IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 12 OF 2022

(Originating from Criminal Case No. 02 of 2020 at the District Court of Magu)

JUMA JOSEPH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

4/11/2022 & 6/2/2023

ROBERT, J:-

The appellant, Juma Joseph, was convicted and sentenced to thirty years imprisonment by the District Court of Magu for the offence of rape contrary to section 130(2)(e) and 131(1) of the Penal Code. Aggrieved, he preferred this appeal challenging the decision of the District Court.

The prosecution alleged that on the 2nd day of January, 2020 at about 22:00 HRS, a girl aged 13 years (the victim) together with her siblings were sent to their aunt's house to fetch their father's phone. On their way home they met the appellant who pulled the victim inside unfinished building where he undressed and raped her. The victim's siblings hurried back home to

inform their father who went searching for her daughter and found her inside unfished building together with the appellant. The trial Court having been satisfied that the prosecution evidence established the case of rape against the appellant, convicted him as charged and sent him to jail for thirty years. The appellant filed this appeal challenging the conviction and sentence passed by the trial Court.

This appeal came up for hearing on 30th September, 2022. The appellant was represented by Mr. Fidelis Cassian Mtewele, learned counsel whereas Ms. Maryasinta Lazaro, Senior State Attorney appeared for the respondent. Hearing proceeded orally.

Submitting in support of the appeal, Mr. Mtewele opted to drop two of the four grounds of appeal listed in the petition of appeal. He dropped the 2nd and 4th grounds of appeal and argued the 1st and 3rd grounds which after editing reads as follows:-

1. *That the trial Court erred in law and fact by failure to analyze the evidence adduced by the prosecution witnesses before concluding that there is enough evidence to prove the offence beyond reasonable doubt.*
2. *That the trial court erred in law and fact by relying on the prosecution evidence which is full of contradictions and inconsistencies.*

Highlighting on the two grounds together, Mr. Mtewele started his submissions on a number of alleged contradictions in the prosecution's evidence. He argued that, the first contradiction is in relation to the hospital where the victim was taken for examination and where the PF3 was filled, signed and stamped. He argued that, PW7 who examined the victim testified in Court that she examined the victim at Kisesa Health Centre where she was working whereas PW2 (victim's father) and PW4 (village Chairman) stated that the victim was taken to Sese Dispensary for medical examination. He noted further that, during preliminary hearing it was also indicated that the victim was taken to Sese Dispensary for medical examination. He maintained that the noted contradictions goes to the root of the case as both Kisesa Health Centre and Sese Dispensary are in existence and they are in two different locations.

He submitted further that, the other contradiction is related to individuals who escorted the victim to the hospital. He argued that while PW2 stated at page 9 of the proceedings that he went to the dispensary together with the victim and accused (appellant), PW7 stated at page 22 that when she received the victim at the hospital the victim was escorted by her mother.

He submitted further that, the other contradiction is related to those who witnessed the alleged rape. He argued that PW1 (victim) stated at page 7 of the proceedings that her father caught the appellant raping her while PW2 (victim's father) stated at page 9 that he found them in unfinished building, accused was drunk but wearing clothes.

Submitting further, he noted that another contradiction is in the explanation given by the victim and her siblings with regards to the person who sent them to fetch a mobile phone from their aunty. He argued that PW5 stated at page 18 of the proceedings that their mother sent them to fetch a mobile phone from their aunty who lives at Sese while PW1 (victim) said she was sent by her father to take the said phone.

He expressed that, another contradiction is related to the time of the alleged crime. He argued that, while PW1 stated at page 7 of the proceedings that the crime took place around 20.00HRS, PW3 and PW5 stated at page 10 and 18 respectively that it was around 10.00 PM.

He faulted the trial Court for relying on contradictory evidence to convict the appellant and maintained that even if the court is legally allowed to rely on the evidence adduced by the victim of rape to enter conviction, such

evidence should not be acted upon without considering other circumstances of the case. To support his argument, he referred the Court to the decision in the case of **Pascal Sele vs Republic, Criminal Appeal No. 23 of 2017**, CAT, (unreported) at page 7.

