IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 13 OF 2023

(Originating from Songea District Court in Criminal Case No. 10 of 2022)

SAID DAIMU BAHATI @ MKOPE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 09/06/2023

Date of Judgment: 28/06/2023

U. E. Madeha, J.

This appeal is originating from the decision made by the District Court of Tunduru (hereinafter referred as the trial Court) in Criminal Case No. 55 of 2022, in which the above-named Appellant was charged, tried, convicted and sentenced for two offences of attempted rape contrary to section 132 (1) (2) (a) of *The Penal Code (Cap. 16, R. E. 2019)*. On the first count, it was alleged that the Appellant on 26th day of March, 2022 at Namiungo Village within Tunduru District in Ruvuma Region attempted to rape one "AA" (not her real name for the purpose of hiding her true

identity) a primary school girl aged thirteen (13) years. On the second count, it was alleged that on 26th day of March, 2022 at Namiungo Village within Tunduru District in Ruvuma Region, the Appellant attempted to rape one "BB" (not her real name for the purpose of hiding her true identity) a primary school girl aged twelve (12) years old.

On the material date the two victims were living in the same house and studying at Namiungo Primary School and Misufini Primary School within the District of Tunduru in Ruvuma Region. After a full trial the Appellant was convicted and sentenced to serve ten years imprisonment for each count. Being dissatisfied by the convictions and sentences of the Trial Court, the Appellant appealed before this Court on grounds which are:

i. *That, the Trial Court erred in law and facts to convict the Appellant by not considering PW6's evidence (Medical Officer) who examined the victim and found that her parties were normal.*

ii. *That, the Trial Court erred in law and facts for misdirecting itself by failing to give the Appellant rights to ask questions to the prosecution witnesses.*

iii. *That, the Trial Court erred in both law and facts by relying upon prosecution's evidence only without considering the evidence of the defence witnesses.*

iv. That, the Trial Court erred in law and facts by relying on contradictory evidence produced by PW1 and PW2.

Briefly, the evidence which led to the conviction and the implicated sentence are as follows: PW1 (AA) testified that on the material date at around 3:00 hours while asleep, she wanted to stretch her legs but she noticed that something was obstructing her. She asked PW2 (BB) if their mother had brought Doreen to sleep with them and she replied that she didn't. When she lightened the "Richmond" meaning the dry cell light, she found the Appellant who stopped her from lightening the light, blocked her mouth, pushed her on the bed and asked them the person who they met with in the afternoon and they told him that they went to their senior mother. The Appellant told them that; "You have been grown up." The accused then asked for money, they told him, that they don't have any amount of money, he then told them that they had to choose between being raped or killed. PW2 told him that it was better to be raped than been killed. The Appellant ordered them to undress and he put his penis in AA's private part. The penis never penetrated and the Appellant told her that he will just put his penis on top of her private parts because they were not yet matured enough to have sex. Then he left her and moved to PW2 (BB), undressed her and put his penis on top of her vagina. He also, left

PW2 and came to her and put his penis on top of her private parts and he never penetrated. When the Appellant left, they went to wake up their parents and neighbors who reported the matter to the Village Executive Officer who referred them to Nakapanya Police Station where they were given PF3 for medication. PW1 further testified that they didn't shout for help since the Appellant threatened to kill them if they would shout for help. They went to Nakapanya Health Center where they were diagnosed and she was not found with any bruises while "BB" had slight bruises between her vagina and anus.

PW2 "BB" in her testimony testified that she lives with her parents and on the material day she was sleeping in the same room with PW1. At around 03:00 am, PW1 awaken her to assist to go to the washroom for a short call. When she stretched her legs, she found someone had blocked it. PW1 asked who was blocking her leg and she told her that she didn't know. Then the Appellant asked for money, they told him that they don't have money and they were given two options of being killed or raped. They chose to be raped. She witnessed the Appellant undressing his cloth and putting his penis on PW1's vagina. Later on, the Appellant approached her and put his penis in her private parts. The Appellant told them that he will

not insert his penis into the vagina since they were not grown enough to have sexual intercourse. They failed to shout for help because he intimidated to kill them with a knife. After that he left her and then went to rape Husna again. The Appellant told them not to tell anyone and he left their sleeping room by passing through the window. After that they went to awaken their mother and told her what had happened. Then they went to report the matter to the Village Executive Officer of Namiungo Village who referred them to Nakapanya Police Station where they were given PF3 for medication at Nakapanya Health Center.

