IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO.84 of 2023

[*Arising from Ukerewe District Court Criminal Case No. 19 of 2023]*

BITURO S/O MAENGERA BITURO.....APPELLANT

Versus

REPUBLIC .....RESPONDENT

JUDGMENT

Sept. 14th & 22nd, 2023

Morris, J

Mr. **Bituro s/o Maengera Bituro**, the appellant herein, earned both conviction and sentence from the District Court of Ukerewe in Criminal Case No. 19 of 2023. A rape case, that was. He is now before this Court challenging both conviction and sentence.

Briefly accounted, facts of this case are easily graspable. The appellant was charged for rape under sections 130 (1)(2)(e) and 131(1) both of ***the Penal Code***, Cap 16 R.E. 2019 (the ***Penal Code***). The District Court of Ukerewe (elsewhere, `*the trial court*') found him guilty of the offence. He was convicted and consequently sentenced to life imprisonment and payment of Tshs. 200,000/= compensation to the

victim. The crime which yoked him in the wrath of the penal law is recorded as having been committed at Nansore Village, Ukerewe on February 28th, 2023. The appellant allegedly raped a 13-year girl. The victim girl was later examined by the medical expert (PW4) who filled the requisite PF3 (exhibit P1).

The appeal was originally premised on three (3) grounds. However, during the hearing, the first and third grounds were merged. The second ground also was amended by omitting exhibit P1. I undertake to paraphrase the spared two. This approach is in the interest of brevity and coherence. Consequently, the spared grounds are: firstly, that the prosecution failed to prove the case beyond reasonable doubt; and secondly, that exhibit P3 (Social Welfare Report) was erroneously admitted and relied upon.

The appellant appeared in this Court under the representation of Advocate Mashaka Tuguta. Further, Ms. Thabitha Zakayo, learned State Attorney, represented the respondent. Regarding the 1st ground, Mr. Tuguta submitted that the appellant was convicted and sentenced to life imprisonment while the prosecution failed to prove the case beyond reasonable doubt. His major argument was that for the offence against

the appellant to be founded, the prosecution was enjoined to establish two critical things. These are: **one**, the victim was to be proved as being below 18 years of age. **Two**, there should proof that there was penetration into her sexual organs by the accused-appellant. I was referred to the case of ***Bugumba @Cherehani v Republic***, Criminal Appeal No. 251/2019 (at page 6); and ***Frenk Benson Msongole v Republic***, Criminal Appeal No. 72 "A" of 2016 (at page 14); and ***Jafari Juma v Republic***, Criminal Appeal No. 252/2019 (all unreported). The appellant's insistence was that proof of age in statutory rape cases is mandatory.

In this connection, he submitted that, the proof of age should come from the victim or parents or school teacher (as necessary); or vide birth certificate or clinic chit. This is per ***Rutoyo Richard v Republic***, Criminal Appeal No. 114/2017 (unreported -at pages 15 and 16). He argued further that, from trial court's proceedings and judgment, proof of age remains wanting. He cited page 11 of the judgment and submitted that the trial court records that the victim did not testify on the basis that she had mental impairment which hindered her intelligence and social functioning. However, on record, no medical report from the authorized doctor to

prove the alleged mental disability. Consequently, in his view, the trial court did not get and apply best evidence regarding age of the victim.

Mr. Tuguta also argued that, the best evidence of rape comes from the victim. He referred to the case of ***Osward Kasunga v Republic,*** Criminal Appeal No. 17/2019 (unreported - at page 13). He added that, the victim's sister (PW1) did not testify as to victim's age. Also, the step mother of the victim (PW3) never stated the age of the victim. Similar anomaly befell the rest of prosecution witnesses. Nevertheless, PW5-G7344 DC Charles stated that age of victim was 13 years old (page 19 of typed proceedings). However, the record does not disclose if PW5 was a relative to the victim howsoever. Further, it is not evident how such witness became aware of the victim's age. He further argued that no certificate or any other credential was tendered to prove victim's age.

Furthermore, the appellant's counsel maintained that the evidence of PW1 and PW2 contradicted one another. That is, whereas the former stated that after seeing the appellant on top of the victim, she (witness) ran home for help; but PW2 stated that the person seen by her running home was the victim. PW2 also stated that the crime was committed near Bukindo Primary and Secondary School. But PW1, testified that the victim

was yelling for help but no testimony of nearby pupils who ordinarily should have come to offer assistance. In addition, PW2 testified as seeing the appellant grazing cattle at the secondary school area in the morning. But PW2 stated that he was on another area. He concluded that such contradictions cast adequate doubts on prosecution's case. He prayed that they should be analysed in the appellant's favour.

