THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 29 OF 2023

(Originates from Criminal Case No. 53 of 2019 before the District Court - Mvomero)

SAMSON MKULAGO OLOLYAI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 25/8/2023

Judgement date on: 04/9/2023

NGWEMBE, J:

This rape case preferred by the Republic against the appellant/accused Samson Mkulago Ololyai was fully tried by the trial court at the end the appellant was found guilty, convicted and sentenced to suffer imprisonment for thirty (30) years. Briefly the appellant was accused for raping a woman called Witness Gaudence aged 31 years old and a school girl aged 17 (her name is preserved, rather is baptized as PW2 throughout of this judgement). On the eventful date, and according to the charge sheet, PW2 was 16 years old but on the date, she testified her evidences in court, she was already 17 years old. Thus, notwithstanding, she was still a child, unable to provide her consent. The charge of rape was contrary to section 130 (1) (2) (e) and section 131 (1) of the **Penal Code, Cap 16 R.E. 2002**, and the

offence of rape to Witness Gaudence was contrary to sections 130 (1) (2) (a) and 131 (1) of the **Penal Code Cap 16 R.E. 2002**.

The road which took the appellant to thirty (30) years imprisonment commenced on 20th to 21st September, 2018 when he was alleged to abduct the two women when were collecting charcoal in the bush at Mangae village within Mvomero district in Morogoro region. The appellant upon finding such attractive opportunity of having two women alone in the bush, he abducted them and took them to the inner bush where he turned them as his wives. To overcome those women, he had a stick, club and machete in his hands.

Fortunate to the victims, PW1 and PW2 escaped from the hands of the appellant after two days of having continuous sexual intercourse with the appellant. After two days, the appellant left them in the bush, and he went to purchase some maize flour. Thus, the victims took refuge to a certain house, met with one woman who took them to the chairman of Ngaiti where they explained the whole episode which occurred to them. Eventually they were taken to hospital at Melela for medication. In turn the appellant was not arrested until August, 2019. However, police identification parade was conducted at Doma police post, whereas the two victims properly identified the culprit who is the appellant herein. The victims' testimonies were corroborated by five other witnesses constituting a total of seven (7) prosecution witnesses.

However, the defence case was blessed by the appellant alone who denied generally to have had abducted and turned them into his wives. Rather admitted to have involved into stealing cattle from different places. The appellant admitted to have stolen 33 heads of

cattle at Mkuranga and managed to walk four days to the new land Mikese. Upon being arrested, he expected to be charged for cattle theft not rape for he did not know those two women. In cross examination, he confessed as quoted hereunder: *"Yes, it is my work to steal cattle from one place to another"* That he normally moves from Mkuranga to Sokoine through Wami Mbiki.

Having in mind those facts constituting the offence of rape, I find indebted to briefly build the principles constituting the offence of rape. Usually, rape is unconsented sexual intercourse between matured male and matured female. However slight penetration may constitute rape. See section **130 (4) of the Penal Code**. Also see the case of **Godi Kasenegala Vs. R, Criminal Appeal No. 271 of 2006 (CAT)**. Equally important is sexual intercourse between a matured male with a girl child. In such relationship, it is prohibited unless she is married and is above 15 years old. Therefore, for a girl below the age of majority, the issue of consent does not arise.

At no point in time in our jurisdiction, rape was legalized, all the time rape was/is illegal, unacceptable act and is against our laws. Even before the era of **Sexual Offences Act No. 4 of 1998**, best known as **SOSPA**, sexual related acts were punishable offences, but the nature of sentence was left to the discretionary powers of the trial court. However, at the era of **SOSPA**, the legislature enhanced punishment from minimum of thirty (30) years to life imprisonment, thus baptized as statutory rape to a girl below the age of majority.

Rape cases have exercised minds of judges and magistrates from time immemorial to date. Undoubtedly it is an enormous crime, even upon enhancing punishment to life imprisonment with minimum of thirty

(30) years with or without corporal punishment, yet the offence is still persistent. Even in ancient Babylonian law, rape was considered as theft of virginity, whose punishment was by death.