He submitted further that, the case of **Pascal Sele** cited above also decided at page 8 that credibility of a witness can be determined; **first**, by assessing coherence of the testimony of that witness; **secondly**, when the testimony of that witness is considered in relation to other witnesses. He maintained that credibility of witnesses in the present case was shaken and the trial court failed to consider this when convicting the accused.

With regards to the age of the victim, she submitted that none of the prosecution witnesses stated the age of the victim. She maintained that although the charge sheet stated that the victim was 13 years old, this was disputed during preliminary hearing and the prosecution failed to bring evidence to prove the victim's case. He maintained that, failure to establish the victim's age is fatal as that is a useful fact in determining the offence charged and mitigation. To support his argument, he cited the case of **Andrea Francis vs Republic, Criminal Appeal** No. 173 of 2014, CAT at

Dodoma quoted in the book titled Criminal Law in Tanzania, A case Digest by Fauz Twaib and Daudi Kinywaf at page 429.

Moving forward, he submitted that PW6 was not listed as one of the prosecution witnesses during preliminary hearing but testified as prosecution witness. Hence, he prayed that his testimony should be expunged.

With regards to the PF3 (Exhibit A1) at page 23, he argued that the said exhibit was filled, signed and stamped by PW7 on 3/12/2020 while, according to the charge sheet, the alleged rape took place on 2/1/2020 and the Doctor (PW7) testified that the victim was brought to him on 3/1/2020. He argued that a gap of twelve months between the time when the victim was taken to hospital for examination and the date when the examination was done and PF3 filled is too big for the Doctor to remember the details relevant to that patient. He perceived the noted delay to imply the likelihood of fabrication of evidence (PF3) which was tendered and admitted in court as exhibit on 18th December, 2020. To support his argument, he referred the Court to the case of **DPP VS Simon Mashauri**, Criminal Appeal No. 394 of 2017, CAT at Tanga (unreported) at page 17 where the Court of Appeal in consideration of whether the person who filled and signed the PF3 could have memorized what had happened two weeks after observing the patient

concluded that it was not an easy task. He reminded this Court that in the present case the said gap is twelve (12) months which must have made it even harder for PW7 to remember the outcome of his examination. He urged the Court to disregard the PF3 tendered by the prosecution.

Submitting further, he faulted the prosecution for failure to bring some of the important witnesses to testify in this matter. He maintained that, although under section 143 of the Evidence Act there is no specific number of witnesses required for the proof of any fact, the prosecution needs to warn itself if the evidence adduced meets the requirement of the law.

He argued that the victim's mother who is mentioned at page 22 by PW7 and in the PF3 as the person who witnessed the medical examination of the victim was an important witness to explain how she received the victim and witnessed the said examination but she was not called as a witness. He submitted that the other witness who was not called to testify is the Victim's aunty who is mentioned by PW1, PW2, PW3, PW5 from whom the victim and her siblings went to fetch a phone. He argued further that the phone which the victim and her siblings went to fetch was also not tendered in court as evidence. Further to that, the victim's alleged torn under pant according to the testimony of PW2 was also not tendered as exhibit. He argued that the

prosecution was under a duty to call the said witnesses because of their connection with the transaction in question. He urged the Court to draw adverse inference to the prosecution for failure to call the said witnesses without sufficient reason. To support his argument, he cited the case of **Raphael Mhando versus Republic, Criminal Appeal No. 54 of 2017** at page 10 and 13.

In response to the submissions by the counsel for the appellant, the learned Senior State Attorney started her submissions by responding to the alleged contradictions on the hospital where the victim was taken for medical examination. She submitted that, there is no dispute that the victim was taken to hospital. What is disputed is whether she was taken to Sese Dispensary or Kisesa Health centre. She argued that, all witnesses who testified in this case said they were living at Sese village. The accused who testified as DW1 also said they went to hospital although he didn't name the hospital. PW4 also testified that they went to a dispensary together with the accused and victim. She maintained that, the witnesses who said they went to Sese Dispensary may have been referring to a dispensary found in Sese village while PW7 who is the Doctor in that hospital mentioned the actual name of the dispensary which is Kisesa Health Centre. She urged the Court

to regard the said contradiction to be minor as it doesn't go to the root of the case.

