IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT BUKOBA

CRIMINAL APPEAL NO. 86 OF 2021

(Originating from Criminal case No. 06 of 2021 of Muleba District Court)

MBONEKI GRATION@ JOHANES .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

28/03/2022 & 11/05/2022

NGIGWANA, J.

In the District Court of Muleba sitting at Muleba hence forth (the District Court), the Appellant was charged with two counts. First, Rape contrary to sections 130 (1) (2) (e) and 131 (1) of Penal Code Cap. 16 R: E 2002, (now R: E 2019). Second, marrying a school girl contrary to section 60A (a) and (2) of the Education Act, Cap 353 R: E 2002 as amended by the Written Laws (Miscellaneous Amendments) Act No.2 of 2016.

At the trial court, it was alleged on the first count that between August 2020 and October, 2020 at Kanazi Village within Muleba District in Kagera Region, the appellant did unlawfully have carnal knowledge of one A.P (Identity of the child hidden) a girl aged 15 years old.

As regards the 2nd count it was alleged that in August 2020, at Kanazi Village within Muleba District in Kagera Region, the appellant did unlawfully

marry A.P (Identity of the child hidden) a primary school student (STD V) girl aged 15 years. The appellant denied the charges.

After full trial which involved five (5) prosecution and two (2) defense witnesses, the trial court was satisfied that the 1st count had been proved beyond reasonable doubt. Consequently, the appellant was convicted and sentenced to thirty (30) years imprisonment. As regards the 2nd court, the trial court found that the same had not been proved beyond reasonable doubt, as a result, the appellant was acquitted accordingly.

Aggrieved with such conviction and sentence of 30 years imprisonment imposed against him in respect of the 1st count, the appellant appealed to this court armed with two (2) grounds of appeal upon which he asked this court to quash the conviction, set aside the sentence and set him free. For easy reference, the grounds of appeal are reproduced as follows;

One, that the trial court erred in law and facts by convicting the appellant basing on contradictory evidence by the prosecution witnesses. **Two**, that the trial court erred in law and fact to convict the appellant on the weak evidence produced by the prosecution.

At the hearing of this appeal the appellant appeared in person and represented by Mr. Scarius Bukagile, learned counsel whereas the Respondent/Republic was represented by Ms. Veronica Moshi, learned State Attorney.

Expounding on the first ground of appeal, Mr. Bukagile submitted that, in this case, the prosecution evidence was characterized by contradictions on

what date the victim disappeared from her home place. Bukagile stated that PW1 who is the mother of the victim (PW2) told the trial court that the victim went on missing from August 2020 to September 2020, and during that time, she was not aware of the victim's whereabout. Bukagile added that, PW1 gave a contradictory evidence that, he daughter was arrested at the appellant's home 10 days after her disappearance. That evidence of PW3 was to the effect that victim absconded studies on 7/09/2020. Bukagile further argued that the contradictions ought to have been resolved in favor of the appellant.

Submitting on the 2nd ground of appeal, Mr.vBugagile argued that, the evidence of PW4 as per the trial court is to the effect that, the accused and the appellant were arrested by the Militiamen on 10/10/ 2020 at the appellant's home and were both taken to Burigi Police post, but no Militiaman appeared and testified on that effect. Bukagile also argued that the PF3 was not filled in by the Medical Practitioner but by a mere nurse, therefore urged the court to expunge the same from record. Bukagile went on submitting that in rape cases, the best evidence comes from the victim, but the victim's evidence should not be taken as a gospel truth. The trial court has the duty to satisfy itself whether or not the evidence of the victim is nothing but the truth. Bukagile referred this court to the case of **Abiola Mohamed @Simba versus The Republic,** Criminal Appeal No.291 of 2017. Bukagile ended his submission, urging this court to see that the offence of rape had not been proved beyond reasonable doubt.

Opposing the 1st and 2nd grounds of appeal, Ms. Veronica submitted that in statutory rape, two elements which must be proved are penetration and

the age of the victim, and that, in the case at hand, the two elements have been duly proved. Veronica argued that the evidence PW1 is to the effect that her daughter (PW2) was born on 13/05/2005.That apart from that, Baptism certificate indicating the said date of birth was admitted without objection and marked Exh. P1.