Upon perusing the Holy Bible, yet in the book of Genesis, one Jacob's daughter was raped, but the rapist and the whole family were punished by death. Even in the so-called civilized societies of Britain and USA, yet rapist meet with long imprisonment sentence. However, to date no society on earth may confidently say that they have no rapist. Usually, it is a persistent offence like homicide which have passed from one generation to another.

In establishing and proving the offence of rape, certain elements of rape must be established and proved, those include: - penetration however slight, proof of absence of consent to a woman of age of majority, but same is not applicable to girls below the age of majority; corroboration where possible including, medical report, confession and alike; proper identification of a rapist if is night and there is no proper light; overall circumstances leading to rape; use of force to overcome resistance; abduction; threat to death; unlawful detention; and the most important is availability of watertight evidence on the offence committed (See section 130 (2) of the Penal Code).

Those requirements are quite important due to difficulties of raising appropriate defence to the accused. It is extremely difficult to the accused to raise viable and sensible defence, unless the alleged rapist successfully raises the defence of alibi. This was observed many centuries ago, even today, we have found many accused persons fail to defend. **Sir Matthew Hale,** Lord Chief Justice of the King's Bench Court, in his book **The History of the Pleas of the Crown 635**

(1847) stated at the time of Saxon laws when rape was punishable by death, he observed: -

> *"It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent. I only mention these instances, that we may be the more cautious upon trials of offenses of this nature"*

Under the circumstance therefore, it is of utmost importance that before convicting a man for rape or any other sexual related offences, the court should be assured that, the evidence laid before it, proved all ingredients of the offence and that, it is established crystal clear, the accused before it, is the true offender in respect of that particular offence. Notwithstanding, our courts must in no doubt stand firm to issue deterrent punishment. However, I would with wide experience on handling rape cases, advice the legislature to amend the minimum sentence of 30 years into discretionary powers of the court to pass sentences based on the prevailing circumstances.

Having so discussed on those basic principles of law related to the offence of rape, yet the question remains, whether those principles are applicable in the circumstances of this appeal? To answer this question, I need to discuss holistically the evidences adduced during trial as well as the arguments advanced by parties on the hearing of this appeal. The above brief facts, obviously constituted the offence of rape to both women under unlawful detention and or abduction.

The appellant has raised six grounds of appeal namely: -

1. The trial magistrate erred in law and in fact in convicting and sentencing the appellant based on cautioned statement which was not tendered and admitted in court during trial;
2. The trial magistrate erred in law and in fact in convicting and sentencing the appellant without considering the appellant was not addressed in terms of section 214 (1) of CPA as the case was transferred to another magistrate;
3. The trial magistrate erred in law and in fact to convict and sentence the appellant;
4. The trial magistrate erred in law and in fact in convicting and sentencing the appellant when there was no birth certificate or any document proving the age of the victim that she was 17 years old;
5. The trial magistrate erred in law and in fact in convicting and sentencing the appellant when the visual identification was not watertight; and
6. The trial magistrate erred in law and in fact in convicting and sentencing the appellant for the case was not proved beyond reasonable doubt.

In addressing these grounds of appeal, unfortunate the appellant appeared in court unrepresented, hence had tongue tied with no viable contributions to his grounds of appeal. Likewise, during trial the accused appeared in court unrepresented, thus no serious defence was advanced, rather defended by raising another offence of cattle theft. Unfortunate in this appeal, the appellant did not know even the contents of his grounds of appeal. I tried to remind him all his grounds of appeal, and invited him to address the court, yet he failed to say anything viable

therein. In such imbalanced representations on serious offences like rape cases, it is difficult to see justice being done and seen to be done.

We have been witnessing similar situation in our courts. Sometimes, when the court invites the appellant to address the court on his grounds of appeal, simply replies that, he leaves it to court to consider his grounds of appeal. Others remain silent, confused and not knowing what to do; others start crying and leaving everything to the Almighty God. Such state of imbalance, especially on offences attracting long imprisonment sentence like sexual related offences, I am convinced with no doubt in my mind, the accused should have legal assistance for the costs of the Government like it is done in homicide cases. This situation has reminded me the oldest books of law in England where the House of Lordships issued a long living warning to the society, in the case of **Pett Vs. Greyhound Racing Association Ltd [1969] 1 QB. 125** when they held: -

> *"It is not every man who has ability to defend himself on his own... he may be tongue – tied, nervous, confused or wanting in intelligence, we see it every day. A magistrate says to a man, you may ask a question you like, whereupon the man immediately starts to make a speech.* ***If justice is to be done, he ought to have the help of someone to speak for him"***

In the absence of another person who is legally trained to speak for the appellant/accused, in serious offences like homicide, sexual offences, armed robbery and economic related cases, the likelihood of imprisoning innocent persons cannot be overlooked.

