IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 26 OF 2023

(Arising from Criminal Case 43 of 2022 District Court of Bukoba)

JACKSON FROLENCE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

22nd August & 29th September, 2023

BANZI, J.:

On 7th June, 2022, the appellant was arraigned before the District Court of Bukoba charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap.16 R.E. 2019] ("the Penal Code"). It was alleged in the particulars of offence that, on 21st May, 2022 at Kagemu area, within Bukoba Municipality, in Kagera Region, the appellant had carnal knowledge a girl of eight years whom I shall refer as the "victim".

In a bid to prove the case against the appellant, the prosecution side called four witnesses and produced two exhibits. In the main, the evidence by prosecution reveals that, the victim and her mother (PW2) were staying within the same compound with the appellant who is cattle herder of their

landlord. On the date of incident, 21st May, 2022, about 11:00 am to 12:00 noon, PW2 informed the appellant that, she was going to hairdressing salon leaving behind the victim to take care of her young brother. After a while, the appellant called the victim and asker her to enter into his bedroom. Upon entering, he asked her to lay on the bed. Then, he undressed her underpants, undressed himself and inserted his male organ into her female organ. The victim felt pain and the appellant forbidden her to raise alarm. After quenching her desires, he told her not to tell anybody. When PW2 returned, she found her youngest son alone and neither the victim nor appellant were there. She went to the appellant's bedroom and found the victim's open shoes on his door. The door was slightly opened and PW2 found the victim inside the appellant's bedroom. After enquiring, the victim informed her about the whole ordeal. PW2 examined her and found her with sperm on her genitals. Thereafter, PW2 informed her husband and they reported the matter to the police where they were given PF3 (Exhibit P2) by G.3717 D/C Ramadhan (PW4) and took the victim to hospital. She was examined found with evidence of penetration.

In his defence, the appellant claimed that, the case against him was concocted because the incident was not reported to the village chairman or

ten cell leader. He claimed to be arrested by the victim's father who threatened to kill him by using a knife. He also claimed to be beaten by him and finally, he took him to police station where he stayed in custody for two days before he was arraigned in court charged with the offence of rape.

At the end of the trial, the appellant was convicted and sentenced to mandatory sentence of life imprisonment. Aggrieved with both conviction and sentence, he preferred this appeal with six (6) grounds which are reproduced as hereunder:

1. ***That***, *the Learned Trial Magistrate erred in law and in facts to convict the Appellant without taking into account that the case was planted and fabricated against the Appellant.*
2. ***That***, *the Trial Magistrate erred in law and facts to rely on the concocted and fabricated evidence to reach a conviction.*
3. ***That***, *the Learned Trial Magistrate erred in law and in facts to convict the Appellant while the prosecution side did not prove the case beyond reasonable doubt.*
4. ***That***, *the Learned Trial Magistrate erred in law and in facts to convict the Appellant while the element of the offence charged was not proved to the required standard.*
5. ***That***, *the Trial Magistrate erred in law and in facts to convict the Appellant basing on defective charge.*

6. ***That***, *the Trial Magistrate erred in law and in facts for not considering the evidence adduced by the Appellant, thus reaching unjust on part of the Appellant.*

At the hearing of this appeal, the appellant was represented by Mr. Ibrahim Mswadick, learned counsel whereas, Mr. Amani Kilua, the learned State Attorney appeared for the respondent.

Mr. Mswadick began his submission by informing the court that, the first and fourth grounds jointly will be argued jointly and the rest of the grounds will be argued separately. Arguing in support of the first and fourth grounds, Mr. Mswadick submitted that, the fact about the victim to be threatened to remain silence during the alleged rape is unfounded because, being her first time, it was expected for the victim to shout and there was no evidence of presence of panga or knife which was used to threatened her. Also, the record does not show if the victim was promised something in exchange of her silence. He added that, much as he was aware of the principle about the best evidence in sexual offences comes from the victim, but the same should not be taken as gospel truth without being tested. He cited the case of **Mohamed Said v. Republic** [2019] TZCA 252 TanzLII to support his argument. He further submitted that, there is contradiction between the evidence of PW2 and Exhibit P2 in respect of presence of sperm

on victim's female organ considering that, the victim was examined on the same date.

