IN THE HIGH COURT OF TANZANIA
(BUKOBA DISTRICT REGISTRY)
AT BUKOBA

CRIMINAL APPEAL No. 52 OF 2022
(Originating from Criminal Case No. 84 of 2021 in the Resident Magistrate's Court of Bukoba at Bukoba)

EVODIUS RWEGOSHORA @BABA AIKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

25th May & 28th July 2023

OTARU, J.:

The Appellant, Evodius Rwegoshora @Baba Aika was charged in the Resident Magistrates' Court of Bukoba at Bukoba with the offence of Rape contrary to Sections 130(1)(2)(e) and 131(3) of the **Penal Code** (Cap. 16 R.E. 2019). He was convicted for raping a seven year old girl and sentenced to serve a term of life imprisonment. Dissatisfied, he filed this appeal against the judgment, conviction and the sentence.

At the trial, the prosecution called four (4) witnesses to prove the case. These witnesses are the doctor who examined the victim (PW1), the victims' mother (PW2), the victim herself (PW3) and investigator (PW4). There is also one documentary evidence, to wit, PF3 admitted as exhibit P1. On the defense side, the accused was the only witness.

The case was built upon the testimony of PW2 who begun by narrating her daughter's age and the year she was born. She then explained how she observed her daughter walk differently and with difficulty, prompting her to examine her private parts. She continued to narrate how her daughter told her that the accused had been raping and sodomizing her. She took her to Police Station then to Rwamishenye Health Centre. She then set a trap for the accused and successfully caught him under suspicious circumstances with the victim, showing her pornography on his phone. At the hospital, PW1 examined the victim and testified that indeed she had carnally known. She also tendered exhibit P1. The victim herself narrated in detail how the accused had raped and sodomized her a number of times.

In his defense, the accused denied the accusations and stated that he had misunderstandings with the victim's parents that is why they concocted the case against him.

At the hearing of the Appeal, the Appellant appeared in person and the Respondent, Republic was ably represented by Mr. Amani Kilua, learned State Attorney. Hearing was done by way of oral submissions whereby the Appellant was the first to submit.

The Appellant had originally preferred eleven grounds of appeal then added four more prior to the hearing. Briefly, the Appellant challenged the age of the victim; the overall evidence, the investigation, his arrest and the charge sheet. He also claimed that the trial magistrate did not consider his defense.

In his submissions, he begun by questioning the age of the victim. He argued that the age was not proved and that there was no evidence brought in court that the victim was indeed a standard 2 pupil.

He then questioned the overall evidence by stating that the PF3 has not disclosed that he did rape the alleged victim. He also questioned the prosecution not calling Mzee Christopher to testify, claiming that prosecution's evidence was contradictory in the sense that PW2's statement at the Police was not the same as in court concerning when she noticed the victim walking abnormally. He pointed out that PW2 stated that she saw the victim on 25th October 2021 while PW3 stated that it was on unknown date. He questioned the prosecution for not tendering the phone allegedly used to show the victim pornography.

On the issue of investigation, the Appellant claimed that the case has not been investigated as the investigator has not stated when he was arrested and interrogated. He claimed that his arrest was unlawful because local leaders were not involved, thus the court should not have convicted him. Further, he challenged the charge sheet as defective for not disclosing the time the offence was allegedly committed.

The Appellant also claimed that the trial court did not consider his defense that he and the victim's mother who is his co-tenant had misunderstandings which involved even the land lady. He therefore claimed that the offence against him has not been proved beyond reasonable doubt and that the victim was forced to

mention him. He prayed for the appeal to be allowed. He be set free after quashing and setting aside conviction and sentence.

Mr. Kilua on the other hand resisted the Appeal and supported both, the conviction and the sentence. In response to the Appellant's submissions the learned State Attorney submitted as follows;

On the issue of age not being proved, the learned State Attorney referred the court to pages 11, 13 and 17 of the trial proceedings where PW1, PW2 and PW3 respectively, testified on the age of the victim. He cited the case of **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (CAT) (unreported) where it was held that parents, relatives and medical practitioner can prove age. In this case, the medical practitioner as well as the mother have sufficiently proved the victim's age. He thus prayed for this ground to be dismissed.

On the issue of overall evidence proving the offence charged, the learned State Attorney submitted that the witnesses as well as the PF3 clearly showed that the incident had not occurred once. PW1 testified that the vagina had been penetrated by a blunt object and there was no hymen. The learned State Attorney insisted that, in her testimony, PW3 clearly explained that the person who raped and sodomized her was none other than the Appellant.

