IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO. 27 OF 2023

(Originating from Criminal Case No. 14 of 2023 in the District Court of Njombe at Njombe).

IVAN FABIANO MPWAGA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 05.06.2023
Date of Judgment: 16.06.2023

A.E. Mwipopo, J.

This appeal originates from Criminal Case No. 14 of 2023 in the Njombe District Court. Ivan Fabiano Mpwaga, the appellant herein, was charged and convicted by the Njombe District Court for rape offence contrary to section 130 (1) and (2) (e) and 131 (3) of the Penal Code, Cap. 16 R.E. 2022. The particulars of the offence in the charge sheet revealed that on the 4th day of December, 2022, at Kibena Hospital Street within the District and Region of

Njombe, the appellant had carnal knowledge of G.M. (the name of the victim is concealed), a girl aged seven years old.

When the charge sheet was read to the appellant, he pleaded not guilty. The prosecution called eight witnesses to prove its case. PW1 (victim's mother) testimony was that the victim was born on 10.01.2016. The victim was living with her grandmother at Kibena, and she is a student of standard two at Ujamaa Primary School. PW2 (victim) said in her testimony that she is seven years old and living with her grandmother (PW6). On 04.12.2022 accused person visited their home, took her to the forest, undressed her clothes, undressed his clothes and inserted his penis in her vagina while she was lying down. After the incident, the appellant gave her Tanzania shillings 500 and warned her not to tell any person about the incident. PW2 said that she felt pain. PW2 did not tell her grandfather about the incident as she was afraid to tell him. She said on 18.01.2023, her grandfather asked her where she got the money, and she told him the accused gave her after he had raped her. The victim was taken to Kibena Hospital for examination, and after the examination, she went to the police station.

PW3 (the victim's grandfather) testified that he lives with his wife (PW6), PW5 and PW2, a standard two student at Ujamaa Primary School.

On 18.01.2023, PW3 and PW5 told him that on 04.12.2023, the appellant took both of them to the forest, stayed with one, and gave her Tanzania shillings 500/=. PW3 informed ten cell leader who arrested the appellant. PW3 said the appellant confessed to doing it. The victim was taken to Kibena Hospital for examination.

PW4 is the medical officer who examined the victim. PW4 testified that on 19.01.2023, he examined the victim, who alleged to be raped. In his examination, PW4 said he found that the victim was not a virgin and filed the report in PF3. The PF3, which was admitted as Exhibit P1, shows that the victim has a perforated hymen, and the doctor remarked that a hard object penetrated the victim's vagina.

PW5 testified that she was living with PW2, PW3 and her grandmother (PW6). She said on 04.12.2022, she was with PW2 (victim) at home and the appellant, whom she knew after seeing him twice, came and asked them to go with him to the garden to pick up some vegetables. They went together with the appellant. When they reached the garden, the appellant told PW5 to go and look for Baraka Nduya. PW5 left. The appellant and the victim remained at the garden together. The victim returned home at night with Tanzania shillings 500/=. The victim told PW5 that she had sex with the

appellant, and he gave her Tanzania Shillings 500/=. The victim told PW5 not to tell their grandfather. On 18.01.2023, PW3 asked them what happened, and PW5 told him what the victim had told her.

PW6 is the victim's grandmother, who testified that she lives with PW2, PW3 and PW5. On 18.01.2023, PW2 and PW5 came home late, and PW6 decided to punish them. PW6 said that PW2 told her she came home late as the appellant raped her. PW6 said they informed the ten cell leader (PW7). The appellant was arrested and confessed to the tencell leader to rape PW2.

The ten cell leader (PW7) testified that on 19.01.2023, he received a phone call from PW3 that the appellant raped his granddaughter (PW2). PW7 apprehended the appellant and took him to the house of PW3. He asked PW2 and PW3 about the incident, and PW2 said the appellant raped her. PW7 stated that the appellant admitted to raping the victim (PW2) and prayed to be pardoned. PW7 decided to take the appellant and the victim to the police station.

