IN THE HIGH COURT OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 3 OF 2023

(Arising from Bukoba Resident Magistrate Court

in Criminal Appeal No. 03 of 2023)

ANOLD DOMINICK @ YAWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

24th May 2023 & 30th May 2023

K. T. R. MTEULE, J.

In the Resident Magistrate Court of Bukoba at Bukoba the Appellant **ANOLD DOMINICK @ YAWE,** was convicted with of rape contrary to **section 130 (1) and (2)(e) and 131 (1) of the Penal Code Cap. 16, R.E. 2019** and consequently, sentenced to serve a life imprisonment with corporal punishment of 12 strokes. Aggrieved by the conviction and verdict he filed this appeal containing thirteen (13) grounds revolving around the following issues:

1. Reliance on a defective charge sheet.
2. Trial court failure to take into consideration the appellant's defense evidence with the mitigation factor.
3. Admission of fabricated evidence of PW2 (the victim), having stated that it was not the first time the accused had sex with her, while failing to explain how many times did the accused used to sex with her, and why she kept silent.
4. Poorly conducted Voire dire test contrary to Section 127(2) of the Tanzania Evidence Act.
5. Lack of DNA test due to prosecution contradictory evidence the accused penis was clothed with blood while the victim's vagina was found with penile shaft and yellowish fluid and lacerations.
6. Failure to note that not only lacerations and yellowish fluids can prove the offence of rape but also penetration.
7. Failure of (PW3) to specify what kind of object penetrated the victim's vagina.
8. Absence of the important prosecution witness who did not come to testify at trial Court.
9. Failure to observe contradiction in the prosecution evidence of (PW3 and PW5) that PW3 admitted the accused at Kigarama health Centre on 15:00hrs while at the same time the police

officer (PW5) testifying that the accused person arrived at Kanyigo police within that time.

10. Failure to comply with the statutory requirements of Section 312 (2) of the **Criminal Procedure Act, Cap 16 R.E 2019**.
11. Failure to tender as Exhibits, TZS 100/= and 200/= which accused used was alleged to have given the victim.
12. Lack of evidence from any victim's family neighbor who witnessed the incident.
13. Prosecution failure to prove the case to the standard required by the law.

The Appeal was disposed of by oral submissions. The Appellant appeared in person while the Respondent was represented by Mr. Aman Kilua, State Attorney.

In his submissions, the Appellant denied to have committed the offence charged and he wondered why the magistrate convicted him while the time alleged by victim's father that his daughter was raped, he was working with another boss. He prayed for the court to adopt and consider his grounds of appeal as part of his submission.

On the other hand, Mr. Amani Kilua, learned state attorney submitting on the grounds related to procedural irregularities, started with the first ground that the charge sheet was defective. He denied the allegation for being unfounded. In his view, the Appellant was rightly charged and convicted under a proper charge.

On noncompliance with **S. 127 (2) of the Evidence Act, Cap 6 of 2021 R.E** on voire dire test, Mr. Kilua submitted that the mode of voire dire test has changed, and that the requirement for now is for the child of tender age to only promise to tell the truth. Supporting his position, he cited the case of **Abdallah Athuman vs. Republic**, Criminal Appeal No. 669 of 2020 CAT page 14 & 15, (unreported) where the court held that if the child promises to tell the truth, it is sufficient. He submitted that in the proceedings at page 11 of the typed proceedings, the victim promised to tell the truth.

With regards to the assertion that the Court erred to convict the accused person contrary to S. 312 (2) of the CPA, Mr. Kilua submitted that the trial Court complied with Section 312 (21) which provides for punishment and in the judgment punishment is vivid.

Submitting on the grounds concerning insufficient evidence, Mr. Kilua denied the assertion that the defence evidence was not considered. According to him the defense evidence was properly taken into account. Regarding the argument that the victim failed to mention how many times she was raped, Mr. Kilua submitted that the victim managed to explain what happened. In his view, regardless of the number of times, having sexual intercourse with the victim at her age was wrong and amounted to rape.

Concerning lack of DNA evidence, Mr. Kilua submitted that the DNA is not mandatory in law, especially on rape offences. He insisted that, it can prove pregnancy and not rape. He referred this Court to the case of **Hamis Shabani (Ustaa) vs. Republic; Criminal Appeal No. 259 of 2010 (unreported).** The Court held that DNA is not mandatory in rape offences.

