THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC. CRIMINAL APPEAL NO. 51 OF 2022

(Originating from the District Court of Kondoa at Kondoa in Criminal Case No. 74/2021)

HAMIS IDD RAMADHANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order 24/10/2023

Date of Judgment: 07/12/2023

Mambi, J.

In the District Court of Kondoa at Kondoa the appellant **HAMIS IDD RAMADHANI** was charged with two counts of RAPE c/s 130(1)(2)(e) and 131(1) and of UNNATURAL OFFENCE c/s 154(1)(a) both of the Penal Code [Cap 16 R: E 2019].

It was the prosecution case that the appellant on 22nd of September, 2021 at Tampori Village within Kondoa District in Dodoma Region did have

carnal knowledge and unnatural offence with a 12 years old girl. The appellant pleaded not guilty to both counts.

Upon hearing both parties, the trial court was satisfied with the evidence from the prosecution side and convicted the appellant with both counts. Having convicted the appellant, the trial court sentenced him with a 30 years jail term and life imprisonment for the fist and second count respectively.

Aggrieved, the appellant is appealing to this court challenging the decision of the trial court basing on nine grounds of appeal. These are: -

1. *That, the trial court grossly erred in law and in facts by sustaining the Appellant's conviction without considering that the prosecution side did not prove their case beyond all reasonable doubts.*
2. *That, the trial court grossly erred in law and in facts by sustaining the Appellant's conviction without observing that there was noncompliance of section 231(1) of the Criminal Procedure Act Cap. 20 R.E 2019.*
    (i) The trial court failed to explain the substance of the charge to the Appellant before the appellant defense.
3. *That, the trial court grossly erred in law and in facts for failing to notice that the identification of the appellant to the locus quo descriptions was given on respect of the Appellant what has been dressed was to general deification.*
4. *That, the trial court grossly erred in law and in facts when failed notice that there was no water tight identification due to the fact that if the appellant was real identified there was no need to trace*

him by using foot print what was supposed is to find where about to use foot print create doubts that there was no proper identity.

5. *That, grossly erred in law and in fact by failing to notice that the age of the victim(PW1) was not established whereas the prosecution side did fail to tender neither birth certificate nor clinic card during the trial.*
6. *That, the trial court grossly erred in law and in fact by failing to consider that there was a need of calling the doctor as the requirement of section 240 (3) of the Criminal Procedure Act, Cap 20 R.E 2019.*
7. *That, the trial court grossly erred in law and in fact when convicted the appellant basing on procedural irregularities.*
8. *That, the appellant was convicted and sentenced in absence of the evidence of the village authority.*
9. *That, the trial court convicted and sentenced the appellant without considering the appellant defense.*

During hearing, the appellant appeared in person and unrepresented whereas the respondent had the legal services of Ms. Sarah-learned State Attorney.

In his submission the appellant prayed this Court to rely on his petition of appeal that he filed at this Court.

On her part, Ms. Sarah, submitting against the appeal prayed this Court to collectively argue all grounds of appeal. In her submissions the learned State Attorney referred this Court on page 29 of the proceedings of the trial court and contended that the trial court complied with section 131(1) of the Criminal Procedure Act, Cap 20 (*the CPA*).

With regard to identification of the appellant Ms. Sarah averred that the appellant was properly identified at the scene since the incident occurred at midday (13hrs). She further averred that even the victim (PW1) in her evidence stated that she knew the appellant prior the incident.

Concerning the 3rd, 6th, 7th and 8th grounds of appeal, Ms. Sarah contended that since the evidence of the victim (as at page 13 and 14 of the proceedings) was clear then there was no need of calling other witnesses from the village authority. Ms. Sarah further contended that beside the strong evidence of the victim (PW1) her evidence was corroborated by the evidence of PW2 (the victim's mother) and PW3 (the arresting witness). The learned State Attorney asserted that much as the best evidence is that of the victim as per **Seleman Mkumba's case** there was no need of calling the doctor. Further that the trial court was satisfied that the victim was telling the truth and that what was required to be proved was penetration and the victim (PW1) managed to prove.