PW8 is the police officer who recorded the appellant's cautioned statement at Njombe Police Station on 19.01.2023 around 02:30 hours. He testified that the appellant was brought to the police station around 2:00 PM. He told the appellant about his rights during the interview, and the

appellant said he was ready to give his statement without any witnesses. He started to record at 03:20 PM and finished at 03:50 PM. After completing the recording, he read over the statement to him. The appellant said the statement was correct and signed it. PW8 tendered the appellant's cautioned statement, and the appellant did not object to its tendering but said that the statement was not against him. The trial Court admitted the statement as exhibit P2. In the cautioned statement (exhibit P2) appellant confessed to penetrating his penis into PW2's (victim's) vagina. This was the end of the prosecution's case.

The trial Court found the appellant with the case to answer and invited him to enter his defense. The appellant testified in his defense without calling any witnesses. He denied committing the offence and said that the case was fabricated because of his conflict with the ten cell leader (PW7). He said PW7 promised to do something terrible to him as he refused to attend street meetings. This was the end of the defense case.

The trial Court considered the evidence from both sides and delivered its judgment. In the judgment, the trial Court convicted and sentenced the appellant to serve life imprisonment for the offence. The appellant was aggrieved with the decision of the trial Court, and he has preferred this

appeal with a total of five grounds of appeal. The appellant's grounds of appeal are as follows:-

1. *That, the trial Magistrate erred in law and facts to convict the appellant based on the admitted PF3 and the testimony of PW4 without taking into account that the victim was examined after a lapse of time.*
2. *That, the trial Court erred in law and facts by wrongly admitting the caution statement (exhibit P2) and P.F. 3 (Exhibit P1) without giving the appellant an opportunity to object to the tendering of same.*
3. *That, the trial Court erred in law and facts to convict and sentence the appellant without taking into account that the case was not proved beyond a reasonable doubt.*
4. *That, the trial Court erred in law and facts for convicting the appellant for the offence of rape while relying on circumstantial evidence from PW4 and PW5.*
5. *That, the trial Court erred in law and facts by convicting and sentencing the appellant based on evidence of PW2, which demanded to be corroborated with other independent evidence from PW4, which was very important to prove penetration.*

The appellant appeared in person on the hearing date, whereas Ms. Sofia Manjoti, a learned state attorney, appeared for the Republic (respondent). The Court invited parties to make their oral submissions in support of and against the grounds of appeal.

In support of his appeal, the appellant prayed for this Court to consider all grounds of appeal, as found in the Memorandum of Appeal he filed.

In response, Ms. Sophia Manjoti, state attorney, opposed this appeal. It was her submission on the 1st ground of appeal that page No. 4 of the trial Court judgment shows the trial court convicted the appellant relying on the testimony of the victim and the victim's mother. PW2 (victim) testified how the incident occurred, and the victim's mother (PW1) proved the victim's age. She said that the evidence proved the offence, and she prayed for the 1st ground to be disregarded for wants of merits.

As to the 2nd ground of appeal, she submitted that the trial court's proceedings show on page 16 the trial court giving a chance to the appellant to object to tendering of cautioned statement. However, the appellant did not object to it. Concerning the PF3, the proceedings show on page nine that the appellant was afforded an opportunity to object to the tendering of PF3. Still, the appellant chose not to object to the tendering of PF3.

In response to the 3rd, 4th and 5th grounds of appeal, the counsel said that the prosecution proved the case without a doubt. The prosecution proved that the victim's age was below 18 years at the time of the incident, and the victim herself proved the penetration. She said in the case of

Seleman Makumba vs. Republic, Criminal Appeal No. 94 of 1999, (unreported), it was held that the best evidence in sexual offences comes from the victim. It is the victim who has to prove that she was raped. The victim's evidence, in this case, proved the offence. Even without corroborative evidence, the victim's testimony is sufficient to prove the offence. Thus, these grounds have no merits.

