IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO 119 OF 2022

(Originated from Criminal case No 31 of 2021 In the District Court of Arumeru at Arumeru)

FADHILI SUMAYANI KIVUYO .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

21st June & 20th September 2023

KAMUZORA, J.

Fadhili Sumayani @ Kivuyo (the Appellant herein) was convicted by the District Court of Arumeru at Arumeru (the trial court) in Criminal Case No. 31 of 2021 for rape and unnatural offence and sentenced to thirty years for the offence of rape and life imprisonment for unnatural offence. Briefly, it was alleged that on 19th day of May, 2021 at Kishori Village in Ngaramtoni Area within Arumeru District in Arusha region, the Appellant had unlawful sexual intercourse and carnal knowledge of FY (name withheld), a girl aged 9 years whereas, in this appeal she will be referred to as the victim or PW1 interchangeably. Before the trial court,

the Appellant generally denied to have committed the offence and denied even to be at the scene of crime.

After full trial, the trial court was satisfied that the prosecution side proved its case to the required standard hence, convicted and sentenced the Appellant as above stated. The Appellant being aggrieved by both conviction and sentence, brought this appeal raising five grounds. However, during the submission in support of Appeal, the Appellant's counsel abandoned the fifth ground thus I do not see any reason to reproduce it. The remaining grounds of appeal are hereunder reproduced:

1) *That, the trial court erred in law and in fact for failure to consider the defence of Alibi raised by Appellant.*
2) *That, the trial court erred in law and in fact for convicting and sentencing the Appellant to life imprisonment without proper analysis of prosecution evidence.*
3) *That, the trial court erred in law and in fact for relying on the testimonies of PW2, PW3 and PW4 which are hearsay evidence.*
4) *That, the trial court erred in law and in fact for convicting the Appellant for the offence of rape and defilement without proof of age of the victim.*

Hearing of the appeal was by way of oral submission and as a matter of legal representation, Mr. Lengai Loita appeared for the

Appellant while Ms. Alice Mtenga appeared for the Respondent, Republic.

Arguing in support of the 1st ground of appeal, Mr. Loita submitted that the prosecution did not bother to scrutinise the evidence by the Appellant that he was at Ngaramtoni meaning that he was not at scene. That, the Appellant's defence of alibi was not considered by the trial court. He added that the evidence of PW4 indicated that on the date of incident he went to verify if the Appellant was at work and he was not arrested until 3 days passed. Referring the case of **Yusuph Amani Vs. Republic,** Criminal Appeal No. 255 of 2015 CAT, the counsel for the Appellant submitted that failure to consider the defence of alibi is fatal. Reference was also made to the case of **Mwanshoka Vs. Republic,** Criminal Appeal No 225 of 2014 CAT.

Responding to this ground, Ms. Alice submitted that, the defence of alibi was raised after the closure of prosecution case. That, the law is clear under section 194(6) of the CPA that where the accused fail to issue notice to rely on defence of alibi, the court has discretion to consider or not consider the evidence. That, the Appellant claimed that he was at Levolosi but he failed to present any evidence to prove such claim. To cement on her submission, she referred to the case of

Masoud Arnlima Vs. Republic [1989] TLR 25. She added that the trial court at page 7 to 8 of its decision still considered the Appellant's defence and stated reasons for not according it weight.

I agree with the submission by the learned State Attorney that the law requires a person who intends to rely on the defence of alibi to give notice of that intention before hearing of the case. See, section 194(4) of the CPA Cap 20 R.E 2022. The above section is clear that, notice must be given before hearing and if not, the party intending to rely on alibi may furnish the prosecution side with the particulars of the alibi at any time before the prosecution closes its case, section 194(5) of CPA Cap 20 R.E 2022. In any other case, where the accused person raises the defence of alibi in situation other than what is required under subsections (4) and (5) of section 194, the court may, in its discretion, accord no weight of to the defence, section 194 (6) of the CPA Cap 20 R.E 2022.

In matter at hand, the trial magistrate accorded no weight to the defence of alibi for the reason that the Appellant's defence of alibi did not comply with the requirement of the law. In that regard, the trial magistrate exercised the discretion under section 194 (6) of the CPA by not according weight to that defence. It is clear that the trial magistrate

assigned reason for according no weight to the defence of alibi. In Criminal Appeal No. 144 of 2017, **Maganga S/O Udugali Vs the Republic**, the Court of Appeal held at page 25 as follows: -

> *"Still on the defence of alibi, section 194 (6) of the CPA requires that the court should consider the defence even where it is not properly raised, but that it is in the discretion of the court to accord no weight or disregard the 24 defence - see Warwa Wangiti Mwita and Another v. Republic [2002], Charles Samson v. Republic [1990] T. L.R. 39 and Leonard Mwanashoka v. Republic, Criminal Appeal No. 226 of 2014 (unreported) where it was held that: "The trial courts ought to have considered the defence of alibi but had the discretion, on the basis of the advanced explanations, to accord no weight or disregard the same."*

I therefore find no error committed by the trial court as it considered the defence but accorded it no weight. Assuming that the defence was to be accorded weight, I still find the same not raising any doubt to the prosecution evidence. The Appellant's defence that he was not at the scene of crime on the date of incident is a general statement with no support to disprove the prosecution evidence which shows that the Appellant was seen at the scene on the date of incident.

