IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 7 OF 2023

(*Arising from the Judgment of the District Court of Mwanga at Mwanga dated 27th May 2022 in Criminal Case No. 11 of 2022)*

SAADAM RAMADHAN ATHUMANI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29th August & 26th September 2023

A.P.KILIMI, J.:

The appellant in this appeal was arraigned in the District Court of Mwanga at Mwanga for the offence of Rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap. 16 of R.E.2019 "Penal Code". Therein the prosecution in respect to this charge alleged that on diverse dates September, 2021 at or about 15:00hrs at Toloha village, within Mwanga District and Kilimanjaro Region, the appellant did have carnal knowledge of

the victim XW (in pseudonym protect her identity) a girl aged 15 years old without her consent.

The appellant pleaded not guilty to the above charge, to prove the above charge, the prosecution paraded five witnesses together with one exhibit, whereas the accused in his defence brought one witness to disprove the same. Having considered the evidence adduced, the trial court found the appellant guilty as charged, he was then convicted and sentenced to serve thirty years imprisonment.

The appellant, being aggrieved by the conviction and sentence, has appealed to this court. Before I proceed with the merit of this appeal, let me reproduce, albeit brief the facts which gave rise of this appeal gleaned from trial court record. The victim XW live in one roof with her grandmother, his uncle (appellant) and her two siblings. On the fateful day her grandmother was traveled, she was at home sleeping, then appellant went and undress her and raped her, XW called her grandmother and narrated what happened, the grandmother promised her to talk with the appellant. After some days the appellant repeated the act again, this time it was night, while sleeping with her sibling, appellant raped her while shut her mouth, she also informed her grandmother who told not to tell anybody.

This evil act of the accused was repeated on 23rd January 2022, victim's grandmother was not around also this time, the accused raped and sodomized her again while she was in the kitchen. XW this time refused to inform her grandmother because she did not take any actions for previous reported incidents, she reported the matter to PW2 her teacher, who informed Headteacher, then the matter was reported to Village Executive Officer and Social welfare Officer, then the matter was reported to Police Station, the victim was taken to Hospital for medical examination, and later Police continue with further investigation, and later the appellant was arrested.

In his defence, the appellant relied on the defence of Alibi and refuted to commit the charged offence, his mother DW2 who is also grandmother of the victim supported him that his son was not around the time the offence was committed, she also told the court that the accused came to toloha on December 2021, and the victim never told her that the accused raped her.

As pointed out above after the hearing, the trial court convicted the appellant as stated above, the appellant dissatisfied with the said decision, has moved this court by way of appeal basing on the following grounds;

1. That, trial magistrate erred in law to convict the appellant without punishment in their judgement held 25/5/2022 at Mwanga District Court, it is against to section 312(2) of the Criminal Procedure Act Cap 20 R:E 2019.
2. That trial Magistrate grossly erred in both law and facts to convict and sentence the appellant through proceedings and not a judgement while Prosecution side fail to prove their case beyond reasonable doubt.
3. That trial Magistrate grossly erred in both law and facts for failure to consider the evidence adduced by defense side.
4. That, trial Magistrate grossly erred in both law and facts to convict the appellant on relied to insufficient evidence adduced by prosecution side.

At the hearing of this appeal, the appellant was unrepresented but came from prison with written submission while Respondent was represented by Ms. Edith Msenga assisted by Ms. Wanda both learned State Attorneys who prayed to reply the said written submission orally.

The appellant to support his ground of appeal, argued in respect to first ground that, it is clear that the trial Magistrate erred in law for failure to award the punishment against the appellant in their judgement held on 25/5/2022. The appellant further said this is contrary to section 312(2) of the Criminal Procedure Act Cap 20 R.E 2019 "hereinafter CPA" which categorically provide the content of judgement with the inclusion of punishment.

Submitting in respect of proving the case beyond reasonable doubt, the appellant argued that, it is not desirable for the type of the Offence which was suspected to be committed, their medical examination to be conducted after 4 days, the offence was suspected to be committed on 23/1/2022 and medical examination was conducted on 27/1/2022. Therefore, the appellant alleges this make rooms for fabricating the case against him. The appellant further added that the medical expert did not say whether the victim was penetrated with something sharp or blunt which also show was fabricated and it create doubts to the prosecution case, thus prayed to be advantage to him.

