IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL No. 15 OF 2022

(Appeal from the decision of the District Court of Simanjiro in Criminal Case No. 6 of 2022 Hon. O. I. Nicodemo-RM dated 29th December 2022)

LALAHE KAROLI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date:22/5/2023 & 8/6/2023

BARTHY, J.

In a blissful evening of 17/12/2021 a fourteen years girl meant to believe she was celebrating her Holly Communion, was enjoying the celebration at her parents' home with the gatherings of friends, neighbours and family.

As she was in a company of her brother, things went sour, when a gang of men appeared and eloped her. Held captive in the house of a man for couple of days and she was carnally known, until a good Samaritan came

to her rescue. Only to realize later she was wedded off as the second wife without her consent.

In the occurrence of events, Lalahe Karoli, the appellant in this case, was arraigned before Simanjiro District Court (hereinafter referred as the trial court), for one count of rape contrary to Sections 130 (1) (2)(e) and 131(1) of the Penal Code [CAP 16 R.E 2019 now R.E 2022].

It was alleged before the trial court that, on unknown date of December 2021 at Loswaki village within Simanjiro District of Manyara Region, the appellant had a carnal knowledge with a girl aged 14 years. For the purpose of hiding her identity, the girl testified as PW1, whom shall be referred to as PW1, XY or simply the victim.

The appellant pleaded not guilty to the charge; hence full trial ensued. In attempt to prove their case beyond reasonable doubt, thus the prosecution side paraded total of three witnesses and tendered one documentary exhibit.

After hearing the parties, the trial court was convinced that the case against the appellant was proved to the hilt, hence, convicted and sentenced him to serve 30 years imprisonment.

A brief factual background leading to the arraignment of the appellant before the trial court as gathered from the record is that, on 17/12/2021 XY was at home on her holy communion celebrations. Sometimes later that day, she was called by her brother; when she followed him, a group of men emerged and started assaulting her brother.

Suddenly, XY was caught by two adult men, who took her away in a motorcycle. XY narrated that she was taken to the appellant's house and she was locked inside. Later on, the appellant come and started to undressed her dress and underwear and the appellant took off his wrapper (traditional Maasai cloth) and had sexual intercourse with her.

XY stayed at appellant's house until 8/1/2022 when she was rescued by PW2. XY was taken to hospital where she was medically examined by PW3 who tendered the PF3, which was admitted as the exhibit. PW3 stated that there was a proof that XY's was penetrated.

The appellant in his defence he stated that he legally married to XY through her parents. He claimed to have paid dowry of the herds of cows and four crates of soda. The testimony that was supported by DW2 who told

the trial court that there was a wedding arrangement with the father of XY and the appellant paid a dowry and he was given a wife.

On the other hand, DW3 testified before the trial court that, the appellant had a wife and he wanted to marry another one. The appellant having paid the dowry he was given XY, who she was taken to his appellant's house where she stayed for three days.

The trial court was satisfied that the prosecution side had proved its case beyond reasonable doubt; hence, convicted and sentenced the appellant to thirty years imprisonment. Aggrieved with both conviction and sentence the appellant preferred the instant appeal with seven grounds of appeal which after a careful scrutiny have been reduced into four grounds as follows;

1. *That the learned trial magistrate erred in law and fact in convicting the appellant basing on the contradictory, inconsistent, unreliable and fabricated evidence.*
2. *That the appellant's defense was not considered by the trial court.*

3. *That the exhibit was wrongly tendered before the trial court.*
4. *That the learned trial magistrate erred in law and in fact for not properly directing the assessors on matters of facts and law.*

When the appeal was called on for hearing, the appellant appeared in person while the respondent was represented by Ms. Grace Christopher learned state attorney.

The appellant when expounding his grounds of appeal, he prayed for the court to adopt them to form part of his submission. He had nothing further to elaborate.

On the respondent's side, Ms. Grace resisted the appeal entirely. Responding to the first ground of appeal, she maintained that the offence which the appellant stood charged was statutory rape. The prosecution had a burden to prove the age, penetration and if it is the accused who committed the offence.

In proving penetration, XY testified that she was carnally known without her consent. Her evidence was said to corroborate with that of the doctor who examined her to prove there was penetration.

