IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 97 OF 2022

(Originating from Criminal Case No. 68 of 2022 at the District Court of Shinyanga)

BETWEEN

ALEX VICTOR GASPER .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

13th June & 4th August 2023

MASSAM, J.:

The appellant, Alex victor Gasper was charged with two counts of rape contrary to **Section 130(1) and (2)(e) and 131(1)** of the Penal Code, R.E 2019, and un natural offence Contrary to **Section 154(1) (a) and (2)**of the Penal Code, Cap 16 R.E 2019. At the trial court, the prosecution alleged that on diverse date between November 2021 to April 2022 at Mageuzi area within Shinyanga municipality in Shinyanga Region had sexual intercourse with one Bertha Bernard @ Salum a girl of 15 years old. Also in the same day, date and place did have carnal knowledge of the

one Bertha Bernard Salum a girl of 15 years old against her order of the nature.

The appellant pleaded not guilty to the charge, at the hearing of the case before the trial case, the prosecution case was built on the testimonies of six (6) witnesses with five (5) Exhibits while one witness (the appellant) concluded the defense case.

After the trial, the Magistrate was satisfied that the prosecution evidence weighed more than defence of the appellant, and had proven the offense, the appellant was convicted for Rape and unnatural offence and being sentenced to serve seven (30) years imprisonment for the first offence of rape and ,life imprisonment for the second count.

Aggrieved with the said decision, the appellant is now before this court challenging the said Decision armed with six grounds of appeal as follows;

(1) That the trial court erred in law to accept the exhibit pant and skin tight while the victim herself denied to be wearing the same on the alleged date.(see page 9 of proceedings)

(2) That the trial magistrate misdirected herself in law and facts by convicting and sentencing the appellant without considering that the evidence adduced by the PW5 did not prove that the appellant committed the rape/unnatural offence against the victim.

(3) That the trial court erred in law and fact by upholding the uncorroborated and incredible evidence adduced by the pw1 and other prosecution witnesses which is the basis for the appellant conviction.

(4) That the learned magistrate erred in law and in fact by upholding conviction of the appellant even though the pf3 prove that there was no bruises in her vagina instead she has fungus in her anus (see page 24 of the typed proceedings.

(5) The trial magistrate erred in law and fact to accept the contradictory and incredible evidence adduced by the Pw2 and PW3 in what exactly the area where the victim dropped either at the roof of toilet (paa la choo) or nearly the well (kisima)see page 13 and 17 of the typed proceedings.

(6) That the learned trial magistrate totally mis apprehending the nature and quality of the prosecution evidence against me (appellant) which did not prove the charge beyond reasonable doubt.

During the hearing of this appeal which was done orally, the appellant appeared in person, unrepresented whilst the respondent was represented by Ms. Caroline Mushi and Leonard kiwango Learned State Attorneys.

Arguing in support of the appeal, the appellant prayed for the court to consider his grounds of appeal and set him free as the trial court erred in convicting him. Also the trial court erred in law by admitting the exhibit which is pant and underwear which the victim objected to be hers.

He added that the trial court was erred in convicting him without considering the evidence testified by the doctor who said that he did not find bruises nor sperms in victim vagina but with sexually transmitted disease, and he was not taken to the hospital to be examined, if he was transmitted with that deceases too. Also the said doctor failed to prove if the victim was raped or not but he said that she had whitish discharge. Again appellant complained that trial court relied to the contradictory evidence of Pw1 and Pw2 which creates some doubts about the area which victim was found laid, among these one said she was found to the septic tank another one said she was nearby the well.

On his side, Mr. Leonard Kiwango opposed the appeal and supported both conviction and sentence for the reasons that the charges were proved beyond reasonable doubt.

He said all grounds of appeal laid on evidence so he will urge it jointly Starting in his submission he said that, in proving the charge they were supposed to prove three issues, first age of the victim, if the victim was raped and if the appellant was the one who raped the appellant.