I understand that the Appellant had no duty to prove his alibi as it was held in the case of **Sijali Juma Kocho Vs. Republic** [1994] TLR 206. However, the judgment of the trial court shows that the trial

magistrate considered the principle that the prosecution side is bound to prove their case beyond reasonable doubt and applied the prosecution evidence to convict the Appellant. The Appellant's conviction was not based on weakness of defence rather the strength of prosecution case. I therefore find the 1st ground devoid of merit.

Submitting for the 2nd and 3rd ground, the counsel for the Appellant argued that there was no proper analysis of prosecution evidence and the trial court relied on hearsay evidence. That, no one witnessed the incident and no witness who gave evidence touching the root of the crime. Referring section 62(1) (a) and (b) of TEA he argued that oral evidence must be direct and hearsay evidence is not admissible under the law. He also referred the case of **Jonas Nzike Vs. Republic** [1992] TLR.

Responding to this ground, Ms. Alise submitted that the trial court did not rely on hearsay evidence as the witness testified on how they discovered the incident offence. Their evidence collaborated the victim's evidence. He insisted that in sexual offences the best evidence is that of the victim and cemented his submission with the case of **Selemani Makumba Vs. Republic** [2006] TLR 379.

In is clear that at page 6 of the trial court judgment, the trial magistrate considered the victim's evidence as proving the offence against the Appellant. She also linked the evidence of the victim with that of other witnesses. I also had ample time to go through the prosecution evidence. From the victim's story, she was sent by her mother to buy groceries at the shop of PW2 one Elisifa Raphael Laizer. On her way to the shop, she met the Appellant who grabbed and pulled her to the uncompleted house where he was working as a guard. He undressed her clothes and well as his clothes and inserted his penis to her vagina and anus. The victim clearly identified the organs based on its use. She referred her vagina as the organ she uses to urinate and her anus as the organ she uses to excrete/pass stool. She also referred Appellant's penis as the place he uses to urinate. Form her evidence it is clear that she knew what she was referring and the common sense tell that, she was referring to vagina, anus and penis.

The evidence of the victim also shows that she knew the Appellant by the name of Tall and was was working as a guard to the house where the incident took place. Soon after the incident, the victim still went to the shop she was sent and informed PW2 that she was raped by the Appellant.

In her evidence, PW2 claimed that the victim's mother went to her shop looking for the victim after she had delayed going back home. Later, the victim went to her shop crying and trembling and when asked, she narrated to PW2 that she was raped by Tall. PW2 also acknowledged to know Tall as the Appellant who was working as a guard in unfinished house in that area. She immediately contacted the victim's mother (PW3) who went there and did take the victim to the ten-cell leader.

The chain of story was also collaborated by PW3 who is the victim's mother. She informed that court that after she found the victim's at PW2's shop crying and trembling. She was informed by PW2 that the victim was raped by Tall. She went with the victim to the ten-cell leader and reported the matter. They then went to the police station where they were issued with PF3 and went to hospital. PW4 is the ten-cell leader who confirmed that the report was made to him and they tried to look for Tall on that date but they could not find him. Three days later, he was seen at his house and tried to flee when they wanted to arrest him. They however succeeded to arrest and send him to the police station. PW5 is the clinical officer who examined the victim. His oral evidence as well as PF3 reveals that the victim was

penetrated with blunt object in her vagina and anus. Physical examination revealed bruises, blood discharge from the vagina and anus and penetration of both vagina and anus.

In his defence, the Appellant only raised a general denial that he was not at the scene on the date of incident. He claimed that on the date of incident, he was working at Serian and at 17:00hrs he was having dinner and watching news. He later went to his duty as a guard but he was arrested on 20/05/2021. From his evidence, the Appellant did not deny the fact that he was working as guard to the uncompleted house mentioned by the prosecution witnesses.

From the above analysis of evidence, there is no doubt that the Appellant was well linked to the offence of rape and defilement. There is unbroken chain of event from the time the incident took place, immediate report made by the victim and action taken by each and every witness who came into contact with the victim. The claim by the Appellant's counsel that the medical report did not indicate if the victim was defiled is wanting. The medical report is very clear that the victim was penetrated both in her vagina and anus. The victim was found with bruises and blood discharge in both her vagina and anus. Therefore, there is clear evidence that the victim was both raped and defiled.

