IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 74 OF 2022

(Arising from Criminal Case No. 81/2021 District Court of Ngara)

MANENO JOHN.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

22nd June & 21st July, 2023

BANZI, J.:

The appellant was arraigned before Ngara District Court charged with the offence of rape contrary to sections 130 (1) (2) (a) and 131 (1) of the Penal Code [Cap. 16 R.E. 2019] ("the Penal Code"). It was alleged that, on 26th January, 2021 at Kashinga village within Ngara District, the appellant had carnal knowledge of PW1 (name withheld) aged 21 years old without her consent. He denied the charge and, in a bid, to prove the case against him, the prosecution side called in four witnesses and tendered one exhibit, Police Form No. 3 ("PF3"). After a full trial, he was convicted and sentenced to serve 30 years imprisonment with corporal punishment of six strokes of cane.

Aggrieved with his conviction and sentence, the appellant lodged his appeal before this court containing a total of eight grounds. Later on, with leave of this Court, he filed three additional grounds. However, his grounds raised the following complaints; **one**, the charge was defective; **two**, there was contradiction between PW1 and PW2 on the age of the victim; **three**, the case was not proved beyond reasonable doubt and **four**, his defence was not considered.

Before determining the merit or demerit of this appeal, I find it pertinent to give factual background leading to the conviction of the appellant. The appellant is the half-brother of the and the victim, PW1 sharing the same father (PW2). On the fateful date, while the victim was at home alone, the appellant went there and ordered her to lay down or otherwise, he would cut her with the bush knife. She obeyed the order and laid down. Thereafter, the appellant undressed her and undressed himself. After that, he inserted his male organ into the victim's female organ. After quenching his desire, he ran away. The victim went to their neighbour named Shukuru and informed him about the ordeal which befallen her. When PW2 returned home, he was informed by the victim about the incident and at that moment, the appellant was not there. He went to Nyakisasa Ward office where he found the appellant was already arrested.

Thereafter, the appellant was taken to Rulenge Police Station while the victim was taken to Rulenge Hospital after being given PF3 (Exhibit P1). At the hospital, she was examined by a clinical officer, Justine Paschal (PW3) and found with bruises in her genitals which was caused by a blunt object. Also, her hymen was not intact. On the other hand, Georgius Jerome (PW4) in his evidence stated that, on the fateful day, he went to his neighbour Shukuru Elias. When he was leaving and upon reaching at the house of PW2, he heard voice. He went closer and upon knocking the door, the voice stopped. Thereafter, PW1 came out and told him that, she was raped by the appellant who escaped through the back door. He went at the back of the house but couldn't find him. He kept on looking for him without success but he was informed by various people that, they saw him running toward the centre area. He found him arrested at Kashinga which is 30 minutes walking distance from the crime scene.

In his defence, the appellant categorically denied to rape his sister. It was his testimony that, on 26th January, 2021 at 3:00 pm, he was arrested at Kashinga and taken to Rulenge Police Station because of grudges between him and his father. He contended that, PW2 gave him a fam but he did not cultivate it. As a result, PW2 wanted to sell it but he refused which caused the grudges between him and his father to grow leading to the concoction of this case against him.

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

When he was invited to argue his grounds of appeal, the appellant adopted them to form part of his submission and contended that, the central issue behind this case is the land dispute between him and his father who gave him the land without notifying his step mother. After he sold it, his step mother got angry. Due to that anger, his step mother took PW1 and went to report to police complaining that, he raped her while it was not true.

Furthermore, he argued that, the case was concocted because it was not investigated and no police officer went to court to testify. Had the case been investigated, he would not have been convicted. He went on stating that, the age of the victim was not proved because the birth certificate was not produced before the court. Also, there were contradictions on prosecution evidence. In respect of the age of the victim, while the victim contended to be 16 years, her father said, she was 21 years. Also, while PW1 said, after being raped she went to inform Shukuru, PW4 told the trial court that, he was the one who informed Shukuru about the incident. Therefore, the evidence of PW1 was cooked. He concluded his submission, by stating that, there was no proof of rape because even the doctor who examined the

victim did not find sperm on her genitals. He urged the court to allow the appeal and release him from custody.

