**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA**
**IN THE DISTRICT REGISTRY OF SHINYANGA**
**AT SHINYANGA**

**CRIMINAL APPEAL NO. 78 OF 2023**
*(Original Criminal Case No. 196 of 2022, before District Court of Kishapu at Shinyanga)*

**DEREFA S/O JOHN @ NYERERE .....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

## JUDGMENT

27th September & 17th November, 2023

**MASSAM, J.:**

The appellant, namely Derefa John @ Nyerere was charged and convicted in the District Court of Kishapu at Kishapu with Criminal Case No. 196 of 2022 facing the charge of rape Contrary to Section 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 R:E 2022.

The particulars of the offence as per the charge sheet were as such that, on the 24th November 2022, at Kisesa village within Kishapu District in Shinyanga Region, the appellant had carnal knowledge with the victim a girl aged 17 years old.

Brief facts of the case are as such that, on 24th November, 2022 around 19;00 hours, the victim while on her way home from School, her bicycle got puncher, it is when she met the appellant who robbed her bicycle and placed it besides the road, he again came back and grabbed her besides the road and laid her down and fiercely undressed her under pants. The appellant also undressed himself and took his penis and inserted into her vaginal. Thereafter he left the victim and went away. The victim was in pain and she went home while crying and narrated the whole story to her mother.

Her father was informed about the incident and reported the matter to the Village executive leaders who come and took her to Kisesa Dispensary for treatment. They went back home and raised an alarm, where by many people gathered at their home and she narrated the story that she was raped by the appellant who is their neighbor and they are living on the same village.

The appellant was arrested and the following day she was taken to the hospital for examination and after investigation had been finalized the appellant was taken to court. The charge was read over to him and denied to have committed this offence.

At the trial, the prosecution managed to prove the charge against the appellant, and subsequently, was convicted and sentenced to serve 30 years imprisonment without fine.

Aggrieved therein, the appellant rightly lodged this appeal in this court with 8 (eight) grounds of appeal that, **First** That, the learned trial court Magistrate erred in law and in facts in holding that the appellant was positively identified by PW2 (the victim) **Second** That, the learned trial court Magistrate acting on the uncorroborated un sworn evidence of the prosecution side and inconclusive relative evidence (PW1 and PW2) **Third** that, the trial court wrongly convicted the appellant of the purported prosecution evidence while failed to make deep examining and evaluation of the same which lacks the credibility of the prosecution side. **Fourth**, that, the trial court misdirected itself in law and in fact to convict the appellant based on the prosecution evidence while the same consisted full of shadow, constriction and suspicious which yield immaterial facts. **Firth** that, the learned trial court magistrate totally misapprehending the nature and quality of the prosecution evidence against him which did not prove the charge beyond reasonable doubt.

**Again, they had three supplementary grounds, first** That, the trial court magistrate erred both in law and in fact continuing to entertain

and reach verdict against the accused person (appellant) while did not even evaluate evidence and ruling out as to whether the accused person (appellant) had any case to answer. **Second,** that, the trial court magistrate erred both in law and in fact to rule out that the victim was penetrated while at all during trial there was no evidence to link whether the one penetrated was typically the appellant **Third t**hat, the trial court magistrate erred both in law and in fact convicting the appellant where there was no direct evidence to effect that, there was proper identification to the accused person (appellant) as regard to the time and nature of committed offence.

During the hearing of this appeal, the appellant enjoyed the legal service of Mr. Godfrey M. Tuli learned advocate while the respondent was represented by Mr. Leonard Kiwango learned State Attorney. By consent of parties and court this appeal was heard by way of written submission.

Arguing in support of his grounds of appeal, the appellant's counsel abandoned grounds No. 2 and 4 as appeared in the petition of appeal, and argued on grounds number 3 and 6 jointly, 1, 7, and 8 respectively, while ground number 5 was argued separately and make a total of three grounds of appeal.

Arguing on ground number 1, (merged as ground 3 and 6), he submitted that, the trial court wrongly convicted the appellant of the purported evidence while failed to make deep examination and evaluation of the evidence which lacks credibility of the prosecution side.

He claimed that, the credibility of the prosecution witnesses had a lot of doubts preferably on the age of the victim who testified that, she was born on 2005 hence she was 17 during the commission of the offence, and therefore if she was 17 years old how could she be in form one at that age? Further, he added that, with that age of 17. She was expected to graduate form four at the age of 21 and therefore her age creates a lots of doubts as the prosecution did not tender any supporting documents to prove it. He referred this court to the case of **Omary Hashim Versus Republic, Criminal Appeal No. 63 of 2023 HCT at Mwanza. Pg. 8** which states that, criminal justice is dealing with serious business People's life.

