IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 102 OF 2022

(Appeal from the Judgment of the District Court of Kwimba at Ngudu (Ndeko, RM) dated 28th of July, 2022, in Criminal Case No. 74 of 2021.)

RASHIDI S/O MARWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

31st March & 30th June, 2023

ITEMBA, J.

In the District Court of Kwimba at Ngudu, the appellant Rashid Marwa was arraigned and convicted of the offence of rape contrary to section 130 (2) (e) and 131 (1) of the Penal Code. Following his conviction, he was sentenced to thirty-year (30) prison term. The said offence was allegedly perpetrated against DDY, a girl of fifteen years of age.

It was alleged that on 7th September, 2021, about 11:00 hours at Busule village in Kwimba District within Mwanza Region, the appellant had a carnal knowledge of the said DDY, herein he victim. The appellant is aggrieved with both conviction and sentence and he has preferred the instant appeal which has ten grounds reproduced as follows:

1. *That, the trial magistrate misleads himself with both law and fact for imposing conviction and sentence to the appellant relaying on the hearsay evidence from PW1 to PW9 which are contrary to law for the evidence that the court have no opportunity to demeanor the original witness (victim) while knowing hearsay evidence is not admissible to the court under section 7 and 8 of the TEA of 1976. Also, among PW1 To PW9 no one who tells the court that he/she saw an appellant committing the said offence.*

2. *That, the trial magistrate erred with both law and fact on the first issue whether the victim (DDY) raped by relaying on the evidence of PF3 which admitted as P3 while Yohana s/o Dotto PW5 introduced himself that he is daktari wa binadamu without saying his rank whether he was a clinical officer or Amo, whatever he didn't say whether during examination he found sperms in her vagina to proximity if happen to facilitate the offence of rape to appellant contrary to section 47 (1) and (2) of the Tanzania Evidence Act of 1967.*

3. *That, the trial magistrate relayed only to the prosecution side which was not fair to the appellant for interpreting the law and fact when proved the fact from the prosecution side and sentenced the appellant based on the statement adduced by victim's mother who was also not present to the scene, because the duration of being raped and medical examination was not known to the court which brings nonsense contrary to section 48 of the Tanzania Evidence Act, 1967.*

4. *That, the trial magistrate ignored the law in terms of fairness when the prosecution reads over the charge to the appellant without ensured that the appellant understood the element of the charge as it was in the case of R Vs. Joseph Alphonce (1969) HCD 106.*

5. *That, the trial magistrate erred in both law and fact because the prosecution side failed completely to prove the fact beyond a reasonable doubt. That the allegation and witnesses adduced by PW1 and PW9 was a grove suspicious and trained/organized.*

6. *That the trial magistrate erred both in law and fact when convicted and sentenced the appellant without consider that there was contradiction between the witness which adduced by PW5, Yohana s/o Dotto daktari wa binadamu who didn't say anything if he says anything if he found sperms to the vargina while PW2 Jesca d/o Edward a teacher who said to the court that the victim's vargina found with sperms, now who tells the truth to the court.*

7. *That, the trial court based on one side evidence which adduced by the prosecutor without considering the mitigation of the appellant that the age of the victim can be proved by birth certificate during the trial without leaving any doubts but the court ignored it.*

8. *That, the trial magistrate erred in law and fact to impose the conviction and sentence to the appellant without the appearance of the victim to the court and no any statement*

adduced by the victim to the trial court but the court used all statement from police station which was very shallow for sentencing the appellant so the prosecution side failed totally to prove the fact beyond a reasonable doubt.

The brief factual background of what precipitated this appeal is as follows; The appellant was a primary school teacher at a school which the victim attended. That on the fateful day, the appellant sent one student named Veronica George to call the victim. That, the victim went to the appellant's house which was within the school compound and upon reaching there, the appellant dragged her into his bedroom and raped her. Facts reveal further that, the appellant's wife who was absent, came back at the scene and found the appellant indulging in sex with the victim. That, the argument arose between the appellant and his wife where the victim managed to escape. Later, the victim's mother reported the matter to the headmaster who also reported to the village executive officer and the police station. The appellant was arrested. The medical examination report indicated that the victim's female organ had enlarged as there was no hymen, inferring that she had been penetrated. The appellant denied any involvement. At the end of proceedings, the trial court was convinced that the appellant is guilty of the offence of rape hence his conviction.

At the hearing of the appeal, the appellant enjoyed the service of Ms. Magreth Mnihava, learned counsel against Mr. Moris Mtei, learned State Attorney who represented the respondent.

Submitting on the first ground of appeal, Ms. Mnihava argued that the trial magistrate relied on hearsay evidence from PW1, PW2, PW3 and the rest of witnesses which is contrary to section 62 of The Evidence Act, Cap 6, which states that oral evidence must be direct, either from a person who saw or heard. That, the magistrate did not get an opportunity to examine the demeanor of child's mother and the student who was sent to call the victim. And that, section 212 of the Criminal Procedure Act, which require the magistrate to recording remarks was not complied with.

