IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 69 OF 2022

(Originating from Criminal Case 74 of 2022 District Court of Muleba)

EGIDIUS NSONGO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

23rd May & 27th June, 2023

BANZI, J.:

Before the District Court of Muleba, the appellant, Egidius Nsongo was indicted with two counts; rape and sexual harassment contrary to sections 130 (1) (2) (e), 131 (3) and 138D (1) of the Penal Code [Cap.16 R.E. 2019] ("the Penal Code"), respectively. The appellant was alleged to rape a girl of six years whom I shall refer as the "victim". He was also alleged to undress her and caused sexual annoyance or harassment to her. The alleged offences were committed on 8th April, 2022 at Ruhengere – Ibare village within Muleba District in Kagera Region. The appellant denied both counts and after full trial, he was convicted with the offence of rape and since the victim was under the age of ten years, he was sentenced to life imprisonment.

Aggrieved with both conviction and sentence, the appellant preferred this appeal with eight (8) grounds which may be summarised as hereunder:

1. *That, the case was never investigated as no police officer appeared in court to testify and to prove the matter.*
2. *That, the trial magistrate erred both in law and fact for convicting and sentencing the appellant while there are procedural irregularities during and after arrest of the appellant.*
3. *That, the age of the victim (PW2) was not proved to the required law standard.*
4. *That, the trial magistrate erred both in law and fact to convict and sentence the appellant by relying on the PF3 did not prove penetration.*
5. *That, the conviction of the appellant was wrongly based on exhibit PE1 (the PF3) which was filed after three days.*
6. *That, there was contradiction on the age of victim.*
7. *That, the evidence of the victim was recorded without conducting voire dire test.*
8. *That, the prosecution side has failed to prove the case beyond the reasonable doubt.*

Before determining the merit or demerit of the appeal, I find it pertinent to give the factual background leading to the conviction of the appellant. On 8th April, 2022, the victim's mother (PW1) went to the farm leaving behind the victim and her boy child. While they were home, the

appellant whom they know as "*wakaragwe*" came and told the victim's brother to go to his grandmother. After he left, the appellant held the victim's hand and took her to banana trees. Then, he undressed her underpants and inserted his male organ into her vagina. The victim felt pain and started to cry. He told her to stop crying and promised to give her soda and sweets. He asked her to go to his place on Sunday so that he can buy more sweets and soda. He also asked her not to tell her mother and then he told her to go home. When PW1 returned, the victim told her what happened. She examined her and found her with blood on her underpants. PW1 informed local leader, PW3 who arrested the appellant and took him to police. The victim was examined by PW4 who found her with no hymen and bad smell.

In his defence, the appellant denied to have committed the alleged offence. According to him, he was arrested on 12th April, 2022 by PW3 who told him that, he was alleged to rape a girl on 8th April, 2022. He was then taken to police and finally arraigned to court on 21st April, 2022. He further testified that, one day the kids took his bunch of bananas and he made follow up and find them at the kitchen of PW1. He took back his bunch on banana and the lady told her that, he will see. Upon being cross-examined, he claimed to have grudges with PW1.

At the hearing of this appeal, the appellant appeared in person unrepresented, whereas the respondent, Republic had the service of Mr. Erick Mabagala, the learned State Attorney.

The appellant contented that; the case was not investigated because there was no police officer who testified before the court. Also, the law was not complied on his arrest. He added that, PF3 did not indicate if there was penetration and it was filled out of time. He further challenged the prosecution for failure to prove the age of victim for want of any document tendered to prove the same. Besides, there was contradiction on the age of victim as her mother said she was 6 years old while the magistrate concluded that, she was 7 years old. Moreover, it was his contention that, the victim testified without following the procedure of the law and finally, he blamed the prosecution failure to prove the case beyond reasonable doubt. In that regard, he prayed for his appeal to be allowed.

On the other hand, Mr. Mabagala resisted the appeal. Responding to the first ground, he submitted that, it is the duty of the prosecution to call material witnesses in order to prove the case. Likewise, the law does not impose the duty to prosecution on who to call as witness in order to prove a certain fact. They didn't see the need to call police officers because they didn't witness the incident and their evidence would be hearsay. He further

argued that, it is not about number of witnesses but rather quality of evidence of key witnesses who were called to testify. He supported his argument by citing the case of **Abdallah Athuman v. Republic**, Criminal Appeal No. 669 of 2020 CAT (unreported). Concerning the second ground, he argued that, although the appellant was arrested by PW3 who is not a police officer, but section 16 of the Criminal Procedure Act [Cap. 20 R.E. 2022] ("the CPA") permits any person to arrest a suspect.

