

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**CRIMINAL APPEAL NO. 19 OF 2023**

*(Arising from Criminal Case No. 65 of 2022 District Court of Bukoba)*

**STIDE JOACHIM..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

5<sup>th</sup> and 11<sup>th</sup> September, 2023

**BANZI, J.:**

Before the Resident Magistrate's Court of Bukoba, the appellant was arraigned with the offence of rape contrary to sections 130 (1) (2) (a) and 131 (1) of the Penal Code [Cap. 16 R.E. 2019] ("the Penal Code"). The incident occurred on 18<sup>th</sup> April, 2022 at Bulfani village within Missenyi District in Kagera Region, when the appellant was alleged to have carnal knowledge of the victim (name withheld to protect her identity), a girl of 21 years old. The appellant denied the charge but after a full trial, he was convicted and sentenced to serve 30 years imprisonment.

Aggrieved with his conviction and sentence, the appellant lodged his appeal before this court containing a total of ten grounds. Later on, with leave of this Court, he filed four additional grounds. Looking closely at his

grounds, they boil down into one complaint that, the case against him was not proved beyond reasonable doubt.

Briefly, the factual background leading to the conviction of the appellant reveals that, on 19<sup>th</sup> April, 2022, Amina Mohamed (PW2) met with the appellant who informed her that, he had carnal knowledge of the victim and broke her virginity. Later, she received information that, the victim was sick whereby, she visited her and found her in pain. She took her to her house and then called her mother. Thereafter, the matter was reported to the police and the victim was taken to the hospital where she was examined and found to be raped. Unfortunately, the victim did not testify but her statement was received in evidence as Exhibit P3 which reveals that, on 18<sup>th</sup> April, 2022, she was raped by a young man whom she didn't know when she went to visit her aunt. After arriving, she found one girl by the name of Advera as her aunt was not there and it was the said girl who brought that young man.

In his defence, the appellant who denied to commit the alleged offence, claimed to be arrested on 19<sup>th</sup> April, 2022 while he was at a local pub drinking local liquor. He was arrested on allegation of drinking prohibited liquor. He was taken to Kyaka police station where he was later informed to be charged with the offence of rape. He further stated that, on the date of

incident, he went to his work place and later, he went to drink at Jamaica pub.

At the hearing of this appeal, the appellant appeared in person unrepresented whereas the respondent, Republic was represented by Messrs. Amani Kilua and Yusuph Mapesa, learned State Attorneys.

The appellant, being a layman had nothing much to say apart from adopting his grounds of appeal as his submission and prayed for this Court to consider them and release him. Mr. Kilua, learned State Attorney supported the appeal arguing that, the prosecution case was not proved beyond reasonable doubt. Amplifying his stance, he submitted that, the best evidence in sexual offences comes from the victim as it was stated in the case of **Selemani Makumba v. Republic** [2006] TLR 379. In the instant case, there is nowhere one can find the testimony of the victim. However, at page 18 of the proceedings, the prosecution issued oral notice of tendering her statement and the same was tendered as it appeared at page 23 of the proceedings.

He further submitted that, section 34B (2) (a) of the Evidence Act [Cap. 6 R.E. 2022] ("the Evidence Act") requires disclosure of reasons for witness' failure to attend but in our case, it was not disclosed if the victim is dead or out of country or not traceable for her statement to be admitted in lieu of her testimony. Also, the requirements of section 34B (2) (a) to (f) were not

complied with. In that regard, he prayed for the statement to be expunged from the record. He concluded that, in the absence of the victim's statement, there is nothing to prove the alleged rape. Also, had the statement still been on record, the victim's age would not be proved.

Having considered the grounds of appeal in the light of the evidence on record and the the submissions of both sides, the issue for determination is whether the case against the appellant was proved to the required standard.

It is settled law that; the first appeal is in the form of re-hearing. Thus, the first appellate court has a duty to re-evaluate the entire evidence on record by subjecting it to a critical scrutiny and and where possible, arrive at its own conclusion of facts. See the case of **Vuyo Jack v. The Director of Public Prosecutions** [2018] TZCA 322 TanzLII. It is prudent to note here that, in criminal cases, prosecution is duty bound to prove the charge beyond reasonable doubt. It is also important to underscore that, in proving rape cases, the best evidence comes from the victim as it was observed in the case of **Selemani Makumba v. Republic** (supra). Equally, for statutory rape under section 130 (2) (e) of the Penal Code to stand, two ingredients must be proved; age of victim and penetration.

