IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 103 OF 2021

(Originating from Criminal Case No. 23 of 2021 of District Court of Muleba at Muleba)

HASSAN MASUMBUKO---------- APPELLANT

VERSUS

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

JUDGEMENT

Date of Last Order: 01/03/2022

Date of Judgment: 11/03/2022

Hon. A. E. Mwipopo, J.

The appellant namely Hassan Masumbuko was charged in the District Court of Muleba at Muleba for the offence 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 on 10th January, 2021 at Muleba Town within Muleba District the appellant had sexual intercourse with TA (the name is concealed for purpose of protecting her) a girl aged 16 years. The prosecution called 4 witnesses to prove their case and the appellant denied to commit the offence in his testimony. The Court after

considering the evidence from both sides convicted the appellant and sentenced him to serve 30 years imprisonment.

Aggrieved by the decision of the District Court, the appellant filed the present appeal containing 8 grounds of appeal as provided hereunder:-

1. *That, the Hon. Court grossly contravened the law when it decided not to amend section 131 (1) of the Penal Code, Cap. 16, R.E. 2019 to section 131 only of the Penal Code, Cap. 16, R.E. 2019, for convicting the appellant in to the serious offence of rape without pronouncing a sentence facing him (appellant) as it is revealed in page 9 of the judgment of the trial Court.*
2. *That, the Hon. trial Court erred to convict the appellant without cogent evidence brought to collaborate the charges against him from neighbours living in the area of Mkalyambya where the accused person was residing.*
3. *That, the victim after she was given shillings 1000 failed to report to JR Petrol Station workers to get their assistance by telling them what happened to her before she communicated to her uncle Rwekaza John.*
4. *That, a case was fabricated to implicate the appellant as the victim alleged that, meanwhile, it was her first time to have sex but she fails to raise alarm or cry loud immediate the matter which prove the realism fabrication of a case against appellant.*

5. *That, no eye witness saw the accused having sexual intercourse with the victim, the witness saw the appellant motorcycle being used for transport service or the victim boarded the said motorcycle.*
6. *That, under section 110 (1) of the Evidence Act, Cap. 6, the case was not proved by prosecution beyond reasonable doubt against the appellant. And also the said hymen can be raptured by ridding, by carrying heavy things or because of penetration especially to a victim who is aged 18 years.*
7. *That, the Hon. Court is being solicited to reveal the modern generation not to rely only on raptured hymen.*
8. *That, there was no any eye witness at all.*

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. He also prayed for the Court to release him from prison.

In response, Ms. Happiness Makungu, State Attorney appearing for the respondent in this case objected the appeal. On the 1st ground of appeal, she submitted that the record of proceedings shows in page 17 of the typed proceedings that the appellant was convicted and sentenced to face 30 years imprisonment and ordered to compensate the victim. The omission stated by the appellant is curable. Thus, the first ground has no merits.

On the second ground of appeal, she submitted that to prove the case before the court does not need specific number of witnesses. Any number of witness is sufficient as long as they are relevant and they prove the offence.

The counsel submitted on the third ground of appeal that the victim after she was dropped by the appellant at Petrol Station decided to call his uncle and not the employees' of the Petrol Station. There is nothing wrong with victim's decision to call his uncle before telling the workers of the Petrol Station.

On the 4th ground of appeal, she said that the victim in her testimony said that she was not able to call for help as the appellant closed victim's mouth during the incident. Thus, this ground has no merits.

In the 5th ground of appeal, the counsel said that eye witness of the incident is victim herself who proved that she was raped by the appellant. The victim is important witness who proved that it was the appellant who committed the offence to her.

Turning to the 6th ground of the appeal, the counsel for the respondent said that prosecution was supposed to prove to two ingredients of the statutory rape. The ingredients are that the age of the victim was below 18 years during the incident and that there was Penetration. The victim's mother –PW2 proved in the testimony that the victim was born in 08/12/2003, she means the victim was below 18 years when the incident occurred on 10/01/2021. Even though the victim

claimed that she was born on 08/12/2002, but the mother evidence on the age of the child is more reliable. She pray for the court to rely on the evidence of PW2 on the age of victim.