Regarding the second ground of appeal, Advocate Tuguta submitted that the trial court was partly moved by exhibit P3 which was wrongly admitted. Citing page 11 of the typed judgment as an example, he argued that the magistrate is categorical that exhibit P3 was one of the documents used by the court to arrive at conviction. The same was also used to establish the age of the victim. In his view, such exhibit should not have been admitted, let alone to be considered in making any decision. He submitted that oral or documentary evidence should be given by a competent witness. He referred to page 22 of proceedings and stated that exhibit P3 was presented by a Social Welfare Officer. However, no indication that he appeared as a witness, and if so, he should have taken oath prior to tendering such evidence.

The case of ***Hamis Chuma @Hando Mhoja and another v Republic***, Criminal Appeal No. 371/2015 (at page 6) was relied on to buttress the point that section 198 (1) of ***the Criminal Procedure Act***, Cap 20 R.E. 2022 (***CPA***), makes it compulsory for every witness to testify on oath. He prayed that such evidence should be expunged. In final analysis, Advocate Tuguta submitted that the remaining evidence does not warrant conviction and sentence of the appellant.

The appeal was opposed by Ms. Thabitha Zakayo, learned State Attorney. To her, the prosecution had proved the offence to the required standard. She was insistent that elements of the crime in question are penetration and age of victim being below 18 years. She maintained that penetration was fully proved by PW1. She also argued that the appellant was found committing the crime and was caught *in flagrante delicto* (red-handed).

Further, Ms. Zakayo submitted that, at page 8 of typed proceedings, the scene is clearly recorded that the appellant was naked and on top of the victim raping her. It was her further argument that courts give weight to testimonies of accused being found red-handed committing the crime. I was referred to the case of ***Daffa Mbwana v Republic,*** Criminal

Appeal No. 65/2017 (unreported). In addition, she contended that the evidence of PW1 was corroborated by PW4-Clinical Officer (page 17 of proceedings) together with the PF3 (exhibit P1). To her, penetration was competently and fully proved beyond reasonable doubt. Hence, the trial court should not be faulted for holding as it did.

With regards to the victim's age, it was her submissions that the same was proved as being 13 years. She banked her strength with testimony of PW5 - the police investigator. It was her argument that PW5 testified that he had an opportunity of visiting the victim's home and interviewing necessary people thereat. Hence, he had ample time to know the victim. The State Attorney also argued that the law does not set specific time for one to be acquainted with the victim before certifying her age. She made reference to section 112 of ***the Evidence Act***, Cap 6 R.E. 2022 and ***Leonard Sakata v Republic***, Criminal Appeal 235/2019 (unreported) to the effect that the case was proved on circumstantial evidence.

She also maintained that the alleged contradictions between evidence by PW1 and PW2 were too minor to water down the remaining evidence. In other words, evidence proving the offence were more water

tight. For instance, she stated that two witnesses mentioned two different occasions where the appellant was seen; but they are consistent that they saw the victim running away after commission of the rape. In her considered view, the prosecution proved the case beyond every reasonable doubt. Hence, this appeal is without any merit and should be dismissed in its entirely; she so entreated.

In line with the above disputation of parties, I set the Court to address basic aspects pertaining to whether or not the offence herein was fully proved at trial. But before delving into such issue fully, I feel inclined to address the status of the Social Welfare Report (exhibit "PIII") in the court record. This exhibit was tendered at trial and admitted accordingly unobjected. In so doing, I will be determining the second ground of appeal first.

Regarding the foresaid ground, Advocate Tuguta contended that exhibit "PIII" was tendered and admitted in evidence illegally. His two-limb argument catches the Court's attention. **One**, to him, the person who tendered the same did not appear in court as witness. **Two**, even if he were to be inferred under such capacity; the subject person did not swear or affirm. Regarding this ground, nothing was submitted by the

respondent in opposition. I now examine such submissions. It is indeed a true record that at page 21 of the trial court's proceedings; the court recorded the Social Welfare Officer (elsewhere, "SWO") in the coram.

However, throughout the proceedings and judgement, the forestated person is not indicated the capacity under which he entered appearance. It is, thus, not clear if the so-called SWO appeared as witness of either party or for the court; or as an *amicus curia* (friend of the court); or an expert thereof or howsoever. In my view, and as correctly argued by Advocate Tuguta, such person is both a stranger and total alien to the trial court's proceedings. It needs no overemphasis that the court record should have requisite hygiene and sanctity. To introduce parties in the proceedings unprocedurally distorts the purity of court's record. It is not legitimate too. I am loath to condone such approach.

