IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 21 OF 2023

(Originating from Criminal Case No. 60 of 2022 in the District Court of Njombe at Njombe).

ATHANAS NZALALILA..... ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 05.06.2023
Date of Judgment: 23.06.2023

A.E. Mwipopo, J.

Atanas Nzalalila, the appellant herein, was charged and convicted by the Njombe District Court in Criminal Case No. 60 of 2022 for a rape offence contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2022. The particulars of the offence in the charge sheet revealed that on 26.05.2022, 2022, at Mahove Street within the District and Region of Njombe, the appellant had carnal knowledge of A.M. (the name of the

victim is concealed), a girl aged thirteen years old. The appellant pleaded not guilty to the charge, and the prosecution brought three witnesses to prove the case.

The prosecution brought the medical officer (PW1), who examined the victim, as their first witness. PW1 testified that she is a Clinical Officer stationed at Luponde Health Centre. On 26.05.2022 at about 06:00 PM, while at work, she received a girl who had letter from Village Executive Officer asking her to examine the girl as it was alleged she had been raped. PW1 examined the girl (PW3), and after the examination, she asked the victim's parents to go to the Police to collect PF3. On 27.05.2022, PW1 received PF3 and filled it based on what she examined. PW1 tendered PF3 (exhibit P1). PW1 said sperm differs from water due to smell and weight. The sperm has white colour.

The 2nd prosecution witness (PW2) is the mother of the victim. She testified that the victim (PW3) is her daughter, born on 12.01.2009 in Luponde. On 26.05.2022 at about 07:00 PM, she sent PW3 to the milling machine to grind maize. PW3 took a long time at the machine, and PW2 decided to follow her there to see why she is not returning. When she reached the milling machine, PW2 saw the victim coming from the

appellant's room and not from the machine. She called her husband and informed Village Chairman. Together, they asked the victim, who admitted to being with the appellant inside the appellant's room. The appellant was called and admitted to being inside his room with the victim. They went to the hospital for examination. They were informed that the victim was raped, and they went to report to the Luponde Police Station. PW2 tendered the clinic card of the victim, which was admitted as exhibit P2.

The last prosecution witness is the victim (PW3). She testified that on 26.05.2022, she was aged 13 years. On that date, she went to grind the maize at the milling machine operated by the appellant. The appellant did grind the maize which the victim brought. When she paid for the service, the appellant pulled her to his room which is nearby to the milling machine and closed the room door. The victim failed to escape. While inside, the appellant undressed the victim's pants, took his penis and inserted it into her vagina. After finishing having sexual intercourse with the victim, the appellant opened the door, and she went out of the room. While leaving the appellant's room, the victim met with PW2. The victim said she told PW2 what happened. The victim stated that she knew the appellant before the incident as she used to see him grinding maize on the other days. Her evidence show

that she was taken to the Luponde Dispensary for examination. This was the end of the prosecution evidence and they closed their case.

The trial Court found the appellant with a case to answer and afforded him the right to defend himself. After taking oath as DW1, the appellant testified and denied committing the offence. The appellant said he was caught and sent to the Uwemba Police Post. This was the end of the defense case.

The trial Court in its judgment, convicted the appellant for the rape offence and sentenced the appellant to serve 30 years imprisonment. It also ordered the appellant to pay Tanzania shillings five hundred thousand only (500,000/=) to the victim as compensation.

The appellant was aggrieved with the decision of the trial Court and filed the present appeal containing five grounds of appeal. The appellant's grounds of appeal are as follows:-

1. *That, the learned Magistrate erred in law and facts in convicting the appellant of rape offence without allowing him to defend himself.*
2. *That, the learned Magistrate erred in law in admitting the evidence of PW1 and exhibit P1 without considering that the medical examination was conducted without PF3, which was filed on the following date out of time.*

3. *That, the learned Magistrate wrongly admitted the evidence of PW1, PW2, and PW3 without considering that the important witness (village leaders) were not called to testify.*
4. *That, the trial learned Magistrate erred in law and facts by taking into account the evidence of PW1 and PW3, which was totally contradictory evidence.*
5. *That, the trial learned Magistrate erred in law and facts by not taking into account the rule of the right to be heard.*

The appellant appeared in person on the hearing date, whereas Mr. Majid Matitu, 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. The appellant being a layperson, asked the Court to consider all of his grounds of appeal, and he will make a rejoinder after the respondent has replied to the grounds of appeal.

