IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 30 OF 2022

(Arising from criminal case No 76 of 2022 from Kibaha District Court by Hon. Kibona RM dated 24.03.2023)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

TIMOTHY LAURENT KIPILIMBA@SIR TIMOTHY.....RESPONDENT

JUDGEMENT

7th July & 30th August, 2023

MWANGA, J.

He is also known as **Sr. TIMOTHY**, the Respondent herein. He was an academic teacher at Marian Girls Secondary School located in Bagamoyo District within the Coast Region. He is accused of luring one of his students with his mobile phone and raping her in the school toilet.

The facts can be stated. The victim, whose identity shall be withheld for dignity, requested the Respondent for his mobile phone to speak to her brother. As school regulations do not allow such behavior, the Respondent told the victim to go to the toilet to have her talk. The appellant followed her from behind, entered straight to the victim's toilet, and closed the door. He then covered her mouth with his hands. The respondent removed her skintight and underwear. The respondent bent her down, removed his pants and penis, and inserted it into the victim's vaginal.

In the District Court of Kibaha at Kibaha, the charges were that, on 27th September 2021, at Marian Girls Secondary School area within Bagamoyo District in Coast Region, the respondent, **TIMOTHY LAURENT KIPILIMBA@SIR TIMOTHY** did unlawfully have sexual intercourse with a girl child of sixteen years. The charges were preferred under Sections 130(1), 2(e), and 131 (1) of the Penal Code, Cap. 16 [R.E 2002].

Upon conclusion of the trial, the trial court sought it proper to convict the respondent of the offense of sexual harassment instead of rape contrary to section 38D (1) of the Penal Code, Cap. 16 R.E 2019 and sentenced him to serve three years of community service under the probation officer and to pay fines of Tshs. 200,000/=.

Both conviction and sentence aggrieved the Director of Public of Prosecutions. In the two grounds of appeal, it was contended that: -

1. The trial court erred in law and fact for failure to properly evaluate the evidence of the victim; as a result, she came up with a wrong decision that the offence of rape was not proved against the accused person beyond a reasonable doubt.
2. The trial court erred in law and fact for failure to properly evaluate PW5(doctor) evidence. As a result, she came up with a wrong decision that penetration was not proved.

The appeal was heard by way of oral hearing. In addressing issues, the appellant was represented by Mr. Emmanuel Maleko, the learned Senior State Attorney, while the Respondent enjoyed the representation of Mr. Mutakyamirwa, the learned advocate.

Starting with the first ground of appeal, Mr. Maleko argued that he opposed the unprocedural and illegal sentence imposed by the trial court. He submitted that it was erroneously wrong for the trial court to convict and sentence the respondent with the offense of sexual harassment c/s 138 D while he was charged under sections 130(1), 2(e), and 131 (1), both of the Penal Code, Cap. 16 [R.E 2002]. According to the learned State Attorney,

the trial court failed to analyze and evaluate evidence of PW2, as shown on pages 12, 16, and 17. He narrated the evidence of PW2 on page 14, where the victim stated that the respondent bent her down, removed his pants and penis, and inserted it into PW2's vaginal. According to the State Attorney, those words connote nothing but penetration, however slight. He cited the **Wambura Kiginga Vs Republic** case, Criminal Appeal No. 301 of 2018.

He added that PW2 was below 18 years old, and PW1 proved the same. At the time of the commission of the offense, she was 16 years old. In his view, there was proof of statutory rape due to penetration and age. The State Attorney referred to page 19 of the proceedings, where the victim. PW2 stated that she was 17 years old and knew awful and good things. He referred to the case of **Wambura Kiginga**(supra) on page 27, wherein sexual offenses, the best evidence is that of the victim. He went further that, in that case, the court held that every witness is entitled to belief unless there are compelling reasons not to believe them. See also. **Goodluck Kyando** [2006] TLR 363.

Moreover, the State Attorney submitted that PW5, the medical doctor, revealed that the victim had no hymen or bruises. He contended that PW5 adduced expert opinion evidence, which should not be relied on. According

to him, in sexual offenses, the best evidence comes from the victim. See **Selemani Makumba Vs R** [2006] TLR379.