Again, he submitted that, the Trial magistrate failed to rule out as to whether the accused has a case to answer or not as per the case of **DPP Versus Philipo Joseph Ntoba, Criminal Appeal No. 217 of 2020 HCT** at Zanzibar, Pg. 12, and therefore the court may be mis leaded easily when dealing with the above kinds of matters if the prosecution will not be

clear in their evidence since the prosecution was required to bring birth certificate to clear the doubt about the age of the victim.

Once more, he submitted that, the evidence at Pg 3 and 4 of the court proceedings shows that, the appellant used force to rape the victim, and if it was true, how could she manage to maintain her walk without any indications to the parents as to the commission of the offence like having grasses in her uniform or any changes on her walking style? He referred this court to the case of **Mohamed Said Versus Republic, Criminal Appeal No. 145 of 2017**, at Pg 4 where by the court stated that, the wordy testimony of the victim cannot be taken as a gospel, hence the said tented of doubts was expected to be evaluated properly by the trial magistrate.

Arguing on the 2nd ground, (combined as grounds number 1,7 and 8), he submitted that, there was no proper identification of the appellant by the victim, and therefore the prosecution were required to prove that, it was the appellant who penetrated the victim as per the case of **Jonas Nkinze Versus Republic, [1992] 213,** since the offence was committed during the night, the prosecution did not show how did the victim managed to examine that the appellant was underpants, how did she manage to see the inner parts of the dressed appellant.

Further, he submitted that, it was the doctor who pointed out that there was penetration to the victim with blunt object and therefore the court was required to be satisfied that, the referred blunt object is penis. He referred this court to the case of **Ibrahim Sharif Versus Republic**, Criminal Appeal No 175 of 2018 HCT at Mwanza. Pg. 9 and 10

Regarding ground No. 5 he contended that, there was no strict prove of the case to the required standard as per the case of **Amour Mbarouk Aljeb Versus Republic,** Criminal Appeal No. 226 of 2019 CAT at Dar es Salaam. Pg 13.

In his reply, the learned State Attorney submitted that, he supports the sentence and conviction by trial court because the matter was proved beyond reasonable doubt. With regards to ground number one, he submitted that, the age of the victim was properly proved as the law requires that, the age of the victim to be proved by the victim, parents, relatives, medical practitioner or by producing a birth certificate, hence during trial it was the victim herself who pointed out to be 17 years at Pg 4, the evidence which was corroborated by of PW1 (mother of the victim) at Pg 3 and Pw3 medical doctor at Pg 9. He referred this court to the case of **Victory S/O Mgezi @ Mlowe Versus Republic**, Criminal Appeal No. 354 of 2019 at Pg 16.

With regard to the truthfulness of the evidence of the victim, he submitted that, the best evidence in rape cases has to come from the victim since the offence of rape is usually committed in secret and therefore the evidence tendered by the victim at Pg 4 and 5 of the court proceedings was enough to prove the case beyond reasonable doubt because it was credible and reliable as per Section 127(4) of the Evidence Act, and was also corroborated by the evidence of PW3. He referred this court to the case of **Seleman Makumba Versus Republic [2006] TLR 379,** Criminal Appeal No. 31 of 2020.

Still, he insisted on the issue complained by the appellant that, the trial magistrate did not rule out as to whether the appellant has a case to answer, he referred this court at Pg 18 of the court proceedings which shows the ruling after the prosecution had closed its case and therefore this claim has no merit.

In the second ground of appeal, he submitted that, the evidence testified by PW2 proves that the appellant raped the victim and she properly identified him at the earliest stage as they are living in the same village. He refereed this court at Pg 5 of the court proceedings, the evidence which was also supported by PW1 at Pg 3. He referred this court

to the case of **Kisandu Mboje Versus Republic,** Criminal Appeal No. 353 of 2018.

Again, he submitted on the issue of time that at 19;00 hours were night, but it depends on the environment and therefore areas like Shinyanga at that hours was still bright and a person can be easily seen and identified, and since the victim and the appellant are neighbors, she then managed to identified him easily.

On the issue of penetration, he submitted that, it is evident from PW3 that, the victim was penetrated with the blunt object and his duty was to only prove penetration, the evidence which was supported by PW2 that, the said blunt object was a penis as per Pg 4 and 5 of the court proceedings.

On the last ground, he submitted that, the prosecution managed to prove their case as they were only required to prove penetration which was proved by PW2 and PW3 at 4,5 and 10 of the court proceedings, again the age of the victim was proved at Pg 3, 4 and 10 and finally the evidence testified proved that, it was the appellant who raped the victim hence this appeal is unmerited an should be dismissed.

