IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 172 OF 2021

(Arising from Criminal Case No. 52 of 2021 in the District Court at Ilemela)

EMMANUEL S/O JUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

28th March & 25th May, 2022

DYANSOBERA, J.:

Emmanuel s/o Juma, the appellant, appeared before the District Court of Ilemela District on a criminal charge of rape contrary to Sections 130(1) (2) (e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2019].

The particulars of offence alleged that the appellant, on 10th day of April, 2021 at Lumala area within Ilemela District in the Region of Mwanza, had unlawful carnal knowledge of one **"HG"** (not her real name), a girl of 4 years old.

When called upon to plead after the substance of the charge had been read over and explained to him, the appellant

denied the charge. However, after a full trial, the trial court was satisfied that the case against him was proved beyond reasonable doubt and convicted him. It sentenced him to the statutory sentence of life imprisonment. He was aggrieved hence this appeal.

The brief facts material to this appeal as can be gleaned from the record are that the victim (PW 5) is a girl of four years old schooling at a Kindergarten. . According to her mother, Lydia Juma (PW 1), the victim was born on 13th day of September, 2016. On 10th day of April, 2021 at 1000 hrs, PW 1 was in the room of her neighbour one Leticia Laurent (PW 4). When PW 1 went to her mother in law, she found her second child Julius Marando crying and was alone. PW 1 inquired from the house maid one Neema Robert (PW 2) who told her that she had left Julius Marando with the victim at the sitting room playing. When PW 1 entered PW 2's room she found the victim on the bed without her underpants. The appellant had hidden himself behind the door. When she examined the victim's vagina, she found it with sperms. PW 1 closed the door, called her neighbour PW 4

and sent for the cells leader one Julai Magai (PW 3). According to him, the victim was not walking properly and her vagina had fluid like sperms. PW 4 had also occasion to inspect the victim's vagina and found it with sperms and blood. PW 1 took the victim to Pasiansi Police Station, was issued with PF 3 (exhibit P 1) and went to the hospital. There, PW 6 Joyce Faustin Kiratu, a Doctor at Sekoutoure Hospital medically examined the victim on 10th day of April, 2021 at 1300 hrs and found her labia menorah swollen, her vagina had bruises, was bleeding thereat and it was reddish. The victim's hymen was perforated and PW 6 established that the victim had been penetrated by a blunt object. PW 6 filled in the PF 3. At the trial, she tendered it in court (exhibit P 1).

The victim who testified as PW 5 recalled that she was sleeping at the sitting room. Then Dogo Cairo carried her up to the PW 2's room, laid her on the bed and undressed her underpants. He then inserted his 'dudu' into her vagina and she felt pain. Though the victim asserted that she cried when she was being carnally known, she told the trial court that she did

not raise an alarm when the appellant was taking her into the bed room and when he was undressing her.

The appellant's defence was a flat denial. He admitted to have rented a room at PW 1's in-laws. According to him, on the material day, he had gone to the shop to purchase some cooking oil. When back, she found PW 1 and the victim watching television at the sitting room. PW 1 started insulting and telling him that he would see as he had failed to repay her Tshs. 100,000/=, the appellant owed PW 1. PW 1 closed the door and, went to call PW 4 and then sent for PW 3. PW 1 complained that he had raped the victim. PW 3 arrested him and sent him to the police station. The appellant told the trial court that the case was, but a mere frame up.

Aggrieved, the appellant has preferred this appeal vide a petition of appeal which contains six grounds of appeal as follows:-

1. That the Hon. trial subordinate court grossly erred in law and fact to satisfy itself that prosecution side proved its case beyond reasonable doubt against the accused

person without considering that the victim's age was not proved by any prosecution sided paraded six witnesses not withstanding it was written in the charge sheet, none proveness of the birth certificate of the victim as required.

