IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 8 OF 2023

(C/F Criminal No. 23 of 2022 Resident Magistrate's Court of Arusha Arusha)

LEMINDEA LESIRIA ..... 1ST APPELLANT

KULASA MANDEU ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

19th June & 28th July, 2023

TIGANGA, J.

From the grounds of appeal and the records thereof, two issues are to be resolved **first**, "*whether a man can commit an offence of rape against his own wife?*" and **second**, "*where an act allowed by the customs of a certain community, but prohibited by law as been committed, thereby resulting into a conflict between the law and customs, which one will prevail?*" To understand what brought out these two issues, I find it apt to narrate albeit briefly the historical background of the case which led to the arrest, and arraignment of the appellant.

Briefly, in this appeal, the appellants are two brothers namely Lemindea Lesiria and Kulasa Mandeu who stood charged before the Resident Magistrate's Court of Arusha at Arusha (the trial court) on three

offences. The first count was Grievous Harm contrary to section 225 of **the Penal Code, [**Cap 16 R.E. 2022] (the Penal Code). The second count was Cruelty to Children contrary to section 169A (1) and (2) of the same law. These two offences were for both appellants. The third count is rape contrary to sections 130 (1) (2) (e) and 131 of the same law which was for the 1st appellant only.

According to the evidence on record, on 14th September 2022 at Lumbwa Village in Gelai-Lumbwa Ward, within Longido District in Arusha Region, the appellants tied Mesoni Kashiro, a sixteen years old girl, to the tree, brutally canned her on different parts of her body and left her unattended for three days.

According to the evidence, the 1st appellant was the husband of the victim, PW1 whom he married in 2020 when she was still 14 years old. What triggered the unfortunate ordeal was a bottle of cattle pesticide, erythromycin, which broke as PW1 who was carrying it tripled and fell. The 1st appellant being the husband of PW1, started assaulting her as a punishment for breaking the pesticide bottle. The victim, PW1 ran to the 2nd appellant for help, but to her surprise, instead of helping her, the 2nd appellant joined forces with the 1st appellant who was running after her and continued assaulting her. They tied her to a tree and started to cane

her severally on different parts of her body save for the stomach. After they had assaulted her exhaustively, they later untied her from the tree but continues to tie her hands and legs and kept on assaulting her all over her body, and left her in the bush.

The evidence shows that, she became unconscious, for sometimes and whenever she gained consciousness, she tried to crawl as she could not stand and walk. However, in such attempts, she frequently lost consciousness again and again until 18th September 2022 when she was rescued by PW2 who grazing around the area.

The latter told the court that, he knew her thus, he carried her to his home, offered her the sheep oil as first aid, and notified her father who went, picked her and took her to the hospital where she was examined by PW5, a medical doctor who noted that PW1's genitalia was wide open for her age as his two fingers easily penetrated without resistance hence. Following that findings, he filled in two PF3's one for the assault and the other for rape. The matter was reported to the authorities and the appellants were arrested and charged with the current offences.

In their defence, the appellants denied the participation of any kind in either assaulting the PW1 or abandoning her. As part of his defence,

the 1st appellant claimed that PW1 escaped from his home and ran back to her parent's home thus, such wounds were inflicted on her while at her parents' home. Regarding the offence of rape, he claimed to have been married to PW1 when she was 14 years old after following all traditional procedures and has been having voluntary sex with her ever since, thus he cannot be held liable for raping his own wife.

After a full trial, the trial court found the appellants guilty of all offences, convicted them, and sentenced them to serve five years imprisonment, for the first and second counts, while condemning them to compensate the victim to the tune of Tshs. 2,000,000/= each in the second count. For the third count, the 1st appellant was sentenced to thirty years imprisonment. The sentences were to run concurrently.

Aggrieved by the judgment and sentence of the trial Court, they appealed to this court praying for the judgment and sentence to be quashed and set aside respectively. In such endeavour, they raised a total of four grounds of appeal as follows;

1. That, the prosecution did not prove its case beyond reasonable doubt against the appellants herein.

2. That, the trial Court's proceedings are tainted with gross incurable procedural irregularities which render the whole decision thereof null and void.
3. That, the third court of rape was not proved beyond reasonable doubt against the first appellant.
4. That, the trial Court erred both in law and fact in convicting and sentencing the first appellant on the third count of rape against his wife without satisfying itself concerning the correctness of the age of the victim.