With regards to the contradictions on the persons who took the victim to the hospital, she argued that PW2, PW4 and PW7 all stated that the victim was taken to the hospital. She maintained that evidence adduced shows that individuals who took the victim to hospital were many but the one who went in the Doctor's office together with the victim to witness medical examination was the victim's mother. She implored the Court to regard the alleged contradiction to be minor and doesn't go to the root of the case.

With regards to the contradiction on the persons who witnessed the alleged rape as manifested between the testimony of PW2 and PW1, she submitted that although PW2 didn't state that she witnessed the said rape as stated by PW1 but PW2's evidence still indicates that he found the accused and victim at the scene of crime. Thus, the alleged contradiction does not affect the root of the case or remove allegation that the deceased was raped.

Coming to the contradiction regarding the persons who asked the victim and her siblings to fetch the phone to her aunty, she argued that, this contradiction is not material because it doesn't take away the fact that the

said children were sent to their aunty and during that moment is when the alleged crime happened.

With regards to the contradiction on the time of the alleged offence, she submitted that there is no contradiction. PW1 and the other witnesses said they were at their aunt's house at 20.00HRS, they did not say that 20.00HRS was the time of the alleged crime. She explained that, PW4 said he was called around 10:15 PM and urged the Court to take note of the use of HRS and PM. She also submitted that the alleged contradiction do not go to the root of the case.

She submitted further that, the case of **Paschal Sele** cited by the learned counsel for the appellant is distinguishable from this case due to differences in circumstances. In the cited case, the victim of crime was the only witness. However, in the present case there were several witnesses when the alleged crime took place. The said witnesses went home and informed their father who went to the scene of crime and found the accused and the victim at the scene. Hence, she insisted that, in the present case the principle established in the case of **Selemani Makumba v. R** that the best evidence in sexual offences comes from the victim of crime is not applicable.

She urged the Court to consider evidence adduced by all witnesses not only the victim of crime.

With regards to the contradiction on the age of the victim, she submitted that although birth certificate was not tendered as exhibit and the victim's father (PW2) did not tender evidence with regards to the age of the victim, there was evidence to prove that the victim was below 18 years old although there is no evidence to establish that she was 13 years old. She argued that, such evidence include the charge sheet, PW1's evidence informing the Court that she was 13 years old, she also said she was studying at form one, PW2 said she was studying Bujashi Secondary school. She concluded that the circumstances of this case indicates that the victim was below 18 years old. To support her position, she referred the Court to the case of **Mashaka Marwa vs Republic, Criminal Appeal No. 138/2018** delivered in July, 2022 at Mwanza (unreported) and **Isaya Renatus vs Republic, Criminal App. No. 542/2015 (unreported).**

She also argued that the issue of age was not disputed by the accused during preliminary hearing as alleged by the learned counsel for the appellant.

With regards to the testimony of PW6 who was allegedly not listed during preliminary hearing, she argued that one of the prosecution witnesses listed during preliminary hearing was E9494 Sgt Amani and the prosecution witness who testified as PW6 was E9494 D/sgt Amos. She maintained that, since the force number used by the listed witness is the same as the one used by the witness who testified, it must have been the same witness. She maintained that, there could have been an error in recording the name of the witness during the preliminary hearing.

With regards to the alleged contradiction on the date of filling and signing the PF3 as opposed to the date of medical examination of the victim, she argued that, although the PF3 was filled on 3/12/2020 the witness came to Court and testified that she examined the victim on 3/1/2020. She argued that, there is no evidence that the witness did not document details of her examination anywhere in the hospital. She maintained that the case of **DPP vs Simon Mashauri (supra)** cited by the counsel for the appellant is distinguishable because in that case the victim had sexual intercourse before the alleged rape. That fact created doubt in the PF3 which led to it being expunged. He urged this Court to consider whether the PF3 in this case was recorded in doubtful circumstances.

