IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 13 OF 2022

(Originating from Criminal case No. 141 of 2020 of the District Court of Nyamagana at Nyamagana)

GUTUGU NYANOKWI----------APPELLANT

VERSUS

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

JUDGMENT

Last Order: 30.05.2022
Judgment: 10.06.2022

M.MNYUKWA, J.

The appellant, Gutugu s/o Nyanokwi was charged before the Resident Magistrate Court of Mwanza at Mwanza for the offence of Rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code Cap. 16 RE: 2019. The prosecution case was that on the 13th day of July 2020 at Sinai Mabatini area within Nyamagana District, in Mwanza Region the appellant had carnal knowledge with one young girl aged 5 years, who,

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

It briefly goes that; the appellant did establish a kindergarten school within Mabatini area where he used to teach children. It happened that PW3 the victim was among of the students of the appellant. According to PW1, the mother of the victim, the appellant used to pick up children to school including PW3 and return them home in evening hours after school.

On the date of the alleged incident, it happened that when PW3 and her colleagues were playing outside their classroom, the appellant called her inside, undressed her and enter his penis into her vagina. The victim was threatened not to raise alarm and she was later released. When she was at home and during a bath, her mother (PW1) noticed that the victim was bleeding in her vagina and suspected that she was raped and reported the matter to the police station. She took the victim to the hospital and the act of rape was confirmed by PW4, a medical doctor at Sekeotoure hospital after attending the victim. The victim could not instantly mention the culprit but she did mention him on 11.08.2020 giving a reason that she was threatened that the appellant could beat her at

school. PW1 reported back to the police station when the statement of PW3 was taken and the accused was arrested and charged with rape.

When the charge was read over to the appellant at the trial court, the appellant denied the charges. The prosecution, thereafter, called a total of four (4) witnesses, who testified against the appellant who entered his defence in person and at the conclusion of the trial, it was held that the prosecution case was proved beyond a reasonable doubt and the trial court accordingly convicted the appellant Gutugu s/o Nyanokwi followed by a statutory minimum sentence of life imprisonment pursuant to section 132(3) of the Penal Code Cap. 16 R.E 2019. Dissatisfied, the appellant has lodged the present appeal before this court appealing for both the conviction and the sentence.

The appellant fronted five (5) grounds of appeal thus: -

I. *That the appellant was convicted on the defective charge, because the charge sheet stated that the incident had occurred on 12th July 2020 and the case Facts PH stated that the incident had occurred on 13th July 2020 while the prosecution witness (PW1) testified that the incident took place on 17th March 2020.*

II. *That the victim's age was not proved to, as the law requires.*

III. *That the trial court erred in law and in fact convicted the appellant relied on uncorroborated evidence when the prosecution failed to produce a witness that corroborate the evidence of PW1 and PW3.*

IV. *That the trial magistrate erred by relying on bruises in the PF3 which does not prove the offence as required by the laws of the land.*

V. *That the case against the appellant was not proved beyond reasonable doubts.*

When the matter was called for hearing, the appellant appeared in person while the Respondent was represented by Ms. Sabina Choghogwe and Mr. Deogratius Rumanyika, learned State Attorney attorneys.

The respondent was the first to submit and supported the conviction and the sentence insisting that the prosecution case before the trial court was proved beyond reasonable doubts.

Submitting on the first ground of appeal that the charge sheet was defective as it shows that the incident occurred on 12.07.2020 while at the preliminary hearing it shows that the offence was committed on 13.07.2022, the counsel for respondent referred to page 14 of the trial court's proceedings and avers that the charge sheet was amended on

04.03.2021 to reflect what is stated by prosecution witnesses that the crime was committed on 13.07.2020 and the preliminary hearing was conducted which reflects that the crime was committed on 13 .07. 2020. The respondent went on that the evidence of PW1 and PW4 reflects the date on the charge sheet and the assertion of the appellant that the charge sheet is defective is unfounded. For those reasons, the respondent insisted that the evidence did not go contrary to the charge sheet and prays this ground of appeal to be dismissed.