In response, the counsel for the respondent opposed the appeal and submitted on all grounds of appeal as found in the petition of appeal. On the first ground of appeal, he said that the appellant was allowed to defend herself during the trial. The record shows that on 22.08.2022, the Court found the appellant with a case to answer, and the trial court complied with section 231 of the CPA. The appellant defended himself on the date shown

on pages 18 and 19 of the typed proceedings. Thus, this ground has no merits.

In the 2nd ground of appeal, the counsel said that it is settled law that the expert opinion in the evidence before the Court is provided where the person giving it is an expert with knowledge in the area he is going to testify. This is provided under section 47 of the Evidence Act, Cap 6 R.E. 2022. The Doctor who filed PF3 was a medical Doctor and an expert in medical examination. The evidence shows that the victim was taken to the hospital for assessment on 26.05.2022, and the PF3 was filed on 27.07.2022. The delay in filling the PF3 for one day is not fatal and does not affect the appellant in any way. It was in the child's best interest to be examined and get treatment even without the PF3.

The state attorney admitted that there was a procedural error in the record where the trial court did not give the appellant a chance to object to the tendering of the PF3 by PW1. He said that the error was fatal and had prejudiced the appellant. He prayed for the PF3 to be expunged from the record. After expunging the PF3 from the record, still, the evidence of PW3 and PW2 proved that the victim was aged 13 years at the time of the incident, and the appellant had sexual intercourse with the victim. The

evidence by PW2 and PW3 is supported by PW1, who proved that PW3 was penetrated. This evidence is sufficient to prove that the appellant committed the offence.

On the 3rd ground of appeal, the counsel said that the village leaders were not important witnesses in this case. He said no specific number of witnesses is required to prove a case. The offence committed is rape which is committed in secrecy. The village leader was not a material witness and did not witness the commission of the crime. PW3 (victim) is the best witness who has testified about what the appellant did to her.

In the 4th ground of appeal, it was the respondent's submission that there was no contradiction in the testimony of PW1 and PW3. PW3 testified that it was the appellant who raped her. PW1 testified that PW3 had no hymen and had sperms in her vagina, which proved that she was raped.

Responding to the 5th ground of appeal, the counsel said that the appellant was arraigned in Court for rape offence and was present at the first stage of the hearing. The appellant later jumped bail. The trial court decided to proceed with the case in his absence. Later on, the appellant was arrested, and the case continued. No reason was provided for his failure to

appear in Court while on bail. The appellant defended himself after he was found with a case to answer.

In his rejoinder, the appellant said that the trial court cancelled his bail without giving him a chance to explain why he failed to appear in Court on the hearing date. He never saw any witness testifying. As a result, he did not get a chance to cross-examine them. He was not given the right to defend himself after the trial Court found him with a case to answer. The whole procedure for hearing was not fair.

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

The 1st, 2nd and 5th appellant's grounds of appeal are based on the procedural irregularities during the trial. The appellant alleges in these grounds of appeal that he was not given a chance to defend himself after he was found with a case to answer, the trial Court did not observe his right to be heard, and the PF3 was wrongly admitted for being filed on the following date after examination of the victim.

On the claim that the appellant was not given the right to defend himself by the trial Court, this is the appellant's right to be heard by the trial Court. It is a fundamental right provided by our Constitution in Article 13 (6) (a).

In the case of **Ausdrill Tanzania Ltd vs. Mussa Joseph Kumili and Another,** Civil Appeal No. 78 of 2014, Court of Appeal of Tanzania at Mwanza, (Unreported), it was held that:-

> *"Right, to be heard (audi alteram partem) is a fundamental principle which the courts of law jealously guard against. In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. (Article 13 (6) (a)."*

The said right to be heard must be observed and guaranteed by the Court. The violation of the right is a breach of natural justice. In the case of **Abbas Sherally and Another vs. Abdul Fazalboy,** Civil Application No. 33 of 2002, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), it was held that:-

> *"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "*

From the above-cited case, the remedy where there is a violation of the right to be heard is a nullification of the decision arrived at.