In his short rejoinder, the appellant submitted that the reply by the respondent had no basis.

Having heard submissions from both sides, the main issue for determination is whether this appeal has merits.

In determining this appeal, I will consider all grounds raised by the appellant in his Memorandum of Appeal. The appellant's first ground of appeal is that the trial Court convicted him based on PF3 and testimony of PW4 without taking into consideration that the victim was examined after the lapse of time. In her reply, the counsel for the respondent said that the trial Court relied on the victim's testimony to convict the appellant.

I have thoroughly perused the record of the trial Court. The evidence in the record reveals that the victim (PW2) was raped on 04.12.2022, and she informed PW3 on 18.01.2023 about the incident. PW3 reported the

incident to the police on 19.01.2023, where the PF3 was issued, and the victim was examined by a doctor at Kibena Hospital on 19.01.2023. More than one month has elapsed from 04.12.2022, when the alleged incident occurred, to 19.01.2023, when the victim was taken to Kibena Hospital for medical examination. PW4 and PF3 (exhibit P1) show the victim had a perforated hymen. In the remarks, exhibit P1 shows that a hard object penetrated the victim's vagina. It is correct that the victim was examined after more than one month from the date of the incident. However, the report in the PF3 shows what was observed by PW4. The evidence does not indicate that the victim was recently penetrated in her vagina. The perforation of the victim's hymen could be observed even after sometime has passed from the date of incident. PF3 shows that it was the hard object which penetrated the vagina of the victim. Thus, the report of the examination was not affected by the lapse of time. PF3 and PW4's testimony shows what was observed during the medical examination. Thus, this ground has no merits.

In the second ground of the appeal, the appellant is saying that the cautioned statement and PF3 were admitted without him being given a chance to object to its tendering. Failure of the trial Court to afford the

accused person the right to comment when the exhibit was tendered by the witness if fatal omission. The same could prejudice the accused person's right to admit or raise an objection on the tendering of the exhibit. This Court was of a similar position in the case of **Issaya Job vs. Republic**, Criminal Appeal No. 319 of 2017, High Court Dar Es Salaam Registry, (unreported), held that:

> *"Starting with the evidence of PF3, it was admitted in Court without following the procedure of admission of exhibits. The law confers a right on an accused person to comment on the admission of any exhibit before its reception in evidence."*

The evidence in the record shows that the trial Court afforded the appellant the right to comment when PF3 (exhibit P1) and cautioned statement (exhibit P2) were tendered. The typed proceedings of the trial Court show on page 9 the testimony of PW4 (a medical doctor who examined the victim) tendering the PF3. The appellant was given a chance to comment on the tendering of the PF3 and replied that he had no objection. The trial Court admitted the PF3 as exhibit P1. The same was done to the cautioned statement, where the typed proceedings reveal on page 16 the witness (PW8) tendering the appellant's cautioned statement. The appellant was given the opportunity to comment, and he replied that he had no objection,

but the statement was not against him. The answer by the appellant was ambiguous. From the answer, the appellant was indirectly objecting to the tendering of his cautioned statement. The answer could be interpreted that he is saying the statement tendered does not belong to him. This means that the appellant repudiated to make the cautioned statement.

The law is settled that a confession or a statement is presumed to be voluntarily made until an objection to it is made by the defense on the ground that it is not made voluntarily or made at all. In **Twaha Ali and Five Others vs. Republic**, Criminal Appeal No. 78 of 2004, Court of Appeal of Tanzania, (unreported), the Court of Appeal held that:

> *"If that objection is made after the trial court has informed the accused of his right to say something in 12 connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial with a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence ..."*

The Court of Appeal was of a similar position in **Frank Michael vs. Republic,** Criminal Appeal No 323 of 2013, Court of Appeal of Tanzania at Mwanza, (Unreported). The omission to conduct an inquiry into the voluntariness of a confessional statement that was objected to is an

incurable irregularity. In **Herode Lucas and Another vs. Republic**, Criminal Appeal No. 407 of 2016, Court of Appeal of Tanzania at Mbeya, (unreported), it was held that:-

> *"Admission in evidence of a confessional statement that was objected without conducting an inquiry into its voluntariness is an incurable irregularity rendering the statement liable to be expunged from the record."*

From the above cited case, where the confessional statement which was objected on its voluntariness is admitted by the trial Court without conducting the inquiry, the remedy is to expunge it from the record.