Further, reading page 22 of the proceedings, it is evident that the said SWO did not take any oath or affirmation. In law evidence not given under oath is no evidence at all. See for instance, ***Amos Seleman v R***, CoA Criminal Appeal No. 267 of 2015 and ***Mwami Ngura v R***, CoA Criminal Appeal No. 63 of 2014 (both unreported). Accordingly, I agree with the appellant that all what was stated and/or tendered by the subject

person (SWO) is a pack of extraneous statements worth a total disregard. I accordingly, expunge from the record of the trial court, both the oral statements by SWO and the purported **exhibit** "**PIII**".

Having resolved the second issue as above, the Court now embarks on the question *whether or not the prosecution proved the offence of rape against the accused-appellant*. As shown above, the charges were made under sections 130(2)(e) and 131(1) of ***the Penal Code***. The first provision is reproduced below for ease of grasp.

> *"130(2)(e): A male person commits the offence of rape if he has sexual intercourse with a girl or a woman* ***with or without her consent*** *when she is under* ***eighteen years*** *of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man"* [bolding rendered for emphasis].

Amongst the requisite elements of the offence from the excerpt above are age and will. I reiterate the weird friendship cited in the case of ***George Ernest Msinzilija v R***, HC Criminal Appeal No. 104 of 2022 (unreported) thus: "[R]ape, age and consent are somewhat inseparable. The three aspects make a tricky friendship. If you mess up with the last two, the first one ditches you into undesirable criminal squares." Nonetheless, for offences committed against the quoted provision above,

the affiliation of the three aspects is even trickier. The victim-girl's age abrogates her consent completely. There is, indeed, a firm philosophy behind this strictness. **One**, naturally, a person considered a child is incapable of making rational decisions given her undergrown mental faculty. **Two**, in most occasions, such victims are inept of making any decision, at all. **Three**, in the interest of protecting the victims' chastity stringently; the law is stricter because *genitalia* of such victims are not fully developed for sexual coition. More so, rape being one of the most degrading and undignified form of attacks to humanity.

Back to this appeal: the pivot of the appellant's strengths is that the age of the victim was not proved before the trial court. As ably submitted by the parties' respective attorneys, in law, proof of age of rape victims may be proved by a plentiful people including parents, victims, doctors or teachers. Cases in this connection are, among others; ***Wambura Kiginga v R,*** Criminal Appeal No. 301/2008; ***Masalu Kayeye v R,*** Criminal Appeal No. 120/2017; and ***Isaya Renatus v R*** Criminal Appeal No. 542/2015 (all unreported).

The age of the victim in the matter at hand was allegedly proved by G7344 DC, the police investigator of the crime (PW5); and the so-called

exhibit PIII which has just been expunged above. After having removed the said report from the court record, PW5's testimony remains to be the sole evidence hereof. Thus, the pertinent interrogation here is whether or not PW5 qualifies to adequately ascertain the age of the victim. In my well-thought-out view, he **does not**. I will explain the basis of my disinclination. **Firstly**, he was an investigator who acquired the information from third parties. The latter were, however, not called as witnesses. **Secondly**, in his entire testimony, he did not specify his source of information regarding the victim's age. **Thirdly**, he said nothing as to how he was acquainted with the victim. Essentially, the testimony of PW5 in respect of the victim's age is, to me, sufficiently hearsay.

Another equally critical aspect is the absence of the victim to prove the charge. It is trite law that the best evidence of rape comes from the victim. See, for instance, ***Victory Mgenzi @Mlowe v R***, CA Criminal Appeal No. 354/2019; ***Vedastus Emmanuel @Nkwaya v R***, CA Criminal Appeal No. 519/2017 (both unreported); and ***Selemani Makumba v R*** [2006] TLR 379. Failure by the prosecution to parade the purported victim for testimony warrants this Court to make negative inference hereof.

Consequently, in the absence of prosecution's proof of age of the victim to the satisfaction of the parameters of the law; the argument for the subject victim being raped (by the appellant and/or at all) is, in my considered judgment, accordingly feeble.

All in the fine, the appeal succeeds. Accordingly, the trial court's conviction is quashed and sentence therefrom set aside. The appellant is to be set free from custody straightaway unless he is still being held therein for another lawful cause.

I so order. The right of appeal is duly explained to parties hereof.

C.K.K. Morris

Judge

September 22nd, 2023

Judgement delivered this 22nd day of September 2023 in the presence of Bituro Maengera Bituro, the appellant and Advocate Deocles Rutahindurwa holding the brief of Mr. Mashaka Tuguta, appellant's Advocate; and Ms. Thabitha Zakayo, State Attorney for the respondent.

C.K.K. Morris

Judge

September 22nd, 2023