On the question of the charge sheet being defective, the learned State Attorney argued that the same was not defective as all the necessary ingredients of

the offence were included and that the time the offence is committed is not material by virtue of Section 234 of the **Criminal Procedure Act** (Cap. 20 R.E. 2022).

On the issue of calling Mzee Christopher to testify in court, the learned State Attorney was of the view that he was not a crucial witness in proving the offence. He was of the view that Mzee Christopher could have been a crucial witness if PW3 had not been able to testify herself. In this case, PW3 explained herself well in her testimony. Further, PW2 testified what Mzee Christopher would have testified. That testimony is further corroborated by PW3. The learned State Attorney stated further that even in the absence of Mzee Christopher's testimony, conviction was rightly secured basing on the testimony of the victim alone, because the victim is the most crucial witness. In support of his argument, he cited the case of **Selemani Makumba v. Republic** (2006) TLR 379.

Concerning the testimony of PW2 being contradictory from her statement, counsel argued that PW2's statement at police was not part of court record as it has not been tendered in court. Therefore, the same cannot be compared with what the witness stated in court. The learned State Attorney argued that the ground should fail as it holds no water just as the previously argued grounds.

On the allegation that the Appellant was illegally arrested due to absence of local leaders at the time of arrest, the learned State Attorney argued that this ground has no merits because the **Criminal Procedure Act** (Cap 20 R.E. 2019)

applicable at the time, has no requirement of having presence of local leaders when arresting rape suspects.

On the allegation that Appellant's defense was not considered, counsel made reference to page 9 of the trial Judgment where the defense of the accused was analyzed. He stated that the defense was considered by the trial magistrate, who was not convinced by it thus proceeded to convict the Appellant. Counsel also added that the Appellant did not cross examine PW2 on any of the allegations. He thus prayed for this ground to fail.

Concerning the phone used for pornography not being tendered in court, the learned State Attorney argued that the same was of no importance in the case at hand. That, it would have been important had it been a case of pornography or had the images been of the victim. Counsel insisted that absence of the phone is not substantial because the most important evidence before the court was that of the victim who testified after the necessary procedure in examining a child of tender age was considered by the court. The learned State Attorney made reference to page 17 of proceedings where PW3 promised to tell the truth, as required by law. He insisted that this ground should fail as well.

Concerning alleged contradictions as to when PW3 was observed to walk differently, the learned State Attorney stated that the same did not touch the root of the matter as the evidence upon which the case was based was solid and intact. That the alleged contradiction was insignificant. Therefore, the learned State

Attorney prayed that since all the raised grounds had no merits, the Appeal should be dismissed in its entirety.

Having considered the rival parties' submissions, the court record as well as the law, the question before this court is whether the Appeal has merits or otherwise.

I have observed that the Appellant has raised a number of items in the evidence in trying to shake the prosecution's case, however, I am alive to the stand the trial court took by considering important elements in proving the offence with which the Appellant was charged. These are, the age of the victim, whether or not there was penetration and if yes, who is responsible for the same. After analyzing the overall evidence, the trial magistrate answered these questions as follows;- (1) that the age of the victim was 8 years; (2) that there was penetration, and (3) the person responsible was none other than the Appellant.

On the issue of age of the victim, as correctly observed by the learned State Attorney, the testimonies of PW1, PW2 and PW3 were all proving the age of the victim. PW1 stated the age to be 7 years. The mother, although stated that the victim was 8 years old, specified that the victim was born in August 2014. Counting the years from the date of birth, the victims age should be 7 years as stated by the medical practitioner. In my view, the age of the victim was sufficiently proved to be 7 years which is the same age that appears on the charge sheet. The same is in

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accordance with the guidance provided by the Court of Appeal of Tanzania in the case of **Isaya Renatus v. Republic** (supra).

Having sufficiently proved the age of the victim, the claim by the accused that there was no proof that the victim was a standard two pupil does not hold water because the important element in proving the offence at hand is age and not the class the victim is in. This ground therefore fails.

On the overall evidence proving the offence, the Appellant contended that the PF3 did not name him as the person who committed the offence. The Appellant should understand that PF3s are not intended to prove who committed the offence but show the extent of injuries sustained by the victim. Thus, the contention by the Appellant that the PF3 has not named him is absurd. What is important, as correctly submitted by the learned State Attorney, is that the said PF3 shows the injuries the victim had sustained.

