IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 39 OF 2022

(Originating from Criminal Case No. 158 of 2021 of Moshi District Court at Moshi)

HARISON HELIAMIN KAALE @ MANAIA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

23/03/2023 & 20/04/2023

SIMFUKWE, J.

The appellant, Harison s/o Heliamin Kaale @ Manaia was charged before the District Court of Moshi (the trial court) with the offence of rape contrary to **section 130(1)(2)(e) and 131 of the Penal Code**, **Cap. 16 R.E. 2019**. He was convicted and sentenced to 30 (thirty) years imprisonment.

It was the prosecution's case that on 15th April, 2021 at Mwika Kirueni area within Moshi district in Kilimanjaro Region, that the appellant did have carnal knowledge of one MM (identity withheld), the girl of 15 years old. The appellant pleaded not guilty to the charge.

The prosecution summoned 5 (five) witnesses to substantiate its case. It was testified by prosecution witnesses that on 15th April 2021 during morning

hours, while PW1 was on her way to school, she heard someone coming on her back (whom she later identified to be the appellant herein) and approached her. She greeted him but the appellant did not respond instead, he choked her on the neck, lifted her and took her to the farms. That the appellant pulled up the victim's skirt, undressed her skintight and underwear. He unzipped his trouser and penetrated the victim by inserting his penis into her vagina while choking her neck and covered her mouth so that she could not shout. After he had quenched his lust, the appellant escaped and left the victim down bleeding on the mouth and vagina. That is when the victim got an opportunity to cry for help. PW3 who was also on her way to school heard the cry for help from the victim. She went to the scene and found the victim crying and her belongings scattered. Upon inquiry as to why she was crying, the victim told them that she was raped. PW2 was among the witnesses who heard the alarm and proceeded to the crime scene. PW2 told the trial court that she was the one who helped the victim and took her to her parents. The victim's mother who testified as PW4 said that she took the victim to the police station. At the Police station, they were issued with a PF3. The victim was attended by the doctor who testified as PW5. The PF3 was admitted into evidence as exhibit P1, through PW5.

In his defence, the appellant under oath denied to had committed the alleged offence. He told the trial court that the case was fabricated against him as he had a misunderstanding with the victim's father.

The trial court after hearing the evidence from the prosecution and the defence side was satisfied that the prosecution case was proved beyond

reasonable doubts. Thus, the appellant was convicted and sentenced to 30 (thirty) years imprisonment.

Aggrieved with the decision of the trial court, the appellant preferred this appeal advancing three grounds of appeal as follows:

1. *That, the Learned Trial Magistrate erred both in fact and in law when ruled that the prosecution proved the offence of Rape against the Appellant beyond reasonable doubt.*
2. *That, the Learned Trial Magistrate erred both in fact and in law when ruled out that the **PF3** produced during the Trial was suffice enough (sic) to convict the Appellant.*
3. *That, the Learned Trial Magistrate erred both in fact and in law when ruled that the age of the victim of Rape was proved before the Trial Court.*

Hearing of this appeal was conducted through filing written submissions. Mr. Gideon Mushi learned counsel argued the appeal for the appellant, while Ms. Grace Kabu learned State Attorney appeared and contested the appeal on behalf of the respondent Republic.

Before submitting on the grounds of appeal, Mr. Mushi prayed for their grounds of appeal to be adopted and decided upon.

On the first ground of appeal, the learned counsel submitted that the offence of rape contrary to **section 130(1)(2) (e)** and **section 131(1) of the Penal Code** (supra) was not proved against the appellant beyond reasonable doubts. He elaborated that the duty of the court is to receive evidence from the parties and their respective witnesses, assess credibility

of each witness and make the findings on the contested facts in issue. To support his argument, he cited the case of **Stanslaus R. Kasusura and A.G vs Phares Kabuye [1983] TLR 334**.

Further to that, the learned counsel noted that, in case the lower court fails to properly analyze, assess and evaluate the evidence brought before it, then the higher court will jump into the shoes of the lower court to re-assess, re-evaluate the said evidence and come up with its own findings. He cited the case of **Deemay Daati and 2 Others vs Republic [2005] TLR 132** to back up his argument.

Having stated the above positions of the law, Mr. Mushi blamed the trial magistrate for failure to assess, analyze and evaluate the evidence brought before her hence, ruled against the appellant.

