IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MWANZA
AT MWANZA

CRIMINAL APPEAL NO.106 OF 2022

(*Originating from Criminal Case No. 14 of 2022 of Nyamagana District Court*)

ISSA LENATUS ELIAS .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Feb. 16th & 23rd, 2023

Morris, J

Issa Lenatus Elias, the appellant above, was convicted of rape. The contravened provisions of the laws were recorded in the charge as sections 130 (1)&(2)(e) and 131(3) of ***the Penal code***, Cap. 16 R.E.2019 (currently, R.E. 2022). He was charged for having unlawful sexual intercourse with a girl aged 2 years on 20/01/2022. The trial was before the Nyamagana District Court. Subsequent to conviction, he was sentenced to life imprisonment and compensation of Tshs. 1,000,000/= to the victim. Aggrieved by the conviction and sentence, he has appealed to this Court.

This appeal is based on two grounds of appeal. The gist of the both grounds of appeal is that the prosecution failed to prove the case beyond reasonable doubts; and that the trial court recorded and used purported words of the victim who was unable to speak.

Both parties were represented. The accused was represented by Advocate Emmanuel Paul Mng'arwe. Ms. Magreth Mwaseba, learned Senior State Attorney, represented the respondent. Mr. Mng'arwe started by submitting that, in proving a rape case, penetration is necessary. According to him, all witnesses of the prosecution (PW1, PW3, PW4 and PW5) failed to discharge this obligation. Citing an example, he argued that PW5 testified that he saw a gap in the victim's private part. However, he did not prove whether such gap was natural or caused by rape. That is, it was expected of the doctor to prove to the court that the victim's hymen was perforated. Also, the learned counsel faulted the doctor for having stated that at the time of examination there was no any discharges seen.

He referred the Court to page 6 paragraph 4 of the judgment in ***Athuman Juma v R***, HC Criminal Appeal No. 2/2022 (unreported). He contended further that PW1 found the victim sleeping only to discover the next morning that she was in pain. He opined that it was not possible for the child who had been the victim of rape was not even crying when her mother returned. He, thus, concluded that such discrepancy in the prosecution evidence cast doubt on the whole case.

In addition, the counsel argued that PF3 (Exhibit P1- per page 14 of the proceedings), was tendered by PW1 – mother of the victim (PW2) but its contents were read out by PW5. According to him, the

admissibility and reliability of such documentary evidence was irregular. It ought to have been expunged from the records of the court. Reference was made to the case of ***Semeni Mgomela Chiwanza v R***, Criminal Appeal No. 49/2019 (unreported) and ***Exhibit Management Guideline*** issued by the Judiciary of Tanzania in 2020.

Regarding the **second ground** of appeal; Mr. Mng'arwe submitted that in the proceedings, the girl was recorded that she did not informe her mother on the fateful night. He argued that, if the child was able to speak, the 1st person to talk to would have been her mother rather than waiting to later speak to total strangers in court. That is, in her evidence, the victim is recorded as having cried and told her mother. However, PW1 stated that the victim was not crying and did not state anything to her until she discovered it herself the next morning. Consequently, the evidence of the child should be discredited thereby finding that the prosecution failed to discharge its duty of proving the case on the given statutory bar.

In reply the Ms. Mwaseba supported conviction and sentence of the trial court. She maintained that penetration was fully proved. This

proof notwithstanding, she was of the view that, per ***Athuman Juma's case*** (*Supra*) at page 5, Para 2; penetration, however slight, suffices. To her, the evidence revealed how the private parts of the victim girl had been affected by rape for they were reddish and no hymen.

Regarding PW5 reading the exhibit (P1), the learned Attorney distinguished ***Chiwanza's case*** (*supra*) because in that case the document was expunged from the record as the appellant had not heard the admitted documents being read out. But in the present case PF3 was read out to the appellant. Hence, to her, this ground is baseless and should be dismissed accordingly. She submitted further that, it is not fatal for any party to tender the document which is read out by another witness later. That is, all that matters is the contents of such document being read out to the accused by the prosecution. She cited section 240 of ***the Criminal Procedure Act***, Cap 20 R.E. 2022 and argued that any person may tender the document and an expert would be summoned to read or explain its contents later. It was her conclusion that the appellant's argument in respect of the expert is thus misplaced.

In controverting the second ground of appeal Ms. Mwaseba submitted that, it is not true that PW2 was not telling the truth. The appellant was convicted, partly basing on circumstantial evidence. She maintained that the accused was the only person who was left with the victim at that night. PW1 also had testified that she found the victim in different posture and distressed state from the one she had left her before. Thus, the appellant was correctly convicted. She invited the Court to refer to ***Hussein Abdallaham Kindamba v R***, Criminal Appeal No. 20/2021 (unreported).

The above account is the summary of the arguments for and against the appeal. The Court is, thus, to determine the merit of the appeal. This being the first appeal it takes a form of rehearing. This Court, thus, has a duty to, apart from considering the grounds of appeal; re-evaluate the evidence to consider whether the prosecution established the appellant's guilt beyond reasonable doubt. See the Case of ***Kaimu Said v R***, Criminal Appeal No. 391 of 2019 (Unreported).

