

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**MWANZA DISTRICT REGISTRY**  
**AT MWANZA**

**CRIMINAL APPEAL No. 92 OF 2021**

*(Originating from Criminal case No. 80 of 2020 of the District Court of Ilemela at Ilemela)*

**FREDY s/o SALVATORI@PAULINE-----APPELLANT**

**VERSUS**

**THE REPUBLIC-----RESPONDENT**

**JUDGMENT**

*Last Order: 16.05.2022*

*Judgement date: 27.05.2022*

**M.MNYUKWA, J.**

The appellant, Fredy s/o Salvatory @Pauline was charged before the District Court of Misungwi at Misungwi for the offence of rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code [Cap 16 RE: 2019]. The case for the prosecution at the trial was that on the 10<sup>th</sup> day of May 2020 at Igombe area within Ilemela District, in Mwanza Region the appellant had carnal knowledge with one young girl aged 9 years, who,



for purposes of concealing her identity will be referred to, in this judgment, as either the victim or PW1.

The appellant denied the charge, so the prosecution called a total of five witnesses, who proved the case against the appellant beyond a reasonable doubt, according to the judgment of the trial court. The appellant entered his defence as DW1 and he did not call any witness. At the trial, the appellant was accordingly convicted followed by a statutory minimum sentence of thirty (30) years imprisonment. Dissatisfied, the accused has lodged the present appeal before this court appealing both the conviction and the sentence.

The appellant fronted 12 grounds of appeal thus: -

- 1. That the trial court erred in law and in fact to convict the appellant by relying on the prosecution evidence which had several basic contradictions and inconsistencies which went to the root of the case and were not cured by any means.*
- 2. That the trial court erred in law and in fact to convict the appellant based on the age of the victim which was not proved on account of non-production of birth certificate which features in the evidence of the prosecution side.*
- 3. That the testimonies of PW3 Samiah Nuru who was the medical doctor and PW5 Theresa Nchemba are tainted with contradictions which raise doubts and sufficiently rendered that evidence unreliable and completely worthless.*



4. *That the trial court erred in law and in fact for failure to note that the evidence of the victim KS was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No. 04 of 2016.*
5. *That there was no cogent and straight evidence to corroborate the evidence of KS the victim also the evidence of PW2 Helen Nyamsha and PE4 Clement Andrew was doubtful also weak which can not be used to corroborate the evidence of the victim.*
6. *That the trial court erred in law and in fact for failure to note that the appellant as the layman was neither represented by the lawyer under the Legal Aid Act nor been informed of that right of any stage in the Act which led to unfair trial and equality of law.*
7. *That the evidence of the prosecution side was framed and could not be considered and not trusted by the trial Court to warrant a conviction.*
8. *That the conviction of the appellant was wrongly based on the weakness of the evidence of the appellant rather than the strength of the prosecution evidence as the law requires.*
9. *That both the evidence of KS the victim and PW4 was doubtful unreliable and untruthful which can assist the trial court to implicate the appellant as the one who committed the alleged offence.*
10. *That the case was not investigated and the defence of the appellant was not properly considered by the trial court.*
11. *That, where the copy of the judgment is silent on whether the victim was sworn or affirmed during the trial in court it becomes difficult to ascertain whether or not the witness was competent to testify and how such evidence can be valid in court.*
12. *That the trial court incurably and grossly erred in law and in fact to convict the appellant while the evidence of the prosecution side was elaborated enough to prove the charge against the appellant beyond a reasonable doubt.*



When the matter was called for hearing, the appellant appeared in person while the Republic was represented by Sabina Choghogwe, State Attorney. The respondent was the first to submit where she prays to argue jointly the 1<sup>st</sup> and 3<sup>rd</sup> grounds of appeal and the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> grounds of appeal. She also prayed the remaining grounds that is the 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> to be argued separately.

On the 1<sup>st</sup> and 3<sup>rd</sup> grounds of appeal, the appellant alleged that, there was a contradiction on the evidence of the respondent. The learned state attorney submitted that there were no contradictions as claimed. She avers that PW1 to PW5 testified to prove that the victim was raped and it was the appellant who did rape her. She enlightens that PW3 a medical doctor examined the victim on 13.05.2020 and found blood in the victim's vagina. She went on that PW5 was the witness who responded to the alarm "Mwano" raised by PW4 who eye-witnessed the appellant rapping the victim and upon examination of the victim by PW5 she was found the victim bleeding as reflected on page 30 of the trial court proceedings. On the claim that the victim was examined after three days by PW3, she avers that bleeding is not among the elements of proof in rape cases rather the proof of penetration and the prosecution evidence prove the case.



