**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 35 OF 2020**

**(Appeal from the decision of the District Court of Babati at Babati, Criminal Case No. 42 of 2019)**

**JOEL NADA..... APPELLANT**

**Versus**

**THE D.P.P..... RESPONDENT**

**JUDGMENT**

***04th March & 1th April, 2022***

**MZUNA, J.:**

In this appeal, Joel Nada, the appellant herein, is challenging the conviction and sentence imposed on him. He was charged with and convicted of two counts, to wit:- Rape: Contrary to section 130(1), (2)(e), Section 131(1) of the Penal Code and; Impregnating a school girl: Contrary to Section 60A (3) of the Education Act, Cap. 353 RE 2002 (as added by section 22 of the Written Laws (Miscellaneous Amendments) (No.2) Act of 2016).

It was alleged that on or about the 25th December, 2018 and 6th January, 2019 at Endanachani Village, within Babati District in Manyara

Region, the appellant did unlawfully have sexual intercourse with N. d/o B. (the real name of the victim is concealed to hide her identity).

In the second count it was alleged that on the same date time and place, the said appellant did impregnate a form II Secondary School girl (N d/o B) aged 16 years of Gorowa Day Secondary School.

The appellant denied the charge. The trial court acting on the adduced five (5) prosecution witnesses and three (3) defence witnesses, found the appellant guilty for both counts and proceeded to sentence him to a concurrent sentence of 30 years imprisonment.

Aggrieved, the appellant preferred this appeal with five grounds of appeal; ***One,*** *that the trial Magistrate erred both in law and fact to enter a conviction of the appellant while the offence of rape under section 130 (e) (sic) was not proved beyond reasonable doubt.* ***Two,*** *that the trial Magistrate erred in law and in fact for admitting the purported cautioned statement which was taken contrary to the provision of the law.* ***Three,*** *that the trial Magistrate failed miserably to look at the whole evidence so as to ascertain whether there was evidence against the accused person/ appellant adduced by the Prosecution to warrant a conviction of the appellant.* ***Four,*** *that the trial Magistrate erred in law and in fact by solely relying on Exhibit P2 to convict the appellant contrary to the law.* ***Five,*** *that the trial Magistrate erred in law and in fact for failure to evaluate the evidence tendered by the defence side which raised reasonable doubt.*

The hearing of this appeal was heard through written submissions. The appellant appeared in person, unrepresented after his advocate

opted to withdraw from defending him. The respondent republic had the service of Akisa Mhando, learned Senior State Attorney.

The brief historical background of the matter is that on 29/1/2019, PW1, the victim, reported to school as usual. She felt some dizziness. The class monitor reported to the teacher Frank and or Moshi Kamala who in turn notified the Head Master one Mpanura Hassani (PW2). Teacher Moshi was directed by PW2 to communicate with the victim's father Boo Kalimi (PW4) about her sickness. In response, PW4 directed the Bodaboda driver to pick her and report her to Endanachi dispensary as he was very busy. She was medically examined by PW5 Scolastica Mussa Milanzi on 30th January, 2019. She confirmed that she was pregnant as per the tendered medical report PF3 exhibit P2. It is during this time after PW4 had enquired from the victim (her daughter), she disclosed that the appellant is the person who raped and then impregnated her. She disclosed that they had love affairs in the appellant's kiosk where he shaves people.

The appellant was arrested with the aid of the WEO and reported to the Police. He was interrogated through the cautioned statement which was admitted after trial within trial as (exhibit P3). The School register proving that indeed the victim was their student in form two

was admitted as exhibit P1. Both the victim and her father confirmed that she was 16 years of age. He was then charged in court.

During his defence case the appellant (DW1) said that on the alleged date of rape 6/1/2019 he was away. That he went at Godabagala to attend Christmas ceremony up to 26/12/2019 in the company of Daniel Lucas (DW2) who owns a Bodaboda. On his part, Joseph Sima (DW3) who is the appellant's uncle, confirmed that the appellant helped him during planting on 5/1/2019-7/1/2019.

In dealing with the raised grounds of appeal, I will start with the issue as to whether there are procedural defects which occasioned injustice; Second, whether the evidence was properly analysed, and, lastly, whether the charge was proved to the required standard of proof.

The appellant has raised issues that the cautioned statement was admitted in evidence without following the required standard of the provisions of the law. That, his defence of alibi was not considered by the trial Magistrate and hence occasioned injustice.

