

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

CRIMINAL APPEAL NO. 53 OF 2022

(Originating from Criminal Case No. 147 of 2021 of Magu District Court.)

PASCHAL JOHN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

28th April & 2nd May 2023

Kilekamajenga, J.

The appellant was arraigned before Magu District Court for the offense of rape contrary to **section 130(1)(2)(e) and 131(1) of the Penal Code, Cap. 16 RE 2019**. Later, the charge was substituted and he was charged with the offence of grave sexual offence contrary to **section 138 C (1) (a) and (2)(b) of the Penal Code Cap 16 R:E 2019**. According to the charge available in the court file, it was alleged that, on 24th October 2021 at or about 16:00 hours at Nyigogo Street within Magu District in Mwanza Region, the appellant touched the genital parts of a girl aged four (4) years using his penis for sexual gratification.

During the trial, the prosecution paraded six witnesses. PW1 (the victim) testified that, on 24/10/2021 at about 16:00 hours she was playing at the back of the house. At that time, her mother had gone to the *shamba* leaving her with Mama



Dorothea. The appellant, who was well known to her, came and gave a piece of dried cassava (*udaga*). The appellant later instructed the victim to follow him towards his grandfather's house. While in the house, the appellant took the victim into one of the rooms and lay on her. The victim further testified that, the appellant undressed her and unbuttoned his trouser. The appellant took his penis (*dudu*) and touched her private part with it. She narrated further that, she felt pain and started crying while the appellant pleaded her not to cry. The appellant finally saw the appellant's slippery fluid coming from the penis and her dress became wet. The victim insisted that, she felt pain as she tried to walk back home. Immediately, Mama Dorotea appeared and the appellant run away. Thereafter, the victim narrated the whole incident to Mama Dorotea.

PW2 (Dorotea Paul) testified that, on 24/10/2021, the victim was left under her watch by her mother who is her neighbour. The victim's mother went to Simiyu. At around, 15:30 hours, PW2 bathed the victim and dressed her up. PW2 also went to take a shower leaving behind the victim with another child called Rose. While in the bathroom, PW2 was told by Rose about the sudden disappearance of the victim. PW2 instructed Rose to look for the victim. However, Rose could not find the victim. PW2 dressed up and quickly went outside looking for the victim. PW2 finally saw the victim together with the appellant coming from the appellant's

grandfather's house. But, the victim was unable to walk and the appellant immediately ran away. The victim narrated the whole story to PW2. PW2 left the victim at appellant's house and went to report the matter to the ten-cell leader. She could not find the ten-cell leader but his wife (Mama Getruda). PW2 together with Mama Getruda went back and undressed the victim but they found out that the victim had no underpant at that time. They also saw sperms on victim's thighs and vagina. Later, PW2 went to look for the appellant and found him at Lamboni area. She took him to the crime scene though the appellant consistently denied to have sexually abused the victim. The appellant was arrested.

PW3 (Imelda Ezekiel) who was the victim's mother confirmed that the victim was four years old at that time because she was born on 09th June 2017. She further testified that, on 24/10/2021, she travelled to Simiyu leaving the victim under the care of PW2. She was later informed by PW2 on what befell her daughter. When she came back, PW3 also saw sperms on the victim's vagina. PW3 further confirmed that the appellant was her neighbour and she knew him very well.

PW4 (Getruda Nakuzelwa) testified that on 24/10/2021, PW2 went to her home asking for her husband who is a Ten-Cell Leader. PW2 told her what happened to the victim. She was screaming for help and several people gathered at the scene.

She accompanied PW2 to the scene and undressed the victim. She witnessed the victim without any underwear and that, the victim's dress was wet. The victim told them about what the appellant had done to her. However, the appellant denied the allegation and he was arrested by the militia man and taken to Magu Police station.

PW5 (James Chagula) who was a medical doctor from Magu Government Hospital testified that on 24/10/2021 at 20:00 hours, the victim while accompanied by a woman arrived at his office. He examined the victim and found dried sperms on the victim's thighs and outer part of the vagina. However, the victim's hymen was intact. PW5 filled-in the PF3 form which was tendered and admitted in court as Exhibit P1.

