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

CRIMINAL APPEAL NO. 60 OF 2023

(Original Criminal Case No. 20 of 2023, before District Court of Kahama at Kahama

JUMA MACHIBYA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

12th October, & 1st December, 2023

MASSAM, J.

The appellant, namely Juma Machibya was arraigned in the District Court of Kahama at Kahama in Criminal Case No. 20 of 2023 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 9th January 2023, at Kakola village in Msalala District Council within Kahama District in Shinyanga Region, the appellant had sexual Intercourse with the victim a girl aged 10 years old.

Brief facts of the case were that, on 9th January, 2023 in the evening at Kakola Msalala within Kahama District in Shinyanga Region, the victim, a girl aged 10 years was sent to the shop by her sister to buy charcoal, when she was on her way to the shop, she met the accused person (appellant) whom she knows as they are neighbors. The appellant gave her money and asked her to go and buy him soda and after she had bought the soda, the appellant told her to take it in his house. She entered inside and the appellant closed the door and griped the victim to the bed and had sex with her forcefully.

There after he took his bed sheet and sleep. The victim was in pain and she went away. On the next day, the victim narrated the story to her mother who reported the matter to the police station and the accused was arrested on 11th January 2023 and the victim was taken to the hospital for examination and after investigation, the report revealed that she was penetrated, the appellant was arrested and taken to the court. The charge was read over to him and denied to have committed the said 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 in jail.

Aggrieved therein, the appellant rightly lodged this appeal armed with 5 (five) grounds of appeal as follows that:

1. *That, the trial Magistrate Court erred in law and facts to convict the appellant whereas the Prosecution side has failed to prove the offence of Rape beyond doubt and therein the appellant denied fully committing the offenses alleged.*
2. *That, the trial Magistrate erred in law and in facts by convicting the appellant without proving the age of the victim especially by birth certificate or any certificate.*
3. *That, the trial Magistrate court erred in law and in facts to convict the appellant without basing the defence given by the appellant and the case had been created by the prosecution.*
4. *That, the trial Magistrate court erred in law and in facts to convict the appellant by using poor evidence brought by the prosecution side, thus no any witnesses appeared in the trial Court to prove if he saw the appellant committing the offence of rape. The court simply used hearsay evidence to convict the appellant.*
5. *That the accused wishes to be present on hearing this appeal.*

The appellant therefore prays for orders that the sentence, conviction and judgment be set aside and the appellant be acquitted.

During the hearing of this appeal, the appellant appeared in person unrepresented, while the respondent was represented by Mr. Leonard Kiwango learned State Attorney.

Submitting on his grounds of appeal, the appellant claimed that he submitted his grounds as they are sufficient and therefore, he prayed for the court to consider it and let him free.

In his reply, the learned state attorney submitted that, he is objecting this appeal and supports the sentence and conviction by trial court. With regards to the grounds of appeal submitted by the appellant he chose to consolidate grounds number 1, 2, and 4, and argued them jointly and ground number 3 separately, and chose not to argue on ground number five and make a total of two grounds.

Submitting on the 1st ground that is (grounds number 1,2 and 4) as complained by the appellant that, the prosecution failed to prove the case beyond reasonable doubt, he contended that, the prosecution was only required to prove penetration, age and if it was the appellant who raped the victim.

Starting with the issue of penetration, he submitted that, the evidence of PW1 at Pg. 8, 10 and 11 of the court proceedings revealed that, when the victim was on her way to buy charcoal, the appellant

requested her to buy him soda after she had bought the soda she took it to the appellant, the appellant told her to enter inside and when she entered inside the appellant forcefully raped her, and this evidence was supported by the testimony of PW3 (the Doctor) at Pg 16 of the court proceedings, who testify to have examined the victim and found her with bruises in her vagina which indicated that, the victim was penetrated with a blunt object.

He added that, though the doctor said that the victim was still virgin, therefore, the penetration was slight as the law is very clear that, even slight penetration is sufficient to constitute sexual intercourse. He refered this court to the case of **Nasib Ramadhani, Criminal appeal No 310 of 2017 at pf 10.**

He further submitted that, because the victim was the one who was raped, and she was in a good position to say what happened to her, it is very clear that, it was the appellant who raped her and the victim was penetrated as per the case of **Isaya Msofe versus Republic, Criminal Appela No. 31 of 2021 at 13.**

With regard to the issue of age, he submitted that, the age of the victim was proved by the victim herself at Pg 10 of the court proceedings who informed the court that she was born on 17/3/2012, and the same was supported by the evidence of PW2 (victim's mother) at Pg 13, who pointed out that the victim was 10 years old as she was born on 2012.