In brief rejoinder the learned counsel for the appellant kept on insisting as per the requirement of Section 3(2) of the Evidence Act (Cap 6

R; E 2022) all possible doubt arises must be proved and therefore the age of the victim was not properly proved beyond reasonable doubt, hence the case of **Victory S/O Mgenzi (supra)** cited by the respondent is distinguishable and put emphasis by making reference to the case of **Majaliwa Ihemo Versus Republic**, Criminal Appeal No. 197 of 2020 CAT at Kigoma, Pg 9.

On the other hand in submitting on the second ground by refer this court to Section 5 of the Penal code Cap 16 R;E 2022 which gives meaning of night time.

Having heard the submissions from both parties, I will now make a determination on the merit of this appeal, and the issue before this court for determination is **whether this offence has been proved beyond reasonable doubt.**

To commence with, it is well stated under Section 3(2)(a) of The Evidence Act that, ***"A fact is said to be proved when - (a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;"***

Again, Section 110 (1) of The evidence Act provides that,

***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

To be satisfied if the case at hand was proved to the required standard, this court will direct its mind at Section 130 (1) (2) (e) which provides for the basic components of the offence of rape.

For clarification, ***Section 130 (1) provides that "it is an offence for a male person to rape a girl or a woman. (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances failing under any of the following descriptions: - (e) 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."***

Consequently, for the offence of rape to be established, **first,** male penis should penetrate to a girl reproductive organ, and that act should be properly proved, **second,** if a girl was below the age of 18 years, it is immaterial whether the girl gave consent or otherwise. If a woman was above the age of majority, that is, above 18 years old, then such penetrations should be without her consent to constitute rape.

To begin with the first ground, that is ground 3 and 6, it was from the appellant's advocate that, the prosecution witnesses lack credibility on the issue of age which was not properly proved and again the trial court failed to rule out as to whether the appellant had a case to answer. In responding to this, the respondent submitted that, the evidence tendered proved the age of the victim and also the trial magistrate properly rule out on whether a prima face case had been established against the appellant.

To start with the issue of age, the prosecution was bound to prove that the victim was below the age of 18 years when the alleged offence was committed since age in statutory rape is fundamental element, and must be proved beyond reasonable doubt as it also goes to the root of the case of rape and determine the whole issue of sentence, consequently the law placed the age of the victim as mandatory for the whole offence of rape. That being the case, the question herein **is whether the age of the victim was properly proved as required by law?**

As per the case of **Isaya Renatus V. R. Criminal Appeal No. 54 of 2015**, it was held that "***the age of the victim can be proved by either parent, relative, medical practitioner or birth certificate if available***"

The position was clearly debated in the case of **Festo Lucas @Baba Faraja@ Baba Kulwa V. R, Criminal** Appeal No. 27 of 2022, that, ***"The proof of age must be concrete, viable and reliable, General statement cannot be accepted at this era of statutory rape."***

As per the evidence of PW2 and PW3, both stated out at Pg 3 and 4 of the court proceedings that, the victim was born on 7/10/2005 hence she was 17 years old when the offence was committed. Again, at Pg 10 PW3 pointed out that, the patient was 17 years old. Since those three witnesses proved that the victim was 17 years old as per the requirement of the above cases, I may say that, the age of the victim was properly proved by the prosecution as there were specific date month and year mentioned by people who are required to prove the age of the victim. Under such scenario, I may say that, bringing birth certificate to prove the age of the victim as complained by the appellant in this case was immaterial since the evidence tendered by itself support each other and there were no inconsistencies.

Again, the appellant was wondering on how could it be possible for a person with the age of 17years to be in form one while she was expected to graduate form four, I may say that, it is neither a matter of law nor a

matter of procedure that every person with that age should not be in form one, and therefore this ground has no merit.

Consequently, there is another complain that the trial magistrate failed to rule out as to whether the accused has a case to answer. After a thoroughly perusal of the court proceedings, preferably at Pg 18, I note the following, **"..... Court. Prosecution case closed and accused has found to have a case to answer following the evidence adduced by prosecution witnesses. Let the accused be called to enter his defence....."** after that, the accused was addressed in term of Section 231 of the criminal Procedure Act Cap 20 R; E 2020.