On the second ground of appeal the appellant claims that the age of the accused was not proved, the respondent denied the facts insisting that the age was proved. Referring to the evidence of PW1 as reflected on page 19 of the trial court's proceedings, the mother of the victim, testified that she gave birth to the victim on 02.10.2015 and at the time when the crime was committed the victim was only five years and five months old. In the tone, she referred this court to the case of **George Claud Kananga vs DPP,** Criminal Appeal No. 376 of 2017 whereas the court held that the age of the child can be proved either by the medical doctor, teacher, or a close relative or the parent. She insisted that PW1

who is the parent of the victim proved the age of the victim and the appellant did not object at the trial.

On the third ground of appeal, the appellant claimed that he was convicted based on the evidence of PW1 and PW3 which was not corroborated, the respondent opposed his claims. The respondent avers that this ground is baseless for the offence of rape, the best evidence is that of the victim. Insisting she cited the case of **Seleman Makumba vs Republic** [2006] TLR 379 and went on to aver that, it is on record, specifically on pages 19 and 20 that PW1 noticed blood stains on the clothes of PW3 who informed her that it was a teacher who inserted his penis in her vagina and the evidence was also corroborated with PW4, a medical doctor who examined the child and found that the child was bleeding. She insisted that this ground has no merit and therefore prays this court to dismiss it.

On the fourth ground of appeal, the allegation is that the trial court convicted the appellant relying on the evidence of the PF3 (exhibit P1) that does not prove the offence, the prosecution objected. Ms. Sabina insisted that the evidence of PW3 was credible for the trial court also used the evidence of PW4 and did not rely on the PF3 alone. She insisted that

the trial court was satisfied that the prosecution case was proved beyond reasonable doubts.

On the fifth ground that the case against the appellant was not proved, it was Ms. Sabina submissions that the case was proved beyond reasonable doubts because in rape cases penetration is the element which must be proved and referred to page 29 of the trial court's proceedings, she insisted that, PW3 stated what happened, the evidence which was corroborated by PW4, the Medical Doctor. She therefore retires and prays this court to dismiss the appeal.

On his submissions, the appellant prays this court to adopt his ground of appeal to form part of his submissions and this appeal to be allowed.

On the first ground of appeal, he insisted that he was convicted over a defective charge citing page 1 of the judgment that shows the alleged crime was committed on 12.07.2020 while the preliminary hearing shows that the crime was committed on 13.07.2020.

On the age of the child, he avers that it was not properly proved in the absence of the birth certificate or the clinic card. He therefore, prays this ground to be allowed. On the third ground, he insisted that the

evidence of PW1 and PW3 was not corroborated. On the fourth ground, he avers that the PF3 was not brought in the court and was not read to him. On the fifth ground, he avers that there were lots of doubts for the evidence was illegal. Referring to the evidence of PW3, he claims that it was tendered while PW1 was in the courtroom which resulted in the victim giving evidence through her mother.

After the submissions by both parties, I am now placed at the apex to determine this appeal based on the five grounds of appeal advanced by the appellant and argued. In the process, based on the matter at hand, which is statutory rape, I am going to first determine the 2nd ground of appeal to clear doubt as to whether the age of the victim was proved as against the claims by the appellant who claimed before this court that the age of the victim was not proved for the offence of statutory rape to stand against the appellant.

Going to the trial court records, I first perused the charge sheet, which goes by the appellant's claims that he was charged with a statutory rape under sections 130(1) and (2)(e) and 131(1) of the Penal Code, Cap. 16 R.E 2019 which is described as having carnal knowledge with a girl of below 18 years. The law provides basic elements of the offence and, the

defence as to the consent of the victim is not available to the suspect. Section 130(I)(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*
>
> *(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 this appeal, the appellant was charged under the cited section 130(I)(2)(e) of the Penal Code, Cap 16 R.E 2019 alleged to have carnal knowledge with the victim who was 5 years of age at the time. Based on what the law provides, the appellant was accused of rape and was tried, convicted and equally sentenced. Based on the offence, the appellant is disputing that the age of the victim was not proved. I agree with the appellant that age is a vital element for the offence charged and to decide on his allegations, I am now in the position to test the appellant's claim as to whether the age of the victim was proved.