He added that the law is very clear that, the age of the victim can be proved by his parents, relatives, medical Practitioner or by producing a birth certificate. He refered this court to the case of **Victory Mgenzi @ Mlowe Versus Republic,** Criminal Appeal No. 354 of 2019 at Pg 16. And therefore, the age of the victim was proved beyond reasonable doubt as per the evidence of PW2 and PW3.

On the issue as whether it was the appellant who raped the victim, he submitted that, it is from PW1 evidence at Pg. 8,10, and 11 of the court proceedings which shows that the victim did mention the appellant by his name that Juma was the one who raped her. Also, she said that she knows him as they are neighbors. Again, PW2 testified that, the victim mentioned the appellant at the earliest stage at Pg 13 of the Court proceedings. He refered this court to the case of **Kisandu Mboje Versus Republic, Criminal Appeal No. 353 of 2018.**

Further to that he added that, since the victim managed to mention the appellant at the earliest stage, the evidence tendered by the victim proved that, the appellant was properly identified by the victim. He also cited the case of **Seleman Makumba Versus Republic [2006] TLR 379,** Criminal Appeal No. 31 of 2020, at Pg 384, which insisted that the best evidence comes from the victim. Therefore grounds number 1,2 and 4 has no merit.

On the last ground which was complained by the appellant that his defense was not considered, he submitted that, at the trial court judgment preferably at Pg 9 shows that the evidence from both sides were properly analyzed and considered by the trial Magistrate thus why she decided the said decision, Again this ground has no merit too.

With regard to the ground five he submitted that it has no merit as the appellant was present at the court during the hearing of this appeal. He therefore prayed for dismissal of this appeal and the decision of the trial court to remain undisturbed.

In brief rejoinder the appellant had nothing new to add than complaining that, he had a dispute with the victim's mother that is why she planted the said offence.

Having carefully considered the arguments both parties, the grounds of appeal and its reply, the evidence and exhibits from the lower court the **issue to determine is *whether the offence against the appellant was proved beyond reasonable doubt.***

In determining this issue what is important is to examine is whether the prosecution proved all the ingredients forming the offence of rape.

Since this is a statutory rape, the key elements which distinguishes this offence from other offenses is the age of the victim. Therefore, aside from penetration, the important element to be established by prosecution

in view of the clear provisions **of section 130 (1) and 2(e) of the Penal Code,** Cap. 16 R.E.2019 was the age of the victim.

In order for a girl to qualify for the protection of the law under that provision, sufficient evidence has to be adduced to establish the age of the victim.

To start with the first ground, that is ground 1, 2 and 4, it was from the appellant that, the prosecution did not prove the offence of rape beyond reasonable doubt but on their side, the respondent submitted that, they managed to prove this offence to the required standard as they were only supposed to prove **age, penetration and if it was the appellant who raped the victim.**

Commencing 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 and it also goes to the root of the case of rape and determine the whole issue of sentence, thus the law placed the age of the victim as mandatory for the whole offence of rape.

From 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."***

It was from the respondent that, the age of the victim was properly proved. After a thoroughly visit of the Court proceedings preferably at Pg 10 and 13, I noted that, PW1 testified to be born on 17/03/2012, and PW2 her mother supported the same that the victim was born on 2012. Also PW3 pointed out that, when she received the victim for examination, she was 10 years old. From that evidence, this court is of the view that, since those three witnesses proved that the victim was 10 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.