PW6 (H. 5494 D/C Robert) investigated the case after the appellant was arrested. Among other things, he interrogated the appellant who admitted to lured the victim to his grandfather's house. He further admitted to have undressed the victim and applied his penis on the victim's vagina until ejaculation. PW6 tendered the appellant's cautioned statement which was admitted in court as exhibit P2.

On his defence, the appellant had no other witness than his own testimony. He informed the court that, he lived with his grandparents at Nyigogo Street within Magu town. However, he consistently denied committing the offence charged by alleging that he was not at home on 24/10/2021. He further denied to have known the victim before the incident. He confirmed that PW2 was his neighbour for more than ten years. On 24th October 2021, he was arrested and taken to Magu Police Station.

After the conclusion of the trial, the appellant was found guilty of the offence charged. He was sentenced to serve twenty years in prison and ordered to pay a compensation of Tshs. 500,000/= to the victim. Being aggrieved with the decision of the trial court, the appellant has advanced eight grounds as follows:

- 1. THAT the trial court erred both in law and facts to convict the appellant based on fabrication story from PW1 that she was unable to walk because of the pain she felt which caused by the appellant for touching her private part with his penis. No pain can be caused with the touch of penis on a private part unless the penis has penetrated into the vagina by force.*
- 2. THAT PW5 the doctor who was important witness to prove the matter beyond reasonable doubt, he failed to tell the court how he did examination to the victim and how he found out those dry fluid was sperms (male sperm) cause if the fluid which come*

from the nose got dry, they look totally like dry sperms. So, the doctor failed to explain he only said that he saw dry sperms, this leave a doubt in his evidence.

- 3. THAT no any effort imposed to search the underpants at the incident to establish the strong evidence alleged by witness.*
- 4. THAT there should be sufficient evidence to prove the fact the act of victim to fail walking, this showing the penetration then was this rape or sexual abuse? Whereby still contradicting and showing fabrication.*
- 5. THAT the PW3 the mother of the victim failed to tender the birth certification of the victim to prove age instead the mention the date this is not enough to prove the age of the victim.*
- 6. THAT neither of the complainant statement tendered to avail the appellant to prepare the hearing the error which led to fabrication of testimony as the court and the appellant had no opportunity to compare the first felony report and the testimony, hence unfairly tried albeit them be mentioned.*
- 7. THAT the trial court decision falls short of standard legal judgment as it partisan unbalanced without analysis evaluation and consideration of the appellant defence*
- 8. THAT the trial court erred in law and in facts by wrongly convicting the appellant.*

During the hearing of the appeal, the appellant appeared in person whereas the respondent was represented by the learned Principal State Attorney, Ms. Revina Tibalengwa. As the appellant had no legal representation, he prayed to the court

for the respondent to commence the submission. In her submission, Ms. Tibilengwa started by supporting conviction and sentence of the trial court and gave a summary of evidence adduced during the trial. Ms. Tibilengwa went on submitting on the grounds of appeal as advanced by the appellant. On the first ground, the learned State Attorney submitted that, the appellant advanced a ground that, PW1 did not testify whether she was actually raped. Also, there was no evidence to suggest whether there was penetration. Furthermore, the appellant argued that, PW5 testified that the victim's hymen was intact. The counsel further argued that, exhibit P1 was admitted without objection; therefore the argument advanced by the appellant has no merit.

On the second ground, the learned State Attorney argued that, the ground lacks merit because PW5 testified what he observed and not otherwise. According to the evidence adduced during the trial, PW5 found dry sperms on the outer parts of the victim's vagina. On the third ground, the counsel was of the opinion that, the tendering of underpants could not have proved anything in connection with the offense. On fourth ground, the learned State Attorney insisted that, the appellant touched the victim's vagina using his penis hence this ground lacks merit as well. On the fifth ground, it was the counsel's submission that the age of the victim was proved by her mother (PW3). On the sixth ground, the counsel averred

that, there is no evidence to suggest whether the appellant ever requested the victim's statement. Therefore, the appellant's argument that he was not availed with the victim's statement has no merit. On the seventh, the counsel argued that, the appellant's evidence was considered and did not shake the prosecution's case. On the eighth ground, the counsel insisted that the prosecution proved the case against the appellant beyond reasonable doubt. The learned State Attorney finally prayed for the dismissal of the appeal and upholding of the trial court's decision.