In the process, I also made reference to the principles enunciated in court decisions regarding the proof of age in rape cases. It goes that, proof of age in statutory rape is of great essence, without which the case must fail. In **George Claud Kasanda v. R,** Criminal Appeal No. 376 of 2017 (unreported) which was also cited by Ms. Sabina State Attorney, 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."*

The Court of Appeal maintained this principle as it was held 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 as 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..."

Returning to the appeal at hand, it reads that the appellant Gitugu s/o Nyanokwi did have unlawful sexual intercourse on 13.07.2020 with the victim, a girl of five (5) years old. PW2, the mother of the victim testified before the trial court and among other things, she testified that the victim was born in 02.10.2015 and her age at the time she testified was 5 years and 5 months and as for the day of the commission of the crime, that is 13.07.2020 the victim was five (5) years old. On the part of the appellant, as reflected on pages 19 to 22, the appellant did not object to the age of the victim.

It is from this point that Ms. Sabina insisted that the victim's age was proved and cited the case of **George Clad Kasanda vs DPP** (supra) 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. I agree with Ms Sabina as the law is trite as stated by the Court of Appeal in the case of **Isaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 CAT (unreported), that: -

"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under

section 130(l)(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."

(See also the case of **Rutoyo Richard vs R,** Criminal Appeal No 114 of 2017.)

In respect of what was stated in **Isaya Renatus** (supra), it is reflected on records of this appeal on page 19 of the trial court proceedings that PW1 who is the mother of the victim, testified under oath that the victim's age was five (5) years old at the time of the commission of the offence. That means, PW1 dully proved the age of the victim and the assertion by the appellant that proof of age of the victim was not met could not negate the fact that PW1, the mother of the victim testified that the victim was of the age of 5 years. In this regard, I proceed to dismiss the 2nd ground of appeal and hold that the offence of statutory rape was properly before the appellant at a trial court.

On the first ground of appeal, the appellant claims that he was charged, convicted and sentenced over a defective charge. He avers that the charge sheet stated that the offence occurred on 12.07.2020 and the

preliminary hearing that was conducted stating that the incident occurred on 13.07.2020 and at the same PW1 testified that the incident occurred on 17.03.2020. His allegations were opposed by the respondent insisting that the charge sheet was proper and no contradictions in the evidence of the prosecution. The law is clear under section 132 of the Criminal Procedure Act, Cap 20 RE: 2019 which reads; -

> **132.** *Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

I am of the settled view that, when the charge sheet is defective as claimed by the appellant when proved, is a legal defect that goes to the roots of the case and as a result, the whole proceedings, judgment and orders become a nullity. The reason behind being that, failure of the prosecution to properly prepare charge against the accused with a proper offence, section of law and particulars, leaves doubts as to whether the accused was availed with the right to know the contents and particulars of his charge. Reference can also be made to the decision of the Court of

Appeal in **Abdallah Ally Vs The Republic** (Criminal Appeal No. 253 of 2013) where it observed and held that:-

> *"... being found guilty on a defective charge based on wrong charge or and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the courts below..."*

This view was maintained by the Court of Appeal in the case of **Frank Kanani vs Republic** Criminal Appeal No. 425 of 2018 adding that, a defective charge will deny the accused person a chance to properly prepare his defence. (See also the case of **Peter Kombe vs Republic** Criminal appeal No. 12 of 2016, **Kashima Mnadi vs Republic,** Criminal appeal No.78 of 2011 and **Magesa Chacha Nyakibali & Another,** Criminal Appeal No.307 of 2013).