On the 2<sup>nd</sup> ground of appeal, she avers that the trial court rightly convicted the appellant for PW1 stated that she was 9 years old. That this evidence was corroborated by PW2 on page 14 that the victim was born on April 2011 and at that time the victim was a pupil of standard three. She insisted that the evidence of PW2, the mother of the victim on the age of the victim was enough to prove the age of the victim. Insisting she cited the case of **George Clad Kasandra vs DPP**, Criminal Appeal No. 376 of 2017 CAT Mbeya where it was held that the age of the victim can be proved by the victim, parent or a medical practitioner.

On the 4<sup>th</sup> ground of appeal that the evidence of the child of tender age was not taken in accordance with section 127 of Evidence Act Cap 6 R.E 2019, she avers that the evidence was properly taken as the child promised to tell the truth as required by section 127(2) of the Tanzania Evidence Act Cap 6 RE: 2019.

On the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> grounds, the appellant alleged that the prosecution case was not proved beyond reasonable doubts. The learned state attorney insisted that, the prosecution case was proved to the standard required. Referring to the evidence of PW1 at the trial court, at page 12 of the proceedings, she avers that PW1 the victim testified that the appellant took her to the hill forced her to remove her clothes and





threatened her and put a cloth in her mouth so that she could not scream. She went further that the appellant inserted his penis into her vagina and she was in severe pain and there was a person who saw them. She went on that the position of law requires the proof of rape to be a proof of penetration the evidence which was given by PW1. Insisting, she cited the case of **Seleman Makumba vs Republic** [2006] TLR 379.

She went on that there was evidence of PW2 on page 14 of the trial court proceedings who examined the victim and found her bleeding in her vagina and when the victim was asked, she explain that she was raped by Fredy, the appellant. She went further that the circumstantial evidence of PW4 corroborates the evidence of the victim as reflected on page 27 of the trial proceedings where PW4 testified that on 10.05.2020 when she was on the way to his home, he passed near Mr. Mkama's home where he found the appellant lying naked under the tree and the victim who was crying lying between his legs where he managed to apprehend the appellant who wanted to flee and raised alarm. For that reason, she insisted that the prosecution case was proved to the standard required.

On the 6<sup>th</sup> ground that the appellant was not given legal assistance, she avers that it is not the duty of the court to find or issue a legal



assistant to the appellant. For that reason, she prays this court to dismiss the ground of appeal.

On the 11<sup>th</sup> ground of appeal, the appellant alleged that the trial court judgment did not show that the victim gave her evidence on oath, she avers that it was correct for the trial court to take evidence without oath for the law under section 127 TEA requires the child to promise to tell the truth.

On the 10<sup>th</sup> ground of appeal, it was her submissions that the case was properly investigated and submissions of his own defence at the trial court were well-considered as shown on page 10 of the judgment.

She retires citing section 131(3) of the Penal Code Cap 16 which provides that a person who raped a child under the age of 10 the sentence is life imprisonment and she prays this court to substitute the sentence of 30 years imprisonment to the proper sentence.

Responding to the respondent's submissions, the appellant prays this court to adopt his grounds of appeal to form part of his submissions. he added that the medical doctor did not prove that the victim was raped as he did not find bruises or clotted blood. He insisted that the prosecution failed to prove the case to the standard required and therefore he retires and prays this court to allow the appeal and set him free.

After the submissions from both parties, I now proceed to determine this appeal where the appellant is protesting his innocence fronting 12 grounds of appeal. The centred issue to the grounds of appeal is allegation by the appellant that, the prosecution case was not proved to the standard required which placed me with a legal duty to determine whether the prosecution case was proved beyond reasonable doubts. In the process, I will determine the grounds of appeal as consolidated by the respondent in the submissions for the consolidated grounds are intertwined.

For the reason that this is statutory rape, I proceed to determine the 2<sup>nd</sup> ground of appeal that the age of the victim was not proved before the trial court. According to the charge sheet, the appellant was charged under sections 130(1) and (2)(e) and 131(1) of the Penal Code, Cap 16 which is described as having carnal knowledge with a girl of below 18 years. The basic elements of the offence are that, the defence as to the consent of the victim is not available to the suspect. Section 130(1)(2)(e) of the Penal Code provides: -

*"(1)N/A*

*(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:*





(a) to (d) N/A

(a) to (d) N/A

(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."*

In the appeal at hand, the appellant was charged with the offence of statutory rape for it was alleged that the victim was 9 years of age. In this appeal, the appellant is disputing that the age of the victim was not proved. I am now in the position to test the appellant's claim as to whether the age was proved to make the offence of statutory rape stand. As a matter of law, it goes thus, proof of age in statutory rape is of great essence, without which the case must fail. In the case of **George Claud Kasanda v. DPP**, Criminal Appeal No. 376 of 2017 (unreported), it was stated that: -

*"In essence that provision (section 130(2)(e) of the Penal Code) creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense, age is of great essence in proving such an offence."*

