IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 82 OF 2022

(C/f Criminal Case No. 98 of 2020 District Court of Kiteto at Kibaya)

ADAM DAGRAS ..... APPELLANT

VERSUS

THE DPP ..... RESPONDENT

JUDGMENT

5th December, 2022 & 20th March, 2023

TIGANGA, J.

This appeal emanates from the District Court of Kiteto at Kibaya (the trial court) where the appellant was arraigned for the offence of rape contrary to section 130 (1), (2) (e) and 131 (1) of the **Penal Code**, Cap 16 [R.E 2019]. According to the prosecution case, it was alleged that on 15th August, 2020 at Enguserodiani area within Kiteto District in Manyara Region, the appellant herein carnally knew the victim **EJ** (true identity hidden), a girl of fifteen years old, a student at Enguserodani Primary School.

According to the prosecution evidence at the trial court, the unfortunate ordeal happened when the victim, PW1 and her younger sister

were collecting firewood in the wilderness near their home. The appellant approached them and started making conversation that, he wanted to marry PW1. She replied that, she was still a student and was not interested, however, the appellant chased away PW1's younger sister while threatening to kill her. He then grabbed the victim, undressed her skin tight and underpants, he also undressed his shorts and raped her. He threatened to kill her had she raised alarm or told anyone. After he quenched his lust, he let go of the victim who was crying at the time. She carried the firewood, found his younger sister who was hiding nearby and went straight home where they notified their parents.

PW1's evidence was strongly supported with that of PW2-her young sister, who witnessed the whole act, the victim's father-PW3 and the victim's mother-PW4, who were the first to receive the information and with the help of local militia managed to arrest the appellant. Also, there was evidence of investigation Police Officer-PW5 who tendered appellant's cautioned statement, Exhibit PE1, where the appellant confessed to have raped the victim and that of a Clinical Officer, PW8 who medically examined PW1 and concluded that she was indeed penetrated. She also tendered PF3 which was admitted as Exhibit PE5.

In his defence, the appellant denied to have raped the victim. He claimed that, he was just arrested at his home on 15th August, 2020, brought to the police for questioning where he was beaten and forced to sign the cautioned statement. At the end of the trial, the court was satisfied beyond reasonable doubt that the prosecution had managed to prove the case against the appellant beyond reasonable doubt. It found the accused guilty, convicted and sentenced him to serve thirty years imprisonment.

Aggrieved by the decision, the appellant filed this appeal with initial four grounds and later additional five making them nine grounds of appeal as follows;

1. That, the court grossly erred in law and fact in holding that penetration was proved beyond reasonable doubt.
2. That, the court grossly erred in law and fact in convicting the appellant while there was poor identification.
3. That, the court grossly erred in law and fact in shifting the burden of proof to the appellant to prove his innocence instead of the republic to prove the case beyond reasonable doubt.
4. That, the trial court's findings in judgment are nullity for contravening the law.

5. That, PW2's evidence was recorded in contravention of **section 127 (2) of the Evidence Act** [Cap 6 R.E. 2019].
6. That, the court erred in law and fact in acting on a confession statement which was illegally procured.
7. That, the court erred in law and fact in relying on PW8's evidence who was not credible witness in tendering exhibit P5.
8. That, the court erred in law and fact in failing to consider that, the appellant was mistakenly identified to Mr. Mng'afu.
9. That, the court erred in law and fact in failing to note the variance between the charge sheet and the evidence adduced by witnesses.

During hearing, the appellant who appeared in person and unrepresented, prayed that the court adopt his nine grounds of appeal as they are and decide his fate. He did not submit further.

In reply, Ms. Akisa Mhando, learned Senior State Attorney for the respondent started by submitting on the 1st, 2nd, 3rd and 5th grounds jointly that, the prosecution was required to prove that the victim was penetrated and it was the appellant who was responsible. That, PW1 and her parents testified that she was 15 years old when the incident occurred. Also, she identified the appellant as her assailant who knew her carnally and against her wishes. Ms. Akisa cited the case of **Shabani Rulabisa vs The**

Republic, Criminal Case No. 88 of 2018, CAT at Shinyanga (unreported) where the Court of Appeal emphasized that, in sexual offence cases the important testimony is that of the victim herself. Learned state attorney asserted that, although PW1 did not promise to speak the truth, her evidence was credible as she properly identified the appellant as the incident took place during daylight and she reported the matter promptly. Also, her testimony was dully corroborated by the testimony of her young sister, PW2 who witnessed the whole act and that of medical expert, PW8, who medically examined her and concluded that she was penetrated.