Coming to the alleged failure of the prosecution to bring important witnesses particularly, the victim's mother and aunt, she submitted that, this was a rape case and witnesses brought to Court were required to prove the offence of rape. There was no need to bring the victim's mother because the gist of her testimony was not disputed. The victim's aunt was equally not important because there was no dispute that the victim and her siblings were sent to their aunty.

On the coherence of evidence of PW1 and other witnesses, she testified that the trial court considered all witnesses to convict the appellant. She maintained that the sentence awarded was right and prayed for the Court to dismiss the appeal.

The learned counsel for the appellant had no rejoinder submissions.

Having heard the rival submissions from both parties, I will have to pose here and make a determination on the merit of this appeal. The question arising in this appeal is whether the respondent proved its case beyond reasonable doubt.

The appellant's contention that the case was not proved beyond reasonable doubt is premised on a number of issues one of which is that the prosecution evidence was full of contradictions and inconsistencies.

Starting with the alleged contradiction on the hospital where medical examination of the victim and filling of the PF3 took place. The appellant's concern is that, some of the prosecution witnesses (PW1, PW2, and PW4) testified that the victim was taken to Sese Dispensary for examination while PW7 who conducted the said examination testified that the alleged examination took place at Kisesa Health Centre. As rightly argued by the Senior State Attorney, it is not disputable that the victim was taken to hospital as stated by both prosecution (PW1, PW2, PW4 and PW7) and defence (DW1). I have noted that, the Doctor who conducted the examination (PW7) indicated both in the PF3 (exhibit A1) and his testimony that the examination took place at Kisesa Health Centre. However, PW2 and PW4 referred to the name of the said dispensary as Sese, which is the name of the village where the victim and his family were residing and where the alleged offence took place. The argument by the counsel for the appellant that both Sese Dispensary and Kisesa Health centre are in existence and located in different areas is not supported by the evidence on record. The

Court is convinced by the argument made by the counsel for the respondent that the name Sese Dispensary may have been used to mean a dispensary found at Sese. Be as it may, the alleged contradiction is not a material contradiction affecting the substance of evidence that the victim was taken to hospital for examination as the appellant himself testified that he was taken to the hospital together with the victim and he did not dispute the medical examination report (PF3) during trial. That said, I find no merit in the appellant's argument.

The other alleged contradiction is related to the persons who took the victim to the hospital. The concern here is that the list of persons mentioned by PW2 to have escorted the victim to hospital does not include the victim's mother who is mentioned by the Doctor (PW7) as the one who witnessed the medical examination. Having gone through the testimony of PW2 it is obvious that the witness did not mention the names of individuals who escorted the victim to hospital. Similarly, PW7 did not mention the individuals who escorted the victim to hospital but testified that when she received the victim for examination the victim was together with her mother. This does not mean that the victim's mother was the only person who took her to

hospital. In the circumstances, I find no contradiction in this matter as alleged by the counsel for the appellant.

The other alleged contradiction is in the evidence of PW1 (victim) that her father caught the accused continuing to rape her as opposed to the testimony of her father (PW2) that he found them in unfinished building, the accused was drunk but wearing clothes. The appellant's concern, which I find to be of substance in respect of the alleged contradiction, is whether the victim's father (PW2) witnessed the alleged rape as stated by PW1. While the learned state attorney is right that PW2's evidence still indicates that the appellant was found with the victim at the scene of crime, I do not agree with her argument that the alleged contradiction does not go to the root of the matter or affect PW1's evidence that her father witnessed the alleged rape taking place. The Court finds the alleged contradiction to have a negative effect on the evidence of PW1 regarding the person who witnessed the alleged rape.