Regarding the 6th ground that the Court failed to note that not only the yellow fluid proves rape offence but also the penetration, Mr. Kilua submitted that there was evidence from the prosecution witness who testified that there was penetration. He referred to the evidence of the Doctor who examined the victim who confirmed that there was

penetration. With regards to Doctor's failure to identify the blunt object that penetrated the victim, he submitted that their witness testified that there was a penetration by blunt object which in his view, was enough for a Doctor's testimony. As to the argument that there was a missing evidence of important witnesses, Mr. Kilua submitted that all important witnesses testified on how and who raped the victim. He mentioned the witnesses to be the doctor, the victim and the father of the victim who found the Appellant committing the rape.

On the 9th ground, the appellant is asserting that PW3 and PW5 gave fabricated evidence stating that PW3 admitted the accused at Kigarama Health center at 15:00 pm while PW5 stated that the accused arrived at Kanyigo Police post at the same time, Mr. Kiula submitted that this was a minor contradiction which is not fatal. Concerning the failure to tender the money Tshs. 100 & 200 alleged to have been offered to the victim, Mr. Kilua stated that it was not necessary to tender the money. Concerning the assertion of failure to prove the case beyond reasonable doubt, Mr. Kilua submitted that the prove was beyond reasonable doubt due to the evidence of the victim, as supported by the evidence of her father and the Doctor.

In rejoinder the appellant proceeded to claim innocence, denying to have ever raped the child.

Having heard parties' submissions, and of the District Court, this Court is called upon to determine **as to whether the appellant has adduce good grounds for this Court to interfere with the decision of trial Court in Criminal Case No. 99 of 2022.**

In addressing this issue, the grounds of appeal are group in two categories, one concerning evidence and the other concerning legal & procedural compliances. All the grounds of appeal will be considered in line with these two categories.

The legal issue is in ground No. 4 of Appeal where the Appellant asserted noncompliance with **S. 127 (2) of the Evidence Act,** on voire dire test. As submitted by Mr. Kilua there is recent development which requires voire dire test to be sufficient if it only confirms that the victim promises to tell the truth. I will follow the position in **Abdallah Athuman vs. The Republic,** Criminal Appeal No. 609 of 2020 CAT, page 13, 14 & 15 especially page 15 where it was held that; -

"In the case at hand, it is common ground that the complainant, who stated to be six years old at the time she took the witness stand, was in the eyes of the law a child witness of tender years. Consequently, her evidence had to be given in compliance with the dictates of section 127 (2) of the Evidence Act. Although it is shown at page of the record of appeal that the trial magistrate did not ask any preliminary questions to determine if PW2 understood the nature of oath or affirmation for her to qualify to give evidence on oath or affirmation, she recorded her to have said, I [norm ally] speak the truth. I promised (sic) to speak the truth" before she let her testify. Unquestionably, the trial court could not let her testify on oath or affirmation because it had not established whether she understood what an oath or affirmation meant. All the same, trial magistrate extracted the child witness' promise to speak the truth in compliance with the law, she rightly allowed her to give evidence on the strength of such promise. Consequently, the first ground of appeal fails."

From the above principle, the trial magistrate owes a legal duty to assure that the child of a tender age promises to tell the truth in her testimony. I have gone through the proceedings of the trial court and confirmed that at page 10 of the proceedings of 18th October 2022 the

trial magistrate secured the child's promise of telling the truth in her testimony. This makes the appellant's ground on voire dire test to beunfounded. This ground of appeal fails.

Regarding the assertion that DNA test was not taken as per ground 5, as submitted by Mr. Kilua, the circumstances of this case do not attract a mandatory requirement to conduct DNA. This is because there was no dispute concerning identification. It is not a mandatory requirement in law that DNA should be used to prove every sexual offences. I agree with Mr. Kilua on the relevance of the position in **Shabani's Case (supra)** which expounded as to whether DNA is one of essential factor in establishing sexual offence. In this case it was held; -

> *"As to the last point of contention, there is no legal requirement that in offences of this kind, "sophisticated scientific evidence" to link the appellant and the offence is required. It is not the requirement, for example, that the assailant's spermatozoa, red and white blood (or even DNA) should be examined to prove that he is the one who committed the offence. If there is other, independent evidence to implicate the accused with the offence and the court is satisfied to the required standard (that of proof*

beyond reasonable doubt), that in our view, is sufficient and conclusive."