Similar event occurred in this appeal, the appellant instead of arguing his grounds of appeal, he narrated another offence he committed, that he is thief of cattle. That he did steal heads of cattle from Mkuranga to Wami – Sokoine. Thereafter he was arrested and taken to various police stations and police posts expecting to be charged for cattle theft, but surprisingly he was charged for rape, an offence he never committed. Lastly, prayed this court to find him not guilty to the offence of rape.

In turn the Republic was represented by learned State Attorney Shaban Abdallah and Paulina Masawe. From the outset, the Republic discrete all grounds of appeal as unmerited and wastage of time. Submitting on the first ground, briefly argued that same lacked merits because the trial court's judgement was not based on cautioned statement of the appellant, rather was based on strong evidences of the prosecution. Added that, the alleged cautioned statement of the appellant was neither tendered in court nor admitted during trial.

Submitting on grounds 2 & 3 on the change of trial magistrate, the State Attorney referred this court to page 17 of the proceedings that the change of magistrate was properly communicated to the accused and in fact he willingly accepted to continue with trial from where they ended. Also, he supported his argument with a case of **Charles Yona Vs. R, Criminal Appeal No. 79 of 2019 at page 14.** Ground 3 was irrelevant.

In respect to the age of PW2, whether, was 17 years or otherwise, the State Attorney argued forcefully, that the age of the victim was disclosed in page 19 of the proceedings. Above all, PW2 was born in year 2002, thus, by the year she was raped, she was 17 years old. Also,

he referred this court to the case of **Bashiri John Vs. R, Criminal Appeal No. 486 of 2016 at page 14.** Again, he added that reading loudly the documentary evidences admitted in court is now mandatory. Thus, all documentary evidences admitted during trial were read over loudly as per page 18 of the proceedings.

Submitting on ground 5, on proper identification, he dismissed it as unfounded for the appellant had the victims in his grip for three days, meaning day and night.

The last ground of appeal is related to proof of criminality of the offence, the learned State Attorney, equally dismissed it as unfounded for the case was proved beyond reasonable doubt. He rested by a prayer that this appeal be dismissed forthwith.

To begin with, in cases of this nature, the fundamental point of determination by any court confronted by similar case is to prove whether the offence of rape was established and proved as required by law. Section 3 (2) (a) of **The Evidence Act, Cap 6 RE 2019,** provide clearly that, in criminal cases, a fact must be proved beyond reasonable doubt. The duty of proving occurrence of rape lies on the shoulders of the prosecution. The prosecution must establish and prove by evidence every ingredient constituting the offence of rape beyond reasonable doubt.

As a general rule, in sexual related offences, the best evidence lies on the complainant. The reason is obvious, usually the offence of rape is committed in closed doors with only two persons therein, the accused and the complainant. In such circumstances, the complainant's evidence stands to be the best evidence. However, such evidence should not be taken wholesome as truth of the matter, nowadays courts have

developed some guiding rules to test credibility and reliability of the victim's evidence. For instance, the court should satisfy on the demeanors of the complainant/witness, coherence of her statement and consistence to other witnesses in support. Similar position was alluded in the case of **Athuman Hassani Vs. R, Criminal Appeal No. 292 of 2017.**

As I have tried to discuss herein above, offences related to sexual act are placed among the most serious offences, which upon conviction attract heavy punishment up to life imprisonment, in any event not less than thirty (30) years. Therefore, according to its seriousness of punishment, its proof must as well be watertight leaving only remote possibilities. In anyway, courts have placed special task on the shoulders of the prosecution to carefully, establish and prove all elements constituting the offence with a view to avoid mistakes, having in mind to net only the rapist and punish them properly.