Returning to third and sixth grounds concerning the victim's age, he submitted that, according to the case of **Isaya Renatus v. Republic** (Criminal Appeal No. 542 of 2015) [2016] TZCA 218, the same can be proved by victim, relative, parent, medical practitioner or birth certificate where available. In the matter at hand, PW1 testified that, the victim was born on 24th November, 2015 and hence, there was no need to produce birth certificate. In respect of the alleged contradiction between PW1 and the trial magistrate, he submitted that, the statement made by trial magistrate about the victim's age to be 7 years is inconsequential error which is curable under section 388 of the CPA as the victim is below 18 years. Reverting to fourth and fifth grounds, he cited the case of **Selemani Makumba v. Republic** [2006] TLR 378 and submitted that, the best evidence of rape comes from

the victim. he argued that, in our case, penetration was proved by the victim herself and PW4 who examined her.

It was further his submission that, the requirement to conduct *voire dire* test was repealed via Act No. 2 of 2016. The law as it stands now, the child is required to make a promise of telling the truth before reception of her evidence and this was done at page 10 of the proceedings. On the last ground, he submitted that, the prosecution was required to prove age of victim and penetration. In respect of age, it was proved by PW1 and penetration was proved by the victim who was coherent in her testimony. Also, her evidence was corroborated by PW4. Apart from that, the appellant was known to the victim and hence there was no possibility of mistaken identity. In addition, the record does not reveal if the victim had grudges with the appellant. In that regard, he urged this court to dismiss the appeal as the case against the appellant was proved beyond reasonable doubt.

In his short rejoinder, the appellant blamed PW1 for concocting this case because she wants to grab his land. He prayed to be set free.

Having thoroughly considered the grounds of appeal and submissions by both sides in the light of evidence on record, the main issue for determination before this Court is whether the appeal is meritorious.

In determining that issue, I will begin with the first and second grounds. It is prudent to underscore that, according to section 143 of the Evidence Act [Cap. 6 R.E. 2022] ("TEA"), no particular number of witnesses is required to prove any fact in a case. This was also restated by the Court of Appeal in the case of **Yohanis Msigwa v. Republic** [1990] TLR 148 where it was stated that:

> *"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility."*

Back to our case, the appellant contended that, the case was not investigated simply because, no police officer was called to testify. He also contended to be arrest by local leader. It is undisputed that, at the trial, no police officer was called to testify. However, as submitted by learned State Attorney that, all material witnesses were called to testify and the evidence of police officer would be nothing but hearsay which has no room in courts of law. Apart from that, PW1 stated to have reported the matter to the police where she was given PF3. Likewise, PW3 said that, after arrest, the appellant was taken to the police. The appellant in his defence also admitted to be taken to the police station where he made his statement. He also admitted

that, during the arrest, he was informed about his allegation. All these demonstrate that, this case was investigated. Equally, the fact that he was not arrested by police officer, does not make his arrest to be unlawful as PW3 who was village leader had a duty to keep peace and security in his area. Besides, since the appellant admitted to be informed his allegation during the arrest, I find nothing to establish that, he was prejudiced for being arrested by local leader. Thus, the first and second grounds lack merit.

Reverting to the third and sixth grounds, as correctly submitted by learned State Attorney, it is settled law that, evidence relating to the victim's age can be proved either by the victim, her parents, a guardian or birth certificate. See the case of **Samwel Nyerere v. Republic** (Criminal Appeal No. 65 of 2020) [2023] TZCA 27. In the matter at hand, there is evidence at page 7 of the typed proceedings that, the victim was born on 24th November, 2015. This testimony came from PW1, the mother of the victim who according to law, is eligible to prove the age of victim. In that regard, it was correct for PW1 to say that, the victim was six years old because at the time of incident and testimony, she was not yet reached seven years. In general, there was no contradiction on the evidence of prosecution in respect of the age of victim because, in her testimony, the victim mentioned her age as six. In that regard, the trial magistrate at page 6 of the judgment made wrong

reference on PW1's evidence in respect of the age of the victim. On this, I am constrained to agree with Mr. Mabagala that, the said error made by trial magistrate is trivial and is curable under section 388 of the CPA because PW1 in her entire testimony did not mention that the victim was seven years old. Therefore, the third and sixth grounds also lack merit.

