IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO 75 OF 2021

(Originating from Criminal Case No. 85 of 2020 of Iringa District Court at Iringa)

FESTO KASIM ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of Last Order: *04/03/2022*
Date of Judgement: *08/06/2022*

MLYAMBINA, J.

The Appellant, Petro Kasim was charged before the District Court of Iringa (the Trial Court) with two offences. He was charged in the first count with the offence of rape contrary to *section 130 (1), (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2019], (henceforth the Penal Code).* In the second count, he was charged with the offence of causing a school girl not to attend school regularly contrary to *regulation 7 (2) and (3) of the Public School (Compulsory Enrolment and Attendance) Order, G N No. 150 of 1977* as amended therefrom.

After full hearing of the evidence from both sides, the Appellant was convicted in the first count and sentenced to serve life imprisonment. Due to the prosecution failure to proof the second offence, the accused was acquitted. Also, he was ordered to pay the victim a compensation to the tune of TZs 10,000,000,000/= (Ten Million Tanzanian Shillings only). The Appellant was aggrieved by the decision of the trial Court and appealed to this Court basing on five grounds of appeal quoted hereunder:

1. *That, the learned trial Magistrate erred in law and fact to convict and sentence the Appellant without the persecution side brought the important witness (the lodge server) with the lodge register to prove before the Court of law if the victim and Appellant sleeps together at lodge located at Ipogoro;*
2. *That, the learned trial Magistrate erred in law and fact to convict and sentence the Appellant without the prosecution side call the independent witness (a driver which victim and Appellant travelling therein) to testify before the Court of law if real the victim and Appellant travelling in same car from Ipogolo to Makambako;*
3. *That, the learned trial Magistrate erred in law and fact to convict and sentence the Appellant without considering the defense side*

when the Appellant states that he was in business from Chimara to Makambako as his work;

4. *That, the learned trial Magistrate erred in law by holding that, the prosecution side proved the case against the Appellant beyond reasonable doubt as charged, and*
5. *That, the prosecution side didn't prove the case against Appellant beyond reasonable doubt.*

After considering the above grounds the Court has found that the issue to be determined in this appeal is; *whether the offence of rape upon which the Appellant was convicted of and sentenced to serve life imprisonment was proved to the standard required by the law.*

At the hearing of the appeal, the Appellant appeared in Court unrepresented and the Respondent, Republic was represented by Ms. Radhia Njovu, learned State Attorney who resisted the appeal and supported the conviction entered against the Appellant and the sentence imposed to him. As for the first and second ground, the Appellant argued that the prosecution was supposed to bring the employees of the said guest house at Ipogoro to prove if he slept with the victim. Also, the driver to know if he travels with the victim from Iringa to Makambako but the prosecution failed to do so.

Coming to the third ground, the Appellant stated that he was doing business with Subira Aloyce Kagai for long time. However, he was un aware if she planted this case for him. He was on business from Chimara to Makamabako. He submitted further on forth point that, the prosecution failed to parade the Guest house employees to prove their case beyond reasonable doubt. Also, he averred that, the doctor who examined the victim testified that the victim had no virginity. There was a sign of penetration and no spermatozoa while the examination was done within 72 hours. Virginity can be removed by any person.

In his additional ground, the Appellant alleged that the caution statement was admitted as exhibit without being read to him. He supported his argument with the case of **Robson Mwanjisi and 3 Others v. Republic** [2003] TLR 218 in which it was held *inter alia* that:

> *Any document must be read after admission for the charged person to know the contents.*

He prayed for the Court to consider his ground of appeal, set aside the conviction and sentence and set him free.

In reply to the above arguments, Ms. Njovu learned State Attorney submitted on the 1st and 2nd grounds collectively, 3rd ground in isolation and she consolidated the 4th and 5th ground of appeal with the supplementary ground. As for the 2nd and 3rd ground, Ms. Njovu State

Attorney submitted that; the two grounds are meritless because the important witness in rape cases is the victim. PW3 (the victim) told the Court how the Appellant raped her as it is reflected at page 23 of the proceedings. Her evidence was sufficient to prove that there was penetration and the accused raped her. Her evidence was corroborated by PW5 (Medical Doctor).

Ms. Njovu submitted further that, in rape cases, what is required is penetration. Spermatozoa is not a requirement. She cited the case of **Suleimani Makumba v. R** [2006] TLR 79, Court of appeal of Tanzania at Mbeya, in which at page 8 the Court stated:

> *The true evidence of rape has to come from the victim and that there was penetration.*

In this case, the victim explained well how she was raped. Her evidence was corroborated by PW5. There was no need to bring the Lodge servant and the driver to prove rape. The sexual intercourse was done privately between the accused and the victim. The Lodge servant did not witness. Also, there was no need to call the driver because PW1 testified that he arrested the accused person while with the victim in the car.

As regard to the 3rd ground, Ms. Njovu argued that the trial Magistrate considered such ground in convicting and sentencing the accused person because the prosecution proved their case beyond reasonable doubt. Even if the trial Court did not consider the accused evidence, Ms. Njovu, called upon Court being the first appellate Court, to re evaluate the evidence of the accused person. She supported her argument with the case of **Prince Charles Junior v. The Republic,** Criminal Appeal No. 250 of 2014, Court of Appeal of Tanzania at Mbeya (unreported).

Ms. Njovu denied the ground of caution statement being admitted without being read. According to Ms. Njovu, PW4 read the caution statement exhibit as it is seen at page 31 of the proceedings.