In his reply, Mr. Mabagala stated that, it was the duty of the prosecution to prove the offence of rape and according to the charging section, two ingredients must be proved; one, penetration and two without consent. He further submitted that, according to the testimony of PW2, the victim was over 18 years. Therefore, the duty of the prosecution was to prove that the victim did not consent to the said sexual intercourse. According to Mr. Mabagala, the offence of rape was proved by the evidence of the victim which is the best evidence in sexual offences as it was stated in the case of **Seleman Makumba v. Republic** [2006] TLR 263. Her evidence was corroborated by the evidence of PW3 who examined her and found her with bruises on her genitals and the hymen was not intact. He added that, PW4 was not a family member and thus, an independent witness with no indication that he would give false testimony against the appellant.

Moreover, Mr. Mabagala conceded that, the defence evidence was not considered because the trial Magistrate just summarised it without analysing the same. However, he urged this court, as the first appellate court, to step into the shoes of the trial court and analyse the defence evidence as it has been emphasised by various cases including the case of **Soud Seif v. Republic** (Criminal Appeal No. 521 of 2016) [2020] TZCA 216 TanzLII. In

respect of complaint that charge was defective he submitted that, the charging section was proper and particulars were sufficient. Although he conceded that, the evidence of PW1 did not support the charge in respect of the age of victim, he argued that, such disparity does not vitiate the conviction of the appellant. Likewise, the complaint concerning contradiction over the age of the victim as stated by PW1 and PW2 was minor which does not go to the root of the matter. In that regard, he prayed for this court to dismiss the appeal because the case against the appellant was proved to the required standard.

In his brief rejoinder, the appellant insisted that the offence of rape was not proved because PW3 examined the victim after four hours of the alleged rape and found no sperm in her genitals although her clothes were dirty. He went on insisting that, the case against him was concocted due to contradictions in evidence from the witnesses.

Having received the submissions of both sides and after thoroughly perused the evidence of the trial court, the issue for determination is whether the case against the appellant was proved to the required standards.

It is well settled that, the first appellate court is duty bound to re-evaluate the evidence of the trial court and where possible, come out with its own findings. It was stated in the case of **Vuyo Jack v. The Director**

of Public Prosecutions (Criminal Appeal No. 334 of 2016) [2018] TZCA 322 TanzLII that:

> *"A first appeal is in the form of a re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact."*

Equally, in criminal cases, it is the duty of the prosecution to prove the offence beyond reasonable doubt. In the case of **Halfan Ismail @ Mtepela v. Republic** (Criminal Appeal No. 38 of 2019) [2020] TZCA 195 TanzLII, it was held that:

> *"It is trite that the burden of proof is on the prosecution on the standard which is higher than mere preponderance of probabilities applicable in civil cases. It is equally the law that the prosecution has to prove its case beyond reasonable doubt."*

It is also settled that, in rape cases, the prosecution is required to prove that, there was penetration and where the victim is above 18 years, there is another requirement to prove which is lack of consent. This was stated in the case of **Masanyiwa Msolwa v. Republic** (Criminal Appeal No. 280 of 2018) [2022] TZCA 456 TanzLII that:

> *"For the offence of rape of any kind to be established, the prosecution or whoever is seeking the trial court to believe*

his or version of the facts on trial, must positively prove that a sexual organ of the male human being penetrated that of a female victim of the sexual offence, and if the victim is an adult of over 18 years of age, a further condition is needed, proof that the victim did not consent to the sexual act."

Likewise, in proving rape cases, the best evidence comes from the victim as it was observed in the case of **Selemani Makumba v. Republic** (supra). However, in the case of **Mohamed Said v. Republic** (Criminal Appeal No. 145 of 2017) [2019] TZCA 252 TanzLII it was emphasised that, the word of the victim of sexual offence should not be taken as a gospel truth but rather her or his testimony should pass the test of truthfulness. See also the case **Elisha Edward v. The Republic** (Criminal Appeal No. 33 of 2018) [2021] TZCA 397 TanzLII where it was insisted that, the position concerning evidence of the victim being the best evidence in sexual offences, depends on the unquestionable credibility of the respective witness on the facts of the incident.