Rape is defined simply to mean sexual intercourse, that is, a male reproductive organ (penis) penetrating into a female reproductive organ (Vagina) without consent to a matured woman, but to a child girl, consent is immaterial. The penetration need not be wholesome to constitute the offence of rape, rather even slight of it may constitute rape. This position is statutory as rightly defined in section 130 (4) (a) of the Penal Code which clearly provides: -

> **Section 130 (4)** *"Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*

Same was amplified by the Court of Appeal in the case of **Godi Kasenegala Vs. Republic (Criminal Appeal 10 of 2008) [2010]**

TZCA 5 and in the case of **Mbwana Hassan Vs. R, Criminal Appeal No. 98 of 2009 (CAT – Arusha)**, held: -

> *"It is trite law also that, for the offence of rape ... There must be unshakeable evidence of penetration"*

Notably, the act of rape and normal sexual intercourse is the same and one thing, the only difference is availability of consent to a matured woman. When the complainant consented to the act of sexual intercourse, the law does not recognize as an offence, save only if the girl is below the age of majority whose consent is not recognized by law as she does not have capacity to consent, unless such girl is married and is above the age of 15 years old, otherwise she cannot consent to sex. In the case of **Abdallah William Vs. R, Criminal Appeal No. 271 of 2006** (CAT – Tabora) the Court held: -

> *"Rape does not necessarily mean that force has to be used in the sexual act. Rape merely means the lack of consent in sexual intercourse"*

I fully subscribe to the above guidance, and the difficulties of proving absence of consent in certain circumstances of the offence of rape.

I am equally aware on the use of expert opinion in proving criminality on rape cases. Always medical doctors and other experts do not testify evidential facts, like eye witnesses, rather they testify expert opinion after thorough examination of the matter. Therefore, their expert opinion is admissible to furnish the trial court with scientific information, which is likely to be outside the experience and knowledge of a trial judge or magistrate. All said, but the court remains

independent to decide the case before it based on available evidences. But when there is a serious doubt on the testimonies of witnesses, the expert opinion would help to arrive into conclusion.

Unfortunate may be in this appeal, the appellant was alleged to have abducted those two women when they were collecting charcoal in the bush with their bicycles. He dragged them to the deeper forest and spent with them two or more days as his wives. They were together day and night, until when their food went missing. Thus, he decided to go and look for it, thus, gave room to the victims to run away.

Moreover, when the appellant was arrested after almost a year, he was properly identified on identification parade at Doma police post. The victims having spent with him day and night for two to three days, undoubtedly, they could not fail to identify him. I find no slight doubt, the issue of mistaken identity does not arise same is dismissed. Therefore, the identification parade was properly conducted and the trial magistrate was careful to follow all laid down legal procedures in recording all proceedings and composition of judgement.

In regard to the cautioned statement of the appellant, I think same should not tie me up for obvious reasons, I have repeatedly perused all proceedings of the trial court, same was not tendered and admitted in court. Equally, the trial magistrate in the whole judgement, did not use it in convicting and sentencing him, as alleged by the appellant. Instead, the whole judgement was properly composed based on evidences adduced by both parties. Therefore, the first ground cannot stand, same is dismissed.

Considering the second ground of appeal which is related to section 214 (1) of CPC, I think, this ground likewise should not tie me up

for the reason that, the record speaks louder as per page 17 quoted hereunder: -

> *"The case file is transferred to another magistrate, as the trial magistrate is on annual leave and the witness are at court and the accused is in custody and the case has more than six months in court"*
>
> ***Court*** *"Accused asked if he is willing to proceed with the case from where it ended or wish to start over".* ***Accused,*** *"I am ready to proceed from where the matter ended".* ***Court,*** *"prayer granted""*

The discussion recorded on 9th April, 2020 answers this ground of appeal and in fact, the trial magistrate followed properly the legal requirements emphasized in section 214 (1) of CPA. In fact, the contents of this section, even without complying it, yet the proceedings cannot be nullified, unless same is proved to have prejudiced the appellant/accused. The Court of Appeal in **Criminal Appeal No. 79 of 2019, Charles Yona Vs. R,** discussed with details that, failure to comply with this section there must be material prejudice to the accused otherwise is not fatal. The Court proceeded to hold: -

> *"In the absence of any evidence proving that the omission to address the appellant in the instant appeal had any material prejudice to him materially, we are left with no other option than holding as we do that the omission was one of the curable irregularities under section 388 (1) of the CPA".*

Even if there would be any default to section 214 (1), which is not the case in this appeal, yet same irregularity is curable under section

388 (1) of CPA. Thus, this ground is baseless, I therefore, proceed to dismiss it.