As the law is very clear that proof of the age may come from either the victim, or her relative, parent, medical practitioner of by producing a birth certificate, this is as elaborated in the case of **Isaya Renatus vs Republic** ,Criminal appeal No 542 of 2015(unreported)

Therefore, the complaint by the appellant that there must be a production of birth certificate or any certificate to prove the age of the victim was immaterial since the evidence tendered by itself support each other and there were no inconsistencies as it was well debated in the case of **Juspini Daniel Sikazwe Vs. DPP,** Criminal Appeal No. 519 of 2019 [2021]TZCA58(26 February 2021) that:

"***The victims age could be proved by other means than the birth certificate ...one of such means for proving the age is through the witnesses own oral evidence"***

In regard with the issue of ***penetration,*** the respondent replied it negatively that, penetration was properly proved. It is clear from the case of **Mathayo Ngalya @ Shabani V Republic,** Criminal Appeal No. 170 of 2006 (unreported), that,

> "*The essence of the offence of rape is penetration of the male organ into the vagina*. Sub-section (a) of section 130 (4) of the Penal Code ... provides; -*'for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence."*

For the offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence".

From the above citation, I have properly reviewed the evidence adduced by the Prosecution at the trial court preferably at Pg 8,10 and 11 and found out that, the victim testified to have been penetrated by the appellant after he called her when she was on her way to buy charcoal and requested her to go and buy him soda. When she brought that soda the appellant told her to inter inside and started to rape her by inserting his penis into her vagina. The victim felt pain as it was her first time, again she saw white fluids from her vagina and she was also bleeding and the appellant gave her clothes to clean her virginal.

Thereafter the appellant allowed her to go home. On the next day, it is when her mother (PW2) realized that she was not walking properly and narrated what had happened to her. This evidence was supported by the evidence of PW2 at Pg 13 of the court proceedings. Again, it was from PW3's testimony at Pg. 16 of the proceedings that, after she examined the

victim, she was found with bruises which proved that, she was penetrated with a blunt object. Also she found that her hymen was intact, therefore it is the testimony by the doctor and PW2 which was corroborated by the story of the Victim with regard to penetration and the so complained by the appellant is not in existence.

Regarding the issue as to **whether the accused was properly identified, to be the one who committed the mentioned offence.** It was from the respondent that, the evidence of PW1 at Pg 8, 10 and 11 reveled that, the victim did mention the appellant by his name JUMA, to be the one who raped her since she knows him as they are neighbors, the evidence which was corroborated by the evidence of PW2 at Pg 13 that, the victim mentioned the appellant at the earliest stage to be the one who raped her after calling her into his room.

It is well settled in the case of **Waziri Amani vs. Republic [1980] TLR 250** that, the court should not act on the evidence of visual identification unless all possibilities of mistake 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 **Philimon 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 clear from the prosecution that, the act occurred in the evening hence the light was enough for the victim to identify the accused. Again, PW1 testified that, it was the appellant who raped her and she identified him by his name JUMA, since she knows him as they are neighbors, also the evidence of PW2 at Pg 13 shows that the victim mentioned the appellant at the earliest stage to be the one who raped her.

From that evidence, this court is also aware that in sexual offence, the best evidence is from the victim while other prosecution witnesses may

give corroborative evidence. Thus, even if there is no other evidence in corroboration, the evidence of the victim of sexual offence, if found credible, can by itself meter a conviction as per the provision of section **127 (6) of the Evidence Act, Cap 6 R.E. 2019,** and also the famous case of **Selemani Makumba v. Republic,** [2006] T.L.R 379**,** and **Godi Kasenegala v. Republic,** Criminal Appeal No. 10 of 2008, CAT **and Galus Kitaya v. The Republic,** Criminal Appeal No. 196 of 2015.

Therefore, in this case and as demonstrated above, the evidence of PW1 was sufficiently corroborated by other witnesses including PW2 and PW3. Again, the act of PW1 naming the appellant at the earliest stage that it was him who raped her and at the court she also pointed him, this was sufficient evidence which proves that the appellant was properly identified, hence the set grounds of ground number one are baseless.

Moreover, there is another issue complained by the appellant that, his evidence was not considered. After a thorough perusal of the trial court judgment, it reveals that, his evidence was considered as it was well stated at Pg 9 that the appellant denied to have committed this offence as he was not around during the alleged time.

Based on the above analysis I am convinced that the prosecution's case was properly proved beyond reasonable doubt. Accordingly, I find the

appeal without merit and I dismiss it in entirely. The conviction is hereby upheld

It is ordered.

DATED at **SHINYANGA** this 1st day of December, 2023

R.B Massam

JUDGE

1/12/2023.