IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB – REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 103 of 2023

[*Arising from Nyamagana District Court Criminal Case No. 60 of 2023*]

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

DICKSON S/O KASASE .....RESPONDENT

JUDGMENT

Oct. 3rd & 13th, 2023

Morris, J

The acquittal of the respondent by the District Court of Nyamagana (*the trial court*) in Criminal Case No. 60 of 2023 disgruntled the Director of Public Prosecutions (*DPP*). He filed this two-ground appeal. He claims that the trial court erred to found that the case was not proved against the respondent beyond reasonable doubt; and that it failed to analyze and evaluate the prosecution evidence.

I will briefly account for the historical backdrop first. The respondent was charged for rape contrary to sections 130(2)(e) and 131(2) both of ***the Penal Code***, Cap 16 R.E. 2022 (*the Code*). The appellant allegedly

raped a girl aged 16 years. The offence was recorded as having been committed at Mwandu-Buhongwa within Nyamagana District, Mwanza. The trial court did not find Mr. Dickson Kasase guilty of the offence.

During hearing of this appeal, the appellant was represented by Mmes. Sara Perias, Thabitha Zakayo and Brenda Mayala - learned State Attorneys. The respondent fended for himself. It was the submissions for the appellant that the case was proved beyond reasonable doubt. To justify such observation, Ms. Perias argued that all elements of the offence herein were proved. That is, the age of the victim was proved; penetration into her genitalia was established; and so was involvement of the respondent in the commission of the offence.

Regarding the victim's age, it was submitted that the mother of the victim (PW3 at pages 5 and 8 of the proceedings) testified that the victim was born in 2007. Therefore, at the time of incident she was 15 years old. To the attorney, age of the victim may be proved by parents pursuant to ***Jaffari Mussa v R***, Crim. Appeal No. 34 of 2019 (unreported). Further, according to her, penetration was proved by the victim. She argued that, in law, the best evidence of rape comes from the victim. In this case, as the victim testified to had had sexual intercourse with the respondent; and

that the latter was the first man to have carnal knowledge with her; the prosecution presented the best proof against him.

I was referred to the cases of ***Selemani Makumba v R*** [2006] TLR 379 and ***Majid Bosco v R***, Crim. Appeal No. 56 of 2021 (unreported). Therefore, to the appellant, penetration was proved in line with section 127 (6) (sic) of ***the Evidence Act,*** Cap 6 R.E. 2022 (*the Evidence Act*). In addition, it was stated that the medical doctor (PW1) corroborated the victim's testimony (page 11 of the proceedings) that she was both no longer a virgin but also had with her a 5 months' pregnancy. To amplify such argument, Ms. Perias submitted that because the victim was raped on 20/8/2022, at the time of medical examination (14/01/2023) about 5 months had passed. Hence, the tie of these events established the offence herein.

Regarding involvement of the respondent, the appellant submitted that prosecution proved how the respondent and the victim came into contact on 13/8/2022 (page 6 of the proceedings). That the two exchanged their contact numbers which they used in communication until on 20/8/2022 when the victim was taken to the respondent's resident and raped. Further, it was argued that the victim clearly recognized the

respondent. Reference was made to the case of ***DPP v Daniel Wasonga***, Crim. Application No. 64 of 2018 (unreported) to the effect that recognition is more reliable than identification.

In favour of the ground that the trial magistrate failed to analyze the evidence, the respondent submitted that at page 9 of the judgement; two issues were framed. But in determining the case, the trial court over relied on second issue about the victim owning a handset without a sim card. That is, the trial court cast doubt on the victim having the mobile phone without detailing how she bought the phone only without the sim. Further, that the trial court raised another doubt on evidence of the investigation officer (PW3) who testified to had investigated the offence of impregnating the school girl. According to the state attorney, that approach on the part of the trial court was wrong because drafting a charge is the prosecutor's role using the investigator's findings. Therefore, to the respondent, all doubts raised by the trial court did not sufficiently support the respondent's acquittal.

In reply it was submitted by the respondent that the elements of the offence were not proved. He opposed the appellant's reliance on ***Selemani Makumba*** (*supra*) because, to him, not all what the victim

says must be trusted. He also argued that section 127 (6) of ***the Evidence Act*** is not applicable in this case because the court should be cautious in acting on the victim's evidence. Moreover, the respondent argued that the prosecution's case is full of doubts. He cited the basic ones to include; the victim's testimony that after the alleged rape she saw blood in her private parts but she did not report the incidence at home.