On the evidence of penetration, the victim – PW1 in her testimony proved that the appellant had sexual intercourse with her, hence, the evidence of penetration was proved. The testimony of PW1 was supported by the evidence of PF3 and the Medical Practitioner who examined the victim after the incident. The appellant did not cross examine the victim on the relevant matters which means that he did admit to have raped the victim. Failure to cross examine the witness in the important or relevant evidence means that the accused admitted the fact as it was held in the case of **Oroko Wankuru as Mmiko v. Republic**, Criminal Appeal No. 514 of 2019. The answer to this grounds also covers ground No. 7.

On the last ground of the appeal, the Counsel said that the answer to this ground is similar to her reply to ground No. 5 of the appeal.

In his rejoinder, the appellant said that there was contradiction on the age of the victim. PF3 shows that the victim was 16 years, the victim testified that she was 17 years but the date she said she was born shows she was 18 years, and PW2 said that the victim was 17 years. He added that PW2 in her testimony said that the suspect who committed the said offence to the victim admitted the offence at the police, but there is no evidence at all from the police which shows

that he admitted the offence. PW2 also testified that she reported to the Police that her daughter was lost, but, there is no evidence from police to prove that PW2 reported the incident of her daughter to be lost which was adduced in court. The appellant said that victim stated in her evidence that after the incident the appeal took her to the Petrol Station where she decided to call her uncle, but the said uncle never testified before the court. The victim alleged that appellant is a bodaboda driver, but this is not true. Also, the victim alleged that appellant is living at Mkalyamba Village which the same is not true.

After hearing submissions from both sides, the Court is called upon to determine whether the appeal has merits or not.

In determination of the appeal, I will commence with the first ground of appeal that the sentence was not pronounced in the judgment after the appellant was convicted. It is true that the typed judgment of the trial Court does not contain the sentence imposed to the appellant after he was convicted. However, looking at the record of the trial Court, both hand written proceedings shows that the appellant was sentenced to serve 30 years imprisonment and ordered to pay compensation of shillings 1,000,000/= to the victim after prosecution said they have no previous conviction record of the appellant and the appellant was afforded an opportunity to mitigate. Thus, the omission found in the typed judgment is not fatal as the proceedings prove that the sentence was pronounced to the appellant

after he was convicted by the trial Court. The said omission is curable under section 388 (1) of the Criminal Procedure Act, Cap. 20, R.E. 2019.

The Court will determine next the 6th ground of appeal that the prosecution failed to prove the offence without doubt as it contains within it all other grounds of appeal. The record available shows that the appellant was charged for the offence of rape contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16, R.E. 2019. In proving the offence of rape under section 130 (2) (e) of Penal Code (statutory rape), the prosecution has duty to prove that the suspect had sexual intercourse with a girl who is below 18 years of age. Section 130 of the Penal Code creates the offence of rape in subsection (1) and it provides for different descriptions of the rape offence in subsection (2). Section 130 (2) (e) of the Act 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 hereunder:-

> *"130. - (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 suspect 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 08th December, 2003. PW2 testimony is collaborated by victims clinic card – Exhibit PE2 which also shows that victim was born on 08th December, 2003. As the incident took place in 10th January, 2021, it means that at the time of incident the victim was aged 17 years. The appellant alleged in his rejoinder submission that there was contradiction over victim's age in the her testimony which shows she was above 18 years and PW2 who testified that she was below 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. 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 may make inferences to the existing facts. In the present case, despite the contradiction in the testimony of PW1 and PW2 on the age of the victim, the trial Court made findings of the victim's age from the testimony of PW2 that the victim was born on 08th December, 2003, is collaborated by victim's clinic card – Exhibit PE2. As a result, the trial Court rightly held that the victim was below 18 years of age hence the first ingredient of the offence was proved.

