IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

RM. CRIMINAL APPEAL NO. 65 OF 2022

(Original Criminal Case No. 39/2021 in Resident Magistrate Court of Katavi at Mpanda)

KENEDI S/O KILONGOZI @ ZEGE ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

24/11/2022 & 22/02/2023

JUDGMENT

MWENEMPAZI, J:

The appellant herein named was charged in the trial Court for the offence of Rape Contrary to Section 130(1) (2) (e) and Section 131(1) of the Penal Code, Cap 16 R.E 2019. It was alleged by the prosecution that the appellant (accused in the trial Court) on the 2nd day of March, 2021 at Ikaka Hamlet within Tanganyika District in Katavi Region the accused person had sexual intercourse with the victim 'AA' a girl of 14 years old.

Upon hearing of the case the Court concluded that the accused (appellant herein) is guilty and convicted him of the offence of rape Contrary

to Section 130(1) (2) (e) and Section 131(1) of the Penal Code, Cap 16 R.E 2019. He was thus sentenced to serve a life imprisonment in jail.

The appellant is aggrieved and has appealed against conviction and sentence raising four grounds of appeal as follows; I quote as they are in the petition of appeal:

1. That the trial Court erred at law and fact by convicting the appellant on the case which was not proved beyond reasonable doubt.
2. That the trial Court erred in law and fact by convicting the appellant by not considering that the (prosecution witness) PW6 (doctor) he fail to explain before the Court that the penetration found to the victim's vagina was caused by rape or not.
3. That, the trial Court erred at law and fact by convicting and sentencing the appellant to serve a life imprisonment by wrong provision of law that Section 130(1) (2) (e) and Section 131(1) of the Penal Code, Cap 16 R.E 2019.
4. That the trial Court totally erred in law and fact by convicting and sentence the appellant without considering the defence from the appellant/accused.

He prays the appeal be allowed and the judgment and conviction be quashed and sentence be set aside and that he be released from jail.

At the hearing the appellant was unrepresented and the respondent was being served by Mr. John Kabengula learned State Attorney. Hearing was conducted by viva voice.

The appellant was brief. He submitted that he is praying that the Court considers the grounds of appeal raised and allow the appeal and release him from jail.

On his part, Mr. John Kabengula the Learned State Attorney submitted that the respondent does not support the appeal. The offence was proved beyond reasonable doubt, the victim of the case "AA" was under 14 years old hence the offence was a statutory rape. The age was proved and the law provide for the **parent, victim or the doctor may prove the age of the victim.**

In the trial Court, the evidence of the father (PW2) of the victim explain that the child was born on 15/12/2007 and a clinical card was tendered as exhibit PE1. He made reference to the case of **Juspini Daniel Sikazwe Vs. DDP,** Criminal Appeal No. 579 of 2019, wherein it was observed that

from decided cases the age of the victim could be proved by other means than the birth certificate, one of such means for proving age is through the witnesses' own oral evidence.

The Counsel submitted that another fact for proof is whether there was any penetration. The victim testified that while on her way to school, she met the appellant who called her, pulled her into his room and forcefully undressed her and penetrated into her vagina. That he led sexual intercourse with the victim. The appellant failed to cross examine the witness on the point. That justifies that it is true that the victim was raped.

PW3 testified that the victim was found inside the room which belong to the appellant. He prayed that the appeal be dismissed. The Counsel also submitted that in the judgment of the trial Court the appellant's defence was considered. He invited this Court to refer at page 8 of the judgment of the trial Court.

On the complaint that the doctor failed to prove that there was penetration, the Counsel argued that the evidence of the victim is sufficient evidence. When the victim testified, the appellant did not cross examine.

On sentence the Counsel for the Respondent submitted that at page 25 of the proceedings of the trial Court, it was shown that the appellant was the first offender, thus the sentence is stiff. He prayed that a sentence of 30 years be substituted thereof in lieu of life imprisonment.

I have read the record of the trial Court as well as the submissions made by the parties in the case. The evidence of PW1, the victim is very clear as what happened. On the 2/3/2021 at around 6:00 hours the victim was on her way to school. At the place where the accused has rented a room, he found the accused, who called her and then pulled her forcing the victim to enter inside his room; the accused pushed the victim to lie on the matress, undressed her and himself and had sexual intercourse with her. When he finished, he locked the girl in the room, took his bicycle and left for unknown place.

The prosecution witnesses PW2, the victim's father, PW3 Holo d/o Kobe, PW4 Chausiku d/o Mrisho confirm that they found the victim locked in the room rented by the accused.

According to the victim, she had blood coming out of her vagina after she had sexual intercourse. The event happened on the 2/3/2021. The

victim was taken to hospital on 4/3/2021 and was examined by PW6 Hassan s/o Said.

The said PW6 examined genital parts of the victim and found that her hymen was perforated. There was sperms and no bruises. There was also no any discharge from the genital parts. Though that may be a factor to down but considering other facts there is evidence that the accused raped the victim.

In rape cases, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence as provided for under section 130(4) (a) of the Penal Code, Cap 16 R.E 2019. In the case of **Juspini Daniel Sikazwe Vs. DPP,** Criminal Appeal No. 519 of 2019 [2021] TZCA 58 (26 February 2021) the Court of appeal held that:

> *"The victims age could be proved by other means than the birth certificate ...one of such means for proving the age is through the witnesses's own oral evidence".*

In this case the victim testified that she is fourteen years old. Her father PW2 tendered a clinic card as exhibit PE1. The same proved that she was born on 15/12/2007. Thus the evidence is very clear the victim is of

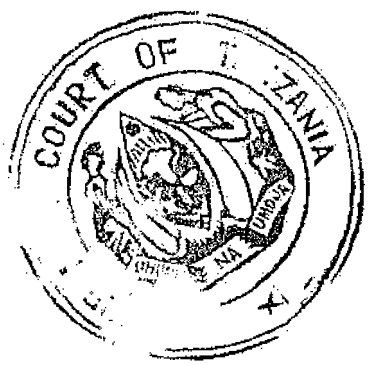
tender. The evidence by the victim was not controverted by cross examination. The accused failed shake the truth. In the referred case of **Juspini Daniel Sikazwe Vs. The Director of Public Prosecutions** (supra) it was also held that:

> *"It is a settled law that failure to cross examine a witness on an important matter implies acceptance of the truth of the witnesses's evidence in that respect".*

Since the record shows the accused (appellant) did not cross examine the witness, it means he accepted the truth. Thus the accused committed the offence, which is statutory rape as charged.

Under the circumstances and for the reasons shown above the appeal has no merit. It is thus dismissed. However, since he is first offender, the sentence prescribed is stiff. I substitute thirty (30) years imprisonment in lieu if life imprisonment.

It is ordered accordingly.



T.M. MWENEMPAZI

JUDGE

22/02/2023