The appellant also said the victim submitted that the victim did not narrate such event to any person even their neighbors house until the school was opened and she decided to ask their fellow student, therefore, her failure to tell the neighbor or person it prove the case was fabricated against him.

In respect to third ground, the appellant alleges that the victim has grudges with him, because in one incidence prohibited her bad behaviour of meeting with her boyfriend. Further on this ground he added that DW2 her

grandmother was at home, the victim did not tell anything, nor their neighbor (Anko Tekelo) or could tell anybody. The appellant further added that he was arrested on 27/1//202 and he was brought to court on 31/1/2022 this is bad in law as provided under section 33 of the Criminal Procedure Act Cap 20 R: E 2019, thus this contrary to the requirement of the law, he then said such situation creates doubts which should be used to his benefit and prayed this court to quash the conviction and set aside the sentence of thirty (30) imposed to him.

Responding to the above submission Ms. Edith Msenga, learned State Attorney in respect to ground number one acknowledged that the judgment offended provision 312(3) of Criminal Procedure Act because found the accused was found guilty but the trial court did not put the sentence. But she then submitted, this is curable for returning the case to the trial court so that the Judgment be read out again as stated in the case of **Samson Bwire vs Republic** Criminal Appeal No. 91 of 2018 CAT at Shinyanga, where at page 18 the court Judgment can be cured by returning to the trial court to read and award punishment. Also, she added another option is for using section 388 of the CPA, because this irregularity did occasion injustice to the appellant, taking regard the provision in charge

sheet did also established punishment which caused the accused knew exactly the offence charged with.

Responding in respect to the second ground, Ms. Wanda, learned State Attorney opted to argue second, third and fourth together since both relate of proof of evidence. She then submitted that Penetration as per section 130(4) of Penal Code was proved, because Prosecution procured Medical Practitioner who said the victim lost virginity, and also, he tendered PF3 as exhibit P1 to such effect. Further, she added the age of the victim was proved by the victim herself and her teacher (PW2), therefore basing on statement of victim and her teacher and taking regard the victim was a pupil at standard VII in normal circumstances, cannot be the person above 18 years, therefore this court should take judicial notice under section 122 of TEA Cap. 6 R.E. 2022. To bolster her assertion asked me to refer the case of **George Claud Kassanda vs. DPP** Criminal Appeal No. 376 of 2017 CAT at Mbeya.

In respect to the prove of the offence charged, Ms. Wanda submitted that under section 127(6) of the Evidence Act Cap.6. R.E.2022 provides that evidence of the victim is the best one, the victim identified appellant by naming him at earliest opportunity, from page 5 to 7 of typed proceeding, the victim stated she started to rape her from November, 2021 and identify him because they live together as his uncle. Therefore, she urged this court to see prosecution case proved this offence without leaving any doubt.

Contending in respect to allegation that the defence was not considered, Ms. Wanda submitted that, the defence of the accused was considered and did not raise any doubt to the prosecution case. In respect to when appellant was arrested and the date was taken to court, she contended that the allegation has no merit because did not cause injustice to the appellant, take regard he did not confess at police, and did not show any form of torture, in order to show that delay caused injustice. In respect to how the PF 3 was obtained, Ms. Wanda submitted it was legally procured since according to evidence of PW4 at page 15, stated that victim came with female police and social welfare, after examination filed PF3. Thus, prayed this court to dismiss this appeal and confirm the trial court decision.

With the foregoing, I am now in a position to decide whether the trial court considered the evidence before it and found the appellant committed the offence charged. I found appropriate to commence my determination on the first ground of appeal, where the appellant alleges that the judgment from the trial court did not contain the sentence in it and that is contrary to section 312(2) of the CPA. And before I proceed with this ground, I wish to point out that this being the first appellate court, thus is expected to make fresh evaluation of the evidence on record and come up with its conclusion. (See **Yustus Aidan vs Republic** Criminal Appeal 454 of 2019 CAT at Arusha (Unreported).

In this first ground the point to be considered is whether to judgment of the trial court contradicts with the law. For purpose of reference, I find desirable to reproduce the said law hereunder;

> *"s.312 (2) In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and* ***the punishment to which he is sentenced."***
>
> [Emphasis added]

The counsel for the respondent concedes with this point but insisted that the defective is curable under section 388 of CPA and referred the case of **Samson Bwire vs Republic,** Criminal appeal No. 91 of 2018 CAT at Shinyanga.