As regards the second element, Veronica submitted that PW2 who is the victim testified how the appellant inserted his penis into her vagina and had sexual intercourse with her six times. She further argued that the appellant in his cautioned statement confessed to have had sexual intercourse with the victim. She added that, the PF3 and the evidence of PW5 is also to that effect.

She added that, the appellant's failure to cross-examine connotes acceptance of the victim's evidence. The learned State Attorney further submitted that in sexual offences the best evidence comes from the victim. She referred to the case of **Athumani Rashidi versus the Republic,** Criminal Appeal No. 264 of 2016 where the Court of Appeal held that; it is now settled that true evidence of sexual offence comes from the victim. She added every witness is entitled to credence unless there are reasons to disbelieve him/her. She referred me to the case of **Goodluck Kyando versus Republic, [2006] TLR 363.** She argued that PW2 is a credible witness, hence the trial court saw no reason to disbelieve her.

On the issue of the contradictions on the dates Ms. Veronica argued that, they are minor contradictions which do not go to the root of the matter. She referred to me to the case of Athuman **Rashidi (Supra**) where the

Court held that; the law on contradictions of dates is settled that not every inconsistency and or contradiction will make the prosecution's case flop.

As regards the Militiamen who were not called to testify in the trial court, Ms. Veronica argued that there was no need to bring the Militiamen because the appellant's cautioned statement shows clearly that he was arrested while with the victim.

As regard the evidence of the nurse (PW5), Veronica argued that each case has its own peculiar circumstances whereas, in the case at hand, the Dispensary that was near to the victim had no Medical Doctors or Clinical Officers therefore, it was justifiable for PW5 to attend the victim and fill in the police form to wit; PF3.

In his brief rejoinder, Bukagile stated then even if the evidence of PW5 is left, still the prosecution evidence was generally weak. He added that, the fact that the cautioned statement was admitted was not final and conclusive evidence that the appellant committed that offence since the appellant told the trial court that he was tortured. He also argued that the variation of dates shows that the matter was fabricated. He added that, the Militiamen who alleged to have arrested that appellant ought to have been called to testify that the victim was really found in the house/home of the appellant.

Now, the relevant question to be answered in this appeal is whether the evidence adduced by the prosecution witnesses in the trial court was sufficient to establish the guilty of the appellant in respect of the 1st count to wit; Rape. It must be noted that, the cardinal principle in criminal cases

places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt.

Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019 provides;

"*A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists*".

The High Court of Tanzania speaking through Katiti J (as he then was) in **JONAS NKIZE V.R [**1992] TLR 213 held that,

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking"

The test applicable was well stated in the famous South African case of **DPP VS Oscar Lenoard Carl Pistorious**, Criminal Appeal No. 96 of 2015, as follows;

"*The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence*

might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

The appellant is now before this court as the 1st appellate court to challenge the decision of the trial court. Describing the duty of the first appellate court, the Court of Appeal of Tanzania in the case of **Registered Trustees of Joy in the harvest versus Hamza K. Sungura,** Civil Appeal No. 149 of 2017 CAT (unreported) had this to say'

"The first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision"

In the same line, the Court of Appeal of Kenya in the case of **David Njuguna Wairimu vs. Republic** [2010] eKLR held that;

"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

In doing so, the 1st appellate court must always bear in mind that unlike the trial court, did not have the advantage of hearing or seeing the

witnesses testify, thus the guiding principle is that a finding of a fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles. **See OKENO V. R [1972] EA 32**

In this case, the appellant was charged under Section130 (1), (2) (e) and 131 (1) of the Penal Code.

130 (1) of the penal code Cap 16 R: E 2002 provides

"It is an offence for a male person to rape a girl or woman"

Section 130 (2) of the Penal Code provides;

"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.*

Reading section 130 of the Penal Code, it is apparent that, for statutory rape upon which the appellant was charged with, since PW2 was 15 years old, among the vital and apparent elements which the prosecution must prove are;

(a) Penetration of the penis into the vagina of the victim;

(b) The age of the victim;

(c) That it was the appellant who is responsible for such act.