On the issue of cautioned statement, he said that the trial magistrate erred in law and fact for admitting and basing her decision on the exhibit which was taken outside the prescribed time and therefore contrary to the law. Ms. Mhando, the learned Senior State

Attorney conceded that indeed the cautioned statement was taken out of the prescribed time by law in violation of the provisions of section 50(1) of the Criminal Procedure Act, Cap. 20 [R.E 2019] [CPA].

Reading the evidence, PW1 said felt ill on 29/01/2019. She was told about the medical results by her father at night of 29/01/2019 leading to the arrest of the appellant on the following morning of 30/01/2019. The cautioned statement was recorded on 31/01/2019 at 15.00 Hrs which was far beyond the prescribe time of four hours, even then without seeking for extension before a Magistrate as per the law.

Section 50(1) of the CPA reads:-

> *50.-(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b),* ***the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*** *(*emphasis added)

When faced with similar problem, the Court of Appeal had this to say in the case of **Pambano Mfilinge versus The Republic**, Criminal Appeal No. 283 of 2009, CAT at Iringa (Unreported) that:-

> *"The period available for custodial interviews by the police is regulated under sections 50 and 51 of the Criminal Procedure Act... Upon numerous occasions, this court has been confronted with situations*

*similar to the one at hand. (See the unreported decisions of the court in Criminal Appeal No. 278 of 2008 -* ***Emilian Aidan Fungo @ Alex and another v R;*** *Criminal Appeal No. 51 of 2010 -* ***Mussa Mustapha Kusa and another v R;*** *Criminal Appeal No. 126 of 2011 -* ***Hamisi Juma @ Nyambanga and others v R;*** *Criminal Appeal No. 261 of 2011 -* ***Majuli Longo and another v R****). In all these decisions the court held that the non - compliance vitiated the particular cautioned statement. To this end, we are left with no other option than to expunge the cautioned statement from the record."*

That being the case, I join hands with both the learned State Attorney and the Appellant, that the cautioned statement – Exhibit P3 was not recorded within the dictates of the law. It must, as I hereby do, be expunged for non-compliance with section 50 (1) (a) of the CPA.

Another complaint which has been raised by appellant and argued in submission is about the defence of alibi. The appellant is complaining that the trial magistrate did not consider even the defence of alibi put forward by him on the ground that he did not give prior notice. This court was referred to a number of case law authorities like **Venance Nuba and Another v. The Republic,** Criminal Appeal No. 425 of 2013, CAT at Tabora (unreported) and the case of **Charles Samson v. R** [1990] TLR 39 to emphasise a point that even without giving notice, still the court must consider the defence of alibi raised by the accused.

On her part, Ms. Mhando, the learned Senior State Attorney faulted this argument. She contended that the defence was considered but unfavourable to the appellant. She went further by quoting the paragraph of the trial court in the impugned judgment as proof that indeed she considered the defence of alibi but was not beneficial to the appellant. She reminded this court on the prerequisite conditions in regard to the defence of alibi, citing section 194(4), (5) and (6) of the CPA.

Reading the record, the trial Magistrate talked about the defence of alibi yet said given the strong prosecution evidence, the same cannot outweigh it. She said at page 6 and 7 (both at bottom pages):-

> *"...Much more the accused said he informed (sic) the court that on 25/12/2019 he was not at Ayasanda...though he said he was absent at Ayasanda the date of commission(sic) whereby* ***his defence of alibi was received by court (sic) though there was no previous notice on his alibi defence.*** *However, in determine (sic) on if the accused is guilty then this court found (sic) the prosecution adduced evidence is watertight to prove the offence of rape..."*

My close reading of the above transcript, it shows that the defence of alibi was received despite the fact that there was no prior notice which was raised. She then weighed it in line with the prosecution evidence and then overruled it though it was so raised without following

established procedures under section 194 (4) of the CPA (supra). The case of **Charles Samson v. R** (supra) held that:-

> *"The court is not exempt from the requirement to take into account the defence of alibi, where such defence has not been disclosed by an accused person before the prosecution closes its case."*

This case insists on the mandatory requirement for the court to consider a defence of alibi even without furnishing court with prior notice. Even assuming the argument by the appellant is anything to go by, still at page 7 of the judgment, the trial magistrate said and I think rightly so, it is unimaginable that DW3 Joseph Sima failed to know the name of the appellant's mother (not wife as alleged in the judgment) whom he said is his sister, he being the appellant's uncle. It is therefore no wonder that even the alleged story that he went to assist DW3 during planting of cereals from 5/1/2019 to 7/1/2019 was not believed by the trial magistrate. I say so while being fully aware that the burden of proof always rests on the prosecution.