Ms. Grace further argued that, the age of victim was stated in the charge sheet and on her evidence. She pointed out that, the age of the victim can be proved by the victim herself, parent, guardian, doctor or birth certificate. To this point she made reference to the case of **Bashiri John v. Republic,** Criminal Appeal No. 486 of 2016 Court of Appeal of Tanzania at Iringa (unreported).

She further added that the testimony of XY's regarding her age was never cross examined which amounts to admission of the fact. To buttress her arguments, the learned state attorney referred to the case of **Haruna Mtasiwa v. Republic**, Criminal Appeal No. 206 of 2018, Court of Appeal of Tanzania at Iringa (unreported).

On further submission Ms. Grace contended that, regarding the testimonies of PW1 and PW2 as their testimonies corroborated the evidence of XY, it was the appellant who committed the offence as she was found in the appellant's house.

The contention that the case was fabricated against the appellant, Ms. Grace contended that, the claims are baseless on indication that XY's parents had married her off to the appellant. She added that the evidence of DW2 and DW3 proved that XY was in appellant's house. Although the appellant denied to have sexual intercourse with her.

On the claims that the appellant was convicted basing on contradictory evidence, Ms. Grace contended that the appellant could not point out on the contradiction hence the claim does not have merit.

Submitting on the second ground Ms. Grace contended that, the appellant's defence was considered by the trial court and it was accorded weight as seen on page 2 of the typed judgment. As the trial court evaluated the evidence of the appellant and his witnesses and did not shake the veracity of the prosecution evidence.

Submitting on the third ground of appeal, Ms. Grace contended that, PF3 (exhibit P1) was properly admitted after it was identified by the doctor.

On the last ground, Ms. Grace contended that the said ground is baseless as the trial court did not sit with assessors. She thus urged the court to dismiss the appeal.

On a brief rejoinder, the appellant stated that the case against him was fabricated and the claim that he wanted a wife is unfounded since he has a wife with seven children.

Having gone through the rival submissions of the parties, grounds of this appeal and records of the trial court, the point for determination is whether the appeal has merits.

In determining this appeal, this being the first appellate court, it is enjoined to re-appraise the evidence of the trial court and where necessary this court should make its own findings.

This position was succinctly underscored in the case of **Peters v. Sunday Post Ltd** [1958] EA 424 quoted in **Deemay Daati & 2 others v. Republic** [2005] TLR 132.

I will begin my deliberation with the first ground of appeal. The appellant claimed the court had relied on the evidence which is contradictory, inconsistent, unreliable and fabricated.

The appellant was charged with the offence of rape contrary to Sections 130 (1) (2)(e) and 131(1) of the Penal Code, which is commonly referred as the statutory rape.

In respect to this offence, it was incumbent for the prosecution side to establish that the XY was carnally known, establish she had the age of minority and that it was the appellant who committed the said offence.

As rightly pointed out by the learned state attorney, it is the settled law that the best evidence in sexual offences comes from the victim herself. This position was underscored in the case of **Selemani Makumba v. Republic,** [2006] T.L.R 379 where the Court of Appeal of Tanzania held as follows:

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

In the instant matter the victim gave a detailed account of what had transpired on the fateful night. She narrated that she was taken to the appellant's house and locked inside. During the night she was undressed with the appellant who also undressed himself, then put his manhood in her womanhood. After the incident she stayed up to his house until 29/12/2021.

The evidence of PW3 is corroborated with the testimony of the victim able to prove there was penetration after doing test on her. Looking at the

evidence in totality, it leads to the conclusion that the victim was carnally known.

The next question for determination is whether it is the appellant who committed the offence. XY in her evidence she narrated that it was the appellant who had sexual intercourse with her. She gave a sequential narration on how she ended up in the house of the appellant who undressed her, then he went ahead to undress himself and then had sexual intercourse with her. Then the pair slept together for overnight also lived together for couple of days and she was rescued with the good Samaritan.

On that account of XY on what had transpired on the fateful day, I am satisfied that there was correct identification of the appellant to be the one who raped the victim. The reasons being that the appellant himself admitted that the victim was in his house as his wife.

This evidence proves that XY and the appellant were not strangers to each other. Similarly, in the night which the appellant had sexual intercourse with the victim, they slept together till morning and lived for couple of days. Thus, coming to the conclusion that the appellant was well identified to be the rapist.