It was also his contention that, section 240 (3) of the Criminal Procedure Act [Cap.20 R.E. 2022] ("the CPA") was not complied with because the trial Magistrate failed to give the appellant his right to require the doctor who made Exhibit P2 to be called for cross-examination. As the offence attracts long sentence, the appellant was affected by such denial because the doctor would be in a position to explain the nature of bruises whether they were fresh or not. He therefore prayed for Exhibit P2 to be expunged from the record. According to him, penetration was not proved because the doctor was not called without assigning any reason.

Reverting to the fifth ground, it was his submission that, the charge was defective for not disclosing the punishment section in respect of rape of the child under ten years. It was his contention that, the charge mentioned section of punishment concerning thirty years but he was sentenced to life. Had he known from the beginning that, he was about to face long sentence, he would have prepared his defence properly. To him, the appellant was prejudiced and section 388 of the CPA cannot save the situation. Submitting on the last ground, he stated that, the trial court failed to consider the

appellant's defence. He clarified that, it was not proper for the trial Magistrate in his judgment to conclude that, the appellant in his defence did not deny the offence while the appellant clearly said that, the case was concocted. He therefore prayed for the appeal to be allowed by quashing the conviction, setting aside the sentence and releasing the appellant from custody.

In his reply, Mr. Kilua resisted the appeal. Responding to the first and fourth grounds, he submitted that, basically, in sexual offences, the best evidence comes from the victim as it was stated ion the case of **Selemani Makumba v. Republic** [2006] TLR 379. He further submitted that, they are aware of the position of the law that, the evidence of the victim should not be taken as gospel truth. But in the matter at hand, the trial court believed the credibility and testimony of the victim which was corroborated by the testimony of PW2 who found the victim in the bedroom of the appellant and after examining her, she found her with sperms. According to him, the victim was threatened not shout which was the main reason for her not to raise alarm. He added that, even if Exhibit P2 is expunged from the record, the evidence of PW1 and PW2 was enough to prove the offence against the appellant.

Mr. Kilua further submitted that, the issue of contradiction between PW2 and PF3 dies automatically following the PF3 to be expunged from the record. Also, PW4 gave the reason why the doctor failed to appear for his testimony and thus, the issue of adverse inference does not arise. Responding on the complaint concerning defective charge, he cited the case of **Jamali Ally @ Salum v. Republic** [2019] TZCA 32 TanzLII and argued that, non-citation of subsection (3) of section 131 of the Penal code is curable under section 388 of the CPA. He added that, in the matter at hand, the charge mentioned the age of the victim and by doing so, it informed the appellant about the sentence. Thus, the omission did not prejudice the appellant. Replying to the last ground, he argued that, the defence of the appellant was properly considered at page 11 of the judgment. In that regard, he prayed for the appeal to be dismissed.

In his short rejoinder, Mr. Mswadick submitted that, at page 9 of the proceedings, PW1 did not state how she was prevented by the appellant not to shout. Also, the trial Magistrate did not explain why he believed PW1 considering that, she was the only witness to the alleged rape. According to him, he ought to have recorded in the proceedings the basis of his belief. He

insisted that, non-citation of punishment section prejudiced the appellant. He reiterated his prayers for the appeal to be allowed.

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

It is settled law that, in rape cases, the prosecution is required to prove that, there was penetration and where the victim is above 18 years, there is another requirement to prove which is lack of consent. This was stated in the case of **Masanyiwa Msolwa v. Republic** [2022] TZCA 456 TanzLII that:

> *"For the offence of rape of any kind to be established, the prosecution or whoever is seeking the trial court to believe his or version of the facts on trial, must positively prove that a sexual organ of the male human being penetrated that of a female victim of the sexual offence, and if the victim is an adult of over 18 years of age, a further condition is needed, proof that the victim did not consent to the sexual act."*

Moreover, in rape cases of persons under the age of eighteen years which is commonly known as statutory rape, a further condition of proof of age is required to be proved. See the case of **Alex Ndendya v. Republic** [2020] TZCA 201 TanzLII. Likewise, in proving rape cases, the best evidence comes from the victim as it was observed in the case of **Selemani Makumba v. Republic** (supra). However, in the case of **Mohamed Said v. Republic** [2019] TZCA 252 TanzLII it was emphasised that, the word of the victim of sexual offence should not be taken as a gospel truth but rather her or his testimony should pass the test of truthfulness. See also the case **Elisha Edward v. Republic** [2021] TZCA 397 TanzLII where it was insisted that, the position concerning evidence of the victim being the best evidence in sexual offences, depends on the unquestionable credibility of the respective witness on the facts of the incident.