In the instant appeal, I went to the trial court records to settle the disputed claims by the appellant. His first allegation on defective charge was that the charge sheet provides that the offence was committed on 12.07.2020 while the preliminary hearing shows that the crime was committed on 13.07.2020. My perusal on the trial court's proceedings, specifically on page 14, it revealed that the charge sheet was substituted on 04.03.2021 which reads that the alleged offence was committed on

13.07.2020 and follows with the preliminary hearing which also reflects the charge sheet that the incidence occurred on 13.07.2020 as it is reflected on page 15 of the trial court's proceedings. It is from this point that the first weighed defect has no merit.

The second defect according to the appellant's claim was that PW1 evidence on records shows that the alleged offence was committed on 17.03.2020 contrary to the charge sheet which reads that the offence was committed on 12.07.2020.

Before going to the trial court records, I am alive that, not every contradiction goes to the root of the case and contradiction on dates is curable under section 234(3) of the Criminal Procedure Act, Cap 20 R.E 2019. The law reads as I quote: -

234(3)

> *'Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof'.*

In the circumstances, I revisited several court decisions when confronted with a similar situation. In the case of **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (unreported) referred with authority at page 12 in **Said Majaliwa vs Republic,** Criminal Appeal No. 02 of 2020 CAT where it was stated that: -

> *"The complaint in the second ground has merit in the sense that it is true that the charge sheet reflected that the date of the incident was 23/4/2002 whereas in the evidence of PW1 it was stated that the incident took place on 23/3/2002. However, as was correctly submitted by Mr. Hilla, this was probably a slip of the pen.* ***At any rate, the variance in dates was curable under section 234 (3) of the Act...***"

Revisiting the court records specifically on page 19 of the trial court typed proceedings, the claim by the appellant is not reflected. PW1, the victim's mother testified before the trial court that the alleged offence was committed on 13.07.2020 and this reflects the charge sheet. Again, the allegation by the appellant that the charge sheet contradicts the facts, I also perused the trial court records and page 15 of the typed proceedings shows the preliminary hearing and item 4 of the memorandum of facts stated clearly that the appellant did rape the victim on 13.07.2020 contrary

to the appellant's allegations. In the circumstances, I satisfied myself that the mistake committed by the trial magistrate on the dates as reflected on page 1 and 2 of the judgement regarding the date of the incidence and the evidence of PW1 on when the offence was committed is the slip of the pen. In the fine, I find this ground wanting of merit and therefore I proceed to dismiss it.

On the 3rd ground of appeal, it is the appellants claim that the trial court erred by convicting the appellant relied on uncorroborated evidence. The claim was opposed by Ms. Sabina insisting that this being a rape case, the evidence of the victim alone can solely be used to convict the appellant without corroboration. In that regard, she added that the evidence of PW3 was corroborated by that of PW1 and PW4.

Going to the records, it appears that PW3, the victim was the key witness in this case. And, all other witnesses gave a piece of corroborative evidence in establishing and proving the offence of rape. On this, I am mindful that in terms of section 127 (6) of the Tanzania Evidence Act, [Cap. 6 R.E. 2019] the court can base a conviction on the evidence of the victim of rape without any corroboration, as long as the court is satisfied that the witness is telling the truth. In the case of **Godi Kasenegala v.**

Republic, Criminal Appeal No. 10 of 2008 (unreported) refered with authority in the recent case of **Said Majaliwa vs Republic,** Criminal Appeal No. 02 of 2020 CAT, where it was stated that:

> *"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 evidence. "*

(See also the case of **Selemani Makumba v. Republic**, [2006] TLR 379, **Mawazo Anyandwile Mwaikavaja v Republic**, Criminal Appeal No. 455 of 2017 and **Ally Ngozi v. Republic,** Criminal Appeal No. 216 of 2018, **Omari Kijuu vs the Republic** Criminal Appeal No. 39 of 2005 CAT).