On the 4th and 5th grounds, Ms. Njovu denied the assertion that the prosecution did not prove its case beyond reasonable doubt. PW3 proved that the accused person raped her. The evidence was corroborated with PW5 and PW1. The accused was charged under *section 130 (1) and (2) (e) of the Penal Code. (supra).* It was proved by PW2 (grandfather) that the victim was 14 years (below 18 years).

Ms. Njovu went on arguing that the evidence of PW3 and PW5 was further corroborated by PW4 who tendered the caution statement.

The Appellant was arrested while with the victim during day time. PW1 and PW3 identified accused person. He reminded the Court that the accused was charged contrary to *section 130 (1) (2) (e) and 131 (1) of the Penal Code (supra)*. But he was given excessive punishment. He was sentenced to life imprisonment instead of 30 years. He prayed to the Court to reduce the punishment and the compensation to remain intact.

In his brief rejoinder the Appellant said that the investigation was done without an independent witness.

The Court has carefully considered the arguments from both sides and the grounds of appeal and discovered that all of the five grounds raised by the Appellant aimed to challenge the credibility of the evidence provided by the prosecution side. Therefore, the only issue to be determined in this appeal is; *whether the prosecution side proved their case beyond reasonable doubts.* It is clearly known that, it is upon the prosecution side to prove their case as required by the law, which is beyond reasonable doubt. *Section 2 (2) (a) of the Law of Evidence Act [Cap 6 R. E. 2019]*, provides that:

> *(2) a fact is said to be proved when-*
>
> > *(a) 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.

From the above quoted provision of the law, it is clear that, it is upon the prosecution side to prove their case beyond reasonable doubt. In the case of **Nehemia Rwechungura v. Republic**, Criminal Appeal No. 71 of 2020 (unreported), the Court of Appeal has this to say:

...it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is universal standard in criminal trials and the duty never shift to the accused.

The Court went further and quoted with approval the case of **Magendo Paul and Another v. Republic** [1993] TLR 219 where the Court observed that:

For the case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed.

Being the first appellate Court, this Court may re-evaluate the evidence adduced before the trial Court and come to its own decision while bearing in mind that, it never had an opportunity to observe the

demeanor of the witnesses when they testified. The circumstances upon which an appellate Court can interfere with the finding of a trial Court based on credibility of evidence of witnesses testified before the trial Court was stated in the case of **Pia Joseph v. R** [1984] TLR 165 where it was held that:

> *An appellate Court will not lightly interfere in the trial Court's finding on credibility unless the evidence reveals fundamental factors of a vitiating nature to which the trial Court did not address itself or address itself properly.*

Basing on the principle quoted herein above, I went through the evidence of PW3, PW1 PW2 and PW5. I discovered, as lightly submitted by the learned State Attorney Ms. Njovu, the accused was arrested while he was with PW3 in the car. They were travelling from Iringa to Makambako. The victim herself testified all what happened between her and the accused. The same evidence was corroborated by PW1 and PW5. The later was the Medical Doctor who testified to see the bruises and penetration on the victim private part. The caution statement tendered before the Court said it all. It must be recalled that, in rape

cases, the best evidence is the evidence of the victim as it was insisted in the case of **Selemani Makumba v. Republic** *(supra).*

According to PW3' evidence, the accused raped the victim in the guest house room at night hours. Therefore, it is absurd to call the Lodge employee and the driver to prove the act which was committed at the middle of the night in the private room. The Appellant alleged that he was on business trip from Chimara to Makambako but he did not put clear on how he ended up being found with the victim in the same car during the arrest. All in all, the prosecution proved their case beyond reasonable doubt not only that the victim was raped but also the one who raped her is the Appellant.

Ms. Radhia Njovu State Attorney in his submission prayed for this Court to reduce the Appellant's sentence on ground that the sentence awarded to the Appellant is excessive. With that prayer, the Court has revisited the provisions of *section 131 (1) of the Penal Code (supra).* It provides:

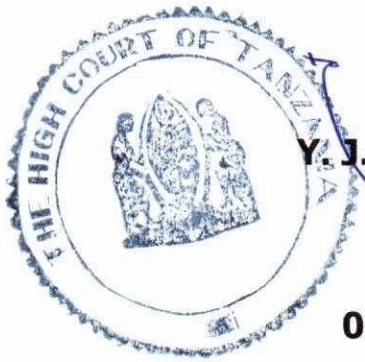
> *Any person who commits rape is, except in the case provided for in the numbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with the fine, shall in*

addition be ordered to pay compensation of an amount determined by the Court, to the person in respect of whom the offence was committed for the injuries caused to such person.

From the quoted provision of the law, it is clear that, if a man raped a child under 18 years the maximum punishment for rape is life imprisonment and minimum is thirty years with other orders such as corporal punishment, fine or compensation. From the record the Trial Magistrate sentenced the Appellant to serve life imprisonment and he ordered him to pay a compensation to the victim at the tune of TZs 10,000,000/= (Ten Million Tanzania Shillings only).

It is the final findings of this Court that the sentence meted to the Appellant is excessive. How can he pay a compensation while he will spend his entire life in custody? It is valid that the victim has a right to be compensated. However, sentence must be proportionate to the offence committed and it should be exercised in accordance to the law.

In the upshot, this Court do hereby reduce the sentence to thirty years. The compensation to remain intact as ordered by the Trial Court.



Y. J. MLYAMBINA

JUDGE

08/06/2022

Judgement pronounced through Virtual Court and dated this 8th day of June, 2022 at 10:48 am in the presence of the Appellant in person and Senior learned State Attorney Alex Mwita and Blandina Manyanda, for the Respondent. Both parties were stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal explained.

Y. J. MLYAMBINA

JUDGE

08/06/2022