During the hearing which was done by way of filling written submissions, the appellants were jointly represented by Mr. John Shirima learned Advocate whereas the respondent was represented by Ms. Akisa Mhando, learned State Attorney.

Supporting the appeal, Mr. Shirima submitted on the first ground that, the case against the appellant was not proved by the prosecution beyond reasonable doubt. Analyzing the doubt, he started with PW1's narration of how she stayed in the bush for three days while being tied, unconscious, and without clothes. According to him, PW1's narration was of inconsistency and full contradiction as she told the trial court that, she was naked and left tied. However, when PW2 found her in the bush he

told the court that her unconscious body was laying on the ground covered in a Maasai blanket which prove that she wasn't naked. Mr. Shirima argued that in criminal proceedings the burden of proof lies with the prosecution side and the standard of proof is beyond reasonable doubt. Whenever there is doubt as to the commission of the offence, such doubt should benefit the accused. He referred the Court to the case of **Jonas Mkize vs. The Republic** [1992] TLR 213 and contended that none of the prosecution witnesses saw the appellant assaulting the victim. Since the appellant denied having committed the offence and claimed that this case has been fabricated against them and since the victim was not found in any of their houses, Mr. Shirima asserted that these doubts should benefit the appellants.

Submitting in support of the second ground, Mr. Shirima averred that, the trial court's proceedings were tainted with irregularities that were incurable. He pointed out the irregularities such as the hearing was not conducted fairly. However, in his submission, the learned counsel did not submit anything useful to assert the alleged irregularities.

As to the third and fourth grounds of appeal which hold the same contents, the learned counsel submitted that the offence of rape against the first appellant was not proved at the required standard. He argued

that, the victim was the first appellant's wife for two years and neither her relatives, parents, or herself claimed that she was raped. Further, there is no document tendered to prove that she was aged 16 years old. Apart from that, the first appellant told the court that the victim was his wife for two years and he acquired her after completing all traditional steps of marriage. In that regard, he claim he could not rape his own wife. He referred the Court to the case of **George Claud Kasanda vs. The Republic**, Criminal Appeal No. 376 of 2017, CAT at Mbeya, (Unreported) in determining the issue of age, where the Court referred to its earlier decision in the case of **Issaya Renatus vs. The Republic**, Criminal Appeal No. 542 of 2015 which underscored the importance of documentary proof of age such as through birth certificate, clinic card, affidavit, or medical report. He prayed that this court resolves the above shortfalls in the appellants' favour, allow the appeal, quash the conviction, set aside the sentence, and set them at liberty.

In reply, Ms. Mhando submitted on grounds of appeal interchangeably that, the case against both appellants was proved to the required standard. She started with the 1st count of appeal, on the complaint of grievous harm that, the prosecution managed to prove how the victim was seriously wounded as seen on page 10 of the typed

proceedings where she showed the court the scars on her hands, wrists, and head. She also showed healing wounds on her whole back, buttocks, breasts stomach, and thighs. This evidence was supported by the evidence of PW4, the doctor from Gilai Lumbwa Dispensary who examined her wounds and referred her to Longido District Hospital where PW5, another medical doctor treated her. More so, even the 1st appellant admitted that he was aware that PW1 had wounds as reflected on page 34 of the typed proceedings.

Ms. Akisa further submitted that another ingredient of grievous harm was also proved that is; it was the appellants who were responsible for the harm they inflicted on the PW1's body. This was proved through the victim herself who narrated how the appellants tied her to the tree, beat her in turns, and left her in the bush for three days. Also, the 1st appellant himself admitted he was the one responsible for what happened to her and not the 2nd appellant as featured on page 36 of the typed proceedings.

As to the 2nd count of cruelty against children, the learned State Attorney submitted that the victim was married to the 1st appellant and according to section 169A of the Penal Code, he was her custodian. Also, the 2nd appellant being her brother-in-law had a duty to take care of PW1

when she ran to her for help. Therefore, their act of beating her to the extent they did and leaving her in the bush unattended and without care amounted to cruelty.

On the 3rd count of rape, Ms. Mhando submitted that both the appellant and the victim testified to having sexual relations as husband and wife which proves there was penetration as elaborated in detail by PW5, the medical doctor. According to him, the victim was a 16-year-old girl her vagina was too big as he penetrated his two fingers without resistance which is proof that, she was regularly penetrated by a blunt object. Under section 4 of the **Law of a Child Act**, a child is defined as any person below the age of eighteen years. Thus, the 1st appellant having sexual relations with her amounts to rape and there was no need for proof of consent.