On the Appellant's query of the prosecution's decision not calling Mzee Christopher to testify, as observed by the learned State Attorney, the offence of rape had been proved against the Appellant even in the absence of Mzee Christopher's testimony. As the prosecution had established the case against the accused through PW1 who testified that the victim had been raped; PW2 who testified how she discovered that her daughter had been raped and the steps she took until the Appellant was charged; and finally, the victim herself (PW3) who described in detail how the Appellant was raping as well as sodomizing her.

By virtue of Section 127(2) of the **Evidence Act** (Cap. 6 R.E. 2019), a child of tender age is a child of up to 14 years who is mandatorily required to make a promise to tell the truth prior to testifying in court, as rightly submitted by the learned State Attorney. This position was also discussed in the case of **Godfrey Wilson v the Republic**, Criminal Appeal No. 168 of 2018 (CAT Bukoba) (unreported) that;-

> *'a promise of telling the truth and not telling lies before the court is a condition precedent before reception of evidence of a child of a tender age.'*

In the case at hand, the same can be observed at page 17 of the trial proceedings. The trial magistrate followed the requisite procedure when the victim testified in court.

On the Appellant's claim that prosecution's evidence was contradictory in the sense that PW2's statement at the Police was not the same as testimony in court concerning when she noticed the victim walking abnormally, as submitted by the learned State Attorney, the Appellant did not cross examine PW2 on that aspect. Neither is the said statement part of the court record. Such that the court is in no position of discussing this aspect.

I have also considered the contradiction referred to by the Appellant between the testimonies of PW2 and PW3. The proceedings indicate that PW2 stated that she saw the victim on 25th October 2021 while the victim herself stated that it was on

unknown date. It should be remembered that PW3 is a child of 7 years who, under normal circumstances cannot and should not be expected to mention specific dates. Thus, not mentioning the dates does not in any way distort the availed evidence. The fact remains that the availed evidence points that the Appellant had carnal knowledge of PW3, the evidence that the trial magistrate relied upon in convicting the Appellant.

On the question by the Appellant about the prosecution not tendering the phone allegedly used to show pornography to the victim, I subscribe to what the learned State Attorney submitted, that the offence was not about pornography. The trial record indicates that when PW2 observed that her child had been carnally known, she pretended to leave while hiding nearby. She requested neigbours to observe the Appellant who then informed her that the Appellant has taken her daughter to his house. She immediately went to his house. Appellant was caught showing pornography to PW3. Pornography was not the offence he was charged with, it however confirmed that the Appellant had indecent intentions with the victim. Rape itself had already been proved beyond reasonable doubt by other evidence as stated above. This ground thus holds no water and fails.

All in all, the trial magistrate based the conviction on the evidence adduced by the prosecution. Being a trial magistrate, she was best versed with demeanor of the witnesses since she had the advantage of seeing and hearing them. In the case of **Peters v Sunday Post Limited** [1958] EA 424 at p 429, the Court held that;-

'It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion'.

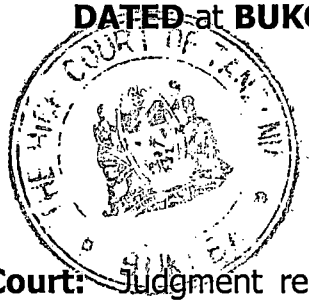
The trial magistrate having had the advantage of observing the demeanor of the witnesses, analyzed the same in line with the substance of their testimonies. She was thus satisfied with the overall evidence adduced in proving the offence to the required standard. That evidence was not shaken by the Appellant's allegations of misunderstanding with the parents of PW3. The trial magistrate found no reason to disbelieve the witnesses and I have no reason to doubt her judgment.

Therefore, I concur with the findings of the trial court that the evidence adduced by the prosecution did prove beyond reasonable doubt that the Appellant committed the offence of rape as charged and that the Appellant's defense did not cast even a scintilla of doubt on the prosecution's case. As such, there is no reason to fault the judgment of the trial court.

Consequently, I find the Appeal to lack merits and it is hereby dismissed in its entirety. The trial court's decision is upheld.

It is so Ordered.

DATED at **BUKOBA** this 28th day of July, 2023.



M.P. Otaru
Judge

Court: Judgment read in Judge's Chamber under the seal of the court, in the presence of the Appellant and Ms. Mgeni Mdee, learned State Attorney for the Republic.

M.P. Otaru
Judge
28/07/2023