Starting with the age of the victim was proved by victim herself in page 8 of the proceedings who said that she was born on 25th October 2006 her evidence was supported with the evidence of the doctor and the exhibit which is PF3.

He added that victim and the doctor are among the ones who can prove the age of victim as it was held in the case **Francis Paulo vs. R,** Criminal Appeal No. 251 of 2017**.**

Again the issue of penetration was proved by PW2 who is victim's aunt who said that victim was suffering from stomach ache when she took her to the hospital was diagnosed to have sexually transmitted diseases which is gonorrhea and syphilis. Next day victim was taken to school after

been bitten she mention appellant to be his boyfriend and they used to have sexual intercourse, her evidence was supported with the evidence of PW1 and PW5 who was doctor who said that victim had sexually transmitted deceases so all of the proved the issue of penetration.

Also the said issue was proved because victim mentioned the appellant at the earliest stage as stated in the case of **Victoria Magenzi @Mlowe vs. Republic** Criminal Appeal No. 354 of 2019 pg 7 proves that the best evidence comes from victim.

In page 8 and 9 of the proceedings victim told the court it was Good Friday she started having sexual intercourse with appellant, so that evidence prove penetration and who had raped victim. She added by saying that the day when they were having sexual intercourse the appellant door was knocked so appellant decided to throw her outside through the window when she got some bruises to her face and that piece of evidence was supported by all prosecution witnesses that victim was found with bruises on her face.

The evidence of the doctor which was found in page 16, 17 and 18 told the court that he received victim with some bruises in her face. The

said doctor in his examination found out that victim was not virgin and her vagina muscles was weak because she was inserted with the blunt object.

Another issue to prove the offence was the victim under wears was found in his room when PW4 and street chairman and DW2 who was the appellants wife in her testification said nothing about the said clothes that it belongs to her and PW3 and PW4 did prove that the said clothes was found to the appellants room.

Replying to the raised issue from the appellant that he was not taken to the court he said that the appellant did not inform the court that he had that intention so bringing it this time is afterthought.

Lastly he said that his defence did not shake the prosecution evidence that he was the one who raped and sodomize victim so his evidence was found weak compared with of the prosecution as stated in the case of Z**akaria Samweli Kasuga Criminal Appeal no 457of 2021,** so he conclude that the ground brought by appellant had no merit ought to be dismissed.

In his brief rejoinder, the appellant told the court that the said under wear and skintight was not identified by the victim. He added that he had

family how he invite the victim in his home and throw her through the window? And lastly he said that the said clothes belonged to his wife.

Having considered the submission made by both sides, this court will now determine one issue **whether the appeal has merit or not**.

I will start with the 1sth ground of appeal where the appellant complained that the trial court erred in accepting the exhibit which was pant and skin tight while victim denied to be hears, in page no 9 para 1 pw1 when testifying said that "*.....I was wearing clothes when Alex dropped off .....I was not yet wearing my pant and skin tight the said police collected the said pant and skin tight I can identify the pant as it was black and tight also was black*" Also when pw1 was told to identify the said pant to the court she said that "*this is my black pant, this is my black skin tight'*.

So according to the said piece of evidence this court find that victim did identify her underwear and skin tight by its colour to be hears so 1st ground of appeal has no merit and its hereby dismissed.

Coming to the second ground of appeal appellant complained that the trial court convicted him without considering the evidence of PW5 which did not prove the offence of rape.

This court in perusal of PW5 testimony finds out that he was a doctor who examined victim, he said that she was 15 years old, he examined her and finds two bruises on her face, also he examined her vagina which had no bruises but there was nodes, again he said that the victim was not virgin but the muscles of her vagina was weak and she had white discharge with no smell. He said that he finds no sperms but he finds the victim infected with venereal and fungus in her vagina.

That evidence was supported by the evidence of PW2 the victim's aunt who said that it was April 2022 victim was complaining to have stomach ache she took her to the hospital and diagnosed to have veneral diseases gonorrhea and syphilis.