2. That after the variation of Hawa Gyole and Hawa Emmanuel in charge and exhibit P 1 expunged, the trial court grossly erred to sustain conviction and sentence due supra variance.
3. That the trial court failed to note that there was fabrication because it was impossible for a girl aged four (4) years to know a word rape, hereupon it cast grave doubts on the credibility of the prosecution side witnesses.
4. That, there was no person who eye witnessed appellant having sexual intercourse with the victim or raping her on the material date incident.
5. That, notwithstanding of the allegations that the accused had hidden at the back of the back of the door

in PW 2's room, and PW 1 locked the accused person inside and notified PW 2 who was at the kitchen cooking food and PW 4 her neighbour in their team and immediately why they failed to undress him for ascertaining the sperm either its smell or any symptomatic fluid comes from his penis. This is evidence case was fabricated against the appellant.

6. That the trial court did not consider the accused person's defence and there was no cogent evidence adduced by the prosecution witnesses to warrant a conviction and sentence the appellant.

At the hearing of this appeal the appellant appeared in person and unrepresented whereas the respondent Republic enjoyed the services of Ms Fyeregete, the learned Senior State Attorney.

On his part, the appellant informed the court that he had filed six grounds of appeal and prayed it to consider them and set him free. He complained that the case was not investigated and no reasons were given for the failure so as to clear some

doubts. He argued that no medical report was tendered in court to support the offence of rape, that there was no evidence linking the appellant with the offence. The appellant concluded that the case against him was not proved beyond reasonable doubt.

In reply, Ms Fyeregete had the following to submit. On the first ground of appeal, she told this court that the victim's age was proved to the required standard. According to her, PW1-Lydia Juma proved the age of the victim. She stated that the victim was born on 13.09.2016 and by then she was 4 years and six months old and was studying at the kindergarten. The first ground has no basis learned counsel insisted

As to the prayer that the PF 3 be expunged from record on account of variation of the evidence between, the learned Senior State Attorney admitted that exhibit P1 (PF.3) was not considered as there was confusion on the names of the victim. She however, stressed that the evidence of the remaining witnesses, particularly PW 1, PW 2 and PW 4 was strong on how PW 1 and PW 4 found the victim's vagina, the evidence which was supported by that of PW 3. Relying on the cases of **Jumanne Shaban Nondo v. R.** Criminal Appeal No. 882 of 2010 CAT Arusha at p. 5 quoting the decision in **Isaa Hamis**

Lake Mwira V. R. Criminal Appeal No. 125 of 2005 on the authority that rape cases can be proved even without medical evidence, Ms Fyeregete urged the court to find that the case against the appellant was proved beyond reasonable doubt.

With respect to the 3rd ground of appeal, it was argued for the respondent that PW 5 was clear in her evidence on what the appellant actually did. The court believed her, PW5 was well known to the appellant. The appellant was found in the same room where the victim was found and there was both direct and circumstantial evidence, learned Senior State Attorney asservated.

As to the 4th ground, admitting that there was no person who eye-witnessed the appellant carnally knowing the victim, learned Senior State Attorney argued that it is the position of law that true evidence comes from the victim. Reliance was placed on the case of **Selemani Makumba v. R.** [2006] TLR 379. Further that the evidence is not only of the victim but there is circumstantial evidence by PW1, PW2, PW3 and PW4.

As to why the appellant was not undressed to ascertain the remnant of sperms and the smell which is the 5th ground of appeal, it was argued for the respondent that the witnesses had no mandate to undress him.

On the sixth ground of appeal on the failure to consider his defence, Ms Fyeregete told this court that the complaint is

baseless as the appellant's defence was considered in detail and the trial court found nothing from the defence which created doubt in the prosecution case.

Supporting conviction and sentence, Ms Fyeregete conceded that no investigator was called but was insistent that failure to call the investigator did not mean that the case was not investigated that is why it was prosecuted and that there was no necessity of calling the investigator as, under section 143 of Evidence Act, no number of witnesses is required to prove any fact.