As the appellant, in this case, said that the cautioned statement alleged to be given by him was not his statement, the trial Court was supposed to conduct an inquiry before admitting it as an exhibit. The act of the trial Court to admit the cautioned statement (exhibit P2) without conducting an inquiry was a fatal irregularity. The same has prejudiced the appellant. For that reason, the appellant's cautioned statement is expunged from the record.

Turning to the 3rd, 4th and 5th grounds of appeal, I will determine these grounds jointly as the appellant says that the trial Court convicted him while the prosecution's case was not proved. It is the duty in the criminal case for

the prosecution side to prove its case without a doubt. The appellant in this case was charged with the offence of rape contrary to sections 130 (1), (2)(e) and 131 (3) of the Penal Code, Cap. 16 R.E. 2022. The section reads as follows:-

> *"130. (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under the circumstances falling under any of the following descriptions:*
>
> > *(e) with or without her consent when she is under eighteen years, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

Where the accused person is charged for the rape offence under the above cited section, the prosecution evidence is supposed to prove the presence of penetration and the victim's age to be below 18 years old.

The victim's age is proved by her or his testimony, the testimony of her/his parents, relatives, medical practitioner or documentary evidence as it was stated in the case of **Issaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (Unreported). In this case, PW1 (victim's mother) and PW2 proved the victim's age. PW1 said that the victim was born on 10.01.2016. It means that when the incident occurred on 04.12.2022, the victim was six years old, and when PW1 was

testifying on 02.02.2023, the victim was seven years old. PW2 (the victim), who testified on 02.02.2023, said that she is seven years old. The evidence of PW1 and PW2 proved without doubt that the victim was six years old at the time of the incident, which is below 18 years.

The second element of the rape offence, which the prosecution must prove, is the presence of penetration of the penis into a vagina. The law on penetration is settled that penetration of the penis into the vagina, however slight, is sufficient to constitute penetration. Section 130 (4) (a) of the Penal Code provides that evidence establishing penetration of the male's manhood into the female organ is necessary, and such penetration, however slight is sufficient to constitute sexual intercourse. In the case of **Nebson Tete vs. Republic**, Criminal Appeal No. 419 of 2013, Court of Appeal of Tanzania at Mbeya, (unreported), it was held on page 9 that:-

> *"The penetration of the male organ into the female organ is an essential element, however slight, it may be; see Tumaini Mtayomba Vs Republic, Criminal Appeal No. 217 of 2012, Minani Selestini Vs Republic, Criminal appeal No. 66 of 2013 (both unreported). And in view of the clear language of the law in section 130(4) (a), the slightest penetration is sufficient to prove the offence of rape; See Hassani s/o*

Amiri Vs Republic, Criminal Appeal No. 304 of 2010, Daniel Nguru and Others Vs Republic, Criminal Appeal No. 178 of 2004 (all unreported)."

The penetration in sexual offences must be proved beyond a reasonable doubt. In the case of **Kayoka Charles vs. Republic,** Criminal Appeal No. 325 of 2007, Court of Appeal of Tanzania at Tabora, (Unreported), it was held by the Court of Appeal that penetration is a crucial aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ. As stated by the learned counsel for the respondent, the best evidence in rape offence is that of the victim. The position was expressed by the Court of Appeal in several cases, including the case of **Selemani Makumba vs. Republic [2006] TLR, 379,** where it held 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."

The Court of Appeal had a similar position in the case of **Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2018, Court of Appeal of Tanzania at Iringa, (unreported), where it held that:-

"It is now settled law that the proof of rape comes from the prosecutrix herself."