Reverting to the matter at hand, it was the duty of prosecution to prove the charge against the appellant beyond reasonable doubt. The appellant complained that, there was contradiction on age of the victim. The victim in her evidence told the trial court that, she was 16 years while PW2 contended that, her daughter has 21 years of age. Although Mr. Mabagala took it as

minor contradiction which does not vitiate the conviction of the appellant, it is the considered view of this court that, such contradiction goes to the root of the matter. Basically, the age of the victim is one of the determining factors in ascertaining the type of rape to be preferred to charge the accused. If the victim is below 18 years of age, that is statutory rape in which case consent whether present or not, is immaterial. Where the victim is over of and above the age of majority *i.e.,* 18 years, it is unconsented rape in which lack of consent must necessarily be proved.

As stated herein above, while the victim said she was 16 years of age, PW2 who testified on the same date stated that, the victim was 21 years old. Apart from that apparent contradiction between them, the evidence of the victim is in discordant with the charge. In other words, there was variance between the charge and evidence. According to the testimony of the victim, if it was for offence of rape, the appellant was supposed to be charged with category of rape commonly known as statutory rape under section 130 (2) (e) of the Penal Code. Apart from that, the testimony of the victim and PW2 reveals another offence incest by males which is at variance with the charge. It is undisputed that, the appellant is the half-brother of the victim. Any sexual intercourse between them falls under section 158 (1) (a) of the Penal Code because, according to section 161 of the Penal Code, the expression "sister" appears under section 158 includes half-sister. Thus, although the

appellant was charged with unconsented rape under section 130 (2) (a) of the Penal Code, the available evidence discloses the offence of incest by males under section 158 (1) (a) of the Penal Code. This variance is so glaring which as a matter of law, the charge was supposed to be amended under section 234 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] ("the CPA") immediately after the reception of the victim's testimony. This in itself suffices to hold that, the charge is fatally defective which cannot be amended at this stage, or cured under section 388 of the CPA as already the trial proceedings prejudiced the appellant. Besides, unconsented rape and incest by males are two distinct offences with different ingredients.

Despite the charge being defective, there are other matters which dismantle the prosecution case. The testimony of the victim does not support the charge on the date of the incident. Although in her chief testimony, she did not mention the date of incident, during cross-examination, she said to be raped in August. Her testimony on this fact, did not support the charge which indicates that, she was raped on 26th January, 2021. This disparity cast doubt on the victim's testimony concerning the truthfulness of the alleged offence if at all it was committed on the fateful date leave alone, it was committed by the appellant. Moreover, the contradiction in the testimonies of PW1 and PW2 over the age of victim diminishes their credibility because it is strange for a parent and a daughter to have a

differentiated spot over the same fact and therefore the court cannot rely on either testimony to sustain the conviction.

Apart from that, there is another contradiction in the testimonies of PW1 and PW4 concerning facts of incident. On the one hand, PW1 stated that, after the appellant finished to rape her, he left. Then she went to their neighbour, namely Shukuru (who was not called to testify) and informed him about the ordeal which befallen her. After that, Shukuru informed the victim's father, PW2. On the other hand, PW4 who according to his testimony, he is the first responder stated that, while he was coming from Shukuru's house, he heard voice inside the house of PW2. When he knocked the door, the voice stopped. After that, the victim came out and informed him that, she was raped by the appellant who escaped through the back door. He went behind the house but he did not see him. If PW4 was really the first responder, how comes the victim said nothing about him and instead she insisted to have reported the alleged rape to Shukuru? If Shukuru was the first person to be informed about the incident, why the prosecution chose to call PW4 instead of him who was the material witness? Therefore, these contradictions cast doubt on credibility of PW1 and PW4 which should be decided in favour of the appellant.

For those reasons, it is the finding of this court that, the case against the appellant was not proved beyond reasonable. In that regard, I find the

appeal with merit and I allow it by quashing the judgment and setting aside the sentence of imprisonment and corporal punishment meted against the appellant. I hereby order his immediate release from custody unless is held for other lawful cause.

I. K. BANZI
JUDGE
21/07/2023

Delivered this 21st July, 2023 in the presence of Mr. Eric Mabagala, learned State Attorney for the respondent and the appellant in person. Right of appeal duly explained.

I. K. BANZI
JUDGE
21/07/2023