Returning to the case at hand, in order to prove penetration, the prosecution banked on the testimony of PW1, PW2 and Exhibit P2. So far as Exhibit P2 is concerned, it is apparent that, the same was produced by police officer (PW4). The said exhibit was admitted without any objection from the appellant. However, since it was produced by PW4 who is not the maker, the trial Magistrate was supposed to comply with section 240 (3) of the CPA.

The section requires the trial Magistrate to inform the appellant his right to require the person who made the report to be summoned for cross-examination. There is nothing in the proceedings which indicates that, such requirement was complied with. Thus, the findings of the trial Magistrate at page 10 of the judgment about the appellant to be explained of his right to require the doctor who made PF3 to be summoned for cross-examination is unfounded. The resultant, Exhibit P2 is expunged from the record.

Having expunged Exhibit P2 from the record, the remaining evidence to prove penetration is the testimony of PW1 and PW2. The testimony of PW1 who was the child of 8 years was taken after compliance of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2022] *i.e.,* after a promise of telling the truth. At page 9 of the proceedings, PW1 testified as follows:

> *"...I entered the accused bedroom, and he asked me to sleep on his bed. When I ins (sic) on the bed, he undressed my underpants, then the accused (Jackson Florence) undressed his trouser, then* ***he enters his penis into my vagina.*** *I feel painful, (sic)..."* (Emphasis is added).

It is apparent from the extract above that, the victim explained how she was raped. Her evidence is very clear on how the appellant inserted his male organ into her female organ. This in itself is a proof of penetration.

Worse enough, the appellant did not cross-examine PW1 on this vital point in respect of penetration. It is a settled principle that, failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of veracity of the testimony. See the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 CAT at Arusha (unreported). The testimony of the victim is corroborated with the evidence of PW2 who found the victim in appellant's bedroom and after explaining what befallen her, she examined her and found her with sperm. Likewise, the appellant did not cross-examine PW2 on this important matter which as a matter of law, it implies that, he accepted the truthfulness of PW2's testimony. Thus, it is clear that, the issue of penetration was proved by the evidence of PW1 and PW2.

In respect of proof of age, it is settled law that, evidence relating to the victim's age can be proved either by the victim, her parents, a guardian or birth certificate. See the case of **Samwel Nyerere v. Republic** [2023] TZCA 27 TanzLII. In our case, there is evidence at page 10 of the typed proceedings that, the victim was born on 4th January, 2014. This testimony came from PW2, the mother of the victim. Although the prosecution did not tender the birth certificate, PW2 being the victim's parent is eligible to prove the age of PW1. The appellant did not cross-examine PW2 on this vital point

concerning the age of victim which as a matter of law, implies that, he accepted the truthfulness of PW2's testimony that victim was born on 4th January, 2014, and thus, at the time of incident, she was of the age of eight. As stated herein above, the position of the law is very clear that, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said because, the silence is tantamount to acceptance of its truth. In that regard, it is the finding of this court that, the prosecution had managed to prove both penetration and age of the victim which are essential requirement in proving statutory rape.

Apart from that, it is undoubted that, the appellant was the one who raped the victim. The evidence of PW1 and PW2 clearly indicates that, the appellant was living with them in the same compound as he was the cattle herder of their landlord. On the date of incident, PW2 left the appellant and her children when she went to the salon. Upon returning, she did find either the appellant or the victim. When she decided to go to the appellant room, she found the victim's shoes on his door which was slightly opened. She entered inside and found the victim together with the appellant. PW1 stated that, after being asked by her mother, she revealed what the appellant did

to her. PW2 also stated the same thing. The appellant did not cross-examine either PW1 or PW2 on this material evidence.