With regard to the age of the child (victim), Ms. Sarah argued that proof of age does not only require birth certificate but the age of the child can also be proved by other means. Reference was made on the decision of the court in **Issaya Renatus vs R**, Criminal Appeal No. 542 of 2015.

The learned State Attorney finally contended that the defense evidence was considered by the trial court in its decision.

In his rejoinder, the appellant submitted briefly that the prosecution failed to prove its case beyond reasonable doubt. He further argued that the evidence of the relative was not supported by the evidence from other witnesses who were not relatives to the victim.

I have thoroughly considered the grounds of appeal and submissions in line with the records, in my considered view, there are two main issues that need to be determined. The first issue is whether there is an irregularity in the proceedings of the trial court, if yes whether such irregularity vitiates the proceedings. The second issue is whether the trial court was right in its decision. In other words, the second issue is whether the prosecution proved both offences beyond reasonable doubt.

Starting with the first issue, the appellant complained that the trial court convicted him without observing the requirement of section 231 (1) of the CPA. The said provision reads as follows.

> *"**231**.-(1) 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 sections 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 and inform him of his right-"*

The provision above requires the trial court after finding that the prosecution has established a *primafacie* case against the accused to remind the accused the charges he is facing before he gives defense.

Going through the proceedings of the trial court at page 28-29 it appears that after the prosecution closed its case the trial court was satisfied that the accused had a case to answer. It would further appear that after pronouncing its ruling, the trial court informed the accused of his rights to defend against the charges be on oath or affirmation and he was also informed his rights to call his witness(es) if any. The proceedings are silent

as to whether the accused was reminded the charges he was facing at the trial court. Indeed, page 29 of the typed proceedings reads;

> *"Court: Ruling delivered today in the presence of accused and State Attorney*
>
> *SGD: M. F. Lukindo-RM*
>
> *13/07/2022*
>
> *Court: Accused is informed of his rights to enter defense on oath/affirmation and to call witnesses (5) if any and he replies;*
>
> *Accused: - I have no witnesses to call*
>
> *Order: -Dhg on 15/07/2022"*

Failure to remind the accused the charges he was facing before he could defend is an irregularity which offends section 231(1) of the CPA. However, in my considered view, that irregularity is not fatal as it did not occasion to failure of justice to the appellant. This is due to the fact that prior to the hearing the charges were read to the appellant during plea taking and the facts were extensively explained to him whereby he managed to identify the facts that he was not disputing. Furthermore, the records show that after several adjournment from when the accused plea was taken, the trial court reminded the appellant of the charges that he was facing before the prosecution could start proving its case. The appellant once again pleaded not guilty to both counts. This can be evidenced from page 10 of the typed proceedings of the trial court. If that was not enough, during hearing the appellant exercised fully his right of cross-examining all the prosecution witness with regard to the charges he was facing at the trial court. By identifying the facts that he was not disputing and cross-examining the prosecution witnesses with respect to

the charges he was facing, it show that the appellant understood the nature of his charges right from the beginning of the case. That being the case, it cannot be said that by failure to remind the appellant with the charges before he could start defending occasioned into miscarriage of justice. Further to that the pointed irregularity is cured under section 388 of the CPA. The said provision reads;

> *"Subject to the provisions of section 387, nomfinding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act;* ***save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice,*** *the court may order a retrial or make such other order as it may consider just and equitable."* Emphasis Mine

The provision above speaks loudly as to when the court on appeal or revision should revise and order retrial or make any other order due to errors, omissions or irregularities committed by the lower court. The cutting point is, unless the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice that is when the court can rule otherwise. In the instant case as alluded above there is nothing to suggest that failure to remind the appellant with the charges he was facing before he could start defending occasioned a failure of justice to him. In other words, the irregularity does not vitiate the proceedings of the trial court.

Coming to the second issue, the appellant faulted the decision of the trial court on ground that it was premised on weak evidence of the prosecution as the doctor and other people from the village authority were not called to testify, the appellant was not properly identified by the victim (PW1) and that the age of the victim was not established by birth certificate or clinic card.