I have scanned the entire record of the trial court, it is true there is a document titled Judgment, but only typed and end with the words *"therefore the accused is hereby found guilty of the offence charged, and I convict him forthwith"*. The same was annexed by the appellant in his grounds of appeal. This infers to me is the document supplied to him as a judgment.

But my perusal of the record shows that, on the day of delivering the judgment, the learned Senior Resident Magistrate wrote in his handwritten in the record of the court what followed in respect to the sentence of appellant after convicting as aforesaid. This also infer to me that the Learned Trial Magistrate typed the judgment in an electronic device then afterward printed it and did not include the last part of sentencing he jotted down the day of delivering judgment. To prove the above, on the trial court wherein all proceeding after judgment were typed, it is shown clearly what happen

on the day of judgement at page 31 and 32 of proceeding and for purposes of clarity, I reproduce them hereunder;

> *"**Date:** 25/05/2022*
> *__Coram:__ J.H. KDUWILE - SRM*
> *__For Pros:__ SGT MROME*
> *__C.Clerk:__ M. NJOU*
> *__Accused:__ Present*
> *__Pros:__ The case is coming for judgments ready to receive.*
> *__Accused:__ I am ready.*
> *__Court;__ Accused is found guilty as charged.*
> *__Previous criminal recorded__*
> *__Pros:__ we do not have a previous criminal record of the accused it is our trouble prayer that the accused be punished according to the law.*
> *__Mitigation:__*
> *__Accused:__ I have a wife and children, my mother is very old and she depends on me, also I have worker, you honor I pray for less punishment.*
>
> *__SENTENCE.__*
> *As I have stated earlier that offence has no punishment less than thirty years imprisonment according to the section your charged with, your sentence is statutory punishment therefore this court sentence you to statutes sentence of thirty years imprisonment without corporal punishment order accordingly.*
>
> *Sgd: J.H. Kijuwile - SRM*
> *25/05/2022*

Court: *Right of appeal is fully explained.*

Sgd: J.H. Kijuwile - SRM
25/05/2022"

Having shown above, in my view the next point to know is whether the appellant was prejudiced by being supplied a document lacking the above content. To my opinion was not prejudiced due to the following reasons, **First,** according to the corum above the appellant was present; **second**, the above was read to him, therefore, he heard his conviction; and it was recorded that he had no previous conviction. **Third,** more important he did his mitigation; **Fourth,** thereafter he heard the sentence passed to him; and **Fifth**, he was told his right to appeal.

Be it as it may, the appellant knew he was charged with the offence of rape c/s 130(1)(2) and 131(1) of the Penal code Cap 16 R.E 2019, the punishment of the said offence is well known to be imprisonment for life maximum and not less than thirty years as minimum.

In view of the above, the appellant knew everything about his sentence, the error in my view started when he was supplied a document called a judgment but missed the content of sentencing envisaged above,

although it was read to him on the Judgment Day. Therefore, it is my opinion since he knows all the above, I am satisfied the said omission to include the above content did not occasion a failure of justice, thus I invoke the provision of section 388 of CPA and I order the trial court to cause and merge the two contents, one supplied to appellant and the other in the trial court proceeding to be one document which will be the Judgement as per requirement of the law above. Then the same be supplied to the appellant immediately as his judgment.

Next, I have considered the remaining grounds, the second and fourth ground entail to whether the prosecution proved the case beyond reasonable doubt while the third ground alleges that the appellant defence at the trial was not considered. I reserve the two alike grounds to be dealt at the end and I proceed with the third ground.

According to the defence evidence, the appellant relied with the defence of alibi and brought a witness who is his mother, I have considered the typed judgment of the trial court, the same was not only considered but evaluated from page 7 to 8. The learned Magistrate started to refer the provision of section 194 of CPA for the requirement of notice but further

observed whether the same raise any doubt to the prosecution. And the trial court had this to say at page 8;

> *"Now we came to the accused alibi defence, whether it creates any doubt to the prosecution. In support of his defence of alibi the accused paraded DW2 Hawa Said who testified that, the accused was not around the time the offence was committed, she told the court that the accused came to Toloha on December 2021, while the accused himself told the court that he came back to Toloha on September 2021, these two witnesses differ that is to say the accused defence has not raise doubt to the prosecution evidence."*
>
> [Emphasis added]

I also subscribe with the trial court, since, it is trite law that an accused person is not required to prove his alibi. It is sufficient for him if the alibi raises a reasonable doubt (See **Leonard Aniseth vs Republic** [1963] EA 206 and **Ali Salehe Msutu vs Republic** [1980] TRL 1). According to the evidence at the trial I am of the settled view the said alibi was properly rejected because the appellant is victim's uncle and was recognized at the

scene of the crime, thus his defence of alibi cannot protrude. However, be that as it may, the above shows that the defence was considered which is the gist of this ground. Having said above, I thus find this ground devoid merit, so fails.