I would like to start with the issues as to whether the age of the victim (PW2) was proved to the required standard. In the trial court, PW2 testified orally that she was born on 13/05/2005 and was not cross-examined by the appellant on her age. The appellant never cross - examined the victim on her age, and that implies acceptance of her age by the appellant. PW1 who is the victim's mother testified that her daughter was born on 13/05/2005 and she tendered Baptism Certificate **(Exh.P1)** without objection. In the case of Karim **Seif @ Slim versus The Republic,** Criminal Appeal No. 161 of 2012, CAT (Unreported), the Court of Appeal stressed that the age of the victim may be proved by statement of the victim, birth certificate, Affidavit of parent or guardian or any proof that may be made orally or in writing.

Being guided by the herein above Court of Appeal authority, In the matter at hand, I agree with Ms. Veronica that, the age of the victim (PW2) had been proved beyond reasonable doubt.

Another issue is whether there is evidence proving beyond reasonable doubt that the victim (PW2) was penetrated. PW1 who is the mother of the victim did not testify in the trial court that her daughter had sexual intercourse/ was penetrated by the appellant. Her evidence is that, her daughter disappeared at home, but finally, she was informed that the victim was found at the home of the appellant and as a result, they were arrested by Militiamen. The evidence as to whether the victim was found in

the home of the appellant is hearsay evidence, since she did not accompany the Militiamen alleged to have arrested the appellant and the victim.

The evidence of PW3 was only to the effect that, PW2 was a standard five student at Burigi Primary School, but absconded classes from 07/09/2020. Attendance register was admitted as Exh.p2. He never testified that PW2 was raped by the appellant or any other person.

As per trial court record PW4 G.6112 D/C Mustapha recorded the cautioned statement of the appellant who was brought at Burigi Police station on 10/10/2020 at 9: 30hours.It is the evidence of PW4 that the appellant had confessed that he had sexual intercourse with PW2 six times at his home six times. Admission of the cautioned statement was not objected by the appellant; thus, it was admitted as Exh. P3. However, in his defense, the appellant alleged that he was tortured at the police and forced to admit that he committed the offence while not.

However, it should be noted that admitting an exhibit during the trial is one thing and assessment of the exhibit to determine its weight or probative value is another thing all together. Having gone through Exh. P3, I have discovered that the same had no **police case number**, and that suggest that by the time the statement was recorded, there was no complaint reported at the police case opened against the appellant. It is again unfortunate that the same was not recorded within 4 hours after the arrest of the appellant. Page 3 of the same reads;

"Kituo: Polisi Burigi.

Tarehe: 10/10/2020

Kuanza saa 09:30 Mchana.

Kumaliza: 10:15 Mchana"

According to Section 50 (1) (a) of the Criminal Procedure Act, Cap 20 R: E 2019 the period available for interviewing a person who is in restraint in respect of an offence is four hours commencing at the time when he was taken under restraint in respect of the offence. There is no doubt in this case, the said provision was not complied and no reasons assigned for the non-compliance. As a general rule, the procedures of recording the cautioned statement must be observed as laid down by the law so as to allow such statement to be admitted in evidence. See, **WILLIAM LENGA V.R, Criminal appeal** No.203 OF 2007 (Un-reported)

However, where the court is satisfied that the statement was voluntarily made and that the same contains information relevant to the issue, and that the procedural irregularity did not prejudice the appellant, the irregularity may be ignored. See the case of **Chacha Jeremiah Murimi and 3 others versus The Republic**, Criminal Appeal No. 551 of 2015 CAT (Unreported).

In the case at hand, no reasons assigned as to why the four hours rule was not complied with. Furthermore, nothing indicating that the investigation of this matter was complex. Moreover, the cautioned statement had no police case number. The same shows that the appellant

was warned in the presence of the witness namely; **Mbonek Gration**, but the said witness was never summoned in court as witness. I have also considered that, though the appellant did not raise objection during admission of Exh. P3 but, during his defense, he alleged that he was tortured to admit to have committed the offence while not. Under the circumstances of this case, no court could safely rely on such a statement to convict the appellant. In that respect, I accord no weight to Exh. P3.