This takes me to the issue on evaluation of the evidence, whether they sufficiently proved the charged offence. Under this issue, the appellant's complaint is on the allegation that there was contradictory evidence by the prosecution side. That, PW1, the victim, referred the appellant to different names like Joel Nada Umuri and Joel Nada.

Another version of alleged contradictory evidence is that at page 9 of the impugned proceeding PW1 the victim, told the court that when she felt bad at school, it was teacher Frank who called PW4, the victim's father but PW4 said that (at page 19) it was PW2 who called him whereas PW2 stated that it was teacher Moshi Kamala who called PW4.

Despite the fact that, Ms. Mhando admitted such contradiction still maintained that the contradiction is not fatal. To substantiate her stance, she cited the case of **Eliah Bariki vs The Republic**, Criminal Appeal No. 321 of 2017 TZCA (Unreported) where the court disregarded mere contradictions which do not go to the root of the matter as minor.

I agree. Minor contradictions cannot 'discredit' the evidence of the victim. In the case of **Mohamed Haji Ali v. Director of Public Prosecutions**, Criminal Appeal No. 225 of 2018 CAT at Zanzibar (Unreported), it was held that:-

> *"This Court when faced with a similar situation in the case of **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported) at page 7 while quoting with approval the authors of Sarkar, The Law of Evidence, 16th Edition, 2007 had this to say:*
>
> > *"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and*

*horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a partie's case, material discrepancies do..."*

This court would agree with the learned State Attorney that the pointed out contradiction is a minor one which does not go to the root of the case, specially so because the proper names Joel Nada appears thereto. The learned State Attorney correctly doubted as to why the appellant did not question the victim on the dissimilarities of his name during trial. He is estopped to raise it on appeal.

That said, this takes me to the issue of proof of rape charge. In his last complaint, the appellant says in his submission that, age of the victim was not proved, more so because her mother was not called as a witness. That, there was also need to call the WEO of Ayasanda Mr. Dickson John who is alleged to have taken part during his arrest. He urged the court to infer an adverse inference on the prosecution for the failure to call them while they were within reach, citing the case of **Aziz Abdallah v. R** [1991] TLR 71.

Further that, the victim did not disclose/report to anybody after the alleged rape which suggest she is not trustworthy citing the case of **Venance Nuba and Another v. R** (Criminal Appeal No. 425 of 2013, CAT (unreported).

On the issue of proof of rape, he said that in the absence of DNA test, the charge had not been proved. Such evidence, he further said, could have assisted to establish and prove issue of paternity.

In response, Ms. Akisa overruled all above complaints in that in a rape charge the evidence of the victim is the best evidence citing the case of **Jacob Mayani v. The Republic,** Criminal Appeal, No. 558 of 2016 TZCA Shinyanga (unreported) at page 15. That the victim in her evidence said knows the appellant very well as well as his name.

On the issue of proof of age, she said that the victim (PW1), clearly said was born on 15/8/2002. Her evidence was corroborated with the evidence of her father (PW4) who testified that she is 16 years old. That they have also proved that she was a student at Gorowa Secondary school through the evidence of PW2 with registration No. 935/2018 as per the tendered admission register exhibit P1. That, all named above witnesses, proved she was 16 years. That the victim named the suspect without delay after it was detected she was pregnant citing the case of

**Halfan Ndubashe v. The Republic,** Criminal Appeal No. 493 of 2017 TZCA, Tabora (unreported).

On issue of proof of rape, she said that so long as the charge is one of statutory rape, proof of penetration even without DNA test is enough citing the case of **Robert Andondile Komba v. The DPP,** Criminal Appeal case No. 465 of 2017 TZCA Mbeya (unreported).

On the issue of failure to call other witnesses to show a link, she said that what is required is not "a number of witnesses but the quality and relevancy of the witnesses" citing the case of **Halfan Ndubashe v. The Republic,** Criminal Appeal No. 493 of 2017 TZCA. That the appellant could have summoned them if he found they were material to his case.