Responding to the counsel's submission, the appellant had a brief submission; he argued that, the case was framed against him. He denied knowing the victim and her mother. The appellant prayed the court to set him free because he did not commit the offense; he only confessed before the police because he was promised to be released.

When re-joining, Ms. Tibalengwa insisted that, the victim's mother is the appellant's neighbour.

Having considered the submission from the appellant and the learned State Attorney, I now find it apposite to address the grounds of appeal as advanced by the appellant. The major issue is whether the grounds have merit. In addressing

this issue, this court is not bound to follow the trial court's findings; the court is at liberty to re-evaluate the evidence adduced during the trial court and make its findings based on the evidence and facts. (See the case of **Christina Damiano v. Republic**, Criminal Appeal No. 178 of 2012, **Abdallah Athumani @ Dulla v. Republic**, Criminal Appeal No. 438 of 2018, CAT at Bukoba (unreported).

Moving on to the grounds of appeal, the first ground faults the trial courts verdict on the reason that it based on fabricated story. PW1 claimed that she was unable to walk while there was no penetration. The respondent's counsel opposed the appellant's argument by arguing that PW1 never testified that she was raped and even the PW5's shows that the hymen was intact. From the trial court's record, PW1 testimony was clear and consistent on how the appellant rubbed his penis on her vagina until he ejaculated. The victim immediately told the same story to PW2. The record further shows that, the appellant took the victim to the house, undressed her cloth, took his penis and used it to touch the victim's private part. The same testimony was given by PW2 who was the first person to see the victim after the incident. In my view, the victim's story was coherent and matches with the testimony of PW2. The fact that there was no penetration as testified by PW1 and later confirmed by PW5 (See also Exhibit P1), does not necessary mean that the victim did not feel pain. PW1 clearly told the court that, she felt pain when the

appellant touched her private part using his penis. Notably, the victim was just four years and it is therefore probable that she sustained injury, felt pain and failed to walk. The victim's testimony on this fact was corroborated by PW2. On this point, I take a stance taken by the Honourable Court of Appeal in the case of **Abdallah Athumani @ Dulla** (*supra*), the Court held that:

"As per the decision of Sokoine Range (supra) the assessment of credibility of witness in so far as demeanor is concerned is the monopoly of the trial court. However as the first appellate court, we can also look at the consistency of the witness in his testimony and make our own findings. In the instant matter, after having closely followed the testimony of PW3, we have come to the same conclusion reached by the trial court that he was credible and reliable witness. His evidence was free of contradictions and straight forward, therefore he was a credible witness."

In this case, at page ten (10) of the judgment, the trial court evaluated the testimony of PW1 and assessed the victim and finally found her to be a credible witness. The victim recounted on what the appellant did to her. The cross examination did not shake her credence. Over all, she named the appellant at the earliest possible opportunity. Based on this clear evidence, I find no merit in the first ground.

On the second ground, the appellants assailed the trial court's findings by believing the testimony of PW5 which showed that, the dried fluid found on the victim's thighs was sperm. Ms. Tibalengwa on the other hand argued that, the testimony of PW5 was based on observation after examining the victim. I entirely subscribe to the appellant's argument as PW5 testimony did not show how he arrived at the conclusion. The fluid might have been any other substance. However, the PW5 conclusion was determined by the victim's testimony; that the appellant rubbed his penis on the victim's vagina until ejaculation. On that line of argument, the testimony of PW5 simply supported what befell the victim on that day. Nonetheless, even in absence of the testimony of the Medical Doctor, the testimony of the victim coupled with that of PW2, there is no doubt, the appellant committed the offense. After the arrest, the appellant further confessed before the police. The victim, PW2 and the police would have doctored a case against the appellant for no good cause.

