IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 83 OF 2023

(Original Criminal Case No. 92 of 2022 of Ilemela District Court)

HASSAN DANIEL MABRUKI----------APPELANT

VERSUS

THE REPUBLIC ----------RESPONDENT

JUDGMENT

5th & 29th September, 2023

ITEMBA, J.

The appellant, **HASSAN s/o DANIEL MABRUKI** was charged and arraigned before the District Court of Ilemela at Mwanza for the offence of Rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code Cap. 16 RE: 2019 (now RE: 2022). The prosecution alleged that, on the 22nd Day of March 2022 at Gedeli area within Ilemela district and Mwanza region, **HASSAN s/o DANIEL MABRUKI**, the appellant did have carnal knowledge of a young girl aged seven (7) years, who, for purposes of concealing her identity will be referred to, in this judgment, as the victim.

At the trial, the accused pleaded not guilty to the charge and the prosecution paraded a total of 5 witnesses and the accused defended himself on oath. After the trial, the accused was accordingly found guilty and convicted followed by a sentence of life imprisonment. Dissatisfied,

the accused is before this court appealing against the conviction and the sentence.

The accused fronted grounds of appeal thus:-

1. *THAT, the presiding magistrate erred both in law and fact for convicting the appellant while the victim failed to describe the facial and physical look of the appellant.*
2. *THAT, the trial magistrate grossly overlooked in law and fact to convict while the whole evidence of the victim was of afterthought. No answer to clear the doubts as to why the victim at the early stage narrated another version and later changed the version.*
3. *THAT, the presiding magistrate erred in law and/or fact for convicting while the penetration was not established. Most of SOSPA cases magistrates has been frequently guided by speculation instead of cogent evidence.*
4. *THAT, the age of the victim was not strictly established, considering the one who appeared before the court was not a relative of the victim and the relationship between her and the victim was not positively proved.*
5. *THAT, S.127 (2) of the evidence act, (Cap 6, RE: 2022) was not observed, therefore the evidence of the victim is entirely nullity.*
6. *THAT, the presiding magistrate relied and acted upon inconsistency and discrepancy pieces of evidence, at the first incidence the victim narrated her teacher and*

confirmed that was injured by a nail but later changed the version unreasonably.

7. *THAT, the prosecution side failed to prove the alleged offence beyond all reasonable doubt.*

The appellant, therefore, prays the court to allow the appeal, quash the conviction, set aside the sentence and set him free. When the matter was called for hearing, the appellant appeared in person and was also represented by Mr. Duttu Chebwa advocate and Mr. Japhet Ngusa state Attorney represented the respondent, the Republic whereas he supported the conviction and sentence.

Mr. Duttu learned counsel for the appellant was the first to submit. He prayed to drop the 4th and 5th grounds and opted to merge the 2nd, 3rd and 6th grounds.

Starting with the first ground that the victim failed to describe the facial and physical look of the appellant, he submitted that there is no sufficient description of the appellant by PW1 (the victim) and PW4 the victim's mother. Recalling PW1's statement that '*I know the accused person since I saw him at school'* and that of PW4 that '*the victim recall that man by face*' was not enough in the absence of face and physical description. He argues that the offence took place on 22nd March 2023 and the arrest was done on 27th May 2023 which takes two months.

Supporting his arguments, he cited the case of **Chacha Mwita & Two Others vs Republic,** Criminal appeal No. 302 of 2013 CAT which insisted on the importance of description of appearance. He insisted that though the best evidence in the sexual offence is of the victim but it must be credible.

On the 2nd 3rd and 6th grounds he argued that evidence of the victim was an afterthought. That, the victim at the early stage, narrated a different version and she later changed it. Going to the records, he claims that at first, PW1 stated that she was injured by a nail and was taken by PW2 to PW3 the headteacher who summoned her parent (PW4) and there was no issue of rape but the other day the version changed that the victim was raped. He claims that PW1 was not a credible witness and to support his arguments he cited the case of **Majaliwa Ihemo vs Republic** Criminal Appeal No. 197 of 2020 insisting that the credibility of the witness and circumstance of the case should be considered.

On the 7th ground, he submitted that the magistrate has been frequently guided by speculation instead of cogent evidence. That, this ground cut across all the grounds that the case was not proved beyond reasonable doubt. He refers to exhibit P1 the PF3 that was filed and stamped on 22.03.2023 while PW2, PW3 and PW4 took the victim to the hospital on 23.03.2023. He insisted that there was a doubt whether the

said medical the examination was done at all. He also refers to the evidence of PW1 who stated that she was in the class with another young lady but the said lady was not called upon to testify. Supporting his argument, he cited the case of **Japhiar Masoud @Msonga vs Republic** Criminal Appeal No. 66 of 2021 that victims' words should not be taken as gospel but they should be tested. He insisted that the victim's evidence did not pass the test as it lacked coherence and consistency. He prays for the appeal to be allowed.