In his rejoinder, the appellant prayed to be set free arguing that the learned Senior State Attorney was not present at the crime scene.

On my part, I have perused the record of the trial court, the grounds of appeal and the submissions of both sides. I undertake to discuss the grounds of appeal in the following order. The 1st, 3rd and 5th grounds of appeal will be tackled first and there after I will revert to discuss to the 2nd, 4th and 6th grounds of appeal.

It is not disputed that the appellant was charged with rape. There is no dispute that this is a statutory rape and important

elements to prove its commission include age of the victim and penetration of the male organ into the female private parts.

As far as the 1st ground of appeal is concerned, with respect to the age of the victim, the law under paragraph (e) of sub-section (2) of section 130 of the Penal Code [Cap 16 R.E.2019], makes it mandatory that before a conviction of the offence of rape can stand, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the alleged offence. It is equally true that the Court of Appeal in the case of **Andrea Francis versus Republic**, Criminal Appeal No. 173 of 2014 (unreported) said that

> "...it is trite law that the citation in a charge sheet relating to the age of the victm person is not evidence. Likewise, the citation by the magistrate regarding the age of a witness is not evidence of that person's age.

Was the victim's age proved? The answer is obvious. PW 1, the victim's mother told the trial court that the victim (PW 5) was, at the time of the commission of the alleged offence, four years old. According to her, the victim was born on the 13th day

of September, 2016. As rightly pointed out by Ms Fyeregete, learned Senior State Attorney, the prosecution proved the age of the victim beyond reasonable doubt. The appellant's complaint in the first ground of appeal that the age of the victim was not proved in that none among the six prosecution witnesses tendered a birth certificate has no legal basis. The reason for this is not far-fetched. It is definitely true that age can be proved by either biological parent of the victim, guardian, the victim herself or by a birth certificate. This position was stated in the case of **Andrea Francis v. R.**, Criminal Appeal No.173 of 2014 (unreported) where the Court observed that: -

> *"In a case such as this one where the victim's age is the determining factor to establish the offence the evidence must be positively laid out to disclose the age of the victim. Under normal circumstances evidence relating to the victim's age would be expected to come from the any or either of the following: -the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc."*

Further, in the case of **Christopher Rafael Maingu versus Republic**, Criminal Appeal No. 222 of 2004 (unreported)

where it was argued that since there was no birth certificate to confirm that the victim was actually under the age of 18, the charge of rape was not proved beyond reasonable doubt, the Court of Appeal held that since the age of PW 1 was proved by the mother of that PW 1 as such birth certificate was not necessary.

In the present case, on the evidence given by PW 1, who is the biological mother of the victim and taking into account the legal position as indicated above, I am in no doubt that the age of the appellant was proved beyond reasonable doubt by the prosecution.

Respecting the third ground of appeal on case being a fabrication in that the child of six years old could not know the word rape. My observation is the following

Truly, PW 5 when testifying in the trial court said that; Dogo Cairo carried me up to the room, removed my underpants, inserted his dudu at my vagina. The accused sent me in the room of Neema (PW 2) in the house of my grandmother and laid on the bed. Before the incident of rape, the accused removed my underpants and laid me on the bed then the accused inserted his dudu at may vagina...' I think the appellant did not conceive well

what PW 5, the victim had said. The victim did not say that she was raped, rather, she said that, 'the accused inserted his dudu in my vagina'.

With regard to penetration, it is a general rule supported by many authorities that true evidence of rape has to come from the victim. For instance, the Court of Appeal in the case of **Godi Kasenegala v. R**, Criminal Appeal No. 10 of 2008 observed:-

> "It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative"

Likewise, the same Court in the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379 stated 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."