Regarding contradictions of whether or not the victim was found naked, Ms. Mhando asserted that, it is true the victim was found covered by a Maasai blanket which was covered in blood. She challenged the appellants for not cross-examining the victim whether or not she was found naked or raised this issue during trial hence making it an afterthought.

To cement her argument she cited the case of **Joseph Kanankira vs. The Republic**, Criminal Appeal No. 240 of 2019, CAT at Arusha (unreported) which held that, failure to cross-examine a witness on certain facts is tantamount to admission to such facts. In that regard, she was of the view that all three counts were proved beyond any reasonable doubt. She prayed that, this court dismiss the appeal and uphold the judgment and sentence of the trial court.

In their brief rejoinder, the appellants maintained that the charge against them was never proved at the required standard and prayed for acquittal.

I have given due consideration to the submission made by both parties and the trial court's records. I will now proceed to determine the grounds of appeal which are all centered on answering one question as to whether the offences against the appellants were proved at the required standard

Starting with the 1st and 2nd grounds of appeal in which the appellants are alleging that the case against them was not proved to the required standard and, that the case is tainted with incurable procedural irregularities. Starting with the 1st count of grievous harm c/s 225 of the

Penal Code. The section reads upon which they were charged reads as follows:-

> *"225 Any person who unlawfully does grievous harm to another is guilty of an offence and is liable to imprisonment for seven years".*

From this provision, two ingredients have to be proved, **first**, whether the victim was grievously harmed, and **second**, if the appellants were the ones responsible. In the appeal at hand, as briefly intimated earlier, the victim thoroughly told the court that, she was vigorously and severed assaulted by the appellants as a punishment for breaking the pesticide bottle. She showed the trial court the scars on her body as well as healing wounds which portrayed that she was indeed assaulted. Her testimony was corroborated by that of PW2 who found her unconscious in the bush while grazing and that of the medical doctors, PW4 and PW5 who examined her. PW5 tendered a PF3 for the grievous body harm inflicted to PW1 which was admitted in court as exhibit P1. All these prove that the first ingredient was proven. PW1 also mentioned the appellants as the ones responsible for the assault inflicted on her. She first mentioned it to PW2 as soon as she was rescued, then to her father, PW3, and also to the Village and Ward authorities which facilitated their arrest. Based on

the principle in the case of **Marwa Wangiti Mwita & another vs. Republic,** [2002] TLR 39 in which it was held *inter alia* that;

> *"The ability of a witness to name a suspect at the earliest opportunity possible is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry (emphasis supplied)".*

As it can be noted, the victim mentioned the appellants to PW2 as soon as she was rescued, then to her father, PW3, and also to the Village and Ward authorities which facilitated their arrest. The mentioning of the appellants immediately after she was rescued, ensures the reliability of the victim in her evidence. Her evidence was supported by the evidence of PW2 on page 15 of the proceedings when he was cross-examined by the 1st and 2nd appellants, also the evidence of PW3 was very much in support of this fact, as reflected on page 17 of the proceeding when he was cross-examined by both appellants.

The appellants claimed that the case was fabricated against them as they had nothing to do with the victim's condition. However, their defence did not cast any doubt on either of the prosecution cases or discredit PW1's testimony. In the case of **Crospery Ntagalinda @ Koro**

V R, Criminal Appeal No. 312 of 2015, CAT- Bukoba (unreported), the Court of Appeal stated:

> *"Every witness is entitled to credence and his testimony believed unless there are good and sufficient reasons for not believing the witness."*

Without any doubt raised in the testimonies of PW1, PW2, and PW3 the appellants remain to be the ones responsible for the grievous harm caused to PW1. The first count was therefore proved to be the required standard.

On the 2nd count of cruelty to children c/s 169A (1) and (2) of the Penal Code. The section reads;

> *"169A.-(1)* ***Any person who, having the custody, charge, or care of any person under eighteen years of age, ill-treats, neglects, or abandons that person*** *or causes female genital mutilation or carries or causes to be carried out female genital mutilation or* ***procures that person to be assaulted, ill-treated, neglected or abandoned in a manner likely to cause him suffering or injury to health, including injury to, or loss of, sight or hearing, or limb or organ of the body or any mental derangement, commits the offence of cruelty to children.***

(2) Any person who commits the offence of cruelty to children is liable on conviction to imprisonment for a term of not less than five years and not exceeding fifteen years or to a fine not exceeding three hundred thousand shillings or to both and shall be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person." (Emphasis added).