Reverting to the issue as to whether the prosecution proved its case beyond reasonable doubts, Mr. Mushi submitted that it was the duty of prosecution under **section 110 of Tanzania Evidence Act, Cap 6 R.E 2019** to prove beyond reasonable doubts that the appellant had committed the offence of rape. He cited the case of **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda vs Republic [2006] TLR 395** to buttress his point. He added that in case of doubts, the accused should benefit from such doubt.

Mr. Mushi continued to state that it is trite principle of law that in measuring the weight of evidence, it is not the number of witnesses that counts, but the quality of evidence as stated in the cases of **Yohanis Msigwa vs R [1990] TLR 148** and **Juma Kanenyera vs R [1992] TLR 100.** He contended that each case has to be determined based on its own merit.

It was the opinion of Mr. Mushi that basing on the sections under which the Appellant was charged, the prosecution had failed to prove as to whether the offence of rape was actually committed against the victim. That, before the trial court the prosecution assembled five witnesses who were Magreth Erick Mtei (PW1), Tecla Ferdinand Shirima (PW2) Rachel Shayo (PW3), Joyce Erick Mtei (PW4) and Dr. Yohana Mahundo (PW5), while the appellant had one witness. However, the prosecution failed to prove the basic element of rape which is penetration. That, PW5 Dr. Yohana Mahundo who claimed to had conducted physical examination to the victim, testified that on the material date he attended the victim and found bruises on the victim's neck and blood on her vagina. That, there was no evidence to prove that the alleged blood found on the victim's vaginal part was associated with the offence of rape, menstrual period or any other reason. It was PW5's evidence that since he had no High Vaginal Swab (HVS) he advised the victim's parents to go to Mawenzi or any other hospital for the purpose of conducting the said HVS to ascertain as to whether the victim was actually raped or not, but the same was not done. To substantiate what he said, the learned counsel referred to Part IV at page 2 of Exhibit P1 on paragraph B(iii) where it is written:

> *"Details of specimen of smears collected including pubic hairs and blood:*
>
> *Blood for PITC-Negative*
>
> *HVS-Not done due to luck of HVS Swab."*

Elaborating further the evidence of PW5, the appellant's counsel pointed out that at page 25 of the proceedings while being cross examined, PW5 admitted that he did not conduct HVS but he conducted physical examination. Also, while being re-examined, PW5 explained that the purpose of conducting HVS in cases of rape is to verify if there are sperms in the victim's vagina.

Basing on his observations in respect of PW5's evidence, Mr. Mushi was of the view that since the HVS was not conducted to the victim to ensure that there were sperms in her vagina, then the essential element of the offence of rape was not proved. That, the evidence that the victim was found with bruises on her neck and blood on her vagina is not conclusive proof that the victim was raped. That, even in Exhibit P1 nowhere it is indicated that the victim was actually raped.

Expanding his argument, Mr. Mushi said that in sexual offences including rape, the best evidence comes from the victim but such evidence should be corroborated with other evidence especially medical report (PF3). He explained that the PF3 which was tendered before the trial court as exhibit P1 does not show the essential element of the offence of rape which is penetration. He supported his contention with the case of **Seleman Makumba vs R [2006] TLR 379** which held that:

> *"True evidence of rape has to come from the victim, if an adult, that there is penetration and no consent, and in case of any other woman, where consent is irrelevant, there is penetration."*

The learned counsel also cited the provision of **section 130(4) of the Penal Code** (supra) to cement the point of penetration. He emphasized that in the instant matter, proof of penetration was never shown; what was seen was only bruises on the PW1's neck and blood on her vagina. That, neither a PF3 nor PW5 had managed to prove that there was penetration. Reference was made to the case of **Essau Samwel vs R, Criminal Appeal No. 227/2021** which held that:

> *"For the offence of rape to be proved, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed.*

It was the opinion of the appellant's counsel that since the essential ingredient of the offence of rape was not proved, the learned trial magistrate erroneously convicted the appellant. He implored the court to quash the judgment and sentence and acquit the appellant.

Submitting on the allegations that the age of the victim was not proved, Mr. Mushi opined that since the appellant was charged with statutory rape under **section 130(1)(2) (e) of the Penal Code** (supra) then, the most important factor to prove was the age of the victim. He maintained that this court being the first appellate court should jump into the shoes of the trial court re-assess, re-evaluate the evidence brought before it and come up with its own findings according to the case of **Deemay Daati and 2 Others** (supra).