PW2 added that, the doctor found her with bruises around the anus, they were asked to go back Nakapanya police station. PW2 further testified that, she knew the Appellant even before the date of the incident since he was their neighbour. Also, she testified that the Appellant has the tendence of raping the children of Namiungo Village and he had raped three other children.

PW3 (Fatuma Matembeni) testified that she is residing at Namiungo Village with her husband and PW1 is their biological daughter who is a class seven pupil at Namiungo Primary School. On 23rd March, 2022 at around 03:00 am she was awakened by her daughters PW1 and PW2 who

were crying. She asked them what had happened they told her that they were raped by the Appellant. She was told that the Appellant entered via the window. She looked at the window and noticed that it was destroyed. She never heard any shouting noise or shouting. PW3 added that their house does not have electricity but they always use the dry cell with bulbs as the source of light. She also testified that she knew the Appellant before the date of the incident since they live in the same street but she never saw him when he was raping her daughters.

As a responsible mother, she decided to report the matter to the Village Executive Officer of Namiungo Village who referred them to go to report to the Police Station. They went to report the matter at Nakapanya Police Station where they met PC Rama, who gave them PF3 and ordered them to go to Nakapanya Health Center for diagnosis. Then the Appellant was arrested by the militia men and sent at Nakapanya Police Station.

PW4 testified that she is residing at Namiungo village with her parents and the victims are daughters of her sister. She further told the trial Court that on 23rd March, 2022 at around 3:00 hours she was awaken by PW3 who told her that PW1 and PW2 have been raped. She went at the scene of crime where she found her relatives, neighbours and the victims

who were crying. She was told that the victims were raped by the Appellant who entered into their room via the window, shut their mouths and intimidated to kill them if they could shout. They reported the matter to the Village Executive Officer of Namiungo Village who ordered the arrest of the Appellant. The matter was reported at Nakapanya Police Post. She added that the Appellant's behaviour is not good and, on several occasions, he is used to be accused of raping children in their village.

PW5 (G. 5920 Detective Corporal Ramadhan) of Nakapanya Police Post who told the trial Court that he is a Police Officer working at Nakapanya Police Post. He testified that on 25th March, 2022 he was on duty at Nakapanya Police Post and he received two victims who were pupils from Namiungo Village who are PW1 and PW2. The victims were accompanied by their mother, one Fatuma Matembeni. He was told that the victims were raped and they reported the matter to the Village Executive Officer who directed them to report the matter at Nakapanya Police Post. He issued PF3 for medication and directed them to go at Nakapanya Health Centre.

PW6 (Antony Bonifance Kayombo) who is a Clinical Officer at Nakapanya Health Centre. He testified that he has been working at

Nakapanya Health Centre for one year and eight months and he got training on Clinical Officer at Mkomaindo College at Masasi. On the 25th day of March, 2022 while at the office he received two young girls who are PW1 and PW2 who were accompanied by their parents. He told the trial Court that the victims told him that they were raped. He conducted physical diagnosis in their private parts and PW1 had no any bruises in her vagina but PW2 was found to have slight bruises between the vagina and the anus. He testified further that he ordered the laboratory technician to take diagnosis for more clarification to look whether there were sperms but the result showed that there were no sperms for both victims. In that case, he then gave them medicine and filled the PF3 and handed it to them so that they could take it back to the Police Station. Lastly, PW6 tendered the PF3 as an exhibit. That marked the end of the prosecution case and the trial Court found the Appellant has a case to answer under section 231 of Criminal Procedure Act (Cap. 20, R. E. 2019). The Appellant in his defence testified as follows:

DW1 (Saidi Daimu Bahati @ Mkope) a peasant of Namiungo Village, testified that on 23rd March, 2022, during evening hours he was at his home and he slept with his wife. On the following day he was surprised to

find the military men came and arrested him and he was sent at the Village Executive Officer where he was told that he had raped children. He denied to have committed the offences and he was sent at Nakapanya Police Station where he also denied to have committed the offences.