As for the alleged contradiction on the person who sent the victim and her siblings to fetch a mobile phone from their aunty, it is not disputable that the victim and her siblings went to fetch a phone from their aunty. I find the alleged contradiction on whether it was the mother or father who sent them

to fetch the phone to be of no substance as it doesn't take away the fact that the alleged rape took place when the victim and her sibling went to their aunty to fetch a phone. I find the alleged contradiction devoid of merit.

With regards to the contradiction on the time of the alleged crime, having perused the proceedings of the trial court, it is obvious that there is no contradiction on the time mentioned by the said witnesses. PW1 referred to 20:00 HRS as the time when she was at her aunt's place with her siblings while PW3 and PW5 referred to 10 pm as the time when they were on their way home. I therefore find no substance in the alleged contradiction.

Therefore, although the appellant faulted the trial Court for relying on contradictory evidence to convict him, it is clear, as observed above, that apart from the contradiction between the testimony of PW1 and PW2 with regards to whether PW2 witnessed the appellant raping the victim (PW1), there is no any other material contradiction in the prosecution evidence.

However, I am in agreement with the counsel for the appellant that while the correct position of law is that true evidence of rape has to come from the victim such evidence should not be taken wholesome, believed and acted on to convict the accused person without considering other

circumstances of the case as stated in the case of **Pascal Sele vs Republic, Criminal Appeal No. 23 of 2017**, CAT, (unreported) at page 7. In the present case, apart from the victim (PW1), no witness claimed to have witnessed the incident of rape taking place, not even PW2 who is mentioned by PW1 to have witnessed the said rape. Hence, the credibility of PW1 was important in determining her truthfulness. It is unfortunate that records of the trial Court do not indicate if the Court made a determination on the credibility of PW1 before relying on her evidence to convict the appellant. In the circumstances, this Court is entitled to look at the evidence of PW1 in relation to that of the other witnesses so as to determine whether she was a witness of truth or not.

Having examined the evidence on record, apart from a specific fact that PW2 did not witness the alleged rape as testified by PW1, the version of evidence adduced by prosecution witnesses on how the appellant grabbed the victim from the company of her siblings and pulled her inside unfinished building where both of them were found by PW2 who said the victim told her she was raped by the appellant appears to be consistent and proves that PW1 was a truthful witness in her testimony. It is also apparent that the appellant did not raise questions in his cross-examination to challenge the

evidence adduced by PW1. That said, I find no merit in the appellant's contention in this issue.

I will now look at the arguments in respect of the age of the victim. The appellant faulted the trial Court for convicting and sentencing him for statutory rape without proof of the victim's age. As rightly argued by the counsel for the appellant, age of the victim of rape is particularly important in proving statutory rape. Section 130(2)(e) of the Penal code provides that:

> *"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."*

In its analysis, conviction and sentence of the appellant the trial Court did not ascertain or give consideration to the victim's age at all. However, the learned state attorney contends that the citation of the victim's age in the charge sheet, the statement made by the victim immediately before her testimony and the prosecution evidence (PW1 and PW2) that the victim was studying at Bujashi Secondary school indicates that the victim was below 18 years old. The question for determination is whether the evidence as alleged

by the Senior State Attorney can be taken as proof of the victim's age in this case.

In the case of **Andrea Francis vs. Republic, Criminal Appeal No. 173 of 2014,** CAT at Dodoma (unreported), the Court was faced with similar issue and decided 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."*

Guided by the cited decision, it is apparent that, the citation in a charge sheet that the victim was 13 years old or the statement made by the victim about her age prior to her testimony is not evidence of the victim's age and therefore cannot be so regarded in this case.

However, in the cases of **Mashaka Marwa vs Republic**, Criminal Appeal No. 138/2018 and **Isaya Renatus vs Republic**, Criminal App. No. 542/2015 (unreported) cited by the Senior State Attorney, the Court of Appeal deciding in circumstances where there was no direct evidence on the victim's age decided that the Court may infer the existence of such fact under section 122 of the Evidence Act, Cap. 6 (R.E.2019) which provides that:-

> *"A court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case".*

In the cited cases, the Court of Appeal having considered that the victims in the respective cases were pupils at a primary school at the time of their testimony and they testified as witnesses of tender age, inferred that the victims were below the age of 18 years when they were raped with the appellants.