Mr. Mushi went on opining that, since the age of the victim was not proved it renders the whole proceedings, judgment and sentence passed a nullity

and the remedy is for the court to quash and set it aside. He cemented his argument with the case of **Erick Ashery vs R, Criminal Appeal No.32/2020** (HC).

Mr. Mushi insisted that there was a need of proving the age of the victim. He said that while testifying, the victim just stated that she was 15 years of age without any proof of either birth certificate or any affidavit from her parent signifying that she was aged 15. Thus, the omission is incurable and vitiates the conviction and sentence as stated in the case of **Erick Ashery** (supra).

To buttress more the requirement of proving the age of the victim, the learned counsel referred to the case of **George Claud Kasanda vs DPP, Criminal Appeal No. 376 of 2017** in which the Court of Appeal held that:

> *"The prosecution is duty bound to establish, among other ingredients, that the victim is under the age of eighteen to secure a conviction."*

Submitting on the issue whether key witnesses were called to adduce evidence before the trial court, it was the argument of the learned counsel that the victim at page 11 of the typed proceedings testified that around 06:00 am when the incident occurred, there were neighbours around the scene of crime. He opined that they could have witnessed the incidence. However, the victim said no one witnessed the same. Worse enough, PW1 confirmed that Kiruweni Primary School is very close to Kiruweni Dispensary. That, the dispensary had a watchman who could have helped her during the incidence. Also, the man by the name Shukuru was named by the victim and

PW2 at page 12 of the typed proceedings that he was found at the scene of crime soon after the incidence.

Mr. Mushi was of considered opinion that, although in sexual offences the best evidence comes from the victim, the said Shukuru could have been very important witness on the respondent side but he was not called to testify what happened and no reason was advanced. Thus, failure to call key witnesses is very fatal and vitiates the conviction. To support his argument, he cited the case of **Mujuni Joseph Kataraiya vs Samwel Mtambala Luhangisa and Another [1996] TLR 53** which held that:

> *"Failure to bring a key witness before the court to testify, was an error and it weakens evidence on part of the plaintiff."*

It was stressed that failure by the prosecution to call the above witnesses raised doubts on their part as no reason was given to support their absence. That, Shukuru being a person who first appeared at the scene of crime was very important and key witness to build the respondent's case. He cited the case of **Yohanis Msigwa vs R [1990] TLR 148** and the case of **Hassan Juma Kanenyera vs R [1992] TLR 100** which held that:

> *"There is no specific number required to prove the case, what is required is the quality of evidence and the credibility of each witness."*

In his final analysis, it was the argument of Mr. Mushi that since the respondent failed to prove the offence of rape against the appellant beyond

reasonable doubts as their evidence had doubts, then the appellant should have been given benefit of doubt.

In conclusion, Mr. Mushi prayed that this appeal should be allowed and the proceedings, judgment and sentence be quashed and set aside and the appellant be acquitted unless arraigned with any other offence.

Responding to the above submission, Ms. Grace Kabu started her submission by expressing the position that she was not supporting the appeal.

Responding to the first ground that the prosecution did not prove the offence of rape beyond reasonable doubts, Ms. Grace stated that as per the case of **Seleman Makumba vs Republic,** (supra) at page 379 it stated that:

> *"True evidence of rape has to come from the victim, if an adult that there was penetration and no consent and in case of any other woman where consent is irrelevant, that there was penetration*

Basing on the above authority, it was Ms. Grace's argument that at page 9 of the trial court's typed proceedings, the victim testified that the appellant took out his male organ and inserted the same into her vagina. According to Ms. Grace that was penetration. She opined that since the victim was a girl of 15 years and she had not consented to the act (though consent was irrelevant), that was rape. The learned State Attorney also articulated that PW1's evidence was supported with the evidence of PW5 a doctor who examined the victim where at page 24 of the proceedings he testified that:

"I noted that she had blood in her vagina, I further noticed that she had bruises on her labia minora and labia majora and her hymen was not intact. As per my experience, it was obvious that the girl had been inserted with a blunt object few hours ago."

Ms. Grace went on submitting that **section 130(4) of the Penal Code** (supra) provides that:

"For the purpose of proving the offence of rape penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."

She justified that, in the case at hand penetration was proved by the evidence of PW1 and PW5 notwithstanding that HVS test was not done. That, since PW5 at page 26 testified that the aim of HVS is to verify if there are sperms in the victim's vagina, then the test would not have proved penetration.