In the second ground she argued that, PW5 who introduced himself as a doctor did not elaborate clearly whether he found sperms in the victims' vagina. That, it means there was no penetration and the offence of rape was not proved. She argued that, the fact that a victim has no hymen does not mean she is raped. She cited the High Court case of **Ibrahimu Sharifu v R** Cr. Appeal no. 175 of 2018 which states that if there is no proof of penetration there is no proof rape.

In the 3rd ground, she submitted that, the accused raised doubts in his defence that he was never mentioned in any way. And that an accused

person ought to be convicted on the strength of prosecution not on weakness of his defence. She referred the court at page 55 of the typed proceedings stating that the appellant's defence was supposed to be considered in that, at the hours when the offence took place, PW1 was with the appellant at their work place. She cited the case of **Soudi Seif v R** Criminal Appeal No.521 of 2016 CAT at Tabora, which held that defence case need to be evaluated and considered.

The learned counsel abandoned the 4th ground and argued grounds 5 and 6 jointly stating that all the prosecution's evidence was contradictory. That, PW5, who is the medical doctor said he did not see sperms or signs of penetration while the victim's mother said she saw sperms.

In ground 7, she argued that the victim's age was not proved by a birth certificate and that, generally, proof of age is a mandatory requirement. She argued that the appellant raised the issue of proof of age but it was not considered by the court. That, the law requires the either a birth certificate, victim's mother or relative to establish age of child.

In the last ground, she argued that the key witnesses who was the victim and her mother did not testify. That according to **Selemani**

Makumba V R (2000) TLR 379 the best evidence is the one from the victim therefore, in the absence of her appearance there are a number of doubts which remains unresolved. She added that, statements from the victim and her mother were admitted through witness statements contrary to section 34B of The Evidence Act because the court did not satisfy itself on why they could not appear.

In reply, the republic supported the conviction and sentence. In the 1st ground the learned state attorney stated that it is not true that PW1 to PW9 had hearsay evidence. That, apart from PW8 a Village Executive Officer, the rest testified on what they knew.

In the 2nd ground he stated that there is no legal requirement for a rank of medical officer to examine victim of sexual offence. And that, even when PW5 was testifying, he said he is a Clinical Officer at Ngudu. That, the appellant had a room to cross examine the witness on non-mentioning of sperms but he did not, thus this ground is an afterthought.

In the 3rd ground, he argued that the court convicted the accused based on the totality of evidence and that due to the nature of sexual offences there cannot be a third party and as explained in **Seleman Makumba,** the evidence of the victim is the best evidence.

In the 5th and 6th grounds, he submitted that there is no contradiction in prosecution's evidence because PW2 mentioned to have seen sperms and although the medical doctor did not talk about sperms, he did not say there was no sperms. That, the appellant would have cross examined PW2 for clarifications.

He conceded to the 7th ground that the age of victim was not proved. That, the evidence on this aspect was silent as there were neither birth certificate nor oral testimony of the parent or guardian to establish the age of victim.

On the 8th ground he submitted that it was clearly explained before the court that the two witnesses could not found. That, section 34B of the Evidence Act allows for witness statement to be tendered in alternative. And that was done after a notice of 10 days being issued. He added that according to the proceedings at page 16 the appellant did not object production of the said statements. Therefore, the statement qualifies according to the conditions under section 34 B (2) and that the trial court was justified to convict the accused in the absence of victim appearance.

In her short rejoinder, Ms. Mnihava stated that in the 1st ground the respondent only talks about PW8 but all the witnesses had hearsay evidence. That, under ground 8, the victim's evidence was not admitted

procedurally because the prosecution did not make efforts to prove that the victim was not found. That the victim was a student of grade 7 who graduated in the same village and there was possibility of her being available. Otherwise, they could have brought evidence that victim is lost or dead. She questioned as to how could the victim, her mother and her friend Veronica not found? That, the situation raises doubt and the trial magistrate could have satisfied himself before convicting the appellant.

From these rivalry submissions, the question that follows is whether the respondent proved its case beyond reasonable doubt against the appellant.

It is a cardinal principle of law that, in criminal cases, the burden of proof lies with the prosecution. See: ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported) and ***Jonas Nkize v. Republic*** [1992] TLR 213.

According to the chargesheet, the appellant was charged under section 130(1) (e) and 131 of the Penal Code. The section states thus:

> *130.-'(1) It is an offence for a male person to rape a girl or a woman. (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*

(e) ***with or without her consent when she is under eighteen years of age,*** *unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, ***and in any case for imprisonment of not less than thirty years*** *with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, ...'*

Having quoted the relevant sections, I will start with the 7th ground which refers to proof of age of victim. The chargesheet shows that the victim was 15 years old. The medical doctor also testified to that effect but he is not stating where he got such information. The victim's statement is silent on the age as well apart from the particulars which appear on top of the statement which in my opinion, cannot be relied as the victim's testimony.