To him, given the victim's age, she should not have been expected to keep quiet after enduring the alleged pain. He argued further that, she did not raise any alarm or make noise due to the supposed rape. Another doubt observed by him was that the sim card alleged to had been given to the victim by the respondent was registered on 03/09/2022; far beyond the time of the so-called rape. He added that, no extract of communications between him and the victim was tendered to prove his commission of any crime. Moreover, he submitted that the charge indicates that the crime was committed at Mwandu-Buhongwa while he resides at Nyamatara-Buhongwa. The two streets, according to him, are too far apart. Finally, he stated that as PW3 did not investigate the crime facing him the evidence collected is doubtful.

In view of the above parties' contentions, I will start addressing the second ground of appeal. This prioritization is at the advantage of articulate flow of submissions and results therefrom. Accordingly, the appellant is faulting the trial court regarding its analysis of the evidence on record. To the state attorney, the trial court wrongly placed doubts on the victim's possession of the phone without a sim card; and PW3's investigation of offence of impregnating school girl instead of rape. However, the respondent argued that such anomalies were fatal.

I agree with the appellant that, at page 9 of the judgement, the court raised two issues for determination, namely, whether the respondent raped the victim; and whether the victim owned a sim card. The trial court, however did not consider evidence in line with answering the first issue. The whole judgement centers on two doubts: that the victim cannot own a phone without sim card; and the offence of rape was not investigated.

With requisite respect, the trial court was not justified to cast doubts on the prosecution's case beyond the evidence on record. That is, the evidence assessed had no or little bearing on proving or disproving the offence. The doubt regarding the victim's possession of the sim card or

otherwise, was not important in proving the offence. Indeed, such facts were clarified by the respondent himself. He testified (pages 16 and 17 of the proceedings) to had given the victim the said sim card out of friendship. Hence, there was no contention whatsoever in this regard.

Further, it is not fatal in law for the investigation to be conducted in respect of one offence but the accused being charged with another offence similar or related to the investigated crime. The offence of murder, for instance, may be investigated against the accused person who may end up being charged of manslaughter. Therefore, on such basis, I allow the second ground of appeal.

The other issue is whether or not the offence facing the accused-appellant was proved beyond reasonable doubt. This being the first appeal, I will re-evaluate the evidence on record to consider whether the prosecution established the appellant's guilt beyond reasonable doubt. The justification of doing so is according to, among other cases, ***Kaimu Said v Republic***, Criminal Appeal No. 391 of 2019 (unreported).

The respondent was charged under sections 130(2)(e) of ***the Code***. Therefore, the victim's consent was immaterial. The prosecution was only enjoined to prove the age of the victim, penetration and involvement of

the accused in the commission of the rape. The age of the victim was stated in the charge as 16 years. At pages 5 and 8 of the trial court's proceedings, PW1 and PW2 testified that the victim was born in 2007. No question was put across during cross examination regarding or challenging the age of the victim. Therefore, the age of the victim was proved to be below 18 years.

Regarding penetration, it was also proved that the victim had sexual intercourse with a male person at the time of medical examination. Pursuant to the tendered PF3 (exhibit P1), the girl-victim was found to the 5 months pregnant. It takes no rocket science to know that one common way of making a female pregnant is through copulation. There are, of course, other unconventional ways of achieving the same results but they are not related to the appeal at hand. For they are a cup of tea for another morning, I will not delve into them now.

The only critical question remaining for me to determine is whether it was the respondent who had canal knowledge with the victim. According to the evidence of the victim (PW1), she met with the respondent on 13/08/2022 at the shop. She told him that she had a phone without a sim card. On another day, the accused registered a sim card in his own name

and gave it to the victim. Thereafter, the duo kept communicating until 20/08/2022 when the accused took her at his home and they made love. She stated further that the respondent perforated her thereby causing her to bleed in her private part and feel pain. Then the accused escorted her home and from that date they never had any other coition. Nonetheless, they continued communicating. Months later, she returned from school only her mother (PW2) to noticed her being pregnant.

The foregoing teen-tale was somewhat similar to the respondent's (DW1's) testimony; save for the sexual intercourse part and the related plight therefrom. To the respondent, he only met and had casual tête-à-tête with the victim; accepted her offer of the two being friends; gave her a sim card; and they communicated. For precision, he averred that he gave her the subject chip on 6/9/2022; and thereafter they did not communicate until when he was arrested at Mzumbe University.