I will start with the first issue: whether the prosecution proved the case beyond reasonable doubts. The appellant faults the trial

court's conviction which (to him) was arrived at in the absence of proof of penetration. Further, the appellant argued that by relying on exhibit P1 which was read over to the accused by a person who had not tendered it occasioned injustice to him. In law, it is the role of the prosecution to prove the guiltiness of the accused and not otherwise. That is, the onus of proving whether or not the crime was committed lies on the prosecution per ***Ronjino Ramadhani @ Ronji & Others v R***, Crim. Appeal No. 75 of 2019 (unreported); ***Hamisi Mbwana Msuya v R,*** Crim. Appeal No, 73 of 2016 (unreported); ***Mohamed Said Matula v R*** [1995] TLR 3; ***Twinogone Mwambela v R,*** Criminal Appeal 388 of 2018 (unreported) and ***Hassan Singano @ Kang'ombe v R***, Criminal Appeal No. 57 of 2022, (unreported.

As rightly submitted by appellant's counsel, to prove the offence of rape, the prosecution is required to prove; *inter alia*, that the appellant penetrated into the vagina of the victim. I am also mindful of section 130 (4) (a) of ***the Penal Code***. Law is clear that penetration need not be of a great magnitude as portrayed by the appellant. As the respondent rightly put it in perspective; penetration, however slight, is sufficient for the offence of rape to be established. Further reference is made to ***Emmanuel Kabelele v R***, Criminal Appeal No. 536 of 2017 (unreported).

From the evidence of prosecution, particularly testimony of PW5, the medical officer, proved by exhibit 'P2' that there was penetration. This evidence was corroborated by the evidence of PW1 and PW2 who saw the private part of the victim. At page 8 of the typed proceedings, the victim's mother (on being cross examined by the appellant) is putting it in clear terms that "there were dirty (*sic*) in her private part (and) her Labia Majora was swell (sic) and in red colour with bruises".

Furthermore, PW1 testified as having found the victim in state of discomfort and distress when she returned in the room. That is without reiterating her further testimony that while bathing the victim's private part the next morning, the girl was crying due to pain. What else would be required to prove that she was in dire pain due to having been penetrated into; in conjunction the other evidence?

Moreover, PW2 also testified that the appellant inserted the "*dudu"* into her private parts. She testified by showing her private part where the said *dudu* was inserted. Therefore, the prosecution, in my thoughtful judgment, proved beyond reasonable doubt that there was penetration into the victim's private parts. As such, with adequate

respect, the argument to the contrary is a wishful but misplaced afterthought.

Regarding exhibit P1, I am at par with the appellant's submissions that failure to read out admitted exhibits to the accused is fatal. Such omission renders expungement of the impugned exhibits. This position is also the finding of the Court in the case of ***Sunni Amman Awenda v R***, Criminal Appeal No. 393 of 2013 (unreported). However, from the evidence on record, the said exhibit (PF3) was read over by PW5 who had filled it in after examining PW2. The exact reading was done for and in the presence of the appellant. Thereafter, the defence was called upon to interrogate over it and got an opportunity to cross examine both witnesses: the one who tendered and the other who read it over respectively.

Consequently, I settle an agreement with the learned Senior State Attorney that, so long as the exhibit was read by PW5 (the medical expert); the same was properly admitted and relied upon by the trial court. I hold it a position that, the exhibit is not fit to be expunged from the record. Absolutely, the appellant knew its content before and at the time of defence. Therefore, he was not prejudiced

howsoever. It is on such peg; I find the first ground of appeal to lack the necessary merit. I dismiss it.

The Court now turns to the second ground of appeal. The appellant's counsel contended that, strangely, the victim did not cry out for a help or from pain such that she was sleeping when PW1 returned in the room. More so, that she did not tell her mother what had happened to her until when the latter discovered the problem on the next day when bathing her. He strongly argued that it was unlikely for the victim not to tell her mother instead she kept it by herself only to testify before strangers in court.

Law settles it a principle that, the best evidence of rape comes from the victim. For instance, in ***Victory Mgenzi@ Mlowe v R***, Crim. Appeal No. 354 of 2019 (unreported); ***Vedastus Emmanuel @Nkwaya v R***, Crim. Appeal No. 519 of 2017 (unreported); and ***Selemani Makumba v R*** [2006] TLR 379, courts have been so express in recapitulating this principle. Further, it is also trite law that every witness is entitled to credence and must be believed unless there are grounds and cogent reasons for not believing him (***Goodluck Kyando v. R*** [2006] TLR 363). The appellant is relying

on his opinion than evidence to challenge the apt evidence of the prosecution to the contrary. The records indicate that the victim told the court what befell her from her stepfather – the appellant. The appellant is vehement that it was not possible for the victim to had waited that long. Evidence, in law, beats what people feel about it.

In the instant case, the victim promised to tell the truth. And she did. More so, the appellant was accorded an unfettered opportunity to cross examine the victim-girl. And he so did. A reasonable mind remains to be perplexed to learn that the appellant found it fit to put questions before the victim during cross examination; and now argues that she was incapable of speaking. Ironically too, the appellant relies on the testimony of the victim to discredit or establish disharmony between her evidence and that of her mother (PW1).

To me, the appellant is blowing it hot and cold. I, thus, do not agree with his counsel's assertion that the evidence of the victim girl is not credible. I respectfully, dismiss such argument. That is, the second ground of appeal is equally determined in the appellant's disfavour.

In conclusion, the appeal fails and is hereby dismissed. Consequently, the trial court's conviction and sentence are confirmed.

It is so ordered.

The right of appeal is also duly explained.

C.K.K. Morris

Judge

February 23rd, 2023