On the 6th ground, Ms. Mhando submitted that, appellant's cautioned statement was taken within four hours from the time of arrest hence his complain had no legs. Regarding the 7th ground, Ms. Mhando submitted that, PW8 is a medical doctor who examined the victim, filled the PF3 and tendered it at the trial court as an exhibit. The same was admitted as Exhibit PE5 without any objection from the appellant and he did not cross examine the witness regarding the same. She cited the case of **Joseph Kanankira vs The Republic**, Criminal Appeal No. 240 of 2019, CAT at Arusha (unreported) where the Court of Appeal held that, failure to cross

examine a witness on material facts, the appellant is deemed to have accepted those facts.

On the 8th ground, Ms. Mhando argued that there was no any contradiction or mistake regarding appellant's identification while on the 9th ground regarding the variance between the charge sheet and the witness, Ms. Mbambo contended that there was no any variance since the charge sheet and the victim's evidence shows that the incident occurred on 15th August, 2020. Lastly on the 4th ground that, the judgment did not comply with the law, the learned Senior State Attorney submitted that, although the trial court did not consider the defence testimony, it gave its reasons thereto. Apart from that, she submitted that, the judgment complied with the law. She prayed that, the appeal be dismissed.

In his rejoinder, the applicant maintained that, he did not commit the offence alleged against him. He contended that, the responsible person was one Mng'afu and that he was only arrested because he was a stranger. He prayed that this court acquit him.

After going through both parties' submission and trial court's records, I now proceed to determine the grounds of appeal which will only answer

only issue as to whether the case against the appellant was proven to the required standard.

Starting with the 1st ground on whether penetration was proved beyond reasonable doubt. It is a trite principle that, in sexual offences the key element to be proven is the fact that there was penetration however slight. More so, the law is certain and the Court of Appeal decisions are in the same rhythm that in rape offences as the present one, the best evidence comes from the victim herself. In the case of **Jilala Justine vs The Republic**, Criminal Appeal No. 441 of 2017, CAT at Shinyanga (unreported) the Court observed that;

> *"... It is a trite legal principle that, in sexual offences the best evidence is from the victim while other prosecution witness may give corroborative evidence. See:* ***Selemani Makumba v. The Republic****, [2006] T.L.R. 379,* ***Galus Kitaya v. The Republic****, Criminal Appeal No. 196 of 2015 and* ***Godi Kasenegala v. The Republic****, Criminal Appeal No. 10 of 2008 (both unreported). However, the victim's evidence will be relied upon to convict if the same is found credible..."*

In the appeal at hand, PW1 narrated how the appellant penetrated her while threatening to kill her. Such ordeal was painfully witnessed by her

young sister PW2. More so, the testimony of PW8, medical expert corroborated the fact that the victim was penetrated. Guided by the above authorities, I am of the firm view that the victim was penetrated against her will and there was no contrary evidence to prove otherwise.

Regarding the issue of identification as pointed in the 2nd and 8th grounds of appeal, the evidence in record shows that, the victim and her younger sister told their parents some of the features that the appellant had including the cloths he was wearing which led to his arrest. According to them, they had never seen him before except the day of the incident and they managed to identify him on the following day at the village office wearing the same clothes he had the day before. According to PW3, the victim's father, after her daughters gave the description of what the appellant was wearing, he notified the village authority and they managed to arrest the appellant as a person who had visited from a nearby village. In the case of **Godlisten Kimaro & Another Vs. The Republic**, Criminal Appeal No. 363 of 2014 CAT at Dodoma (unreported) the Court of Appeal had this to say;

> *"It is now settled that when a court of law relies on visual identification one of the important aspects to be considered is*

to give enough description of a culprit in terms of body build, complexion, size, attire, or any other peculiar body features to make the next person that comes across such a culprit to repeat those descriptions at his first report to the police on the crime."

Considering the fact that the victim, PW1 and her sister, PW2 never knew the appellant before and although their evidence on record do not show that they described the appellant, the evidence of PW3 as can be reflected at page 12 of the proceedings, last paragraph, it was on that base, the neighbour managed to point out the appellant basing on the description. Also, the second para of the page show that PW2 went back to the village office after he had been given a tip that, the person described is the stranger living in the neighboring house. On that base therefore, I am of the trong view that, the victim managed to describe the suspect especially his outfit of the day which led to his arrest, and that, when arrested, he had the same outfit which PW1 and PW2 had described, therefore, there was no room for mistaken identity. These grounds have no merit and are disallowed.