It calls for no over-repetition that law casts the burden of proving the charge against the accused persons on the prosecution. [***Twinogone Mwambela v Republic,*** Crim. Appeal 388 of 2018; and ***Hassan Singano @ Kang'ombe v Republic,*** Crim. Appeal No. 57 of 2022, (both unreported)]. In this connection, His Lordship Chief Justice Mathew Hale,

remarked in ***People v Benson***, 6 Cal 221 (1856) that: "rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."

According to prosecution, the respondent's involvement was proved because the best evidence of rape came from the victim; and that there was a clear connection between him and her because they communicated; the victim only had canal knowledge with the respondent once; and the test matched both the pregnancy age and the day estimate when she was raped.

I hold no any reservation with the foregoing line of argument. It is widely acceptable the principle that the best evidence of rape comes from the victim. See, for instance, ***Victory Mgenzi @Mlowe v R***, CoA Crim. Appeal No. 354/2019; ***Vedastus Emmanuel @Nkwaya v R***, CoA Crim. Appeal No. 519/2017 (both unreported); and ***Selemani Makumba v R*** (*supra*). It is also the law that, under section 127(7) of ***the Evidence Act***, conviction for a sexual offence may be grounded on uncorroborated evidence of a victim.

The rationale behind such strictness is not far-fetched. **One**, that this kind of offence is committed in secrecy. **Two**, the inhuman nature in

which it is committed, renders most events before, during and (maybe) thereafter to covered in obscurity. **Three**, it takes a lot of courage for the rape-victim to come to terms with the demeaning reality and thereby expose her displeasing ordeal to the public.

The above interrogation and reasoning notwithstanding, before the evidence of such victim is conclusively acted upon; the court must satisfy itself as whether the victim tells nothing but the truth. In the case of ***Mohamed Said v R,*** Crim. Appeal No. 145 of 2017 (unreported); it was recapitulated the holding that: -

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness."*

Considering the age of the victim (15 years) and the fact that she testified to being a virgin before or at the time the alleged offence; doubt is hard to rule out in the way she claims to had handled the situation thereafter. **First**, she did not only remain silent about the alleged forceful and painful incident on the very day but also, she so remained quiet for about 5 months before her mother noticed something unusual on her.

In law there is preposition that delay in reporting an incident by a witness raises doubt on his/her credibility. However, there is an exception in cases involving sexual offences where the victims of such offence are of tender age associated with threats. See the case of ***Wangiti Marwa Mwita and another v R***, [2003] TLR 271; ***Selemani Hassani v R***, Crim. Appeal No. 203 of 2021; and ***Wilfred Andisai Mmari v R***, Crim. Appeal No. 164 of 2020 (both unreported). In the present case, on record, there is neither proof of threat to the victim not to report the crime nor is there any promises made to the victim to intimidate or make her to abstain from reporting the crime.

Two, the prosecution did not place anything on record to conclusively prove that the subject girl-victim has had not involved in sexual intercourse before the alleged incident. **Three**, the credibility of her testimony, in line with the canon of best evidence to come from the rape-victim; was sufficiently distorted by lack of evidence to establish her mode of life after the alleged incident. By proving that she remained without any further coituses, the prosecution would have seized the safe justification to argued that it was the respondent who was responsible for both rape and impregnation of the victim.

Four, another pertinent discourse relates to the alleged communication between the victim and the respondent. It was proved that the respondent gave the victim his sim card and communicated with her. In his defence, however, the respondent testified that the victim requested him to be her friend; and that the sim card was given upon her request. Without proof of the kind of communication the two had, the court will overstretch its legal muscles to safely conclude that they had intimate relationship which culminated into rape. The evidence of prosecution cannot be considered in isolation of the defence made by accused. As correctly submitted by the respondent, the extract of their communications would have been helpful to prove that the respondent forced himself on her into premature love relationship on her part.

In exclusion of the evidence of the victim (PW1), the prosecution evidence essentially remains hearsay and circumstantial regarding involvement of the respondent. In law, circumstantial evidence may warrant conviction if only it arrives at a conclusion that the offence was committed by not other person but the accused. I stand guided by ***Nathaniel Alphonce Mapunda and another v R*** [2006] TLR; and

Mashaka Juma @ Ntatula v R, Crim. Appeal No. 140 of 2022 (unreported) hereof.

The first ground of appeal is, thus, bound to fail on the account of the rendered reasoning. I accordingly overrule it.

All in the fine, the appeal is barren of merit. As rightly held by the trial court, the case against the respondent was not proved beyond reasonable doubt, *albeit* on different lines of reasoning. In effect, the appeal stands dismissed. I so order. The right of appeal is duly explained to parties hereof.

C.K.K. Morris

Judge

October 13th, 2023