Again, the court of appeal in the case of **Solomon Mazala v. Republic**, Criminal Appeal No. 136 of 2012 (unreported), which was quoted with authority in the case of **Raphael Ideje @ Mwanahapa Vs The**



**Director Of Public Prosecutions** Criminal Appeal No. 230 Of 2019 it was held that:

*"The cited provision of law makes it mandatory that before a conviction is grounded in terms of section 130(2)(e), above, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the offence..."*

Reverting to the appeal at hand, the charge sheet clearly expresses that the victim was at the age of 9 years. PW1 who is the victim stated that her age was 9 years and she was a pupil of standard three. Her evidence was corroborated with that of PW2, her mother who testified before the trial court as to the age of the victim that the victim was born in April 2011 and her age was 9 years old at the time of the commission of the offence. On the part of the appellant, he did not object.

I agree with the respondent cited case of **George Claud Kasanda vs DPP**, Criminal Appeal No. 376 of 2017 CAT that the age of the victim can be proved by the victim, parent or medical doctor or any other person entrusted to the victim in a way that he knows the particulars. The same was stated in the case of **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 CAT (unreported), held that:

*"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 evidence as to proof of age may be given by the victim relative, parent, a*



*medical practitioner or where available, by the production of a birth certificate."*

Again, I agree with Ms. Sabina that the age of the victim was proved before the trial court and the assertion by the appellant proof was not met for failure to tender birth certificate could not negate the fact that PW1, the victim and PW2, the mother of the victim their evidence shows that the victim was of the age of 9 years. As stated, a requirement of the birth certificate is not mandatory to prove the age where other evidence is available. In that regard, I proceed to dismiss the 2<sup>nd</sup> ground of appeal and hold that the offence of statutory rape was properly before the appellant at a trial court.

On the 1<sup>st</sup> and 3<sup>rd</sup> grounds of appeal, the appellant claims that the prosecution evidence was full of contradictions, Ms. Sabina submitted that the prosecution case was intact. She avers that the appellant was apprehended at the scene by PW4, and PW5 examined the victim who found her bleeding on her private parts. She went further enlightening that, the assertion by the appellant that the victim was examined by a medical doctor PW3 after 3 days and therefore could not prove that the victim was bleeding, she avers that the proof to rape cases is penetration and not the rate of bleeding and the victim was able to testify that her vagina was penetrated.



It is trite law that, the basic requirement in the proof of rape case is that penetration must be proved to show that the act of sexual intercourse occurred. This was stated in the case of **Mathayo Ngalya@Shaban vs. Republic** Criminal Appeal No. 170 of 2006 that: -

*"...For the offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence"*

The evidence before the trial court pointed to the appellant that he raped the victim. PW1 who on her evidence before the trial court was able to give evidence that the appellant entered her penis in her vagina and as a result, she suffered a severe pain which resulted to bleed blood. The evidence by PW1 was corroborated with the evidence of PW5 who examined the victim at the scene of the crime and that of PW3 a medical doctor who observed the victim after 3 days and he was still able to find blood in the victim's vagina. As I went through the court records, I did not find the prosecution contradictions as claimed by the appellant for this court to fault the findings of the trial court. in that regard, I proceed to dismiss these grounds of appeal.





On the 4<sup>th</sup> ground of appeal, the appellant alleged that the evidence of the victim PW1 was taken contrary to section 127(2) of the Tanzania Evidence Act, Cap 6 R.E 2019. Ms. Sabina objected insisting that the trial court properly took the evidence of PW1 as required by the law. in determining this ground, I revisit the trial court proceedings to make an observation as to whether the trial court complied with the requirement of section 127 (2) of the Tanzania Evidence Act, Cap 6 R.E 2019. It was my observation on records that the trial court properly complied with the requirement of section 27(2) of the Tanzania Evidence Act, Cap 6 R.E 2019 in taking the evidence of PW1 for the court findings after posing several questions and PW1 promises the court to tell the truth as reflected at page 11 of the typed trial proceedings. The court was satisfied that PW1 possessed sufficient intelligence to testify before the court.

Upon scrutinize the records of the trial court's proceedings, I am satisfied that the trial court properly complied with the requirement of section 127(2) of the Tanzania Evidence Act, Cap 6 R.E 2019 as it was stated in the case of **Godfrey Wilson v Republic**, (Criminal Appeal No 168 of 2018) [2019] TZCA 109 (06 May 2019). Among other things, the Court of Appeal stated that, the section



allows the child of tender age to give evidence without oath or affirmation and that before the giving evidence, such child is mandatory required to promise to tell the truth to the court and not to tell lies. The above guidance as stated in the case of **Godfrey Wilson** have been complied with by the trial court. For that reason, I proceed to dismiss this ground of appeal.

