 6, Revised Edition, 2019. It was therefore, the assertion by the appellant that there is no corroboration between the evidence of PW1 and PW5 and thus the charge was not proved beyond reasonable doubt.

It is common ground that this appeal being the first appeal, this court as the first appellate court has therefore a duty to objectively re-evaluate the entire evidence on the trial record and come to its own conclusion which may either affirm the trial court's finding of facts or even arrive at a totally different conclusion on the same facts. I would like to subscribe my holding to the judicial decision of the Court of Appeal at Nairobi in the case of **Widow of Haji Gullamhussein** (1957)1 EA where courts are encouraged to discard a piece of evidence of a witness whose reliability is questionable on record when exercising its appellate jurisdiction and it was inter alia held;

> "Where the trial judge fails to appreciate or attach importance to a deliberate falsehood on a material point told by a witness whose evidence is accepted, an appellate court may place its own valuation upon the evidence of that witness".

In our instant case, it is plainly clear that the victim was found in incapable of giving her testimony though, in practice, it has been held in a number of cases that the best evidence in rape cases comes from the victim. The Court of Appeal of Tanzania in the case of **Seleman Makumba vs. Republic** [2006] TLR 379 held that;

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

Given the above position of the law, it was necessary to record the victim's testimony and thereafter be assessed however if she was too child to speak the same could not be recorded as the case here. Hence, in this instant criminal case the principal witness in this criminal case was no other than the victim's mother on the reason that PW5 could not speak as she was a child of three (3) years old as narrated by the prosecution. Even when the victim was questioned by the trial court, she stated that she did not recognize

anyone except her mother. Thus, the court recorded that she was unable to testify. It follows therefore, the case at hand is distinguishable to the former case of Seleman Makumba (supra).

PW1, the prosecution witness in this criminal matter testified that as she arrived back home her daughter (the victim) who was three (3) years old informed her that she has been raped by the appellant and for clarity the trial court recorded PW1's evidence as follows;

> "My daughter told me that Martin (amenitomba) raped her, my daughter showed me her private parts showing the area Martin raped her."

In my firm stance, given evidence adduced by the victim's mother and taking into account that the victim was reported to be unable to testify and that could not recognize any one in court except her mother, is questionable as to how at her age she was able to tell her mother that the appellant had raped her in very clear and direct words as testified by PW1 that "Martin amenitomba" and subsequently abstained to tell the trial court of what transpired on the material date. Yes, her abstinence might have pertained to a fearful environment of the trial court or otherwise but as the court of law I must take serious cognizance of these pieces of evidence adduced by

PW1 and information given by the prosecution to the trial court. I am alive of the principle enunciated by the Court of Appeal of Tanzania in the case of **Yusuph Baruani vs. Republic,** Criminal Appeal No. 2010 (unreported) where the appellant was seen holding and kissing the victim of rape aged one year, incapable of giving evidence, the victim's mother and another saw the sperms coming out from the victim's vagina after they had taken her from the appellant, there was also incriminating evidence medical practitioner that the victim's private parts had widened, reddish and had spermatozoa, it was held that

> "Even if the best evidence of rape comes from the victim of rape, this depends on the circumstance of each case because there are times when the evidence may not come from a victim of rape who can hardly talk....
>
> Where a victim of rape is incapable of giving evidence, the evidence of eye witnesses who saw an accused person with the victim child, incriminating circumstances and the evidence of a medical doctor may be sufficient evidence to ground a conviction for rape"

In our present case, as explained herein, the victim was observed to be incapable of testifying before the trial court. The testimony of PW1 and that of the medical doctor, DW4 would sufficiently incriminate the appellant

and be capable of grounding the appellant's conviction. However, I have the following observations in this particular case which in my decided opinion, leave a lot to be desired;

i. The alleged acts of the victim of clear and direct telling her mother that she was raped by the appellant by naming his named (Martin) and her subsequent incapacity to talk when she appeared before the trial court

ii. Had the victim been familiar with the appellant, she would have not told the trial court that she did not only know her mother among the persons who were in the court's chamber but also the appellant.

iii. The evidence of the medical doctor is not worth of forming basis for conviction since he testified that he only saw bruises on the labia majora taking into account of the victim's age, further to that nowhere mentioning of sperms by the medical doctor (PW4) considering that the victim was immediately taken for examination whereas it was the evidence of the prosecution via PW1 that, she saw male sperm in the victim's pants and her vagina

As to the appellant's complaint that voire dire test was not conducted, I agree with the learned state attorney that the said prosecution witness, victim (PW5) was recorded to be incapable of testifying. Consequently, there was no evidence that was recorded. That being the position, the requirement

of provision of section 127 (2) of the Evidence Act (supra) was inapplicable as opposed to the appellant's complaint, this ground of appeal is hereby dismissed.

Coming to the **last ground** of appellant's appeal, it is the submission of the appellant that exhibit P2 was admitted in court and read out however the appellant was not informed of his right to cross examine the said document under section 240 (3) of the Criminal Procedure Act Cap 20 R.E 2019. It was his further view that failure to be afforded the right to cross examine on exhibit P2 denied him the right to a fair hearing and therefore prayed for the court to expunge the said exhibit.

The respondent, on the other hand, argued that, the said exhibit together with the evidence of PW4, a medical officer was only to corroborate the testimonies of PW1 PW2 and PW3 which according to her proved the case beyond reasonable doubt. The learned state attorney went further to state that the best evidence in this case was that of PW1 the victim's mother therefore the evidence of PW4 was only to corroborate PW1's evidence.

Before responding to this ground of appeal, this court finds it apposite to reproduce the wording of section 240 (3) of the Criminal Procedure Act herein under;

> "Where a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross- examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."

My reading from the above provision of the law, entails that the trial court, when so requested by an accused or his advocate, to summon the witness who made a report for cross examination, must summon such witness for cross examination. The section also mandatorily requires the court to explain to the accused his right to have the person who made the report summoned.

Having keenly gone through the records of the trial court, the PF3 (PE2) appears to have been tendered by PW4, Jeremia Fissoo an assistant medical doctor. It is further evident that the said document was admitted without objection from the appellant. Moreover, at page 10 of the typed

proceedings it is apparent that the appellant was given an opportunity to cross examine the witness and I wish to quote herein under;

> " XX by accused: Bruises was caused by brunt (sic) object like penis."

Apart from the above statement the appellant did not further cross examine the witness. It known that in cross examination the sky is the limit, therefore since it is evident that the appellant was given the opportunity to cross examine the witness, the appellant was duty bound to exercise his right to ask logical and rational questions as he could. For this reason, this court finds no merit in this ground of appeal.

Given the status of the evidence of PW1 and that of PW5 this court is satisfied that such evidence is insufficient to establish the guilt of the appellant and could not therefore be safely acted and relied upon to convict the appellant

Before I type off, I find it worthy noting that the trial court, after having convicted the appellant of the offence to rape of the victim aged three years by then, illegally sentenced the appellant to the term of thirty (30) years imprisonment instead of life imprisonment since provision of the law under

section 131 (3) of the Code requires an imposition of a sentence of **life imprisonment** for an accused person who commit an offence of rape to a girl under the age of ten years. As the evidence as to the victim's age was strong. Thus, it was mandatory for the trial court to sentence the appellant to the term of life imprisonment (See **Paul Nuru Mgonja vs. Republic**, Criminal Appeal No. 190 of 2012 (unreported-CAT)).

In the event, I find merit in this appeal, the accused shall as soon as practicable be released from prison unless held therein for some other lawful cause.

It is so ordered.

M. R. GWAE
JUDGE
31/03/2022