Apart from that, he challenged the reasoning of the trial court that the offense of rape cannot be proved by scientific evidence. Hence, her reliance on the burnet skirt was of no value. In that regard, the trial court failed to scrutinize the evidence.

As to the sentencing, the learned State Attorney submitted that the sentence imposed by the trial court was not only wrong in law but illegal and offended the provision of section 38D of the Penal Code. Even in that section, the state attorney argued, the trial court should have convicted the respondent for 20 years imprisonment and no less. In conclusion, the learned State Attorney invited this court to intervene in that decision.

Per contra, Mr. Mutakyamirwa referred to the **Wambura Kiginga VR** case (supra), distinguishing it from the present case, stating that the victim's evidence was neither compelling nor reliable. The counsel indicated that no electronic evidence was brought in court to substantiate the claim that the victim was talking to her brother over the phone.

The counsel made scientific or biological connotations that, biologically, when there is such force and harassment as it happened to the

victim, the body creates energy to fight such an act. Hence, there can't be communication between the brain and the wrongdoer of the act. The vagina could not give out the fluid to that effect. On that basis, the counsel invited this court not to rely on her evidence.

The counsel referred to some contradictions. He argued that, on page 18, when cross-examined, the victim stated that the respondent bent her. However, she told the court that she was lying on the floor. He also doubted the victim's conduct after the incident, that after the incident, she went straight into the class and continued with her studies. According to the counsel, there was no way the incident occurred, and it was the first time the victim could go to the class.

Furthermore, the issue would be expected to be resolved after she reported the incident. However, she was told to go to the class as her issue would be dealt with in the evening. He also wondered how the nurse could allow the victim to proceed with the examination and that such a serious issue would be resolved later. He also questioned that the victim was raped on the 27th, but up to the 29th of September 2021, no news broke about the event until on 1st October 2021. The counsel argued that since the victim was brought under the Roman Catholic faith, according to PW2, knowing

that fornication is bad, she was expected to report the incident immediately. He also argued that, since the school has security guards, it was also submitted that the victim should report the incident to them on that particular day.

The counsel also narrated that the victim was found by the academic teacher (the respondent) with a love letter, and he feared that she might be terminated from school. That is why she came up with the allegations of rape so that she can't be removed from school for being found with a love letter. The counsel also referred to the evidence of the medical doctor stating that the victim was normal, with no scars nor any rape, but the victim said she was raped. According to the counsel, such contradictions lowers the credibility of the victim. The counsel cited the case of **Nyanchoha Ryoyki@ Gunza Vs R,** Criminal Appeal No. 259 of 2019 (unreported), where the court held that a mere suspicion alone, however strong, cannot be the basis of conviction.

In addition to that, the counsel submitted that the offense of sexual harassment is not a cognate offense of rape. On that basis, the trial court was wrong to enter a conviction against the respondent. He cited the case of **Baraka Yusf Vs R**, Criminal Appeal NO.99 of 2022(unreported).

According to him, the court has to invoke its revisionary powers to set aside the conviction and sentence. See**. Dpp Vs Said**, Criminal Appeal NO. 28 of 2022, **Lucvas Samson Vs R,** Criminal Appeal NO. 342 of 2018. The counsel concluded that, because of the above, this court should find that the prosecution did not prove the case beyond a reasonable doubt.

In rejoinder, Mr. Maleko submitted that each case should be decided based on its facts. According to him, the contradictions pointed does not go to the root of the case. In his view, electronic evidence on phone conversations has nothing to do with sexual offenses. He insisted that the law be followed, that the respondent be convicted of rape, or that punishment be according to law.

I have reviewed the trial court's proceedings, submission of the respective parties, and relevant authorities cited. The essential issue here is whether the trial court evaluated and appropriately analyzed the evidence of the prosecution's side.