I agree with the learned State Attorney based on the provisions of section 143 of the TEA, Cap 6 RE 2019 which provides that there is no any required number of witnesses for the proof of any fact. Even a single witness can prove any charge provided her evidence is relevant and reliable.

On the age of the victim, I have this to say. Once confronted with the same facts the Court of appeal of Tanzania in the case **Anselimo Kapeta versus The Republic,** Criminal Appeal No. 365 of 2015 while

citing its previous decision of **Niyonzimana Augustine V Republic Criminal Appeal No. 483 of 2015 CAT at Bukoba (unreported)** held that;

> *"The ground relating to age of the victim need not detain us. It is clear from the charge sheet that the apellant was charged with statutory rape and the victim was 16 years. "*
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> *In this case apart from the charge sheet indicating the age of the complainant being sixteen, her mother confirmed that she was sixteen. The appellant committed statutory rape."*

It is apparent that the charge sheet under which the appellant was charged clearly indicated the age of the victim to be 16 years old. The victim herself while testifying at page 9 of the impugned proceeding witnessed to have been born on 15/8/2002 and that she was 16 years old at the material date of giving evidence. This fact was corroborated by her father. Additionally, as per the charge, the Victim NB was a Form II student at Gorowa Secondary School as well stated by PW2 (Mpanura Hassan) the Head Master of Gorowa Secondary School where the victim had been schooling. This complaint is bound to fail.

On the issue of reliability and credibility of the victim PW1, in relation to the rape charge, she mentioned him immediately after being asked by her father. He was arrested without a delay. She said during her evidence, the work place of the appellant where he operates a

saloon. That on the first day on 25/12/2018 he seduced her and had sex with her at his "geto". Again on 6/1/2019 he took her from the saloon where she went to cut her hair and told her to join him at his "geto" of which she did and they had sex as well. In both incidences he did not wear condom. She fully described where the room of the appellant "geto' is:-

*"Your room at Endanachi is across the road at milling machine."*

At page 10 of the proceeding (PW1) witnessed as follows;

> *"And on 25/12/2018 Joel asked me to go at his room "geto" which is at Endanachani centre and I went to his room and found him having soda which he already opened and asked me to drink it but I refused then he insisted and I drunk little and the remain (sic) soda he finished himself and at that time a door was closed. Thereafter, Joel undressed my pant and tight and undressed his trouser and short trouser and entered his penis into my vagina and have sex with me. During sex Joel did not wear condom and after finished I won (sic) my clothes and went to our shop and later at home.*
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> *On 6/1/2019 I went to cut my hair and Joel asked me to go with him at his room again and he went and followed him. Into his room again Joel undressed my pant and tight and undressed his trouser and short trouser and entered his penis to my vagina and had sex with me for the second time."*

Looking at such evidence of PW1, the victim, it is difficult to disbelieve what she said. She knows the appellant very clearly from his names, his

business and the place of residence. Her evidence is credible and trustworthy one which cannot be faulted even if not corroborated or even taken alone. It proves the offence of statutory rape.

The law is now settled that the best evidence in rape cases comes from the victim. This position was stated in the case of **Selemani Makumba v. Republic** (2006) TLR 379 while interpreting and applied Section 127 (7) of the Evidence Act, [Cap. 6 R.E 2019]. The court had the following to say on the evidence of the victim in sexual offences;

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence, the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence, on its own merits, not withstanding that such evidence is not corroborated, proceed to convict, if for reason to be recorded in the proceedings the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*

The appellant in his rejoinder submission cited the case of **Abiola Mohamed @ Simba,** Criminal Appeal No. 291 of 2017 that though the evidence of the victim of rape is the best evidence in a rape charge, nonetheless, it does not mean that such evidence should be taken as a

gospel truth, but has to pass the test of truthfulness. This I am sure was done as per the analysis of the evidence.

The law, section 130 (2) (e) of the Penal code, clearly provides for the proof of statutory rape "*with or without her consent when she is under eighteen years of age...*" The victim no doubt, fall in this category. Again proof in rape charge is only "penetration" of a male organ (penis) into the female genital organ (vagina) whatever slight it may be. Section 130 (4) of the Penal code reads:- *"For the purposes of proving the offence of rape- (a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and..."*

All the ingredients for the proof of the charged offence were successfully proved. This court cannot interfere the judgment of the trial court.

For reasons above stated, this appeal stands dismissed.

**M. G. MZUNA,**

**JUDGE.**

**01/04/2022**