DW2 (Haruna Athumani Maulid) who is the wife of the Appellant testified that on 24th March, 2022 at around 09:00 hours, one Mgambo came and arrested her husband.

They took him to the Village Office whereby she heard that her husband is accused of raping two children. However, her husband denied to have committed the said offence before the Village Executive Officer. Then his husband was sent at Nakapanya Police Post. She added that she wonders when did her husband committed that offence since she was with Appellant in that night.

When the appeal was called for the hearing, the Appellant appeared in person that is without any legal representation whereas Mr. Frank Sarwart, Mr. Alfred Maige and Ms. Tumpale Lawrence, State Attorneys joined forces to represent the Respondent/Republic.

Arguing in support of his appeal, the Appellant submitted that evidence which led to his conviction was the doctor's evidence, which did

not prove the occurrence of the offence of rape. He averred that according to the testimony given by a doctor the two victims were examined and there was no sign of been raped. He further contended that during trial he was not given a chance to cross examine all the prosecution witnesses. He added that he was only given a chance to cross-examine the investigator, the doctor and the other witnesses were not cross examined by him since he was not given a chance to cross examine them. He argued that the trial Court did not read the defence evidence after closure of the defence case.

On the contrary, Mr. Frank Sarwart, opposing the appeal, he supported the Appellant's conviction and sentence. He stated that on the first ground of appeal the Appellant has submitted that the conviction was based on the evidence given by the doctor but in his evidence the doctor testified that the victims of attempted rape were in a normal condition. He argued that, to prove the offence of attempted rape there was no need to prove penetration. To support his argument, he cited the case of **Selemani Makumba v. Republic** (2006) TLR 379, in which it was *inter alia* stated that:

> *"A medical report or doctors' evidence may help to show that there was sexual intercourse but it does not prove*

that there was rape that is unconsented sex, even if bruises are observed in the female sexual organs."

Mr. Sarwart added that this being a case for attempted rape the doctor's evidence does not bind the Court.

On the issue of cross examining the prosecution witnesses he submitted that it is not correct that the Appellant was not afforded with an opportunity to cross-examine some of the prosecution witnesses since the trial Court records shows that the Appellant was given the right to cross-examine the witnesses, but he opted not to ask questions to some witnesses. He added that the Appellant has no genuine reasons to complain that he was not given an opportunity to cross-examined the prosecution witnesses.

Mr. Alfred Maige, the learned State Attorney cemented on what was submitted by Mr. Frank Sarwart on the first and second grounds of appeal. He submitted further that according to the testimonies given by the victims, there was no penetration. He added that the victim's evidence is the best evidence as it was held in the case of **Mohamedi Juma @ Kodi v. Republic**, Criminal Appeal No. 273 of 2018, Court of Appeal of Tanzania (unreported).

On the issue of cross examining the witnesses, Mr. Maige submitted that the Appellant was given an opportunity to cross examine the witnesses but he only cross examined few witnesses and the effect of not cross examining the witnesses mean that he accepted what was testified by those witnesses as it was stated in the case of **Thobias Michael Kitavi v. Republic**, Criminal Appeal No. 33 of 2017.

On the Appellant's submission that defence witness' evidence was not read to him, he prayed for this Court to disregard such arguments and he added that if the Court finds there are irregularities, he prayed for those irregularities to be cured by section 388 of the *Criminal Procedure Act* (Cap. 20, R. E. 2022) since there was no justice that was prejudiced. Lastly, he prayed for this appeal to be dismissed for lack of merit.