In respect two grounds retained above to be argued together, the issue on them is whether at the trial the prosecution proved the offence beyond reasonable doubt. The appellant was charged with the offence of rape c/s 130(1)(2)(e) and 131(1) of the Penal Code. Therefore, rape being sexual offence the best evidence of it lies on the victim. This is according to section 127(6) of Evidence act as well and the case of **Selemani Makumba vs Republic** [2006] T.L.R 379.

In her testimony, victim PW1 narrated how the appellant who she recognizes as her uncle, they used to stay together in one roof. Then sometime in 2021 when remained home with the appellant (uncle), the appellant undress her skin tight, skirt and underwear and she found the accused naked, inserted his penis to her vagina. The victim reported about the incidence to her grandmother (DW1) who failed to act upon it until the last incidence occurred on 23/1/2022 when the appellant did penetrate the victim into her anus. For that incident the victim tireless reporting to her

grandmother who took no action decided to tell her teacher and mentioned the appellants as her culprits.

Soon after the victim narrated about the incidence to her teacher, she was taken to hospital and the accused was arrested. The evidence of Medical Practitioner (PW4) said that the victim's vagina had no hymen and the vagina was loose that something was entered in the victim's vagina. This is corroborated to the victim's evidence that the accused inserted his penis to her vagina. Therefore, I agree with the trial court that penetration which is the essential element in the offence of rape was proved. Nonetheless, the above negate the defence by the appellant that doctor's evidence was fabricated, thus according to the record, in my view the same was a pure an expert opinion evidence.

The appellant questioned why the victim did not narrate the occurrence of rape to the neighbors and reported the same to the teacher. In my view, according to the age of the victim and African cultural upbringing, I think it could have not been possible for the victim to tell anyone who is not close to her, that is why she informed her grandmother more than once but did not acted upon it. However, the victim opted to tell her teacher who successful acted upon it.

I am mindful, in the case of **Marwa Wangiti & Another vs Republic** [2002] TLR 39 where there was delay to name a suspect, the Court held thus:

> *"The ability of a witness to name a suspect at earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

But reporting at earliest opportunity though is important as stated above, the same depend in the circumstances of each case. For instance, in the case of **Phinias Alexander & Two Others vs Republic** Criminal Appeal No. 276 of 2019 the Court stated that:

> *"In the light of the reproduced victim 's evidence at the trial, the earliest opportune time was her encounter with the neighbours."*

Applying the above principle, in this matter, the facts that the victim used to report to her grandmother and no action taken, therefore the earliest opportunity is when she reported to her teacher.

It is settled law that the best test for the quality evidence is based on the credibility of a witness (see **Yohana Msigwa vs The Republic** (1990) T.L.R. 143, and **Richard Mtengule and Another vs The Republic** (1992) T.L.R. 5. As shown above, since the victim's narration of the commission of the offence were very consistence and unshaken. As duty imposed to this court as a first appellate court, I am settled in believing that the victim's evidence was credible and very reliable, thus intact.

Having endeavored above, it is therefore my settled opinion that, the prosecution proved the charge of rape against the appellant beyond reasonable doubt, therefore, I am of considered opinion those two ground above devoid of merit and dismissed forthwith.

Having said so, I am satisfied that the Appellant was properly convicted and sentenced. Thus, I find no reason to fault the decision of the trial court. Consequently, this appeal is devoid of merit and is hereby dismissed, save to the order stated above to be complied by the trial court.

It is so ordered.

DATED at **MOSHI** this 26th day of September 2023.

X

JUDGE
Signed by: A. P. KILIMI

Court: - Judgment delivered today on 26th day of September, 2023 in the presence of appellant (by virtual court while in Karanga prison) and Ms. Edith Msenga learned State Attorney for the respondent present.

Sgd: A. P. KILIMI
JUDGE
26/09/2023

Court: Right of Appeal fully explained.

Sgd: A. P. KILIMI
JUDGE
26/09/2023