As it is reflected at page 29 of trial court proceedings, where the victim testified as I quote: -

> *"I was hurted by Gitugu, she hurted me here (PW3 touched her vagina). He removed my clothes (pens and chupi) then he carried me on his lap then put his penis (aliniweka miguuni haafu akaniwekea dudu lake) ..."*

This was the evidence of PW3, the victim who according to the records and findings of this court on the afore-determined ground, she is

an innocent girl child of five (5) years telling the trial court how she was brutally mistreated by the appellant who she identified him as her teacher. As stated, while the victim was testifying before the trial court, she used to show vagina that it was where the appellant put his 'dudu' Though she used the term 'dudu', she was able to expressly testify that it was the appellant's penis which she referred as 'dudu' when she testified that the appellant undressed her and carry her on his lap and put his dudu to her. This gave a trial court a picture as to where the said 'dudu' is located and according to the trial court, PW3 meant penis. In the case of **Simon Erro V. Republic,** Criminal appeal No.85 of 2012 (CAT) the victim, like here, referred to the penis as 'dudu' and the Court of Appeal held that to be sufficient. [See also in **Haruna Mtasiwa V. Republic,** Criminal Appeal No. 206 of 2018 CAT (both unreported)].

That said, I wish to reiterate the settled law that the true and reliable evidence in sexual offences is that of the victim who is required to prove penetration as one of the essential ingredients. From the evidence of PW3, and PW1 the mother who observed the anomalies befalling her child and reported the matter to the police station and was referred to the hospital, it is clear that the appellant committed the said

offence. PW4 the medical doctor, with 20 years of experience attended PW3 and he found that the victim was penetrated by a blunt object. A slice of PW4 evidence reads: -

> *"I noted that the child was in pain and couldn't walk properly. She was also bleeding in her private parts and her clothes were covered with blood. I continued to examine her vagina and noted that there was blood coming out of the vagina and there were bruises and cervices was protruding out of the vagina..."*

From this piece of evidence, the penis was not just placed, as rightly held by the trial court, for it couldn't cause all observed by PW4 but unless inserted. I did not agree with the appellant's assertion that the conviction based on uncorroborated evidence of PW3 for as I stated above, the main witness was PW3 and any other evidence in support of the prosecution was corroborating that of PW3. As observed, the evidence of PW3, was rightly corroborated by the evidence of PW1, the mother of the victim, PW2 the investigation officer, PW4 a medical doctor and exhibit P1 the PF3.

Again, as is reflected on records, the accused did not contradict PW3 when giving her evidence during cross-examination. As stated in

Jaspini S/O Daniel @ Sikazwe Vs Republic Criminal Appeal No. 519 Of 2019, it is settled law that failure to cross-examine a witness on an important matter implies acceptance of the truth of the witnesses' evidence in that respect. (See also **Bakari Abdallah Masudi v. R** Criminal Appeal No. 126 of 2017 and **Nyerere Nyague v. R, Criminal** Appeal No. 67 of 2010 (both unreported). Since the appellant did not cross-examine PW3 regarding her evidence, her evidence remained unchallenged and, therefore, can not be assailed at this stage. Based on the above, I find this ground wanting for merit and I proceed to dismiss it.

On the fourth and fifth grounds of appeal which are intertwined, the appellant claims that the trial court erred by relying on bruises in the PF3 which does not prove the offence and therefore the prosecution case was not proved to the standard required. I reiterate what I have determined on the foregrounds. It is my finding that the offence of rape was proved against the appellant by PW3 the victim and corroborated by other evidence on record including the evidence of PW1, PW2, PW4 and exhibit P1. I find that the claim by the appellant on this ground unattainable and in fine, I proceed to dismiss these grounds for wanting of merit.

Having considered the appeal holistically, I am satisfied that there is neither misapprehension nor misdirection of evidence by the trial court in this appeal. As such, I find no justification to interfere with the findings of the trial court below. Accordingly, I find the appeal devoid of merit and it is hereby dismissed in its entirety. I proceed to uphold the conviction and sentence of life imprisonment meted to the accused Guturu s/o Nyanokwi as per section 131(3) of the Penal Code Cap. 16 RE: 2019.

It is so ordered.

M.MNYUKWA
JUDGE
10/06/2022

Right of appeal explained to the parties.

M.MNYUKWA
JUDGE
10/06/2022

Court: Judgement delivered in the presence of parties

M.MNYUKWA
JUDGE
10/06/2022