Reverting to the matter at hand, it was the duty of prosecution to prove the charge against the appellant beyond reasonable doubt by proving

penetration and age of the victim. Since the appellant denied the charge, it was also the duty of prosecution to prove beyond reasonable that, it was the appellant who committed the alleged offence. The prosecution relied on the testimony of three witnesses (PW2 and two police officers, *i.e.*, PW1 and PW3) and three exhibits (sketch map, PF3 and statement of the victim). The evidence of PW2 is mainly hearsay as she claimed to be informed by the appellant that, he had sexual intercourse with a certain girl and broke her virginity. However, PW2 did not disclose if the victim mentioned the person who raped her. As stated hereinabove, the victim did not testify but her statement was tendered in evidence. Section 34B (1) of the Evidence Act permits the statement of witness to be admissible as proof of relevant in lieu of direct evidence. However, its admissibility is subject to the conditions mentioned under paragraph (a) to (f) of subsection (2). The subsection provides that:

*"(2) A written or electronic statement may only be admissible under this section-*

*(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not*

*identifiable or by operation of any law he cannot attend;*

*(b) if the statement is, or purports to be, signed by the person who made it;*

*(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;*

*(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;*

*(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence:*

*Provided that, the court shall determine the relevance of any objection;*

*(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."*

The extract above contains the conditions to be complied with before admission of the statement in lieu of oral direct evidence. In the matter at

hand, save for the ten-day notice orally issued by learned State Attorney on 12<sup>th</sup> October, 2022, other conditions were not complied with. It is not even disclosed if the victim was dead or unfit by reason of bodily or mental condition to attend as a witness, or if she was outside Tanzania and it is not reasonably practicable to call her as a witness, or if all reasonable steps have been taken to procure her attendance but she cannot be found. Since the requirement of the law was not complied with before Exhibit P3 was admitted in evidence, the only remedy is to expunge it from the record which I hereby do.

Now the next question to be answered is whether the remaining evidence in the absence of Exhibit P3 can sustain the conviction of the appellant. As I have already explained above, the evidence of PW2 is nothing but hearsay. PW1 was just the investigator who visited the crime scene and drew the sketch map and his evidence does not prove either penetration or age of the victim leave alone the fact that, it was the appellant who perpetrated the alleged crime. The same applies to PW3 who just issued the PF3 and interviewed the victim. Although she claimed to be told by the victim during the interview that, it was the accused who raped her, her version is not supported by the contents of the statement of the victim. In the expunged exhibit, the victim did not mention the appellant as the one who raped her. As correctly submitted by Mr. Kilua, had the statement not been

expunged, yet still, it couldn't have been used to sustain conviction of the appellant because it did not contain proof of age of the victim.

Moreover, so far as the PF3 (Exhibit P2) is concerned, it was admitted in contravention of section 240 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2022] which requires the court to inform the accused person of his right to require the person who made the report to be summoned for cross-examination. Exhibit P2 was produced by police officer, PW3. After being admitted, the learned Magistrate did not inform the appellant of his right to require the doctor who made it to be summoned for cross-examination as the law requires. Hence, I have no any other option than to expunge it from the record. Thus, there is nothing left to prove either penetration or age of the victim leave alone the perpetrator of the alleged rape.

For those reasons, it is the finding of this court that, the case against the appellant was not proved beyond reasonable. In that regard, I find the appeal with merit and I allow it by quashing the conviction and setting aside the sentence of thirty (30) years imprisonment imposed on the appellant. I hereby order his immediate release from custody unless is held for other lawful cause. It is so ordered.



**I. K. BANZI**  
**JUDGE**  
**11/09/2023**



Delivered this 11<sup>th</sup> day of September, 2023 in the presence of Mr. Yusuph Mapesa, learned State Attorney for the respondent and the appellant in person.



A handwritten signature in blue ink, consisting of a large, stylized 'B' followed by a series of loops and a final flourish.

**I. K. BANZI**  
**JUDGE**  
**11/09/2023**