Later on victim was taken to school where she was bitten and confess to have a boyfriend namely Alex and she used to have sexual intercourse with him, on 30/4/2022 she was making her soap but after some times she stated to look for victim but she did not saw her, she

decided to call street chairman that victim is missing the chairman came with police who went to the house of appellant to arrest him and find victim outside the room when asked she told them that appellant dropped out, she had bruises on her face which caused but that act of being throw out victim told the policemen that she forgot her under wear and skin tight so they went inside and collect the same.

This piece of evidence was supported by the evidence of pw1 who mention appellant as her boyfriend and they used to have sexual intercourse without using condom, they used to have sexual intercourse several times until on 30/4/2022 that day as usual after finish up washing utensils she went to the appellant room and started to have sexual intercourse when they heard the knock to the door the appellant decided to throw her outside on the (caro) and she was not wearing under wear and skin tight so police men when entered to the appellant room they collected the same which were black in colour and at the court she identified it by colour to be hers'.

So the appellant submission that trial court convicted him by considering only the evidence of PW5 was immaterial as the evidence of Pw1 was strong and as it was know that in sexual offenses like this the

best evidence comes from the victim and the victim in this case was 15 years so the issue of consent was immaterial.

So according to **Section 130 (2) (e)** of the Penal Code and in the case of **Selemani Makumba vrs Republic** Criminal Appeal no 94 of 1999 court of appeal Mbeya and the case of **John Mgema @ Sabayo vs Republic** Court of Appeal NO 601 of 2017 in all cases it was held that the best evidence in a sexual offenses is the one which comes from the victim and the victim in this case admitted to have sexual intercourse with appellant for several times without using condom, so the ground no 2,3, 4 and 6 had no merit and are hereby dismissed.

Regarding to the 5th ground of appeal appellant challenged the admission of the evidence of PW2 and PW3 as it was contradictory as to the place where victim was dropped, by looking the evidence of PW2 in page 13 of proceedings PW2 said that, she did not went to the scene but policemen did and were the one who asked victim and told them that, she was dropped by appellant at the fence (paa la choo) and PW3 said that as a street chairman he was told by policemen to go and witness and the victim was the one who told them that she was dropped near by the well.

This court has view that all witnesses were not around when victim was dropped by the appellant, all testified hear say evidence from the victim.

But the issue to prove in the cases like this was age of the victim, penetration and if the appellant was the one who raped the victim and as I said above the best evidence was the one who came from the victim and according to the evidence testified by her proved all issues that her age was 15 years and she used to have sexual intercourse with the appellant several times, so the evidence prove the issue of penetration and the appellant was the one who raped and sodomize her as in page 11 of the court proceedings. Victim said that the said good Friday was the last day to make love with appellant and appellant use to have sexual intercourse in front of her vagina and turned her back to her anus and have sexual intercourse too. She told the court that in his room appellant lived alone and she did not tell her aunt what was going on as she was afraid to be bitten.

Therefore based on the evidence on records, there was no doubt that appellant was the one who was having sexual with the victim and having carnal knowledge with her against her order of nature.

So according to this, ground no is dismissed too.As it was held in the case of **Pascal Yoya @ Maganga vs The Republic**, Criminal Appeal No. 248 of 2017 (CAT at Arusha, Unreported) that:

> *"It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt."*This also supported with section 110(1) and (2) of the evidence act cap 6 R.E 2019 which states that
>
> *"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists"*
>
> (2) *when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person'*

Again in the case of **Joseph Makune v Republic** (1986) TLR 44 it was held that;

> *"The cardinal principle of our criminal law is that the burden of proof is on the prosecution to prove its case. The duty is cast on the accused to prove his innocence."*

Guided by the cited authority, and law in our case at hand this proves that prosecution did proved both charges of rape and unnatural offence beyond reasonable doubts.

Consequently, the appeal is found to have no merit and is hereby dismissed. The decision of the trial court is hereby upheld.

It is so ordered.

DATED at **SHINYANGA** this 4th day of August 2023.

R.B. Massam
JUDGE
4/8/2023