IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF KIGOMA)

AT KIGOMA

DC CRIMINAL APPEAL NO. 07 OF 2023

(Originating From Criminal Case No. 129 of 2022 of the District Court of Kigoma)

JUMA SALUMU HAMIS..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of last Order: 11/09/2023

Date of Judgement: 29/09/2023

JUDGEMENT

MAGOIGA, J.

In the district court of Kigoma (trial Court), the appellant **JUMA SALUMU@ HAMISI** was arraigned for the offence of rape contrary to section 130(1) (2) (e) and 131 (3) of the Penal Code, [Cap 16 R.E. 2019]. After full trial, the trial court found the appellant guilty of the offence and consequently convicted him and sentenced him to life imprisonment.

Aggrieved with the whole decision of the trial court, the appellant preferred this appeal to this court armed with five grounds of appeal, couched in the following language, namely:

1. *That, the charge sheet was defective for not citing the appropriate sentencing section in the statement of the offence because the victim of the offence was nine (9) years old as per the charge sheet.*
2. *That, the trial court erred in law and fact for convicting the appellant without regarding that the prosecution side was not proved beyond reasonable doubt.*
3. *The trial magistrate erred both in law and fact for failure to note that there is a discrepancy on the charge sheet in respect of where the offence was committed and the evidence of the complainant the charge sheet indicates the offence was committed at Kagera area the complainant on the other hand said the offence was committed at Kipamba Graveyard.*
4. *The trial court erred in law and fact on convicting the appellant basing on uncorroborated evidence neither Good Samaritan nor her friend was called to justify the allegation.*
5. *That, the honourable court erred in law and fact in convicting the appellant without considering the cardinal principle that the appellant cannot be convicted on the weakness of his/her defence but on the strength of the prosecution evidence adduced.*

On the strength of the above grounds, the appellant prayed that, this appeal be allowed by quashing the conviction, set aside the sentence and set him free.

The brief facts as gathered from the charge sheet are that on the 04th day of May, 2022 at Kagera area within the District and Region of Kigoma, the appellant did have canal knowledge of one **B d/o S** (pseudo name) a girl of 9 years old.

When this appeal was called on for hearing, the appellant was present and unrepresented while the respondent was represented by Ms Edna Makala, learned State Attorney.

When the appellant was called on to argue his appeal, he preferred to hear the State Attorney first and him to reply thereafter.

Ms. Makala strongly opposed all the grounds of appeal by arguing first and third grounds separately and second, third and fifth grounds together.

On the first ground of appeal, the learned Attorney argued that, on failure to cite sentencing section it is not a legal requirement that a section, for sentencing should strictly be cited and where it is not cited do not fetter the offence. She cited the provision of section 132 of the CPA saying that the section is clear as what should be included and specified in the charge sheet. She added, section 135 of the CPA is clear that once section offence is cited, is enough to make the charge proper. She referred this court to the case of **Peter Kabi & Another vs R,** Criminal Appeal No. 5 of 2020 CAT, where it held that it is not a legal requirement to cite sentencing section and is curable under section 388 of CPA.

According to Ms. Makala, the appellant was properly charged and the particulars were specific of which offence he was charged with. So, the appellant was not prejudiced and was aware of all the offence facing him. According to her, this ground is unmerited and should be dismissed.

On the 2nd, 4th and 5th grounds which she argued them jointly, Ms. Makala submitted that the case was proved beyond reasonable doubt. She started with the issue of age by saying that, it is stated that the victim was 9 years old which make the offence a statutory rape. She referred to the first paragraph of the typed proceeding where the age of the victim was proved by PW1 the mother of the victim who testified that her child was 9 years and stated the date when she was born. Additionally, the victim also stated to be 9 years and as such the issue of age was proved.

About penetration, the learned State Attorney submitted that at page 14 of the typed proceeding at paragraph 4, it was proved that the victim was penetrated by force by the appellant. She submitted further that, the evidence shows, immediately after the rape, the matter was immediately reported and the appellant was immediately mentioned as the perpetrator. She insisted that, the evidence of PW1 corroborates the evidence of PW2 (victim). Ms. Makala added that PW7 the doctor who

examined the victim also confirmed that the victim was raped at page 32 corroborate that rape was done.

The learned Attorney referred this court to the case of **Seleman Makumba vs R,** [2006] TLR 379, in which it was held that in sexual offences true evidence comes from the victim. As such in this appeal, penetration and rape was proved from the testimony of PW2. Further, it was argued that, the appellant never cross examined the victim on this point. The learned Attorney referred this court to the case of **Sebastian Michael and Malele Daniel vs DPP,** Criminal Appeal No. 145 of 2018 (unreported) CAT at page 13 where it was held that failure to cross examine on material evidence is deemed to have accepted the truth. The learned Attorney further added that in this case, the appellant never cross examined the victim on this point.

On identification, Ms. Makala submitted that the offence was committed during day light and the victim identified him correctly describing the appellant to her mother that the appellant was selling chostick (cream) and his physical appearance was fully established. Ms. Makala pointed out that this piece of evidence was corroborated by PW1 and PW3.

On that note, Ms. Makala argued that the appellant was property identified so, the issue of corroboration is without merits as the evidence was corroborated.