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 the case of **Kayoka Charles v Republic,** Criminal Appeal No. 325 of 2007, Court of Appeal of Tanzania, at Tabora, (Unreported), it was held by the Court of Appeal that penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ.

In this case, the victim (PW1) testified that on the date of incident the victim boarded appellant's motorcycle as she was going to kibaoni. The appellant took her to his house at Mkaryambwa as there was rain. There at his house, the appellant carried the victim from sitting room to his room, closed her mouth, undressed her and inserted his penis in victim's vagina. This evidence from the victim proved that the appellant penetrated the victim. The evidence by victim is supported by testimony of PW2 who said that the victim has bruises and was breeding in her vagina. Also, testimony of PW3 and content of PF3 – Exhibit PE1 shows that the victim had bruises in her vagina and her hymen was raptured. This evidence is sufficient to prove that there is penetration.

However, the identification of the appellant by the victim and other witnesses has a lot to be desired. The victim named the appellant in her testimony as the person who raped her. Unfortunately, there is no evidence whatsoever in the record which shows how the victim was able to know the appellant by the name. The victim in her testimony did not tell the Court if she knew the appellant

prior to the incident. Also, no witness testified to know the appellant before the incident. The question is how the victim was able to name the appellant as the person who did rape her in her testimony? The evidence available in record is silent and the same could not be assumed.

It is settled that the person can only be convicted on evidence of identification if the Court is satisfied that such evidence is watertight and leaves no possibility of error. This position was stated by the Court of Appeal in several cases including **Waziri Amani V. Republic [1980] T.L.R. 280,** where it held that:

> *"The evidence of visual identification is of the weakest kind and most unreliable. As such, courts must not act on visual identification unless and until all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is watertight."*

From the above cited decision, the trial Court is supposed to scrutinize the evidence on identification if it was watertight and all possibilities of mistaken identity has been eliminated before it act on visual identification.

In the case at hand, the victim said in her testimony that after the incident, the appellant took her to JR Petrol Station where he gave her shillings 1000. The victim said she went to the nearby Mpesa and communicated with her uncle Rwekaza John. The said Rwekaza John later on followed her there. Victim said that she explained to him what happened. Thus, this is the first person to whom the

victim explained what happened and probably the first person whom she named the suspect. Very unfortunately, the said Rwekaza John was not called to testify in Court. This was material witness to clarify to the court if the identifying witness did at the earliest opportunity mention the appellant to be one who raped her. Failure to call Rwekaza John as witness bring doubts to the prosecution case and this benefits the appellant. In **Aziz Abdalla v. Republic, [1991] TLR 71**, the Court of Appeal held:

> *"The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question; are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown the court may draw an inference adverse to the prosecution."*

It is a settled principle that ability of a witness to name a suspect at the earliest opportunity possible is assurance of his reliability. In **Jaribu Abdallah v. Republic [2003] TLR 271,** the Court observed:

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal. But that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor."*

In the present case, the victim said that she called and explained the incident to her uncle Rwekaza John, but the said uncle did not give evidence to confirm it.

In the circumstances, the conviction of the appellant was not based on a proper evaluation of the evidence by the trial court. The appellant was not properly identified by the victim and the same could not be assumed. It was wrong for the trial court to act on weak identification which did not eliminate possibilities of mistaken identity. Thus, I find the prosecution case was not proved beyond reasonable doubts. As this ground has disposed of the matter, there is no need to determine the remaining grounds of appeal.

Therefore, the appeal is allowed. The conviction of the appellant for the offence of rape by the trial District Court is quashed and the sentence of thirty (30) years imprisonment is hereby set aside. Forthwith, I order for the release of the appellant from prison otherwise held for another lawful cause. It is so ordered.

A.E. Mwipopo

Judge

11/03/2022

The Judgment was delivered today, this 11.03.2022 in chamber under the seal of this court in the presence of the Appellant and the counsel for the Respondent.

A. E. Mwipopo

Judge

11/03/2022