This position was re-iterated by the same Court in the case of **Mhina Zuberi v. R**: Criminal Appeal No. 36 of 2016. The word

penetration was defined by the Court of Appeal in the case of **Hassan Bakari @ Mamajicho v. R,** Criminal Appeal No. 103 of 2012 where at p. 11 of the typed judgment said:-

> "Penetration means penis entering the vagina. Such entering, however slight it may be, is an important ingredient of the offence of rape".

Did the victim in the instant case prove to have been sexually penetrated by the appellant? I think the answer must be in the negative.

The position of the law according to the case of **Mohamed Mumba v. R,** Criminal Appeal No. 270 of 2007 is that the best evidence is that of the victim and can be received alone provided the evidence is credible. The issue is whether the evidence of PW 5 is credible.

There is no dispute that none saw the appellant carnally knowing PW 5. This, Ms Fyeregete has admitted in her submissions. The only evidence, therefore, is that of PW 5. Her evidence, however, clearly left a lot to be desired.

In other words, there was no evidence supporting the allegations that PW 5 was carnally known. It is PW 5's word against the appellant. This is particularly so where the appellant denied the offence which put the onerous burden on the prosecution to prove the case beyond reasonable doubt, the duty the prosecution, in my view, failed to discharge.

I will explain. In the first place, the evidence was clear that at the time the alleged offence was committed, PW 2 who is a housemaid of PW 1's mother in law was around. The offence is alleged to have taken place in PW 2's room but PW 2 was clear that she did not see the appellant taking PW 5 in her (PW 2's) room. Likewise, PW 2 did not hear PW 5 screaming or crying for help.

Second, it is not clear how the appellant allegedly took PW 5 in PW 2's room, whether by force or persuasion. It is said that during sexual intercourse, PW 5 raised an alarm but it is surprising how PW 2 could not hear the hue cry while she was within the precincts.

Third, the prosecution evidence was inconsistent on what was actually found at or in PW 5's vagina. While PW 1 told the trial court at p. 8 of the typed proceedings of the trial court that she found sperms, PW 2 said that they found blood. This is clear at p. 11. PW 3, on the other hand, stated that when he looked into PW 5' s vagina he saw some fluids like sperms (p.13). .At p. PW 4 testified as follows:

"I saw the victim having sperms and blood at her vagina".

In her evidence, PW 5, the victim, told the court at p. 16 of the typed proceedings that, when PW 1 entered in the room, she looked at my vagina and found blood. So, according to these witnesses who alleged to have looked at PW 5's vagina, each had his/ her own version of what he or she actually saw. This consistency was not explained away and dented the prosecution case if at all penetration was ever proved. As if that was not enough, PW 6 who medically examined PW 5 on 15th day of April, 2021, that is five days after the incident, told the trial court, at p. 22, that PW 5 was bleeding at her vagina, her hymen was

perforated and the vagina had reddish colour. It was not stated that after the alleged incident on 10.4.2021, PW 5 did not take bathe until on 15.4.2021 when she was taken to and examined by PW 6.

All these inconsistencies are indicative that the possibility that PW 5 was not carnally known, leave alone carnally known by the appellant, was not ruled out. I entertain doubt which is not unreasonable that the penetration which is the crucial ingredient of the offence of statutory rape was not proved, let alone proved beyond reasonable doubt. This doubt has to be resolved in favour of the appellant.

As the appellant rightly complained before this court, this case was not investigated. This creates doubt in the seriousness the prosecution. The appellant's version in his defence on what took place on that day seems to be plausible which means that the case against him was not proved beyond reasonable doubt.

I find this appeal pregnant of merit and allow it. I quash the conviction and set aside the sentence. I order that unless

lawfully held for other causes, the appellant should be released from custody forthwith.

Order accordingly.

W.P. Dyansobera

Judge

25.5.2022

This judgement is delivered under my hand and the seal of the court on this 25th day of May, 2022 in the presence of the appellant and Ms. Margareth, Mwaseba, learned senior state Attorney for the respondent.

Rights of appeal explained.

W.P. Dyansobera

Judge

25.5.2022