Also, it was asserted that the victim mentioned the appellant to PW2 earlier after the act was done as per page 12 and to PW4 as per page 17 and the trial court believed that she was a credible witness. That, this ground has no merit since the records show that the prosecution proved the offence of rape against the appellant beyond reasonable doubts.

Responding to the allegation in respect of the PF3, Ms. Grace said that the PF3 was supported by oral evidence of the doctor (PW5) and the said PF3 was properly admitted as an exhibit and it was read out loud after being admitted. That, the content of the PF3 proves that PW1 received medical

examination and treatment. Also, Part IV of the exhibit as explained by PW5 proves that there was penetration into the victim's vagina. Thus, its content was sufficient to convict the appellant. However, the learned State Attorney contended that the trial magistrate did not rely on the contents of exhibit P1 alone to convict the appellant, but together with the evidence of PW1, PW2, PW3, PW4 and PW5.

Reacting to the allegations that the age of the victim was not proved, Ms. Grace submitted that the age of the victim was proved by the evidence of her mother (PW4) when she testified that the victim was aged 15 years as seen at page 16 of the proceedings. To strengthen the point, the learned State Attorney referred the court to the case **of Wambura Kiginga vs Republic, Criminal Appeal No. 301 of 2018** (CAT) at page 20 where it was held that:

> *"Legally, a parent and a guardian are competent witnesses to give evidence on age of the child, so we treat the evidence of the two witnesses as lawful because one is a parent and another, a guardian."*

On the argument that the key witnesses were not called to adduce evidence before the trial court, Ms. Grace replied that this argument was not raised by the appellant in his petition of the appeal thus this court cannot decide on the ground which is not neither point of law and was not raised as a ground of appeal.

In her conclusion, the learned State Attorney submitted that the grounds of appeal raised by the appellant have no merit. She prayed the court to uphold the conviction and sentence imposed against the appellant.

Having gone through the proceedings of the trial court, the grounds of appeal and the parties' expounded submissions, my task is to determine all the raised grounds. However, before determining these grounds, I wish to start with the obvious. As rightly submitted by Mr. Mushi, this being the first appellate court, its task is to reconsider and re-evaluate the entire evidence and if warranted, draw its own conclusions and arrive at its own decision. This position has been underscored in numerous decisions of this court and the Court of Appeal.

Also, I wish to make it clear that in criminal cases, it is an established principle of law that the prosecution has the duty to prove the case against the accused beyond reasonable doubts. In case of any doubt, such doubt should benefit the accused. See the case of **Jonas Nkize V R. [1992] TLR 213**.

Having established the positions of the law, I now turn to the grounds of appeal.

Under the first ground of appeal, it was the appellant's lamentation that the prosecution did not prove the offence of rape beyond reasonable doubts since the key element of penetration was not proved. That, the doctor conducted physical examination only and found bruises on the victim's neck and blood in her vagina. He said that the blood in the vagina was not proved if it was associated with the offence of rape or otherwise.

On part of the respondent, Ms. Grace was of the view that in sexual offences, true evidence comes from the victim. Thus, the fact that the victim said that the appellant's male organ was inserted into her vagina then, that was penetration. Also, Ms. Grace stated that the victim's evidence was supported with the evidence of PW5 as seen at page 25 of the typed proceedings.

I agree with both learned counsels on the argument that in sexual offences the best evidence comes from the victim. Again, I concur with their contention that in rape cases penetration must be proved. I am grateful and appreciate the authorities cited by the appellant's advocate to support the position that penetration must be proved in rape cases.

Much as I agree with them, with due respect to Mr. Mushi for the appellant, **section 130(4) of the Penal Code**, provides that:

> *"130 (4) For the purposes of proving the offence of rape-*
>
> *(a)* ***penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence****;" Emphasis* added.

The above provision directs that even slight penetration suffices to prove sexual intercourse. Therefore, the argument by Mr. Mushi that the doctor did not conduct High Vaginal Swab to see if there were sperms, is misplaced. In the instant matter, the victim's evidence was very clear that the appellant inserted his penis in her vagina and as a result she bled. Her evidence was supported by the evidence of the doctor (PW5) who at page 24 of the typed proceedings testified that:

"I thereafter examined her private parts. I noticed that she had blood in her vagina. I further noticed that she had bruises on her labia minora and labia majora and her hymen was not intact. As per my experience, it was obvious that the girl had been inserted with a blunt object few hours ago."