It is on evidence that the appellant was apprehended by PW1 who is the victim's father, and who found him having carnal knowledge of the victim and chased him until he caught him. This evidence is in additional to the testimony of the victim who said that she knew the appellant as he used to go at her home to collect manure fertilizer and that it was not the first time he had carnal knowledge of her. This evidence is vivid as to the identification of the appellant, then it is my view that this is not a case where DNA tests should be carried out. It is on this basis I find the ground concerning DNA test lacking merits.

Regarding sufficiency of evidence, I will start with the Appellant's assertion oncerning missing of evidence of important witness. Mr. Kilua submitted that all important witnesses testified on how and who raped the victim. On record, there is evidence of PW1 the father of the victim who found the appellant committing the offence, the doctor who examined the victim and found her to have been raped, and the victim who knew the victim before the incident and who explained how he used to have carnal knowledge of her. The evidence of the victim is

categorized as the best evidence in rape offences. See **Godi Kasengela v. Republic,** Criminal Appeal No. 8 of 2008, Court of Appeal of Tanzania, at Iringa, (reported in Tanzlii) at page 11 where it was held; -

> *"It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence. See, for instance,* ***Selemani Makumba V Republic,*** *Criminal Appeal No. 94 of 1994,* ***Alfeo Valentino V Republic,*** *Criminal Appeal No. 92 of 2006 and* ***Shimirimana Isaya and Another V Republic,*** *Criminal Appeal No. 459 and 494 of 2002 (all unreported). Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so. See C.D. de Souza V B. R. Sharma (1953) EACA 41. We dismiss this ground of appeal."*

The above authority gives more credence to evidence adduced by the victim rather than other collaborative pieces of evidence. In this case the victim PW2 identified the appellant who used to have sex with her. Her evidence was corroborated by that of her father who witnessed the incident and that of the Doctor and Exhibit P-2 (PF3 of the victim) after medical examination which established that the victim was raped. In my

view, the strength of this evidence cleared all doubts about the appellant having raped the victim.

The appellant challenged the Doctor's evidence for having contradictory statement by having found yellowish fluid in the victim's vagina while the appellant's penis was found with clotted blood. Although the Doctor did not explain the variation, in my view, this could not defeat his finding that the child was raped due to the said fluid and due to the lacerations found in her vagina. Perhaps when spermatozoa mix with blood, it becomes yellow. Who knows? May be could the appellant cross examined the doctor on this aspect explanation could have been given, but such cross examination was not conducted. All in all, this scenario does not defeat the evidence of the doctor that the child was raped by penetration due to that yellowish fluid and lacerations in her vagina.

It was as well not the duty of the Doctor to state which blunt object penetrated the victim. This is the evidence which can only be given by an eyewitnesses and in this case, it was the PW1 and PW2, the father of the victim and the victim herself who confirmed that the said blunt object was the penis of the appellant.

The strength of the above evidence terminates grounds 2, 3, 6, 7, 8, 9, 11, 12 and 13 on the reason that it is sufficient to have proved the case beyond reasonable doubt. I agree with Mr. Kilua that the contradiction concerning time in which the appellant was at the dispensary and the time in which he was at the police posts constitute minor contradiction which cannot defeat the evidence of the other eyewitnesses and the doctor's examination.

On the ground as to whether the appellant was charged with defective charge sheet in establishing defectiveness of the charge sheet, it is well provided that under **Section 132 of the Criminal Procedure Act, Cap 22 R.E 2022** that;-

> *132. "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

From the above quotation, **Section 132** makes a charge sheet sufficient if it contains statement of offence and particulars as may be necessary to give reasonable information. It is apparent that section 135

of the CPA gives a detailed description of the contents of the charge sheet.

In the case of **Lwitiko Mwamaso v. Republic, High Court of Tanzania,** Criminal Appeal No. 51 of 2022 citing the case of **Mnazi Philimon v. Republic,** CAT-Criminal Appeal No. 401 of 2015 (unreported), it was held:

> *(1) "It is now beyond controversy that one of the principles of fair trial in our system of criminal justice is that an accused person must know the nature of the case facing him, and this can only be achieved if the charge discloses the essential elements of the offence, and for that reason, it has been sounded that no charge should be put to an accused unless the court is satisfied that it discloses an offence known to law. A clear charge drawn in terms of Section 135 of the CPA, would give an accused person an opportunity to fully appreciate the nature of the allegations against him so as to have a proper opportunity to present his or her own case.*

The above authorities reflect, how a proper charge sheet should be drawn and what should be contained therein. The bottom line is that a

charge sheet must be able to inform the accused about the nature of the case facing him by disclosing the essential elements of the offence.