Coming to the seventh ground, it is a common knowledge that, in terms of section 127 (2) of TEA, it is permissible for a child of tender age to give unsworn testimony on a condition of making a promise to tell the truth prior to the reception of her testimony. It is undisputed that, PW2 was a child of tender age in the meaning of section 127 (5) of TEA as at the time she gave her testimony, she was below fourteen years. In that regard, as required by law, before giving unsworn testimony, she was supposed to make a promise to tell the truth and not to tell lies. The complaint of the appellant is that, the trial magistrate did not conduct a *voire dire* test. However, as correctly argued by learned State Attorney, this is no longer a requirement of the law following the amendment of section 127 (2) of TEA. On how to arrive into the stage of requiring a child of tender age to make promise to tell the truth, the Court of Appeal in the case of **Godfrey Wilson v. Republic** (Criminal Appeal No. 168 of 2018) [2019] TZCA 109 directed that:

"The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the y circumstances of the case, as follows:

1. The age of the child.

2. The religion which the child professes and whether he/she understands the nature of oath.

3. Whether or not the child promises to tell the truth and not to tell lies.

Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

A thorough perusal of the proceedings of the trial court reveals that, before PW2 began to testify, the trial magistrate before recorded a promise to tell the truth, she complied with the law by asking the victim several questions as directed herein above. In that regard, the complaint by the appellant is unfounded and this ground also fails.

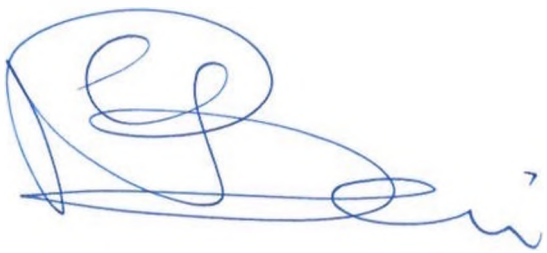
I now turn to the fourth, fifth and eighth grounds which will be determined jointly. As stated in the case of **Selemani Makumba v. Republic** (*supra*), the best evidence in sexual offences comes from the victim. Apart from proof of age for offence of rape under section 130 (1) (2) (e) of the Penal Code, penetration is another ingredient which must also be

proved by prosecution. In the matter at hand, PW2 in her testimony explained in details how the appellant undressed her and inserted his male organ into her female organ. Her evidence is supported by PW1 who upon returning home and being informed about the incident, she examined her and found her with blood in her underpants. Although the victim was examined by medical officer three days after the incident, but PW1 explained the said delay by stating that, at first, she took her to Bugagunzi hospital where she was told that, they had no facilities for diagnosis. She returned home and on Monday, after passing to police station, she went to Rubya hospital where the victim was examined by PW4 who found the evidence of penetration because the victim was not found with hymen. Thus, even in absence of PF3, penetration was proved by PW and her evidence was corroborated by PW1 and PW4.

Moreover, the evidence of PW2 clearly established that, it was the appellant who perpetrated the alleged offence. First and foremost, the appellant was not a stranger to the victim because she knew him as "*wakaragwe.*" According to PW1, the appellant is known to all children in the village by the name of "*wakaragwe*", the name which was not disputed by the appellant in his testimony. Besides, the appellant did not cross-examine either PW1 or PW2 on that aspect of being known as "*wakaragwe*" which as

a matter of law implies that, he accepted the truthfulness of testimony of PW1 and PW2. Apart from that, the appellant in his chief testimony blamed PW1 for being responsible for concocting this case against him. Although in the course of cross-examination, he stated to have grudges with PW1 but, he did not explain in details the alleged grudges which may cause PW1 to frame him. Moreover, when PW1 was testifying, the appellant did not cross-examine her on the alleged grudges. Under these premises, it is undoubted that, the prosecution side had managed to prove the case against the appellant beyond reasonable doubt. Thus, the fourth and fifth and eighth grounds lack merit.

Having said so, I am satisfied that the appellant was properly convicted. Also, the sentence of life imprisonment was legal and properly meted pursuant to section 131 (3) of the Penal Code because the victim was under the age of ten. Thus, I find no reason to fault the decision of the trial court. Consequently, this appeal is devoid of merit and is hereby dismissed in its entirety.



I. K. BANZI
JUDGE
27/06/2023

Delivered this 27th June, 2023 in the presence of Mr. Elias Subi, learned State Attorney for the respondent, Republic and the appellant in person. Right of appeal fully explained.

I. K. BANZI
JUDGE
27/06/2023