As far as I am concerned and having gone through the petition of appeal, which encompasses four grounds, I find they boil down into one issue which is whether the prosecution side proved the offence of attempted rape contrary to section 132 of the *Penal Code* (*supra*).

As a matter of fact, in criminal cases the burden of proof is always on the prosecution side which has a duty to prove all the ingredients of offence. Generally, that burden never shifts to the accused except where

there is a statutory provision to the contrary. This stance has been stated in a number decided cases. In the case of **Uganda v. Monday David,** FPT-00-CR-109 of 2019, while elaborating this stance, reference was made to the case of **Miller v. Minister of Pensions** (1947) 2 All E. R. 372 at page 374, where Lord Denning stated that:

> *"The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it carries a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the courses of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with sentence "of course it is possible but not in the least probable! The case is proved beyond reasonable doubt; but nothing short of that will suffice."*

In the same view, in proving the case beyond a reasonable doubt the Court has to make evaluation of the evidence given by both parties in reaching into its conclusion. On the same note, the court should consider the prosecution evidence in isolation from the evidence presented by the accused person. This stance was elaborated in the case of **Uganda v. Monday** (*supra*). Also, in the case of **Abdu Ngobo v. Uganda,** 60 S. C.

Criminal Appeal No. 10 of 1991, the Court expressed itself as follows with regard to the treatment of the evidence:

> *"The evidence of the prosecution should be examined and weighted against the evidence of the defence so that the final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and the weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successful done so, the accused must be acquitted; but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged."*

With respect to that, for the offence of attempted rape to be proved beyond reasonable doubt, the prosecution must prove all the ingredients of the offence found under section 132 (2) (a - d) of the *Penal Code* (*supra*), which states that:

> *" 2) A person attempts to commit rape if, with the intent to procure prohibited sexual intercourse with any girl or woman, he manifests his intention by; (a) threatening the girl or woman for sexual purposes; (b) being a person of*

authority or influence in relation to the girl or woman, applying any act of intimidation over her for sexual purposes; (c) making any false representations for her for the purposes of obtaining her consent; (d) representing himself as the husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known."

Therefore, from the ingredient of the offence of attempted rape, the prosecution was supposed to prove that the Appellant attempted to rape the two girls. To prove that there was an attempted rape the prosecution was obliged to prove that there was threatening for sexual purposes. In attempted rape the real felony is rape, however the offender does not perform all the acts of the execution of having carnal knowledge. Thus, the overt act is so connected with the intention of the accused to commit the intended offence.

On the issue of whether the prosecution proved all the ingredients of the offence of attempted rape found under section 132 (2) (a), (b) of *The Penal Code* (*supra*). In accordance with the evidence in record, PW1 and PW2 before the Trial Court testified how the Appellant did on them. PW1's evidence is to the effect that on 23rd March, 2022, she was sleeping at

home with her colleagues. When she wanted to go outside for a call of nature, she was surprised to see that her legs were prevented by something. She tried to turn on the dry cell light and she saw the Appellant. The Appellant told "AA" that you have been grownup. Also, the Appellant asked for money and when they replied that they don't have money he threatened to kill or rape them. Later on, the Appellant started to take off their underwear and put his penis on top of her private parts. The Appellant didn't penetrate into the vagina of the victims ("AA" and "BB"). Also, the Appellant threatened to kill the victims if they dare shout for help. They reported the matter at the Police Post and they were given PF3. The Appellant was arrested and brought before the trial Court.

PW2's testimony was similar to what was testified by PW1. In her evidence, PW2 added that on the material date at around 3:00 o'clock the Appellant entered in their bedding room and started raping them. She witnessed the whole incident when the Appellant took off PW1's underwear and put his penis on top of the vagina of PW1. After that, then the Appellant started undressing her and he put his penis on top of her vagina and he never inserted the penis inside the vagina and the Appellant told them that they were not enough matured for him to insert his penis. PW2

testified further that the Appellant told them that he will come again and train them until they know how to do it. They didn't raise an alarm since the Appellant threatened to kill them with a knife.