As to the 3rd ground and 4th ground, appellant challenged the trial court's judgment for shifting to the burden to him to prove his innocence instead of the prosecution to prove the case beyond reasonable doubt hence

the judgment findings should be regarded a nullity. I went through the trial court's judgment and found nowhere that the appellant was asked to prove his innocence. On page 12 of the impugned judgment, after the court's analysis that penetration was proved and the victim identified the appellant as her assailant, it observed that, the accused failed to show why the victim would have incriminated him. However, this one lined statement alone cannot discredit the whole analysis and reasoning since appellant had a duty to discredit or shake the credibility of the victim's testimony but did not do so. These grounds also fail.

On 5th ground, the appellant claim that, the victim's evidence was taken in contravention of section 127 (2) of the Evidence Act. The section reads;

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence promise to tell the truth to the court and not to tell lies."*

However, section 127(4) of the same Act defines who is a child of tender years as follows;

> *"(4) For the purpose of subsection (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years"*

In the appeal at hand, the victim was fifteen years old when testifying hence the requirements as that of a child of tender age do not apply. It is on record that page 7 of the trial court's typed proceedings that;

> *"PW1 Name: EJ, Age: 15yrs, Tribe: Kaguru, Occ: Pupil at Engusererosidani Primary Primary, Rel: Cchristian, Res: Enguserodani. ... sworn and stated that:-"*

This indicates that, PW1 gave a sworn testimony after the trial magistrate was satisfied that she knew the meaning of an oath hence she was sworn before giving her evidence. It would have been different had PW1 gave an unsworn testimony, then the trial court would have been required to indicate that before reception of her evidence that she promised to tell the truth and not lies thus not put under oath. In my view, that was not necessary as the oath she gave sufficed. This ground is meritless and hence disallowed.

On the 6th ground that the cautioned statement was recorded contrary to the law, it is clear that the appellant was arrested on the same day the incident occurred i.e. 15th August, 2020 whereas the cautioned statement was recorded on 16th August, 2020 at 14:00hrs. it has to be noted that the appellant was arrested around 23:00hrs on 15th August, 2020 and was locked

at the village office where he slept till the following day when he was transferred to Dongo Police Station where they arrived at 10:00hrs. However, his caution statement was taken from 14:00 hours to 15:30 hours that being a total of four hours since the arrest this is after computing from 10:00hrs to 14:00hrs when the statement started to be recorded is four hours. Therefore, it complied with section 50 (1)(a) of **the Criminal Procedure Act**, R.E. 2019 which requires caution statement to be taken within four hours commencing from the time the accused person is put under restrain.

Even if I find that the same was recorded beyond four hours, which is not the case here, the remedy would have been to expunge the said cautioned statement, that would not fail the prosecution case. I hold so because as pointed out earlier, the key evidence in rape cases is that of the victim. Since it is undisputedly proved that, the victim was sexually assaulted, and that she managed to report the matter immediately, and she the description of the assailant which led to the appellant's arrest. All these are important assurance and enough evidence to prove that, the case against the appellant was proved to the required standard.

The 7th ground will not detain me much because the law regarding tendering of exhibits is settled that the same can be tendered by the maker, owner, possessor, custodian, addressee and the like. See **Republic vs. Charles Abel Gasilabo @ Charles Gasilabo,** Criminal Appeal No. 358 of 2019, CAT (unreported). In the appeal at hand, PW8, Josephina Bakuro, a clinical officer who examined the victim is the one who filled the PF3 hence was the maker of the same hence had a right to tender it. During its admission the appellant did not object on the same and after admission he did not cross examine on the same. In the case of **Nyerere Nyague Vs. The Republic**, Criminal Appeal No. 67 of 2010 CAT (unreported), Court of Appeal held *inter alia* that;

> *"a party who fails to cross examine the witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the court to disbelieve what the witness has said"*

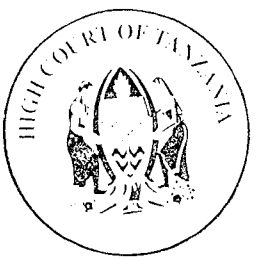
Subscribing to the above position, since the appellant did not bother to either object or cross examine on exhibit PE5, raising this claim at appeal stage remains a mere afterthought. This ground also fails.

Lastly on the 9th ground, the appellant claimed that there was variance between the charge sheet and the testimony. I made a thorough perusal of the record and found that the incident took place on 15th August, 2020 and the evidence given by all witnesses were in respect of the same date. There was no variance of the evidence as alleged. This ground also fails for the reasons given hereinbefore.

With the above analysis, I find the appeal to have no merit and proceed to dismiss it in its entirety. The appellant's conviction was deserving, thus, the trial court's decision is hereby upheld.

It is so ordered.

DATED and delivered at **ARUSHA** this 20th day of March, 2023



J.C. TIGANGA

JUDGE