From the above analysis this court made reference to **Section 231 (1) of the CPA** provides that,

> ***" At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of Section 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused person and inform him of his right-***

***(a) to give evidence whether or not on oath or affirmation, on his own behalf; and***

***(b) to call witness in his defence,***

From the above provision of law and the quotation made from the court proceedings, this court is of the view that, the trial Magistrate properly complied with the requirement of the law that after the prosecution closed their evidence, the procedures speak that, the accused was addressed in term of Section 231 of the CPA. So by that evidence the said ground fails.

Jumping to the second ground of appeal as to whether the accused was properly identified, and was the one who penetrated the victim, it was from the appellant that, since the offence was alleged to have been committed at night hours, then how did the victim identify the accused, also the prosecution did not prove as to whether the said blunt object was actually a penis.

In his reply, the respondent submitted that, the accused was properly identified because at that particular time in Shinyanga, a person can be easily seen since it is bright, again it was from PW3 who proved that the victim was penetrated by a blunt object. To commence with the issue of identification, the law pertaining to identification is well settled in the case

of **Waziri Amani vs. Republic [1980] TLR 250** that, the court should not act on evidence of visual identification unless all possibilities of mistaken identity are eliminated. The above principle was reiterated in the case of **Maganga Udugali vs. Republic** Criminal Appeal No.144 of 2017 CA [2021] TZCA 639 that,

***"It is also settled that although relevant and admissible, the eye witness visual identification evidence is still of the weakest kind and most unreliable which should be acted upon with great caution. Before the court can act on such evidence, it must satisfy itself that the conditions were favorable for proper identification. The evidence must be watertight and all possibilities of mistaken identity must be eliminated. It has to be insisted that the principle applies even in cases of visual identification by recognition as it is in the instant case."***

Again, in the case of Philemon **Jumanne Agala @J4 vs. Republic,** Criminal Appeal No. 187 of 2015 CA [2016] TZCA278, the superior court citing the case of **Shamir s/o John v The Republic,** Criminal Appeal No. 166 of 2004 (unreported) emphasized on the issue of visual identification that should only be invoked when the court is satisfied that the evidence is watertight and the possibilities of mistaken identity are overruled.

In the instance case it is from PW2 at Pg 4 that, the act occurred at 19:00 hours, the provision **of Section 5 of the Penal Code** defined the night hours to mean the period between seven o'clock in the evening. And therefore, this is nighttime. Since the evidence shows that the offence was committed at night, the question is how did the victim manage to identify the appellant at that time. A mere saying that the appellant was their neighbor and they are living on the same village was not enough to prove that she properly identified him to be the one who raped her because she might had been raped by someone else who is identical to the appellant, because when the act was occurring it was already night hours.

This court is also aware that the best evidence comes from the victim, it worth pointing out that the cherished principle has an exception. In the case of **Mohamed Said vs. The Republic,** Criminal Appeal No. 145 of 2017 [2019] TZCA252, the Court had the following to say,

***'We are aware that in our jurisdiction it is settled law that the best evidence of sexual offence comes from the victim [Magai Manyama v. Republic (supra)].*** *We are also aware that under section 127(7)of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded solely on the uncorroborated evidenceof the victim.*

***However, we wish to emphasize the need to subject the evidence of such victims to security in order for courts to be satisfied that what they state contains nothing but the truth. "(Emphasis mine).***

Based on the observations made above, this court is of the view that PW2 failed to testify on how she identified the appellant at that hour as the actual rapist and not someone else, hence this ground has merit.

On the other hand, the appellant contended that, penetration was not proved. I have properly reviewed the evidence adduced by PW3 at the trial court, and find out that penetration was there and it was proved properly. PW3's testimony at Pg. 10 of the proceedings revealed that, the victim after being examined, she was found with bruises in her labia manora and after inserted her fingers the vagina was open.

However, the appellant has complained that the court was to be assured that, nothing can cause open lose than penis, hence there is doubt as to whether the said blunt object was actually a penis, this court is concurring with the submission of the respondent that, what PW3 (the doctor) was required to prove was only penetration and that is what contained in the PF3 and therefore the so complain is not in existence.

Moreover, there is another issue that, prosecution did not prove the case beyond reasonable doubt. This court is aware that, it is the duty of the prosecution to prove its case to the standard required. Since the issue of identification was not properly proved, I may say that, prosecution failed to discharge it duties properly and the trial court was wrong to hold that, the case was proved beyond reasonable doubt.

From the above analysis, this appeal is partly allowed. I therefore quash the conviction and judgment and also set aside sentence of 30 years imprisonment.

Accused be released immediately from prison unless he is otherwise lawfully held.

It is ordered.

**DATED** at **SHINYANGA** this 17th day of November, 2023


**R. B. Massam**
**JUDGE**
**17/11/2023.**