As noted from the charging section, age of the victim is the determinant factor. It is trite law that age of the victim can be proved by either the victim, the biological parents or medical evidence. In **R. v. Athuman Hatibu** (1986) HCD 396, the Court held that doubt as to the accused age should be resolved in favor of the accused. This position was

underscored in the Court of Appeal of Tanzania in ***Emmanuel Kibona & Others v. Republic*** [1995] TLR 241 (CA), where it was held:

> *"Evidence of a parent is better than that of medical doctor as regards that parent's child's age. Where age can't be assessed accurately the benefit of doubt must be given to the accused."*

The issue of age of the victim was discussed at length in **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 CAT Tabora (unreported), the Court of Appeal made the following observation:

> *"True, apart from the charge sheet and the fact that PW1 introduced herself in the witness box to be eleven years before she gave her testimony, there was no direct evidence on the fact of her age. We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate. We are however, far from suggesting that proof of age must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact including age of the victim on the authority of section 122 of the TEA ....."*

Also, in **Andrea Francis v. Republic**, CAT-Criminal Appeal No. 173 of 2014 (unreported), the Court of Appeal was confronted with the position akin to what to what is at stake in the instant. The superior Bench held as follows:

> *"With respect, it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age. It follows that the evidence in a trial must disclose the person's age, as it were. In other words, in a case such as this one where the victim's age is the determining factor in establishing the offence evidence must be positively laid out to disclose the age of the victim. Under normal circumstances evidence relating to the victim's age would be expected to come from any or either of the following: - the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc. in this case, no evidence was forthcoming from PW1, her mother PW2, or anybody else for that matter, relating to the age of PW1. In the absence of evidence to the above effect it will be evident that the offence under section 130 (2) (e) (supra) was not proved beyond reasonable doubt."*

It means therefore, the trial court placed reliance on the victim's statement and testimony of PW5 (medical doctor) who did not explain as to how he knew that victim was 15 years of age. Based on the analysis

and Court's positions explained above, it cannot be said that the prosecution established victims' age. In the absence of such proof, it cannot be said as well that the victim was below 18 years. Therefore, the age of victim which is the key elements of offence of rape as provided for by the 130(2)(e) of the Penal Code, was not proved.

I would have ended here, considering that in proving the offence of rape, age is a determinant factor and it was not established. Yet, I will go further to reflect if the victim was below 18 years, was the case against the appellant proved? The 8th ground question the absence of the victim's oral testimony. It is undisputed that the victim did not testify orally during trial apart from her statement being produced in court. The issue of the role and value of the evidence of victim of sexual offence was discussed in the case of **Josephat Joseph V R** Criminal Appeal no. 558 of 2017 CAT, Arusha. In this decision, the Court acknowledged the principle from landmark case of **Selemani Makumba** (supra) that true evidence of rape or any other sexual offence must come from the victim. In the said case, The Court through Hon. Ndika J.A went further and stated as follows:

> '*At this point, we wish to remark that we are alert that in view of the inherent nature of sexual offences where only two persons are usually involved,* ***the testimony of the victim is of paramount importance and that it must be scrutinized cautiously. Accordingly, the credibility***

of the victim becomes the single most important issue. If the testimony of the complainant is credible, cogent and consistent with human nature as well as the normal course of things, the accused may be convicted exclusively on that evidence.' *(emphasis supplied)*

Therefore, in allegations of sexual offences, it is important to examine, scrutinize and reconsider the victim's evidence before relying solely on it for conviction. The court must be satisfied that the witness is credible and telling the truth. This is only possible when the said witnesses are paraded before the court, testify, be subjected to cross examination and their demeanor being assessed. This is due to the nature of sexual offences happening in privacy. And; I think due to the penalty which the offences attract which is ranging from 30 years to life imprisonment depending on the age of the victim. In the present case as hinted above, the victim was not brought to court as she could not be traced in the village. Instead, her statement was produced under section 34B of The Evidence Act. I am of the firm view that as much as it is lawful to produce the statement under section 34B of the Evidence Act, in accordance with the reasoning in **Josephat Joseph v R** (supra), when it comes to sexual offences, where the evidence of the victim carries a special weight, it is necessary for the victim herself to testify. In the absence of the victim

evidence, I find that the prosecution did not prove that the appellant raped her.

Consequently, I hold the view that the prosecution's case was not proved beyond reasonable doubt. I find merit in the appellant's challenge. Disposal of this ground goes as far as resolving all the remaining grounds of the appeal as the substance of their contention touches on the sufficiency of the evidence which was used to convict the appellant.

In the upshot of all this, I allow this appeal. Accordingly, I set aside the conviction and sentence imposed, and I order that the appellant be set free unless he is held for some other lawful reasons.

It is so ordered.

DATED at **MWANZA** this 30th day of June, 2023.

L.J. ITEMBA
JUDGE