Another piece of evidence is the medical evidence. Medical evidence in sexual offences is important in the sense that it can only assist the court in making a finding on the issue by considering that opinion alongside with other evidence presented before the court. However, the victim has to be attended by a Medical Practitioner who must prepare the examination report. In the case of **Jamal Ally Salum versus Republic,** Criminal Appeal No.52 of 217 CAT (Unreported) It was held that a nurse midwife is not a medical practitioner for purposes of medical examination reports. The court expunged, Exhibit P2 which a Pf3 that had been prepared by a nurse. See also the case of **Hamis Kayanda versus the DPP,** Criminal Appeal No.166 of 2018. In the case at hand, the victim was attended by Nurse, who finally prepared the PF3. Being guided by the herein above authorities, the PF3 which was admitted as Exh.p4 is hereby expunged from the record.

It is trite law that in sexual offences, true evidence must come from the victim. This position was emphasized by the Court of Appeal of Tanzania in its decision; **SELEMAN MAKUMBA V.R [2006] TLR379** in these words;

"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent"

In the instant matter, the evidence of PW2 is to the effect that the appellant had sexual intercourse with her six times, and that they were arrested on 10/10/2020 at the appellant's home as they started as husband and wife on 20/9/2020. It is unfortunate that the Militiamen who alleged to have arrested PW2 and the appellant did not appear in court to testify. There is no evidence on record as to why the leaders of the locality in which it has alleged that PW2 and the appellant were living were not involved to witness the arrest of the said persons, and finally appear in court to testify. The evidence of PW2 was therefore uncorroborated.

The Justices of the Court of Appeal of Tanzania, R. E.S Mziray, R.K Mkuye and I.P Kitusi while addressing the evidence of the victim in sexual cases in the case of **MOHAMED SAID V.R, Criminal Appeal No. 145 of 2017 (Unreported)** stated that,

"We think that it was never intended that the word of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness"

The learned Justice Professor Lilian Tibatemwa Ekirikubinza of the Supreme Court of Uganda, in the persuasive case of **NTAMBALA FRED V. UGANDA Criminal Appeal No.34 of 2015** referring what Lord Justice Salmon stated in R. versus Henry Maning (1969) observed that;

"In cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases, girls and women do sometimes tell an entire false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all".

The emphasis here is that, in order to convict an accused person basing on the evidence of the victim, the trial court must be satisfied that what the victim has testified is nothing but the truth.PW2 told the trial that she was married to the appellant on 20/9/2020 but she did to explain her whereabout prior to that time as according to PW1, she was not at home, and according to PW3, she was not at school. In such a situation, PW2's credibility is also not free from doubt.

When the charge read to the appellant, he denied the allegation. In his defence he told the trial court that he had never had sexual intercourse with PW2.

Indeed, in absence of any other evidence, it cannot be said that, the prosecution had managed to discharge its duty of proving the case beyond reasonable doubt. It is a principle that the accused can only be convicted of an offence on the basis of the strength of the prosecution case, and not on the basis of the weakness of the defense case. **See KERSTIN CAMERON V.R [2003] TLR 84, and** JOHN **S/O MAKOLOBELA KULWA MAKOLOBELA AND ERICK JUMA @ TANGANYIKA V.R [2002] TLR 296.**

In the premise, I am constrained to allow the appeal and, respectively, quash the conviction and set aside the sentence of thirty (30) years meted against the appellant. I further order for an immediate release of the appellant from prison custody unless if he is held for some other lawful cause.

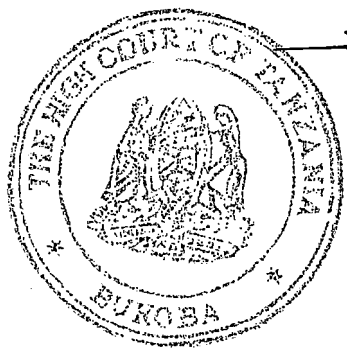
Order accordingly.

E.L. NGIGWANA

JUDGE

11/05/2022

Judgment delivered this 11th day of May, 2022 in the presence of the Appellant by virtual court while at Kwitaga Prison Kigoma, Ms. Veronica Moshi, learned State Attorney for the Republic/Respondent, Ms. E.M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.



E.L. NGIGWANA

JUDGE

11/05/2022