According to the evidence, it is undisputed that, the victim was married to the 1st appellant, thus, as his wife was still under 18 years, he was supposed to care for her. Likewise, the 2nd appellant being the brother-in-law had a duty to protect the victim when she run to him for help. As it is already been established that the appellants took turns in beating the victim mercilessly, their evil deed did not end there, they just left her in the bush like trash, probably leaving her for dead. In his defence, the 1st appellant claimed that, the victim must be wounded while at her home as she had long escaped from his residence.

He however did not take action in caring for her even to visit her even though, he was aware that she was wounded. This paints the picture that, he never cared for her at all. PW3, the victim's father also told the court that, this was not the first time for the 1st appellant to beat the victim, she had once escaped and returned home and after

reconciliation, she went back. All these draw the inference that, the 1st appellant was a serial offender. Moreover, regarding the sentence imposed in respect of this count, I find the trial court to have not been justified in imposing the custodial sentence instead of imposing the fine, looking at the provision of section 169A (2) provides:-

> *"169 (2) Any person who commits the offence of cruelty to children is liable on conviction to imprisonment for* ***a term of not less than five years and not exceeding fifteen years or to a fine not exceeding three hundred thousand shillings or to both*** *and shall be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person."*

it is a celebrated principle that where the law provides for both the fine and custodial sentence, then the court must as a matter of best practice impose a fine, and the custodial sentence be served in default of paying the fine imposed. Since the provision of section 169A(2) of the penal code gives an alternative to a fine, then the trial court was supposed to impose the fine. That said, I thus substitute the sentence of five years in the second count to that of a three hundred thousand fine, and in default, they alternatively serve five years of jail imprisonment. In

the end, the second ground is thus allowed to the extent explained herein above.

I will discuss the 3rd count of rape with the 3rd and the 4th grounds of appeal. It is a trite principle that, in sexual offences, the two key elements to be proven are that, there was penetration however slight, and secondly that the person who penetrated the victim was the accused. This goes on the same rhythm as the decision in the case of **Maliki Geoge Ngendakumana vs Republic,** Criminal Appeal No. 353 of 2014 [2015] TZCA 295 that in a criminal case, the Republic needs to prove that an act amounting to a criminal offence has been committed, two that it is the accused person who committed it. The third ingredient is, if the victim is an adult female the lack of consent, while if she is a child below the age of 18 where the consent becomes immaterial, is the age of the victim that it is really below 18 years.

More so, the law is certain and the Court of Appeal decisions are in the same rhythm that in rape offences, the best evidence comes from the victim herself. In the case of **Jilala Justine vs The Republic,** Criminal Appeal No. 441 of 2017, CAT at Shinyanga (unreported) the Court observed that;

"...It is a trite legal principle that, in sexual offences, the best evidence is from the victim while another prosecution witness may give corroborative evidence. See ***Selemani Makumba v. The Republic****, [2006] T.L.R. 379,* ***Galus Kitaya v. The Republic****, Criminal Appeal No. 196 of 2015 and* ***Godi Kasenegala v. The Republic****, Criminal Appeal No. 10 of 2008 (both unreported). However, the victim's evidence will be relied upon to convict if the same is found credible..."*

In the appeal at hand, it is undisputed that, the 1st appellant married the victim when she was 14 years and when this incident occurred she was 16 years old. The 1st appellant did not deny having sexual relations with PW1, he however claimed that she was his wife whom he acquired through customary marriage. In the submission in support of the 3rd and 4th grounds of appeal, the 1st appellant challenged that, PW's age was never ascertained by any evidence as required by law. As already intimated hereinabove, the issue of proving the age is a legal requirement. However, generally, proof of age may be done by the victim, relative, parent, medical practitioner, or, where available, by the production of a birth certificate. In the case of **Samwel Nyerere vs. The Republic**, Criminal Appeal No. 65 of 2020, CAT at Arusha, the Court of Appeal referred to its earlier decision in the case of **Wilson Elisa @**

Kiungai vs. Republic, Criminal Appeal No. 449 of 2018 unreported where it was held that:

> "... *like any other fact, age may be deduced from other evidence and circumstances availed to the court which is permissive under section 122 of the Evidence Act, [see* ***Issaya Renatus vs The Republic,*** *Criminal Appeal No. 542 of 2015 (unreported)]."*

In the appeal at hand, the charge sheet shows that the victim was aged 16 years when the incident occurred but she was married two years back when she was only 14 years. During her testimony, she told the court that, she was 16 years, and her father PW3, told the court that, PW1 was 16 years old. All this proves that PW1's age was 16 years at the time when the assault incident occurred. This fact was been never an issue at the trial court and the appellant neither cross-examined the victim nor her father on this fact. In the case of **Nyerere Nyague vs. The Republic**, Criminal Appeal No. 67 of 2010 CAT (unreported), the Court of Appeal held *inter alia* that;

> *"a party who fails to cross-examine the witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the court to disbelieve what the witness has said."*

Since the age of the victim was not questionable from the start, I do not think more proof was needed as the above evidence sufficed.

The 1st appellant also claimed that he could not have raped her since she was his wife even though she was below 18 old. Although his statement has not been express, moreover by necessary implications he meant that in Masai customs a girl child below 18 years can justifiably be married under the Masai customs. However, in the law of the country, section 13 of the **Law of Marriage Act**, Cap 29, R.E. 2019, underage marriages are not allowed. The section reads;

> *"**13**.-(1) No person shall marry who, being male, has not attained the apparent age of eighteen years or, **being female, has not attained the apparent age of fifteen years**.*
> *(2) Notwithstanding the provisions of subsection (1), **the court shall, in its discretion, have power, on application, to give leave for a marriage where the parties are, or either of them is, below the ages prescribed in subsection (1)** if-*
>
> *(a) each party has attained the age of fourteen years; and*
> *(b) the court is satisfied that there are special circumstances which make the proposed marriage desirable.*
>
> *(3) A person who has not attained the apparent age of eighteen years or fifteen years, as the case may be, and in respect of whom the leave of the court has not been obtained under*

subsection (2), shall be said to be below the minimum age for marriage." (Emphasis added)

Although this position has been declared unconstitutional, see; **The Attorney General vs Rebeca Z. Gyumi,** Civil Appeal No. 204 of 2017, CAT at Dsm (unreported), hence subject to amendment, the minimum age for marriage is 15 years after the application made in court. Cultural rituals, procedures, and laws especially those which devalue one's dignity cannot supersede the laws of the country. In the circumstances, the 1st appellant is legally liable for marrying and having sexual intercourse with the victim since when she was 14 years even if she voluntarily did it as a wife. With the 2nd PF3 which was submitted in court as exhibit P2 proving that the victim's genitalia was wide open for her age and the evidence of the victim herself and the concession of the 1st accused to have married the victim and to have been having sex as the wife, the 3rd count of rape was proved to the required standard of beyond reasonable doubt. The term beyond reasonable doubt is not statutory defined but has been defined by case law. In the case of **Magendo Paul & Another vs Republic** [1993] T.L.R 219 (CAT), it was held *inter alia* that,

"...for a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the

accused person as to leave only a remote possibility in his favour which can easily be dismissed"

This was held in line with the philosophy in the case of **chandrankat Jushubhai Patel Vs Republic** Crim. App No 13 of 1998 (CAT DSM) in which it was held that;

"...remote possibility in favour of the accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of criminal justice if they were permitted to displace solid evidence or dislodge irresistible inferences"

From my findings on every issue raised, and looking at the evidence in total, the trial court was justified to find that the prosecution managed to prove the case beyond reasonable doubt. The evidence presented against the appellant persons was very strong in proving their guilty. In my evaluation of such evidence, as the first appellate Court, I have not managed to locate any possibility of doubt in their favour, and if there are any of such possibilities which have escaped my attention, then the same is so remote and is incapable to displace solid evidence as presented by the prosecution or dislodging irresistible inference against them. That facts which take us to the conclusion that the 1st, 2nd, 3rd, and 4th grounds of appeal have no merit and are dismissed.

In the upshot, I find the case against the appellants was proved to the required standard. The conviction entered and the sentences imposed, except the sentence in the second count which has been reversed and substituted with the fine of Tsh. 300,000/=, were deserving. I, therefore, dismiss the appeal and uphold the trial court's decision.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 28th day of July 2023

J.C. TIGANGA

JUDGE