The appellant in his defence claimed that, the case was planted. If this case was planted as claimed by him, it was expected to be revealed in the course of testimony of PW1 and PW2 but, he did not ask them any question concerning his claim that, this case was planted. Apart from that, the appellant did not state the reason for this case to be concocted against him. The evidence is silence whether there was any grudge between the appellant and prosecution witnesses. The fact that, it was not reported to the local leaders does not prove that, the case was planted. Besides, there is no any law compelling the incident to be reported to the local leader before being reported to the police. Thus, I find no basis on his defence about being framed up. In that regard, it is the finding of this Court that, the defence evidence did not raise any doubt on the evidence of PW1 and PW2 who were coherent and credible. Under these premises, it is undoubted that, the prosecution side had managed to prove the case against the appellant beyond reasonable doubt. Thus, the first, second, third, fourth and sixth grounds lack merit.

Reverting the ground concerning defective charge, a close look at the charge reveals that, the appellant was charged to contravene sections 130 (1) (2) (e) and 131 (1) of the Penal Code. It is undisputed that, section 130 (1) (2) (e) creates the offence of statutory rape. Likewise, section 131 (1) provides for general punishment for the offence of rape. However, when the offence of rape is committed to a girl under the age of ten years, the offender is punished by life sentence pursuant to section 131 (3) of the Penal Code which provides that:

> *"Subject to the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."*

In the matter at hand, Mr. Mswadick challenged the charge for not citing the punishment section. According to him, the omission prejudiced the appellant because he could have prepared his defence properly, if he had known earlier the punishment of the offence against him. On the other hand, Mr. Kilua by relying on the decision of the Court of Appeal in **Jamali Ally @ Salum v. Republic** (*supra*) contended that, such omission is curable under section 388 of the CPA because the charge mentioned the age of the victim and by doing so, it informed the appellant about the sentence facing him. In

the cited case of **Jamali Ally @ Salum**, the defect aroused from non-citation and citation of inapplicable provisions of the Penal Code. After scrutinising the particular of offence and the evidence on record, the Court concluded as follows:

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA."*

According to the extract above, it is apparent that, the irregularities over non-citation and citations of inapplicable provisions of the law in the statement of offence are curable depending on whether the particulars of the offence and adduced evidence enabled the appellant to appreciate the seriousness of the offence facing him. In our case, the particulars of the offence were couched as follows:

> *"JACKSON S/O FROLENCE, on 21st May, 2022 at Kagemu area within Bukoba Municipality in Kagera Region had*

carnal knowledge with one (the victim) a girl of eight (08) years old."

Basing on the particulars of the offence quoted above, it is the considered view of this court that, the same were very clear to the extent of enabling the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. Basically, those particulars gave the appellant sufficient notice about the date when the offence was committed, the area where the offence was committed, the nature of the offence, the name of the victim and her age. Apart from that, in her testimony, PW1 clearly explained how the appellant asked her to go to his bedroom. She went further stating that, after entering, the appellant asked her to lay down on his bed whereby, he undressed her underpants, undressed himself then he inserted his male organ into her female organ. She felt pain but he asked her not to raise alarm. PW2 also testified on the age of the victim and how he found her in his room. After examining her, she found sperm into her female organ. With this evidence which was believed by the trial Magistrate, it cannot be said that, the appellant did not understand the nature and seriousness of the offence facing him to the extent of being prejudiced by citing inapplicable provision of the law in respect of punishment. In my considered view, the particulars of offence and evidence of PW1 and PW2

enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. In that regard, the argument of Mr. Mswadick that the appellant was prejudiced is unfounded.

Having said so, I am satisfied that the appellant was properly convicted and the sentence of life imprisonment was legal and properly meted pursuant to section 131 (3) of the Penal Code because the victim was under the age of ten. Thus, I find no reason to fault the decision of the trial court. Consequently, this appeal is devoid of merit and is hereby dismissed in its entirety.

I. K. BANZI
JUDGE
29/09/2023

Delivered this 29th September, 2023 in the presence of Mr. Ibrahim Mswadick learned counsel for the appellant who is also present and in the absence of the respondent. Right of appeal duly explained.

I. K. BANZI
JUDGE
29/09/2023