In the case at hand, the victim (PW2) testified that on 04.12.2022, the appellant took her to the forest, removed her clothes, undressed, and inserted his penis into her vagina. After the incident, the appellant gave her Tanzania shillings 500 /= and warned her not to tell anybody. PW2 said she felt some pain, and she returned home. It was on 18.01.2023 when she told PW3 after he asked her. This evidence by PW2 proved that the appellant had sexual intercourse with PW2.

The law is settled that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness, as stated by the Court of Appeal in **Goodluck Kyando vs. Republic [2006] TLR 363**. In the case at hand, there is no reason not to believe the victim – PW2. Before the Court recorded her testimony, PW2 promised to tell the truth and not lies, as is required by section 127 (2) of the Evidence Act, Cap. 6 R.E. 2022.

The testimony of PW2 is corroborated by the testimony of PW5, who testified after promised to tell the truth and not lies, as she was a child of 8 years. PW5 testified that on 04.12.2022, the appellant took her and PW2 to the garden. The appellant asked PW5 to go home and look for Baraka Nduya, and the appellant remained with PW2. PW2 returned in the night with

Tanzania shillings 500 and told her that she heard sexual intercourse with the appellant and that the appellant told her not to tell anybody. This is the reason they delayed telling PW3 about the incident.

There is another corroboration from the testimony of PW4. PW4 testimony shows that he examined the victim and found her hymen was perforated. PW4 believed that the victim was penetrated in her vagina by a hard object. Although the victim was examined more than a month after the incident, the reason for the delay was stated by PW2 and PW5 that the appellant threatened PW2 not to say a word about the incident. As a result, PW2 informed PW3 about the incident more than a month later and she was examined after a lapse of time. The delays in reporting the incident and examination are attributable to the immaturity of PW2 and fear of reprisal from the appellant, as she stated in her testimony. In the case of **Godson Dan Kimaro vs. Republic,** Criminal Appeal No. 54 of 2019, Court of Appeal of Tanzania, at Moshi, (unreported), on page 12 of the judgment the Court of Appeal of Tanzania referred to its previous decision in the case of **Selemani Hassan vs. Republic**, Criminal Appeal No.203 of 2021, (unreported), where it was held that:-

"Delay in reporting an incident of sexual offence due to fear of reprisal or shame does not affect the credibility of the victim. The charge of a sexual offence is not undetermined by the silence of the victim if such silence is fully explained."

In this case, the victim thoroughly explained the delay that the appellant warned her not to tell anyone. This evidence is sufficient to prove victim's fear of reprisal. For that reason, the delay does not affect her credibility.

Further, the report of the examination in the PF3 (exhibit P1) and the testimony of PW4 reveal that what was observed is that the victim's hymen layer was perforated. The perforation of the hymen layer could be observed even after the lapse of time from the date of incident. Since the victim was a child of six years, the fact that her hymen layer was perforated proved that a hard object penetrated her vagina. The expert opinion in the testimony of PW4 and PF3 does not raise any doubt on the findings despite the lapse of time from the date of the incident.

Moreover, there is evidence of oral confession from PW3, PW6 and PW7 that the appellant admitted in their presence that he had sexual intercourse with the victim and asked them to pardon him. This evidence by

PW3, PW6 and PW7 was not cross examined by the appellant, which means that he was not disputing it.

Besides, I have read the appellant's testimony. In his defense, the appellant denied having sexual intercourse with the PW2 (victim) and said that the case was fabricated by PW7 (ten cell leader) as they had a conflict. He said he was not attending street meetings, and PW7 promised to do terrible things to him. The said defense does not raise any doubt to the strong prosecution's case.

Therefore, I find the appeal has no merits. The appeal is dismissed. The conviction and the sentence of the trial Court are upheld. It is so ordered accordingly.

A.E. MWIPOPO

JUDGE

16/06/2023