This Court is also aware that in the case of **Leonard s/o Sakata vs the DPP,** Criminal Appeal No. 235 of 2019, CAT at Mbeya (undecided) at page 14, the Court of Appeal observed that:

> *"Our critical evaluation of the above two sets of decisions, clearly reveal that there are presently two schools of thought on the interpretation of section 130(2)(e) of the Penal Code. The first school is of the view that, for an accused to be convicted of statutory rape, there must be proof from a witness or witnesses that the victim was below 18 years of age at the time of the offence. The view of the second school, as we have demonstrated, is existence of circumstances implying or suggesting that the victim is below 18 years is just as good without necessarily proving the victim's exact age. According to the second school, the offender may be convicted of statutory rape based on section 122 of the Evidence Act and he cannot be sentenced to life imprisonment under section 131(3) of the Penal Code because, there should be lack of positive evidence ascertaining the exact age of the victim to be below 10 years. So, the sentence, in the circumstances is thirty years imprisonment."*

In the present case, although PW1 did not testify as a child of tender age, evidence adduced by PW1 (victim) and PW2 (victim's father) established that at the time of their testimony the victim was a student of form one at Bujashi Secondary School and the victim was introduced into the witness box as a child of 13 years of age. Thus, in the circumstances of

this case it can be safely inferred that the victim was below the age of 18 years at the time of the alleged rape. That said, I find no merit in the point raised by the appellant.

Coming to the contention that PW6 was not listed as one of the prosecution witnesses during preliminary hearing. The typed proceedings of the trial Court indicates that during his testimony PW6 testified as E9494 D/SGT Amos. The same proceedings indicate that there was no witness with that name during preliminary hearing. However, there was a witness listed by the name of E9494 D/SGT Aman. Having perused the original proceedings of the trial Court this Court has confirmed that PW6 was properly listed as E9494 D/SGT Amos during preliminary hearing. The slight difference noted in that name between the preliminary hearing and trial proceedings was simply a typing error. That said, I find the appellant's contention to be devoid merit and I dismiss it accordingly.

Another issue is connected to the PF3 which was tendered by PW7 and admitted as exhibit A1. According to PW7 (Doctor), the victim was examined on 3/1/2020 but he filled, signed and stamped the PF3 on 3/12/2020 which is more than twelve months from the date of the examination. The prosecution did not give any explanation for PW7's excessive delay in filling

and signing the findings of his medical examination in the PF3 until 3/12/2020 which is less than one week before the date of his testimony on 18/12/2020. This Court is in agreement with the learned counsel for the appellant that PW7 could not have memorized what he had observed in his examination more than twelve months prior to the filling and signing of the PF3. The excessive delay in filling the PF3 creates doubt in the genuineness of the contents of the PF3 (exhibit A1). The argument by the Senior State Attorney that PW7 may have recorded results of his observation in some other place is a mere opinion which is not supported by the evidence in record. However, this Court is aware that evidence of rape can be obtained from the victim of rape, as it is in this case.

With regards to the alleged failure of the prosecution to bring some of the important witnesses to testify in this matter, this Court is of the considered view that although the victim's mother and aunty would be important witnesses to establish how they received the victim and witnessed the medical examination respectively, this Court do not consider the prosecution's failure to call them as witnesses to be fatal as the gist of their testimony was not disputed during trial. Similarly, I find the prosecution's failure to tender the phone and the victim's alleged torn under-pant as

exhibit to be of less substance as it doesn't affect proof of the material elements of the offence and the trial magistrate did not consider the said items to enter conviction.

In view of the foregoing discussion, I find no cogent reasons to vary the verdict of the trial Court. As a consequence, I proceed to dismiss this appeal in its entirety.

It is so decided.

K.N.ROBERT
JUDGE
6/2/2023