IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 7 OF 2022

(Appeal from the Decision of District Court of Bariadi at bariadi in Criminal Case No. 36/2022)

KULWA MELEKA @NKOMA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

3th april & 23th june 2023.

MASSAM, J.:

Kulwa meleka @ Nkoma referred to as the Appellant in this appeal, was charged in the District Court of Bariadi with three counts of c/s 134 of the Penal Code,2nd count rape c/s 130(1) (2) (e) and 131 (1) of the penal code and 3rd count rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code. In a nutshell the prosecution case as was unfolded by its witnesses is that, on unknown dates of November 2021 at katente village within Bukombe District in Geita Region did took the victim girl of

13 years out of custody of her parents and against the will of her parents and again in diverse dates between 25th day of november 2021 at Kasulu District Kigoma Region did have sexual intercouse with the girl of 13 years old the victim and at diverse dates between December 2021 up to 10th day of march 2022 at Mwasinasi Village within Bariadi District and Simiyu Region he had a sexual intercouse with the victim a girl of 13 years. On 10/3/2022 the accused person was arrested and taken to Nkololo Police Station then to the Bariadi District where the appellant was arraigned to court.

Though the appellant denied to have committed the offence but to the conclusion of the trial, the appellant was accordingly found guilty in respect of all counts of the offence charged. Upon conviction, accused person was sentenced to 10 years imprisonment for first count and 30 years imprisonment for second and 3rd count.

Aggrieved by that decision, the Appellant preferred the instant appeal on three grounds which may be summarized as follows: **One**, the court was wrong to enter conviction on hearsay evidence that the victim was a pupil even could be prudently to call a teacher to testify that the victim was a school pupil., **two**, the prosecution side did not prove its case beyond reasonable doubt hence it left shadow of doubts

that he committed the said offence , **three,** it was wrong to convict the appellant while a cell leader of that area did not appeared to the court to prove the said allegation. On the date, of hearing the Appellant appeared in person whereas the Respondent Republic had the service of Ms. Glory Ndondi learned State Attorney .

In supporting to his appeal the appellant's submitted that he appealed to this court as the trial court used his feeling to convict him. As victim told the court that he took her to Kasulu but no one called from there to support the same. Again the victim informed the court he rented the house at mwasinasi with his friend Nyamaro but again no witness called to prove the same. So according to that failure he pray to be left free.

In reply in respect to the ground appeal Ms. Ndondi submitted that, she pray to consolidate grounds of appeal No 2 and 4 and grounds appeal No. 1 and 3 will be urged them separately.

In reply to the first ground that appellant complained to be convicted by using hearsay evidence she said that the said ground has no merit as the appellant was charged with three counts which was well proved, and the complained issue that prosecution failed to call a

teacher to confirm that victim was a student she said that there was no need to call them.

In replying of the 2nd and 4th ground of appeal which appellant complained that they failed to call independent witness so they failed to prove its case beyond the reasonable doubt in her side she said that the appellant's conviction was proper ,and by starting to the 1st count of abduction the victim proved the same where her evidence found in page 16 she confirmed her age to be 13 years also PW2 the victim's father support the same, PW1 told the court that on 25th November, 2021 she was sleeping and found herself on the road with appellant when they get to the bus stand she asked appellant where are they going and he told her that they are going to Kalemela to the house where Nyamaro was living, the next day they went with Nyamaro and appellant to Geita Katoro where they lived there until on December 2021 where he took them to Kasulu and February 2022 they were taken to kasulu and later on to bariadi where they were found on 10th March 2022 by PW3 aunt and taken to nkololo police station. PW1 added that appellant stopped her to go home by threatening her to kill as appellant was witch doctor. Pw2 a father of PW1 told the court that on November his daughter get missing so he directed them to report the matter to the village council,

and school where the victim was schooling and later on to the police station his evidence support the evidence of PW1 that she was abducted against their will. To her the evidence of PW1,PW2,PW3 and PW4 all support that victim was abducted. She added that the age of the victim was mentioned by PW1 and PW2 who victims father all of them support that victim succeded to prove the element of penetration and age of the victim as per section 130 (1) (2) (e) and section 131(1) of the Penal Code. PW1 informed the court that when she was with appellant all in places they went appellant used to have sexual Intercouse with her and PW3, that statement prove the element of penetration. Ms. Ndondi informed this court that PW1 used the word to fuck the said word was indirect word but the said was the one which establish the element of penetration she cement her urgement with the case of **Hassan Kamunyu vs Republic** Criminal Appeal No. 277 of 2016 in page No 9-13 the words used by victim was not direct but establish the charge and penetration. She added that the evidence of PW1 did collaborated with the evidence of pw6 the doctor who examined the victim and found her vagina was open his report was admitted to the court as exhibit P1 but the procedure to read over the said was not well followed so she averred the same to be expunged and remain with oral evidence of the

Pw6, also the evidence of Pw3 confirmed that appellant had sexual intercouse with her and Pw1,so the rape offence was proved beyond reasonable doubt.

In reply to the 3rd ground that the cell leader was not called to testify she stated that cell leader was not an important witness as he/she saw nothing,and no law require them to call many witnesses.so she pray the dismissal of this appeal.