In rape cases, penetration however slight it is it amounts to rape. Section 130 (4) (a) of the *Penal Code* (supra) reads as follows:

> *"130 (4) (a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence".*

To my view, what was done by the Appellant was not just an attempted rape. The Appellant committed the offence of rape against the two victims because he put his penis into the vagina's of PW1 and PW2, although, he did not insert it deeply. It doesn't matter the fact that, the Appellant put his penis in top of the victims' vagina.

Arguing in support of this appeal, the Appellant contended that the Trial Court convicted him basing on the Medical Doctor's evidence who testified that the victims (PW1 and PW2) were not raped. On the issue of the medical evidence, the Court of Appeal of Tanzania in the case of **Agnes Doris Liundi v. Republic** (1980) T. L. R 46, stated that:

> *"The court is not bound to accept medical testimony, if there is a good reason for not doing so, At the end of the*

day that is remains the duty of the trial Court to make a findings and in doing so, it is incumbent upon it to look at, and assess the totality of the evidence before it, including that of a medical report."

Also, in the case of **Godi Kasenengali v. Republic,** Criminal Appeal No. 10 of 2008, where the Court of Appeal of Tanzania stated that:

"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 evidences."

In this appeal, during trial the doctors' evidence is to the effect that he examined the victims and found that there were no penetrations but he found slight bruises between the vagina and the anus of PW2. As much as I am concerned, I concur with the holding in the case of **Selemani Makumba v. Republic,** Criminal Appeal No. 94 of 1999 and the case of **Ramadhan Somo v. Republic,** Criminal Appeal No. 17 of 2008 (both unreported), which were referred by the learned State Attorney for the Respondent that, in rape cases the best evidence comes from the victim. In the case of **Selemani Makumba v. Republic,** Criminal Appeal No. 94 of 1999, it was held *inter alia* that:

"The best evidence of sexual offences comes from the victim."

Therefore, I find the Appellant's complaint that the trial Court in its conviction relied on the testimony given by the doctor is unfounded. It has no legs to stand. Eventually, the first and fifth grounds of appeal has failed.

On the second ground of appeal, it is worth considering the fact that, the testimony given by PW1 and PW2 corroborated each other and the prosecution proved beyond reasonable doubt, that the Appellant committed the offence of rape. To put it in a nutshell, I find the second ground of appeal is also unfounded.

Concerning to the third ground of appeal, which stated that the Appellant was not given his right to cross-examine the witnesses. I have passed through the evidence in records and find that the Appellant was given the right to cross-examine the witnesses, but he failed to exercise his right. He only cross examined few witnesses. It is not correct to state that he was denied the right to cross-examine the prosecution witnesses.

This being the first appellate Court, it is duty bound to examine the evidence and find whether there are contradictions that can be resolved in favour of the Appellant. Personally, having passed through the evidence

given by the prosecution and the defence side, I find the available evidence clearly proved beyond reasonable doubt that the Appellant committed the offence rape contrary to sections 130 (2) (e) and 131 (1) of *The Penal Code (Cap. 16, R. E. 2019).*

In the end result, I hereby substitute the sentence and conviction under section 132 of the *Penal Code* (supra) to the offence of rape contrary to sections 130 (2) (e) and 131 (1) of *The Penal Code (Cap. 16, R. E. 2019).* The Appellant is ordered to serve thirty years imprisonment for each count, which will run concurrently from the date of conviction. Appeal dismissed. Order accordingly.

DATED and DELIVERED at **SONGEA** this 28th day of June, 2023.

U. E. MADEHA
JUDGE
28/06/2023

COURT: Judgment is read over in the presence of the Appellant and Mr. Gaston Mapunda, the State Attorney representing the Respondent. Right of appeal is explained.

U. E. MADEHA
JUDGE
28/06/2023