On the argument that the trial court relied on hearsay evidence of PW2, PW3 and PW4, I find this argument baseless. I understand that hearsay evidence is not admissible under the law hence, cannot be relied upon for conviction. See, **Vumi Liapenda Mushi Vs. The Republic,** Criminal Appeal No. 327 of 2016 [2018] TZCA 197, Tanzlii. As well depicted above, it is true that apart from the victim, no other witness was at the scene to witness the incident. However, their evidence was based on their role played upon being informed of the incident.

The story on what transpired at the scene was that of the victim and the trial court believed that story as it was well collaborated by subsequent conducts proved by other witnesses. In further explanation, after rape incident the victim reported the matter to PW2 and PW3 who also informed PW3. She was examined by PW4 who confirmed that she was penetrated. The evidence of the victim was direct on what transpired at the scene and her version of story was linked to other chain of event witnessed by other prosecution witnesses. Those other witnesses did not witness the incident but their story was based on role played upon being informed of the incident. Thus, the evidence by

those other witnesses cannot be regarded as hearsay in this context. I therefore find the 2nd and 3rd grounds are devoid of merit.

On the fourth ground, the Appellants counsel submitted that, the Appellant was convicted and sentence without proof of the age of the victim. That, the evidence of the doctor and Exhibit P1 does not indicate that the victim was defiled. That even the birth certificate was not tendered to prove the age of the victim. The Appellant's counsel referred the cases of **Anthony Samwel Vs. Republic**, Criminal Appeal No. 43 of 2010 and **Ally Athuman Vs. Republic** [1991] TLR 58 on failure to prove the age of the victim.

Responding to this ground Ms. Alice submitted that the victim's mother at page 10 of the proceedings well explained that the victim was born on 28/03/2012. Referring the decision in the case of **Rutoyo Richard Vs. Republic**, Criminal Appeal No 114 of 2017 CAT at Mwanza, the learned State attorney argued that the age of the victim can be proved by the victim, relative, parent, medical practitioner or birth certificate and for that reason, she insisted that the mother of the victim proved the victim's age.

It is the duty of the prosecution to lead witnesses on evidence proving the age of the victim in offenses that fall under sections 130 (1)

(2) (e) and 131 (1) and section 154 (1) (a) (2) of the Penal Code. The Court of Appeal in the case of **Victory Mgenzi @ Mlowe Vs. the Republic,** Criminal Appeal No 354 of 2019 CAT at Iringa (Unreported) cited with approval the case of **George Claud Kasanda Vs. DPP,** Criminal Appeal No 376 of 2017 CAT (Unreported) where it was held that,

> *"The prosecution is duty-bound to establish, among other ingredients, that the victim is under the age of eighteen to secure a conviction."*

In that case, the court also identified possible ways for proof of age of victims of a sexual offence. The court stated that, proof of age may come from either the victim or her relative, parent, medical practitioner, or by producing a birth certificate.

On the basis of the above decision, I agree with the submission by the learned state attorney that victim's mother was in a position to prove the age of the victim. In this appeal, while testifying the victim stated her age to be 9 years and that was supported by victim's mother (PW3) who claimed her evidence that the victim was born on 28/03/2012. The medical practitioner in this case PW5, a clinical officer stated the age of the victim to be 9 years and clarified 9 months seen in Exhibit P1 the PF3. The same indicated 9 years in one part and 9

months in another part and when examined, he clarified that the victim was 9 years and writing 9 months was just a slip of pen.

In that regard therefore, the victim's age was well proved by prosecution evidence to be 9 years. The contention that birth certificate was not tendered to prove the victim's age is baseless. As well discussed above, birth certificate is not exclusive evidence for proof of age. Other evidence can be applied to prove the victim's age as well discussed above.

In the upshot and considering all what has been elaborated above, I am of the firm stand that the prosecution managed to prove its case in the required standard, that is, beyond reasonable doubt in respect of the two counts against the Appellant herein. I however find that the sentence imposed for the offence of rape is contrary to the law. Section 131 (1) to which the appellant was charged attract life imprisonment to the offender. This is also in consideration that the victim was under the age of 10 years at the time the offence was committed.

I therefore substitute 30 years imprisonment with life imprisonment in respect of the first count of rape. Nevertheless, I find no valid reason to interfere with the conviction entered by the trial

court and sentence in respect of the second count which are hereby, upheld. The appeal is devoid of merit and it stands dismissed.

DATED at **ARUSHA** this, 20th day of September 2023.

D.C. KAMUZORA

JUDGE