IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

CRIMINAL APPEAL NO. 70 OF 2023
(Originating from Criminal Case No. 116/2022 from Misungwi District Court)

SIMON ZAKARIA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

31st July & 1st August 2023

Kilekamajenga, J.

The appellant was arraigned in the District Court of Misungwi for the offense of rape contrary to section 130(1)(2)(e) and section 131(1) of the Penal Code, Cap. 16 RE 2022. The charge available in the court file alleges that, the appellant had unlawful sexual intercourse with a girl of fifteen years old on 16th October 2022. During the trial, the appellant entered a plea of not guilty and the prosecution paraded two witnesses to prove the charge against the appellant. PW1 (victim) told the trial court that, she knew the accused as a tenant who lived near their house and that she had relationship with him. On 16th October 2022, she was found in the room of Samwel and arrested by the militia person who was accompanied her grandfather and taken to Nyashishi Police Station. Upon cross examination, PW1 further revealed that, she was arrested while in the room whereas the appellant was outside. PW2, the medical Doctor at Misungwi

Hospital, examined the victim and found her without virginity. He tendered the PF3 form which was admitted without objection as exhibit P-01. In his defence, the appellant, who was seventeen (17) years old, testified to have been arrested for the offense of stealing a mobile phone but later charged with the offense of rape. He blamed the WP Neema for coaching the victim on the testimony.

Based on the above evidence, the trial court convicted and consequently sentenced the appellant to serve thirty (30) years in prison. Being unhappy with the decision, the appellant advanced seven grounds to impugn the findings of the trial court. Due to the reasons stated below, I find no reason to reproduce the grounds of appeal. When the appellant appeared for the hearing of the appeal, he notified the court on the error blatant on record that, he was sentenced to serve thirty (30) years in prison while he was seventeen (17) years old. He further argued that, the age of the victim was not proved. Being a layperson, his brief submission invited the court to set him at liberty as he has already learnt a lesson for being in prison.

The learned State Attorney, Mr. Adam Murusuri, also confined the submission on the errors on the trial of this case. He moved the court to the 19th page of the typed proceedings where the appellant informed the trial court that he was seventeen (17) years old. Also, the second page of the trial court's judgment

acknowledges that the appellant was seventeen years old when he committed the offense. For that reason therefore, the trial court was supposed to conduct an inquiry to ascertain whether the appellant was below the age of eighteen years old and whether the trial court was the proper court to try the case of a child offender. In his view, the trial of the appellant's case led to miscarriage of justice. He further argued that, section 231 of the Criminal Procedure Act, Cap. 20 RE 2022 was not complied hence infringed the appellant's right to call witnesses for the defence. Furthermore, the appellant's evidence was not considered in the trial court's judgment. The counsel urged the court to order the retrial of the case before a juvenile court for a fair trial as the appellant was below the age of seventeen years old. Thereafter, there was no meaningful rejoinder from the appellant.

The submissions from the appellant and the learned State Attorney raise evident error on the trial of this case. First, the trial court's record shows that, the victim was fifteen years old whereas the appellant was seventeen years. As stated by the learned State Attorney, the trial court recorded at page nineteen of the typed proceedings the age of the appellant to be seventeen years old. The trial magistrate further noted the age of the appellant at the second page of the judgment. It seems, the trial court believed the age of the appellant to be seventeen years old and therefore was not supposed to sentence him to serve

thirty years in prison because doing so would contravene section 131 (2) of the Penal Code, Cap. 16 RE 2022. The section provides that:

> *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, to the person in respect of whom the offence was committed for the injuries caused to such person.*
>
> *(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of* ***the age of eighteen years or less****, he shall-*
>
> *(a)* ***if a first offender, be sentenced to corporal punishment only;***
>
> *(b)* ***if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment****;*
>
> *(c)* ***if a third time and recidivist offender, he shall be sentenced to five years with corporal punishment****.*
>
> *(3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment.*

Without labouring on the proper interpretation of the above provision of the law, the appellant was wrongly sentenced to serve thirty years in prison because he was seventeen years old. For his first offense of rape, he was supposed to be sentenced to corporal punishment. If he was a second offender, he could be imprisoned for a term of twelve months without corporal punishment. Even if he

could be a recidivist offender, his punishment could not go beyond five years imprisonment. Therefore, the sentence of thirty years in prison was a grave violation of the law and a serious miscarriage of justice.

Second, as rightly argued by the learned State Attorney, the appellant's defence did not find a place in the trial court's judgment. The trial magistrate put much emphasis on shoddy prosecution evidence without considering the appellant's testimony. Failure to properly evaluate the sets of evidence leads to an unbalanced conclusion as the appellant's evidence was not juxtaposed vis-à-vis the prosecution evidence. In absence of the appellant's story on the analysis of evidence, it is hard to conclude whether the appellant failed to shade doubts on the prosecution's story. I find this to be anomaly that led to an unfair trial.

Third, the appellant's conviction was hinged on two prosecution witnesses; thus, the evidence of the victim and that of the medical doctor. I entirely agree with the well-founded principle of the law; in rape cases, the best evidence comes from the victim. See, the case of **Seleman Makumba v. Republic**, Criminal Appeal No. 94 of 1999; **Vedastus Emmanuel @ Nkwaya vs Republic**, Criminal Appeal No. 519 of 2017; **Mbaruku Deogratius vs Republic**, Criminal Appeal No. 279 of 2019. However, for the victim's evidence to ground a conviction, the testimony must establish all the necessary ingredients of the

offense. The evidence must point towards the accused as the person who raped her. In this case, the close reading of the victim's evidence does not suggest that she was raped by the appellant. The victim testified to have known the appellant as the tenant near their house; the victim confirmed to have a relationship with the appellant. However, the nature of relationship was not clarified. On the fateful day, the victim was found in the room of Samwel and was arrested and taken to the police station. During the arrest, the appellant was outside whereas the victim was inside the room. The other piece of evidence came from the Doctor who examined the victim; his finding was brief and clear; the victim was found with no virginity. Again, such information does not necessarily prove raped by the appellant. Dearth of virginity does not necessarily suggest rape because there are several factors which may lead to perforation of the hymen. The evidence above, in my view, does not prove the offense of rape against the appellant. I am actually puzzled why the trial court ended up convicting the appellant of such flimsy evidence. In fact, I find no reason to order the retrial of the case as prayed by the learned State Attorney because there was no sufficient evidence to warrant a conviction against the appellant. Based on the above analysis, I hereby allow the appeal and order the release of the appellant from prison unless held for other lawful reasons. Order accordingly.

DATED at **Mwanza** this 1st August, 2023

Ntemi N. Kilekamajenga.
JUDGE
01/08/2023

Court:

Judgment delivered this 1st August 2023 in the presence of the appellant and the learned State Attorney, Mr. Adam Murusuri. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga.
JUDGE
01/08/2023