The cardinal principle is that the actual and best evidence of sexual offenses comes from the victims. This position is provided for in **Selemani Makumba vs. Republic** (supra). See also **Hrizostom Laurent @**

Karumuna vs. Republic, Criminal Appeal No 111 of 2020. Also, the case of **Goodluck Kyando vs Republic** (2006) TLR367 stipulates that:

> ***"...every witness must be believed, and their evidence must have entitled to credence..."***

In the present case, the center of discussion is whether the victim had quality, credible, and reliable testimonies. It is settled law that the witness's credibility may be determined by assessing the coherence of his testimony or by comparing it with evidence of other witnesses. See the cases of **Shaban Daud Vs. Republic**, Criminal Appeal No.340 of 2017(Unreported); **Nyakuboga Boniface Vs. Republic**, Criminal Appeal No. 334 of 201(both unreported).

Given the above, the records speak louder that after the victim claimed to have been penetrated, she could go to class to continue her studies. Again, it is observed from trial court proceedings on page 16 that the school system did not allow the students to call their families, and if the need arose, they were supposed to use the phone of Madam Mapunda, Sister Albina, and head teacher. Therefore, to request the respondent's mobile phone, which led to the crimes, it is evident that the court should warn itself in giving weight to the evidence of the victim. This is mainly because she once found

a love letter, and her fellow student, PW6, testified that the victim was stubborn, which implies her integrity is questionable. See the High Court decision in the case of **Republic vs. Elizabeth Michael**, Criminal session No 125 of 2012, page 8.

Further, the trial court proceedings on pages 14 and 15 of the trial court proceedings create doubt since they reveal that the victim did not report immediate after the incident, and neither the victim nor her teachers gave a sound, compelling reason for such delay. It is also important to note the argument of the counsel for the respondent that there is no reason why the crime was not reported to the school guards. The reasons given are as good as if there is no reason because I cannot find how it was essential to continue with studies to deal with the heinous crime allegedly committed by the respondent. In the case of **Emmanuel Thomas Msemakweli vs Republic,** Criminal Appeal No.91 of 2019[2020], it was stated that

> ***"This court always found it unsafe to convict an accused person in unexplained delays in reporting the matter to police since the occurrence of the offense."***

It is evidence that the offense was committed on 27th September 2021, but when she met Catherine up to 29th October 2021, the matter was not reported anywhere. The Court Appeal in the case of **Director of Public Prosecution vs Simon Mashauri,** Civil Application No 394 of 2017 [2019] TZCA, where it held that:

> ***"Besides that, PW1 did not report to the police station at the earliest reasonable time. That night, she took a shower, which was improper in the circumstances, and slept. The following day, she went to church. The question we ask ourselves is, was it a wise idea going to church instead of taking the necessary steps of reporting the rape incident to the police station.PW1 said she did not do it during that night because it was late. We think if that were the case, reporting to the police the following day would have been the first thing to do instead of going to church and waiting to report to PW7 first.***

Borrowing wisdom from the above-cited authorities and relating to what had transpired in this case, I hold that the evidence of PW2 is incredible and unreliable; hence, the best evidence cannot come from her.

In my analysis, the trial court was correct, holding that there was no evidence of rape against the Respondent. However, the trial court's analysis and evaluation reading of the respondent's sentence and within which he was convicted was wrong. Firstly, as contended by Mr. Mutakyamirwa, sexual harassment is not the cognate offense of rape. Therefore the offense of sexual offenses cannot be invoked instead of rape.

Given the above, I exercise my revisional powers under Section 373 of the Criminal Procedure Act, Cap.20 R.E 2022, to set aside the sentence and conviction of the trial court, which is illegal. See the cases of **Baraka Yusf Vs R**(supra); **Dpp Vs Said**(supra) and, **Lucvas Samson Vs R**(supra).

In the upshot, I am confident that the appeal lacks merit. In that regard, the conviction and sentence of the trial court are set aside, and the appeal is, at this moment, dismissed.

Order accordingly.

H. R. MWANGA

JUDGE

30/08/2023

COURT: Judgement delivered in Chambers this 30th day of August 2023 in the presence of Mr. Emmanuel Maleko, learned Senior State Attorney for the Appellant, and Advocate Philemon Mutakyamirwa, learned counsel for the Respondent.

H. R. MWANGA

JUDGE

30/08/2023