On the 3rd ground, the appellant queried the prosecution for failing to tender the victim's underpants during the trial. Ms Tibalengwa for the respondent was of the opinion that the underpants could not have brought any substantial information for the offense. I agree with the submission from the learned State Attorney that, the presence of the underpants could not have proved that the appellant

committed the offense. I have already stated how the victim narrated the whole event to the court and also to PW2. The clear evidence of the victim, PW2 and PW5 cannot, in my view be jettisoned on the mere reason that the victim's underpants was not tendered as an exhibit.

On the fourth ground, as argued by the learned State Attorney, it is the repetition of the third ground which I have already addressed. On the fifth ground, the appellant argued that the age of victim was not proved as PW3 failed to tender the victim's birth certificate to prove the age. Ms Tibilengwa argued that the age of victim was proved by her parent (PW3). I am aware, in sexual offences as this, proof of the victim's age is vital. In the case at hand, it is apparent that, there was no birth certificate tendered to prove the age of victim. There is plethora of cases on proof of the victim's age in cases of this nature. For instance, in the case of **Issa Reji Mafita vs R**, Criminal Appeal No. 337 "B" of 2020, the Court of Appeal quoted with approval the case of **Isaya Renatus v. R**, Criminal Appeal No. 542 of 2015 thus:

*"Evidence as to proof of age can be given by **the victim, relative, parent, medical practitioner, or where available, production of birth certificate.**"*

The same stance was taken in the cases of **AL-Jabir Juma Mwakyoma vs R**, Criminal Appeal No. 463 of 2018, **Bashiri John v. R**, Criminal Appeal No. 486 of 2016 and **Charles Yona vs R**, Criminal Appeal No. 79 of 2019.

In the case at hand, the age of victim was properly proved by the victim herself who told the court that she was four years when she gave her testimony. This fact is recorded on page 12 of the trial court's typed proceedings. Furthermore, the victim's mother (PW3) informed the court that the victim was four years old. Thus, this ground lacks merit and it is consequently dismissed.

On the sixth ground, the appellant blamed the trial court for failure to avail him with the victim's statement that could allow him prepare his defence. Ms Tibilengwa was of the opinion that, the appellant never requested the same statement. I have also gone through the entire trial court's proceedings and the record is silent on whether the appellant requested the victim's statement. Thus, this ground is an afterthought and I hereby dismiss it.

On the seventh ground, the appellant argued that, the trial court failed to evaluate his defence. The learned State Attorney, on the other hand, had an observation that, the appellant's evidence was considered but failed to shake prosecution's

case. I have read the trial court's judgment and it is evident that the trial magistrate evaluated the appellant's evidence at page 12 and 13. In his defence, the appellant raised a defence of alibi which did not meet the requirement of the law. He further denied knowing the victim and her mother. As argued by the learned State Attorney, the defence did not shake the founded prosecution evidence.

On the eighth ground, the appellant alleged that, the trial court erred in law and facts in convicting him. However, the counsel for the respondent believed that, the prosecution proved its case to the required standard. In this case, the appellant was charged under **section 138 C (1) (a) and (2)(b) of the Penal Code, Cap. 16 RE 2019**. The prosecution had a burden to prove that, the appellant used his penis to touch the victim's vagina without her consent for sexual gratification. Based on the adduced evidence, the trial court was satisfied that the offence was proved to the required standard. I also join hands with the trial court's findings. The prosecution evidence which relied on the testimonies of six witnesses proved that, the victim identified the appellant; the victim named the appellant at an earliest opportunity; the victim's testimony was corroborated by PW2, PW4 and PW5. Based on the evidence at hand, it is my findings that, the trial court correctly convicted the appellant as the case was proved beyond reasonable doubt. In that

regard I find no merit in this appeal and consequently dismiss it and uphold the trial court's conviction and sentence. It is so ordered.

DATED at **Mwanza** this 02nd day of May, 2023.



Ntemi N. Kilekamajenga.
JUDGE
02/05/2023



Court:

Judgment delivered this 02nd Day of May 2023 in the presence of the learned State Attorney, Ms. Martha Mwandenya (SSA) and the appellant present in person. Right of appeal explained.



Ntemi N. Kilekamajenga.
JUDGE
02/05/2023