On defence weaknesses, the State Attorney argued that all prosecution material witnesses were called. The argument that the appellant was convicted based on defence weakness is not true at all which the contrary is true.

On the 3rd ground, Ms. Makala argued that, the place of incidence is not a legal nor ingredient of the offence of rape. After all, Ms. Makala stated that, they were living in the same place; so the charge was proper and evidence. She thus prayed this appeal to be dismissed for want of merits

Arguing the appeal, the appellant told the court that after hearing the submission by the State Attorney, he doesn't agree with her. He prayed the court to do justice to him by considering his grounds of appeal as against evidence on record.

This marked the end of hearing of this appeal. The task of this court now is to determine the merits or otherwise of this appeal in the light of evidence on record.

While the respondent has a diametrical view that the case was proved beyond reasonable doubts as it is required in rape offence, the appellant,

however, holds the view that the prosecution side did not prove the case but relied on the weakness on the part of defence. The appellant laments on the 1st ground of appeal that the charge sheet was defective for not citing the appropriate sentencing section in the statement of the offence because the victim of the offence was nine (9) years old as per the charge sheet. He relied on the provision of section 131(1) of the Penal Code of which the appellant argues that failure to cite this provision left him unaware of the sentence he would have faced in case he would be found guilty.

This ground is answered by the case **of Jamali Ally @Salum vs Republic,** Criminal Appeal No. 52 of 2017(unreported) where it was held that failure to cite the punishment provision in a rape case was curable under section 388 (1) of the CPA as it was cited in the case of **Peter Kabi & Another vs R*(supra).*** With the above guidance, I see no reason to discuss further because punishment provision in rape cases is curable under the provision of section 388 (1) above. In the circumstances of this appeal, I found that this ground is unmerited, hence, dismissed.

On the 2nd, 4th and 5th grounds which together the claim was that the case was proved beyond reasonable doubt, the appellant's claims based on the assertion that there was uncorroborated evidence and that he was convicted on the weakness of his defence. On the part of the respondent,

the learned state attorney strongly resisted this allegation by arguing that the case was proved beyond reasonable doubts as per law.

Having heard the submissions by the learned State Attorney in respect of the 2nd, 4th and 5th grounds of appeal which revolves around that the case for the respondent was not proved and having gone through the entire proceedings, I entirely agree with the learned State Attorney for the reasons argued that the case against the appellant was proved to the required standard of prove in criminal cases.

It is a trite law that in criminal proceedings the burden of proof lies on the prosecution as rightly provided for under section 110 of the evidence Act [CAP 6 R.E 2022] read together with section 3 (2) (a) of the Act. This position was also held in the case of **Jonas Nkinze Vs Republic** [1992] T.L.R 213, held:-

> *"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution; is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking"*

Certainly, and as a general rule, the prosecution has a noble duty to establish a prima facie case and prove the offence against the accused beyond reasonable doubt. The same principle was repeated in the case of **Joseph John Makune Versus The Republic [1986] T.L.R 44,** held:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence"

To prove rape, therefore, is to establish penetration of a male reproductive organ to a female organ (Vagina). In the record of appeal, PW2 proved that she was raped which evidence is supported by the evidence of PW7 a medical doctor who proved that her hymen of PW2 was not there and that, there were bruises something which proves that she was penetrated by a blunt object, this is per page 33 of the typed proceedings.

At page 32 of the typed proceedings, PW7 testified that I examined her private part vagina, **I look on her and touched her vigina, I discovered that no dirty no blood spot rather bruises (michubuko kwenye uke).** About the age of the victim which is the other ingredient of rape, it is observed that PW1 stated that the victim was born on 2/10/2012 which means that at the day of incidence, she was 9 years old. This evidence was also proved by PW2 the victim who also testified that she was 9 years old.

On that note, I am of considered opinion that basing on the evidence of the victim and that of the doctor, all proved penetration.

About the perpetrator of the offence, it is not disputed by the appellant that the victim and him knew each other. If that is the case, then, the offence being committed during day time, it means that identification of the assailant was not at issue at all because the perpetrator of the of offence here is nobody else other than the appellant.

I thus rest the 2nd, 4th and 5th grounds for being unmerited and are dismissed.

On the foregoing reasons, the arguments by the appellant that there was uncorroborated evidence and that the he was convicted on the weakness of his defence, hence, the case was not proved beyond reasonable doubt are but without any useful merits in this appeal and are hereby rejected and dismissed.

On the 3rd ground of appeal to be considered as the last ground where the appellant claims that there is a discrepancy on the charge sheet in respect of where the offence was committed stating that the evidence of the complainant in the charge sheet indicates the offence was committed at Kagera area the complainant on the other hand said the offence was committed at Kipamba Graveyard.

The learned Attorney on this ground, reacted by arguing that the place of incidence is not a legal nor ingredient of the offence of rape. I also subscribe to this argued view. It has been discussed above and without

wasting the precious time of the court that, there are three important things that the court must consider in determining rape cases as indicated above. This ground without much ado must fail. On the foregoing, I find no merits in this ground too and same is equally dismissed for want of merits.

That said and done, I find this appeal devoid of any useful merits, and consequently, is hereby dismissed in its entirety.

It is so ordered.

Dated at Kigoma this 29th day of September, 2023

S.M. MAGOIGA

JUDGE

29/09/2023