In this case, the Appellant has not explained which defects does the charge sheet contain. I have examined it to see if it contains essential elements of the offence. It has the statement of offence mentioning the provision of the law alleged to have been contravened, the particulars of offence mentioning the date, place and particular of victim and the allegations. In my view these are vital and reasonable information to be disclosed for an accused person to be able to prepare a defence. Other minor errors should not vitiate the matter if it is not established that the accused person was prejudiced. I have noted in the charge sheet that the Appellant was charged under **Section 130 (1) (2) (c)** of the Penal Code. Being a child of an age below ten, the appropriate provision should have been **Section 130 (1) (2) (e)**. For clarity, I reproduce the entire **Section 130 (1) and (2)** thus:-

> *"130.-(1) It is an offence for a male person to rape a girl or a woman.*

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;

(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;

(c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;

(d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

Apparent on its face, paragraph (c) of Section 130 (2) concerns a consent obtained from a woman who has been induced under an influence of a substance and outright, the victim should not be a child below ten. It is obvious that it is not applicable in instant environment where the victim is a child of tender age. This means the appellant ought to have been charged under paragraph (e) which deals with a consent obtained from a child under 18 years like the victim in this matter. The question is whether the failure to cite the appropriate paragraph becomes a fatally defective.

The answer to the above question has been resolved in different conclusions depending on the circumstances of the case. The bottom line is whether section 232 of the CPA is met then irregularities arising from non-citation or wrong citation does not vitiate the matter. **(See also Jamal Ally @ Salum v. Republic, Criminal Appeal No. 52 of 2017 (both unreported).**

" Where particulars of the offence are dear and enabled the appellant to fully understand the nature and seriousness of the offence for which he was being tried for, where the particulars of the offence gave the appellant sufficient notice about the date when offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age and where there is evidence at the trial which is recorded giving detailed account on how the appellant committed the offence charged and thus any irregularities over non-citations and citations of inapplicable provisions in the statement of offence are curable under Section 388 (1) of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA). "

Since the appellant has not shown how he was prejudiced, then there was no material defect in the charge sheet which may vitiate the trial. This being the case, the ground concerning the defects in the charge sheet fails due to the aforesaid reasons.

The appellant raised a ground challenging the propriety of entering conviction and sentence. These two aspects of judgment are inseparable. That means upon conviction the judge or magistrate owes a legal duty of imposing sentence against the accused, as stipulated under

Section 312 of the Criminal Procedure Act. In this case the appellant was charged with rape contrary to **Section 130 (1) (2) (c) and 131 (3) of the Penal Code, Cap 16 R.E 2022**. However the evidence proved beyond reasonable doubt the offence of rape contrary to **Section 130 (1) (2) (e) of the Penal Code.** The sentence under this offence is provided for under Section 131 (3) which states:

> *131.- "**(3) Subject to the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment.***

From the above provision, since the victim was a girls of 7 years, the approppriate for this sentence if life imprisonment. The trial magistrate sentenced the accused to serve a term of life imprisonment with corporal punishment of 12 strokes. This is contrary to **Section 131(3) of the Penal Code, Cap 16 R.E 2022** as quoted above which provides for a person who commits an offence of a rape of a girl under the age of ten years to be on conviction, sentenced to life imprisonment. Corporal punishment is an addition done by the trial magistrate which is not legally justified. It is at this point I will differ with the lower court sentence.

From the above findings, the answer as to whether there are sufficient reasons to vary the lower court decision is answered negatively except for the sentence on corporal punishment

In the circumstances the appeal is dismissed in respect of all grounds except ground No. 10 concerning sentence. I uphold the conviction and the life imprisonment sentence as entered by the District Court. The sentence of corporal punishment of 12 strokes is hereby quashed. Right to Appeal to the Court of Appeal is explained.

It is so ordered.

Dated at Dar es Salaam this 30th day of May 2023.

KATARINA REVOCATI MTEULE

JUDGE

30/05/2023