On the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> grounds of appeal which are intertwined and argued together, the appellant alleged that the prosecution case was not proved to the standard required, that proof beyond reasonable doubts. The appellant claimed that the evidence of PW1 could not be properly corroborated by the evidence of PW2 and PW4 as the evidence was weak, doubtful, unreliable and untruthful. Ms. Sabina denied the appellant's allegations that the prosecution case was not proved to the standard required.

Referring to page 12 of the trial court typed proceedings, she avers that PW1 testified showing that the appellant took her to the hill, undress her and put a cloth in her mouth threatening her if she could raise an alarm she will be killed and thereafter the appellant entered his penis to her vagina where PW1 testified to have felt severe pain when the appellant penis penetrated her.



Again, she avers that PW2, the mother of the victim inspected the victim and found her bleeding and she told her that she was raped by the appellant. She further refers to the evidence of PW4 who when passing nearby, he found the appellant naked and the victim at his feet crying and he raised an alarm and managed to arrest the appellant. In that regard, I proceed to examine the evidence to find out whether the prosecution case was not proved to the standard required as claimed by the appellant.

As to the offence of rape, it is trite that the evidence of the victim alone can be used to convict the accused. Going to the victim's evidence as reflected at page 12 of trial court proceedings, she testified before the trial court that the appellant told her to undress, threatening to kill her if at all she could shout and put a piece of cloth in her mouth. She straightly stated as I quote what is reflected on page 12 of the trial court typed proceedings: -

*"...he started to rape me where he inserted his penis in my vagina. I felt severe pain..."*

The statement of the victim alone is sufficient to prove the offence of rape as stated in the cited case of **Seleman Makumba vs Republic** (supra) that in rape cases, the best evidence in rape cases is from the victim. The court went further when it was held in the case of **Omari**



**Kijuu vs the Republic** Criminal Appeal No. 39 of 2005 CAT at Dodoma, that, the evidence of the victim as a single witness can ground a conviction. In that regard, I proceed to go through the trial court records and I find that the evidence of PW1 was also corroborated by the evidence of PW4 who testified to have found the appellant at the scene of the crime naked and apprehended him. That being not enough, PW1 evidence was also corroborated by the evidence of PW5 who testified to have examined PW1 at the scene and found her bleeding in her vagina and the evidence of PW2, the mother of the victim who took PW1 to the hospital from the police station and on examination she was found bleeding and after enquiry, she told PW2 that it was the appellant who raped her. I therefore, agree with Ms. Sabina that the prosecution case was proved beyond reasonable doubts and the appellant's claims are unfounded. Therefore, I proceed to dismiss this ground of appeal for want of merit.

On the 6<sup>th</sup> ground of appeal, the appellant alleged that he was not afforded the legal aid. This ground should not detain me much for the law under section 310 of the CPA Cap 20 RE: 2019 does not impose a duty to the court to inform the appellant that he had the right to legal representation by an advocate. Therefore, it was the duty of the appellant





to enforce his rights by engaging an advocate to represent him to defend his case. The Court of Appeal of Tanzania in the case of **Maganga Udugali vs Republic Criminal** Appeal No. 144 of 2017, it was held among other things that: -

*"Under section 33(1) of the Legal Aid Act Cap 21 R.E 2019, it is only an eligible indigent person who after being certified by a presiding magistrate or Judge that he really needs to have such legal aid, who can be entitled to such legal Aid. The two conditions set under S. S. 33(1) for an accused person to be eligible for such legal aid are first that it should be in the interest of justice for such accused to have legal aid in the preparation and conduct of his defence or appeal, that his means are insufficient to enable him to obtain legal services".*

It is for this reason that I proceed to dismiss this ground for want of merit.

On the 11 grounds of appeal, the same has been discussed in the 4<sup>th</sup> ground therefore my stand remains to be the same. Thus, this ground also lacks merit and it is hereby dismissed.

On the 10<sup>th</sup> ground of appeal, the appellant alleges that the case was not properly investigated and the defence case was not properly considered. The allegation was denied by the respondent insisting that the investigation was well conducted and the defence case was considered. I took time to go to the judgment of the trial court and the defence case was considered as reflected on page 8 and 10 of



the trial court's judgement. Therefore, this ground also lacks merit and it is hereby dismissed.

In fine, I dismiss the appeal in its entirety, and as noted for by the prosecution that the statutory punishment for the offence of rape whose victim is below the age of 10 years is life imprisonment under section 131(3) of the Penal Code, Cap 16 R.E 2029, I proceed to substitute the sentence of 30 years imprisonment meted to the appellant Fredy Salvatory @ Pauline to serve life imprisonment.

It is so ordered.

Right of Appeal is fully explained to the parties.



  
**M. MNYUKWA**

**JUDGE**

**27/05/2022**

**Court:** Judgment delivered on 27<sup>st</sup> May, 2022 in the presence of the appellant and in the absence of the respondent.

  
**M. MNYUKWA**

**JUDGE**

**27/05/2022**