On reply, Mr. Japhet Ngusa state attorney adopted the flow submitted by the counsel for the appellant. He started enlightening that in rape cases the evidence of the victim is the key. He also refers to the case of **Selemani Makumba vs Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 that the best evidence comes from the victim. On the issue of identification, he insisted that it was proper. He refers to page 12 of the typed proceedings in which the victim stated that after the incidence she saw the accused and informed her mother and Pw1 also identified the accused at the dock.

On the 2nd issue of the PF3, he refers to pages 28 and 30 of the proceedings which show that the victim was examined by PW5 on 22.03.2023 and the PF3 was stamped on the other date the reason being that the stamp was kept in the office of the Chief Medical Officer.

Replying on 2nd 3rd and 4th grounds, he refers to page 7 of the case of **Dickson Elia Nsamba Shapwata and Another vs Republic** (Criminal Appeal 92 of 2007) [2008] TZCA 17 (30 May 2008) that minor discrepancies which do not go to the root of the case cannot be considered as the ground to acquit the accused. He refers to the evidence of PW5 who examined the victim, PW4 who inspected the victim and that PW3 did not inspect the victim. He insisted that the two versions by PW1 that she was injured by a nail and thereafter that she was raped is just a minor contradiction.

On the 7th ground of appeal, he insisted that the case was proved because at the dock the accused did not question the victim about his arrest or his identification. Referring to pages 17 and 29 of the typed proceedings, he insisted that the prosecution proved the case beyond doubt and that calling additional witnesses was not a legal requirement.

After the submissions from both parties and from the outset of the grounds of appeal, therefore, I am now placed with a legal duty to determine *whether the prosecution case was proved and whether the proof was beyond reasonable doubt.*

On the 1st ground, the appellant claims that the victim failed to describe the facial and physical look of the appellant. The prosecution

maintained that PW1 properly identified the appellant when she saw him at school while she was sent to the shop and again while at the dock.

It is a principle of law that the issues of identification or recognition must be carefully dealt with by the court for mistakes may be made even to the relatives. There are factors established such as in the case of **Waziri Amani vs Republic** [1980] TLR 250, but each case should be determined according to the circumstances which prevailed and the decision in the case should not be taken generally. In the case at hand, I hold that there was positive identification by the victim for the following reasons:

First, the offence of rape is alleged to have been committed to the victim who is seven years old at around 15:00 hrs as per the evidence of PW2, PW3 and PW4. That being a day time, there is still bright sunlight. For the offence of rape to take place there must have been a close proximity between the appellant and the victim. These conditions enables a victim a positive identification of the assailant.

Second, the victim was able to recognise and picture the appellant who gravely abused her and based on the severity of the abuse she could quickly recognise the appellant. The victim testified that she was sent to the shop to buy oil and passed near the school as they live nearby where she saw the appellant and she recognised him as was the one who raped

her. She immediately rushed to her home and told her mother that she saw the person who raped her and they went straight to the school where they found the appellant. PW1 evidence is corroborated by the evidence of PW3 who arrested the appellant on the same day because he trespassed to the school compounds with no just cause and also the evidence of PW4 the mother of the victim.

Thirdly, the victim also identified the victim who was present at the dock and after PW1 gave her evidence, the appellant did not cross-examine the victim on how she was able to identify him. The court has repeatedly held that failure to cross-examine a witness on a particularly important point may lead the court to infer that the cross-examining party accepts the witness evidence and it will be difficult to suggest that the evidence should be rejected. For instance, in **Shadrack Ballnago vs. Flklri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General,** Civil Appeal No. 223 of 2017 it was held that: -

> *"As rightly observed by the learned trial judge in her judgment, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account"*

As stated, PW1 evidence was detailed on how the appellant raped her and when she saw her and informed PW4. The appellant did not cross-examine her whether she identified him during the commission of the crime and how she was able to recognise him. In those circumstances, the appellant accepted the testimony of PW1 which was the basis of the conviction and sentence. To that end, this ground fails as it has no merit.

On the 2nd, 3rd and 6th consolidated grounds of appeal, the appellant claimed that there was a contradiction in the evidence and penetration was not proved. First, penetration is the basic element in proof of rape cases. It is trite law, in terms of section 130 (4) (a) of the Penal code, that in proving rape, evidence establishing penetration of the male organ into the female organ is necessary and such penetration, however slight is sufficient to constitute sexual intercourse, the ingredient necessary to prove the offence. This has been well illustrated in the case of **Hassan Bakari @mamajicho vs Republic** Criminal Appeal No. 103 of 2012. See **Paulo John Vs Republic** Criminal Appeal No. 420 of 2017. In the evidence of PW1, the victim narrated how the appellant raped her and fled. PW2, PW3 and PW4 both observed the victim's clothes and underpants were stained with blood. Furthermore, PW5 a medical doctor who inspected and medically attended the victim affirmed that she was

penetrated. The evidence adduced was also corroborated with exhibit P1. Therefore, penetration was proved.