In this case, the evidence on record shows that the appellant was present when the case was brought to Court on 08.06.2022. The charge was read over to the appellant, who pleaded not guilty and the same was recorded by the trial Court. The appellant was given bail and was released on bail on the same date. The appellant was present when the Preliminary Hearing was conducted on 28.06.2022, and the hearing was fixed to proceed on 12.07.2022. On the hearing date, the appellant was absent, and Court ordered the hearing to proceed in his absence. The prosecution brought PW1, who testified on oath, and he tendered PF3 (exhibit P1). The case was adjourned to 25.07.2022 for the hearing to proceed, and an arrest warrant was issued. On 25.07.2022, the appellant was still at large, and the hearing proceeded in his absence. The prosecution called PW2 and PW3, who testified on oath. PW2 tendered clinic card, which was admitted as exhibit P2. The hearing was adjourned to 11.08.2022, and the warrant of arrest against the appellant continued to be in force. On 11.08.2022 appellant was arrested and brought to Court. When the appellant was afforded the chance to say something concerning his act of jumping bail, he answered that he had nothing to say. Following the appellant's answer, the trial Court

cancelled the bail and ordered the hearing of the case to proceed. The prosecution decided to close its case.

The trial Court found the appellant with a case to answer in its ruling after the closure of the prosecution's case. It informed the appellant of the right to defend himself by recording that the appellant was addressed in terms of section 231 (1) (a) and (b) of the Criminal Procedure Act, Cap. 20 R.E. 2019. The appellant answered that he would defend himself on oath without calling any witnesses, and he has no exhibit to tender. In his defense, the appellant denied committing the offence and said he was caught and sent to the Uwemba Police Post.

From the evidence in the record, the prosecution witnesses gave their testimony while the appellant was absent after he jumped bail. The Criminal Procedure Act, Cap. 20 R.E. 2019 provides in section 226 (1) where the accused person does not appear before the Court for the hearing or further hearing, it is lawful for the Court to proceed with the hearing or further hearing as if the accused person were present. The trial District Court allowed the hearing to proceed on 12.07.2022 and 25.07.2022 in the appellant's absence after he jumped bail. PW1, PW2 and PW3 testified for the prosecution in absence of the appellant. On 11.08.2022, the appellant

appeared in Court after his arrest. When he was afforded the right to comment on his act of jumping the bail, he had nothing to say. The trial Court recorded his answer and ordered hearing to proceed. The prosecution closed their case.

The trial Court found the appellant with a case to answer and informed him of his right to defend himself. The answer given by the appellant that he would defend himself on oath without calling any witness or tendering any exhibit and his prayer for time to prepare proved that he was afforded the right to defend himself. The appellant denied committing the offence in his defense. The appellant's allegation in his submission that the trial court did not take into account the principle of right to be is not correct. The record shows that the trial Court afforded the appellant right to comment after he was arrested for jumping bail and availed right to appellant to defend himself after he was found with a case to answer. Thus, the appellant's complaint that he was not afforded right to comment after his arrest for jumping bail and he was denied right to defend himself has no merits.

On the point that the trial Court did not correctly admit PF3 as it was filed a day after the examination, the record shows that it was PW1 who tendered the PF3. PW1 testified at the time the appellant jumped bail. PW1's

testimony reveals that he examined the victim (PW3) on 26.05.2022 at Luponde Health Centre, and as the victim did not come with the PF3, he told them to go to the Police to get it. The PF3 was brought on 27.05.2022, and she filled it based on her examination. The law does not say when the medical report has to be filled by a medical expert after examination. Usually, it is expected for the report to be made immediately after the examination depending on the circumstances of the case. Sometimes, the medical report is filled out after the victim's treatment is completed.

In this case, the reason for filling PF3 a day after examining the victim was stated by PW1 that the victim was not brought with PF3. After examination, PW1 told the victim's parents to go to the police station to get PF3 and PF3 was brought on 27.05.2022. This explanation is sufficient. The counsel for the respondent said that the PF3 has to be expunged in record for reason it was admitted without affording the appellant right to object its tendering is misconceived. PW1 testified in absence of the appellant who jumped bail. It was not possible to afford the appellant right to comment on the tendering of PF3 where the appellant was not present. Thus, the 1st, 2nd and 5th grounds of appeal on procedural irregularities have no basis.