Regarding the age of the victim, it is on record that the charge shows the age of victim to 14 years old. By the time she testified on 21/4/2022 she was 15 years as she was born on 12/2/2007. This means that on 29/12/2021 when she was carnally known by the appellant, she was 14 years old. The appellant did not cross examine the victim on this aspect. Hence, the age of the victim was proved by herself to be 14 years when rape was committed.

Regarding the appellant's claim that he was convicted basing on evidence that was inconsistent and contradictory; as rightly submitted by the learned state attorney that the appellant could not point out what were the inconsistencies in the said case. It is the findings of this court that, the evidence tendered before the trial court was corroborating on each other on a series of events.

Concerning the claim that the case against the appellant was fabricated with unreliable evidence; the same is farfetched as the appellant could not point how the case against him was fabricated. Consequently, the first ground of appeal lacks merits and it is accordingly dismissed.

On the second ground the appellant has faulted the trial court for not considering his defense. In determining this ground of appeal, as stated earlier that this being the first appellate court it is enjoined to critically

analyze the evidence of both prosecution and defence before reaching its verdict. This position was underscored in the case of **Amiri Mohamed v. Republic** [1994] T.L.R. 138 in which the Court of Appeal held that;

> *"Every magistrate or judge has got his or her own style of composing a judgment, and what vitally matters is that the essential ingredients shall be there, and* ***these include critical analysis of both the prosecution and the defence."*** [Emphasis supplied].

Ms. Grace was of the view that, the trial court considered the appellant defence as shown on page 2 of the typed judgment. With respect I do not agree with the learned state attorney because what was done by the learned trial magistrate was just a summary of the evidence of both sides.

It is now the settled principle that, the summary of evidence is not consideration or analysis of the same. This position was underscored in the case of **Leonard Mwanashoka v. Republic,** Criminal Appeal No. 226 of 2014 (unreported) in which the Court of Appeal stated that;

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence*

to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis, "

Hence, having found that the trial court did not consider the evidence of the defence side this being the first appellate court, it is enjoined to step into shoes of the trial court and consider the defence.

In his appellant's defense he denied to have raped the victim, although he admitted that the victim was in his premises as his wife. The appellant's evidence was supported with that of DW2 and DW3 who told the trial court that the appellant had married the victim and the dowry was paid.

However, the victim stated that she had refused to marry the appellant while on the other hand the appellant and DW2 claimed that the marriage arrangement was accomplished by the victim's parents.

The appellant had denied to have married XY on his rejoinder submission made before this court which I find it to an afterthought and against his testimony he made before the trial court under oath.

With the evidence available there is no way there could be a valid marriage between the appellant and the victim who was only 14 years of age. Since XY had not attained the minimum age of 18 years to be allowed to marry. As provided under section 13(2)(a) (b) and (3) of the Law of Marriage Act, Cap 29 R.E. 2019 as interpreted in the case of **Attorney General v. Rebeca Z. Gyumi**, Civil Appeal No. 241 of 2017 decided on 23/10/2019 by the Court of Appeal declaring the said provision unconstitutional and directing the amendment of the same.

The evidence on record shows that the victim was eloped and taken into the appellant's house, where she was carnally known. Hence, I am satisfied that the appellant's claim that he married the victim is unfounded and also the claim that the appellant did not rape the victim lacks merits. Therefore, the second ground of appeal lacks merits and it accordingly dismissed.

The third ground of appeal needs not detain me longer than it is necessary. The PF3 being the only documentary evidence tendered, the appellant was given chance to address the court before its admission and after being cleared for admission it was read by PW3 as the law required. This ground is also devoid of merits and it is accordingly dismissed.

The fourth ground is equally misconceived as the trial court was not presided over by assessors. The said ground is accordingly dismissed.

In upshot and for foregoing I am of the settled opinion that the case against the appellant was proved beyond reasonable doubt. I find the appeal lacking in merits the same is dismissed in its entirety.

It is so ordered.

Dated at **Babati** this 8th June 2023.

G. N. BARTHY

JUDGE

Delivered in the presence of the appellant in person and Mr. Leons Bizimana the learned state attorney for the respondent.