Second, on the issue of discrepancies, it is a principle of law that in evaluating discrepancies and contradictions the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter. See **Dickson Elia Nsamba Shapwata and Another vs Republic** (Criminal Appeal 92 of 2007) [2008] TZCA 17 (30 May 2008), **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017, **Mohamed Haji Ali v. Director of Public Prosecutions,** Criminal Appeal No. 225 of 2018 - [2018] TZCA 332.

In our case at hand, Mr. Duttu had his concern that PW1 evidence had contradiction for she once said that the blood was a result of being injured by a nail and later on come up with the issue of rape. As I go to the records, it was PW2 who sent PW1 to the headteacher stating that PW1 was injured by a nail. But later, after PW1 was inspected by PW3, her parent, she was seen not being injured but had signs of being raped. Upon being examined by PW5 a medical doctor, she was confirmed raped. Before embarking on the principle stated in the cited cases above, I proceed to find out whether the circumstances qualify as minor or major contradictions. I took a lead on the decision of the Court of Appeal in **Dickson Elia Nsamba Shapwata and Another** (supra) which referred

to the book of **Sarkar, The Law of Evidence 16th edition, 2007**, on page 48 has this to say:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation; normal errors of memory due to lapse of time,* ***due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be****. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do."*

The charge sheet speaks of the victim that she was a young girl aged 7 who most likely knew nothing of sexual intercourse and its aftermath. When PW1 saw the blood, she immediately told PW2 that she was injured by a nail and after inspection, she was confirmed raped. I don't see the victims words can be termed as a major contradiction which goes to the roots of the case for the reason that: first, PW1 was giving the first report out of shock or horror, second, due to her age it is unlikely for her to understand the aftermath of rape which resulted in her to be clothed with blood whereas at the court PW1 testified that the appellant slapped her covered her month and raped her. Under the circumstances, I proceed to hold PW1 credible witness and the contradictions are minor

which does not go to the roots of the case. Therefore, these grounds fail for want of merit.

On the 7th ground of appeal, the appellant claims that the Prosecution case was not proved beyond all reasonable doubt. It is the principle of law and universal standard in all criminal trials that the prosecution has a duty to prove the case against the accused beyond reasonable doubt and the burden never shifts to the accused. As such, it is obligatory for the trial court to direct its mind to the evidence produced by the prosecution in order to establish if the case is made out against an accused person. The Court of Appeal in **Phinias Alexander and Others v. Republic,** Criminal Appeal No. 276 of 2019 cited with approval the decision in **Jonas Nkize v. Republic** [1992] TLR 214 where it was stated that:

> *"the general rule in a 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."*

The term "*beyond reasonable doubt*" was defined in the case of **Magendo Paul & Another v. Republic** (1993) TLR 219 that: -

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed".*

In this case at hand, the prosecution paraded five witnesses and 1 exhibit to prove the case against the accused. As mentioned, the evidence of PW1, PW2, PW3, PW4, PW5 and exhibit P1 proved the required standard of the offence of rape under section 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 RE:2019.

Looking at the appellant's defence, although the criminal case is not proved by weakness of defence but by the strength of prosecution case, there are several questions which raise eyebrows and remain unanswered. These questions weakness the defence case, if any. The appellant did not state anywhere about the day he was accused of raping the victim on 22.01.2022where he was and why he should not be linked to the alleged crime. According to the school teacher PW3, and the appellant himself there is no dispute that the appellant was arrested at the school compound. Eventually, the defence fails to clear doubts as to why the appellant on his day of arrest broke into the school compound in the daytime an act which led to being identified by PW1. The key question is, what was he doing there? As he was neither a staff nor the parent to any student. Was it the appellant habit to tame unaccompanied minors and abuse them? I find that, there was no defence raised to shake the prosecution case and, therefore, prosecution case was proved to the

standard required and the accused was properly convicted before the trial court.

For the reasons stated, and having considered this appeal holistically, I find no justification to interfere with the findings of the trial court. Accordingly, I find the appeal is devoid of merit and it is hereby dismissed in its entirety. I proceed to uphold the conviction and sentence of life imprisonment meted to appellant **HASSAN s/o DANIEL MABRUKI** under sections 130 (1) and (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2019.

It is so ordered.

The Right of Appeal is explained to the parties.

Dated at Mwanza this 29th day of September 2023.

L. J. ITEMBA
JUDGE
29.09.2023

Judgement delivered today 29th September 2023, in the presence of the Appellant and Mr. Japhet Ngusa learned state attorney for respondent and Ms. Josephine Mhina RMA.

L. J. ITEMBA
JUDGE