On the claim that the prosecution failed to call as witness village leaders who are material witnesses, which is the applicant's 4th ground of appeal, the evidence in the record shows that after PW2 found the victim coming out of the appellant's room she called his husband and the Village Chairman. The appellant was called, and he confessed to being with the victim in his room. The Village Chairman wrote a letter to the Luponde Ward Executive Officer, and they went to Ward Executive Officer's office. The appellant confessed to the Ward Executive Officer that the victim was at his home. From the Ward Executive Officer's office, they went to hospital. In this ground, the appellant was saying that the Village Chairman and Ward Executive Officers were crucial witnesses and were supposed to testify.

The Court is aware of the settled law that failure to bring key witness lead to adverse inference to the prosecution in criminal cases. The position is stated in section 122 of the Evidence Act, Cap. 6 R.E. 2019, that the Court may infer the existence of any fact which it thinks likely to have happened, regard being had to the ordinary course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. In **Aziz Abdallah vs. Republic [1991] TLR 71,** it was held on page 72 that:

"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the Court may draw an inference averse to the prosecution."

The Court is also aware that under section 143 of the Evidence Act, Cap 6, R.E. 2019, no particular number of witnesses is required to prove a fact. See YOHANA MSIGWA vs. Republic, [1990] TLR 148. What matters is the credibility of the witnesses.

This case is for the rape offence under sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. The prosecution in such a case is supposed to prove the presence of penetration and the victim's age to be below 18 years. The best evidence in rape cases comes from the victim. The Court of Appeal stated the position in several cases, including 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."

From the above-cited case, the proof of rape has to come from the victim. In this case, the victim's testimony shows that the appellant had

sexual intercourse with her. As the incident occurred inside the appellant's room when the victim and appellant were alone inside, the evidence of the Village Chairman or Ward Executive Officer though relevant, is not material to the present case. The victim's evidence was material evidence. The victim in this case testified as PW3 and said the appellant had sexual intercourse with her Thus, the 3rd ground of appeal has no merits.

The appellant averred in the 4th ground of appeal the evidence of PW1 and PW3 was contradictory, and the trial Court erred in convicting him relying on their evidence. I have read the evidence of PW2 (the victim's mother) and PW1 (the Medical Officer who examined the victim), and there is no contradiction. PW1's testimony is that on 26.05.2022 at Luponde Health Centre she examined PW3 who alleged to be raped. She told PW3's parent to fetch PF3 to the police as PW3's parents did not come with PF3. On 27.05.2022 PF3 was brought to her and she filled it based on examination she conducted to PW3 on the previous date. On her side, PW3 (the victim) said that the appellant inserted his penis into her vagina on 26.05.2022 at appellant's room. There are no contradictions in their testimony whatsoever. This ground of appeal also has no merits.

In general, where the accused person is charged with the offence of statutory rape (the rape offence under section 130 (1) and (2) (e) of the Penal Code, Cap. 16 R.E. 2019), the prosecution evidence is supposed to prove the presence of penetration and the victim's age to be below 18 years old. The age of the PW3 (victim) was proved in the testimony of PW3 herself and PW2 (victim's mother) that she was aged 13 years at the date of the incident (26.05.2022). The evidence is supported by the victim's clinic card (exhibit P2), which shows the victim was born on 12.01.2009. It is a settled rule that the victim's age is proved by her testimony, the testimony of her/his parents, relatives, medical practitioner or documentary evidence as stated by the Court of Appeal in the case of **Issaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (Unreported). The evidence of PW2, PW3 and exhibit P2 proved without a doubt that the victim was 13 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. 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 **Kayoka Charles vs. Republic,** Criminal Appeal No. 325 of 2007, Court of Appeal of Tanzania at Tabora, (Unreported), it was held 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. The penetration in sexual offences must be proved beyond a reasonable doubt.

The victim (PW3) proved that the appellant took her inside his room, closed the door, took off her dress and pants, and inserted his penis in her vagina. PW3, who was a girl of 13 years, testified after she promised to tell the truth and not lies as required under section 127 (2) of the Evidence Act. PW3 appears to be a witness of the truth, and there is no reason not to believe her. PW3's evidence is supported by the testimony of PW1 and the content of exhibit P1 which shows that the victim's vagina had waterly discharge, bleeding tear on labia majora, painful genitalia, and vaginal bleeding. PW1 and exhibit P1 concluded that those are signs of vaginal penetration. This evidence proved without a doubt that the appellant had sexual intercourse with PW3. The appellant's defense that he did not rape the victim does not raise doubt in the prosecution case.

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

A.E. MWIPOPO

JUDGE

23/06/2023