As per the evidence above, the contention by Mr. Mushi that there was no evidence to corroborate the victim's evidence on the issue of penetration and that the blood from the victim's vagina was not proved if it was associated with the rape is misplaced. I am of considered opinion that basing on the evidence of the victim and that of the doctor, penetration was proved. I thus rest the first ground as such.

On the allegation that the doctor did not conduct High Vaginal Swab; I also find that the same has no legal basis since such examination is done to test vaginal discharge like sperms as elaborated by PW5 at page 26 during re-examination. On that juncture, HVS is not the only way to prove rape as suggested by Mr. Mushi.

On the 2nd ground of appeal, the learned counsel for the appellant was of the view that the PF3 which was admitted does not show penetration. The learned State Attorney opined that the content of the PF3 prove that there was penetration. She added that, the trial court did not rely on the contents of the PF3 only to convict the appellant, the court relied on the evidence of PW1, PW2, PW3, PW4 and PW5.

I have answered the issue of penetration in detail under the first ground of appeal that, penetration was proved through the evidence of the victim

herself and PW5 (the doctor). Also, under Part IV B (i) of the PF3 (Exhibit P1) the same was proved.

This court has also taken into account the fact that the said PF3 which the learned counsel for the appellant is challenging at this stage was admitted without objection from him. Therefore, this court contemplate that the same advocate cannot challenge that issue at this stage. See the case of **Abas Kondo Gede vs Republic (Criminal Appeal No. 472 of 2017) [2020] TZCA 391.**

Moreover, even if the said exhibit did not prove penetration as alleged by Mr. Mushi, still the offence of rape can be proved even in absence of medical report as per the case of **Salu Sosoma V R, Criminal Appeal No.4 of 2006** (Unreported) in which the Court of Appeal stated that:

> *"...likewise, it has been held by this court that lack of medical evidence does not necessarily in every case have to mean that rape is not established where all other evidence points to the fact that it was committed."*

In this matter, even if it is presumed that there is no PF3 still other evidence points to the fact that rape was committed by the appellant as the appellant is not challenging the credibility of witnesses particularly the victim.

Concerning the allegation that the age of the victim was not proved; it was the argument of the learned counsel for the appellant that there was no evidence to prove that the victim was 15 years old. He tried to support his argument by the cases of **George Claud Kasanda** (supra) and **Erick**

Ashery (supra). On other hand, Ms. Grace was of the view that the age of the victim was proved by her mother who testified as PW4.

At page 6 of the judgment, the learned trial magistrate made a finding that the age of the victim was proved through the victim herself and her mother (PW4).

I agree with the learned trial magistrate. The law is very clear on how to prove the age of the victim. In the case of **Shani Chamwela Suleiman vs Republic (Criminal Appeal 481 of 2021) [2022] TZCA 592**, the Court of Appeal at page 7 had this to say on how to prove the age of the victim:

> *"We wish to restate the settled position of the law as it was done by the first appellate Judge that, the age of the victim in a court of law can be proved by a parent, victim (as the case herein), relative, medical practitioner or, where available, by production of Birth Certificate*

In the present case, I have thoroughly gone through the proceedings and found that at page 9 the victim (PW1) mentioned that she was 15 years old. At page 16 her mother also testified that her child was 15 years old. Therefore, the age of the victim was proved by the prosecution beyond reasonable doubts. Thus, this complaint fails and I dismiss it.

On the grievance that the prosecution failed to call material witnesses to wit: one Shukuru and the watchman of Kiruweni Dispensary; as rightly submitted by the learned State Attorney, this is a new ground of appeal which I am barred from entertaining it. It is trite law that unless the new ground is based

on point of law, the court should not entertain it. In the case of **Julius Josephat v. Republic (Criminal Appeal No. 3 of 2017) [2020] TZCA 1729** [TANZLII] at page 10 it was held that:

> *"...Those three grounds are new. As often stated, where such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction."*

From the foregoing analysis, I am satisfied that the prosecution case was proved beyond reasonable doubts. I therefore find the appeal has no merit. I dismiss it in its entirety. Conviction and sentence of the trial court is hereby upheld.

It is so ordered.

Dated and delivered at Moshi this 20th day of April, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

20/04/2023