In his rejoinder the appellant stated that,failure to call the cell leader and the owner of the house which he rented him house and the witnesses from Geita and Kasulu creates some doubts .

I have entirely gone through earnestly all the parties' submissions, authorities supplied and the available records. The issue for determination is **whether the appellant's appeal is meritorious.**

In finding the same, I will attend to the grounds of appeal one after the other as brought by the appellant and replied by the respondent.

On the first ground of appeal the appellant complained that the trial court convicted him by using hearsay evidence that the victim was a school pupil,and in record show that respondent in replying the same

informed this court the said ground has no merit, but this court has a view that the issue of calling the teacher was very important as her/his presence could help the trial court to prove that the victim was astudent in that school,second could help to prove the issue of the victim missing to attend to school ,this court find it wise if the said teacher could appear with attendance register which show victim attendance,and lastly the teacher could prove by bringing the victim registrtion number to prove that the victim was their student failure to do that this court is in support with the appellants submission that the issue that victim was a student and she was missing attending to school was hearsay one and this creates doubt. In respect of ground number 2 and 4 the appellant complained the failure to call independent witnesses,in the side of respondent replied that there is no law require them to call many witnesses per section 143 of the TEA this court is in support on that but in this case the father of the victim PW2 told the trial court that after he heard the information that his daughter is missing he went to report the matter to the hamlet Chairaman, to the school where victim schooling and to the police station but the said witness was not called, this court find also that leader was important leader to be called in order to inform the court who informed what about the incident which happened to his

area, this court is aware of the decisions of the court who insisted the impotance of calling material witnesses as among of it is the case of In the case of: ***Hemed Said versus Mahamed Mbiu (1984) TLR 113,*** it was held that where for undisclosed reasons a party fails to call a material witness on his side, the Court may draw inference that if the witness were called, they would have given the evidence contrary to the party's interest. That failure also creates some doubt on that issue even though this court is aware that the best evidence in sexual offenses comes from the victim who has a duty to tell what actually happened at the scene of the crime as in the case of **Selemani Makumba vs, Republic, Criminal Appeal No. 94 of 1994 CAT**, the victim of the offence is the one in a position to tell actually what happened at the scene of crime. By looking the submission from the respondent stated that the evidence of PW1 and PW6 (doctor) collaborates and prove that element of penetration was proved, this court get time to read over the evidence of PW6 and find out that he said he examined the victim and find out her vagina was open as an adult this court ask itself by that wording meant that PW6 proves penetration as among the elements of proving rape cases. Also this court finds out that even though the exhibit P1, PF3 after being admitted was read over to the court un procedural

thus why respondent concede the same to be expunged and remain with oral evidence which the same nowhere proves the issue of penetration. PW6 who is a doctor that conducted medical examination of the victim was not in a position to mention what actually penetrated the victim, but he ended up mentioning that her vagina was open as an adult. From the records, it is not in dispute that, the appellant was charged with the offence of rape contrary to section 130(1)(2)(e) and 131 (1) of the of Penal Code. With the existence of the said section of law and the said offence it therefore goes without saying that, proof of age of the victim is a must as elaborated in the cited case of **Issaya Renatus vs Republic, Criminal Appeal No. 542 of 2015** (unreported) it was held that: -

> *That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent;medical practitioner or; where available, by the production o f a birth certificate.*

With the existence of the above excerpt, I am of firm views that, the victim's age was proved at the trial court by the victim, and her father and doctor and according to the said case law the said are competent persons allowed to prove the age.In this court finds out the

said prove of age was not a prove that victim was a student of V11 more evidence was needed to proof the same as any accusation made like this of the rape can be easily made and hard to be prove but its harder to be defended by the party accused, though never so innocent and the duty to prove it lies on the prosecution side.

As it was held in the case of **Mohamed Haruna @ Mtupeni & Another v. Republic**, Criminal Appeal No. 25 of 2007 (unreported) that: -

> "*Of course, in cases of this nature the burden of proof is always on the prosecution.* ***The standard has always been proof beyond reasonable doubt****. It is trite law that 16 an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.*" (Emphasis is added)

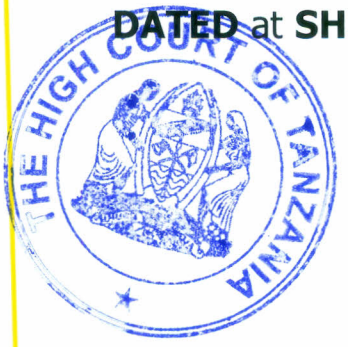
In our case at hand this court finds out that there was material witnesses who failed to be called to prove the case against the appellant ,also this court finds out that respondent told the court that evidence of pw1 the victim and doctor did collaborate to prove the element of penetration but by looking from what the doctor testified said nothing about the penetration even which kind of object used in that penetration

So according to that this court has in view that a lot of evidence was needed to prove the case beyond the reasonable doubt this makes this court to find all grounds of appeal to have merit ..

In view of the above, I proceed allow the appeal entirely on this ground by concluding that the prosecution failed to prove its case to the standard required in law. I consequently quash the conviction and set aside the sentence. I order the appellant to be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED at **SHINYANGA** this 23rd day of June 2023.



R.B Massam
JUDGE
23/06/2023