On the issue of age of the victim (PW2), this is a legally acceptable ground of appeal, because in the current era of 'statutory rape', proof of the age of the victim is mandatory. Also, the age of the victim determines the extent of sentence. Therefore, failure to establish and prove her age, our courts have treated it as fatal. However, in this appeal, the charge sheet disclosed that the child victim was 16 years old by September, 2018, when the offence was committed. By the time she testified in court, that is, on November, 2019, she was 17 years (see page 12 of the proceedings). At that time, she was schooling at Melela secondary school. Equally the age of the victim was corroborated by PW3 a medical doctor at page 21, that the girl was 17 years old. PW4 Angelina Robi, mother of the girl victim, disclosed that the girl was born on 2002 and by year 2018 she was at form one. All those witnesses established the age of the victim that she was 17 years by the time of trial.

The Court of Appeal in developing the principle of proving the age of the victim's child deeply considered it in the case of **Issaya Renatus Vs. R, Criminal Appeal No. 542 of 2015**. That proof of age must be concrete, viable and reliable. For instance, production of birth certificate, clinic card, (if any), affidavit, medical report, school registration which indicates year of birth (if any) and any other reliable and acceptable documentary proof may support the age of the victim. Usually, parents who gave birth to the victim may prove when she was born and thus the age of the victim may be so established and proved.

The Court of Appeal in respect to this point, had strictly required proof of age in the case of **Leonard s/o Sakata Vs. DPP, Criminal Appeal No. 235 of 2019**. In the same vein, the case of **Winston Obeid Vs. R, Criminal Appeal No. 23 of 2016**; **Edson Simon Mwombeki Vs. R, Criminal Appeal No. 94 of 2016;** and **Aloyce Maridadi Vs. R, Criminal Appeal No. 208 of 2016 (all unreported)** discussed in details on the need of proof of age of the victim.

Accordingly, in this appeal, the age of the victim was systematic, straight forward, with no contradictions established that when she was raped by the appellant, she was 16 years old and by the time she testified in court she was 17 years old, all the same she was still a child. The proof of her age was supported by the medical doctor, mother of the victim and herself. In this appeal, the issue of age of the victim I think, was properly established and proved. As such this ground also should follow the same trend of being dismissed as I so order.

Ground five is already discussed above, same bears no validity in this appeal. Equally the last ground of failure of the prosecution to prove the offence of rape beyond reasonable doubt bears no validity. I have already discussed on the viable elements establishing rape. That proof of penetration, absence of consent to a woman above 18 years, proof of age of a child victim, and proper identification of the rapist. All important elements of rape were established and proved; thus, the prosecution dutifully proved the offence of rape beyond reasonable doubt. Equally the trial magistrate followed all legal requirements in recording all proceedings.

In totality and for the reasons so stated, this appeal cannot stand, it is not merited same is dismissed. The conviction and sentence meted by the trial court is upheld.

I accordingly order.

Dated at Morogoro in Chambers this 4th day of September, 2023.

P. J. NGWEMBE

JUDGE

04/09/2023

Court: Judgement delivered at Morogoro in chambers this 4th day of September, 2023 in the presence of Mr. Katale, State Attorney for Republic/Respondent and accused person presence through Video Conference.

L.B. LYAKINANA

Ag, DEPUTY REGISTRAR

04/09/2023

Court: Right to appeal to the Court of Appeal explained.

L.B. LYAKINANA

Ag, DEPUTY REGISTRAR

04/09/2023

I Certify that this is a true and correct copy of the original

Deputy Registrar

Date 13/9/2023 at Morogoro