It should be noted at the out set that in criminal cases it the duty of the prosecution (usually the state) to prove its case beyond reasonable doubt. The court is not required, in convicting the accused, to consider whether the accused's evidence was weak or not but rather on the strongest prosecution evidence. The accused evidence only helps to cast doubts on the prosecution case. Reference is made on section 3(2)(a) of the Evidence Act, [Cap 6 [R: E 2019] which reads;

> *"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"*

This position was clearly clarified and underscored by the court in ***Milburn v Regina [1954] TLR 27*** where the court noted that: -

> *"it is an elementary rule that it is for the prosecution to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".*

Despite the fact that the law places the duty to the prosecution to prove criminal charges beyond reasonable doubt, there is no law that mandates the prosecution regarding the number or which witnesses to call and which type of evidence to produce. The question on how to prove a criminal charge it remains a prosecution discretion in as far as it complies with the laws governing the admissibility of evidence, relevancy,

competence and compellability of witnesses. Reference is made on the decision of the court in **Justine Hamis Juma Chamashine vs R**, Criminal Appeal No. 669 of 2021 where the Court of Appeal of Tanzania stated that: -

> *"Much as the learned advocate for the appellant regarded DNA and fingerprint evidence to be so vital,* ***we think the prosecution had the discretion regarding which witness to call and which type of evidence to produce as long as they comply with the laws governing the admissibility of evidence, relevancy, competence and compellability of witnesses.*** *In other words, subject to any written law applicable,* ***choosing which witnesses to present to court was a matter of prosecution's trial strategy."*** Emphasis Supplied

The Court of Appeal went ahead stating that: -

> *"The burden of proof beyond reasonable doubt* ***does not depend on the availability of any particular form of evidence....."*** Emphasis Supplied.

In light of the above discussion, it is the finding of this Court that failure by the prosecution to call a doctor and any other person from the village authority was not an irregularity and did not vitiate the prosecution case. After all the evidence of the doctor is expert evidence which does not bind the court and in light with the principle in the celebrated case of **Seleman Makumba vs R**, [2006] TLR 379 that in rape cases the best evidence is that of the victim, the trial court can convict the accused basing on the evidence of the victim only. It should also be noted that the prosecution is not bound by the to call witnesses.

Concerning the identification of the appellant at the scene the evidence of the victim (PW1) shows that she knew the appellant longtime before the eventful day as they were living in the same village of Tampori. She further testified that on the eventful day at 9am when her mother had left her at the river to finish washing clothes, the appellant appeared asking her for water to drink. PW1 testified that after serving the appellant with drinking water, the appellant left. PW1 added that at 13hrs when she was on the way going back home with her washed clothes the appellant suddenly grabbed and slapped her down threatening to kill her with a knife should she deny to go to the bushes. The witness further testified that after a struggle at last she surrendered and the appellant raped her back and forth in her silence as he grabbed and threatened to cut her into pieces should she scream. PW1 testified that it was one person by the name of Kamanda who interfered the appellant in response to her scream. With this kind of evidence can we say that the appellant was not properly identified? Or was there a need for the prosecution to lead PW1 on the description of the appellant or the kind of clothes that the appellant put on the eventful day? In my considered view the answer **NO**. This due to the fact that PW1 properly identified the appellant and her evidence was clear without doubt that who committed the offences was the appellant.

With regard to the age of the victim, the age was proved by the mother of the victim, PW2 (Ester Marko) who stated that the victim was 12 years old. There is no doubt that at the trial court there was no birth certificate or clinic card for the victim that was tendered in support of oral evidence. The question is, was it necessary to tender birth certificate to prove the age of the victim (child)? I am very alive with the fact that age of the child is of great essence in establishing the offence of statutory rape under

section 130(1)(2)(e) of the Penal Code. It is more so because it is a requirement that the victim must be under the age of eighteen. There is no law that mandates the prosecution to tender birth certificates or clinic cards of the victim in proving their age. In proving the age of the victim, the evidence can be adduced by the victim, parent, guardian, medical practitioner or by production of birth certificates or clinic cards. However, the list is not exhaustive and there may be cases, in my view, where the court may infer the existence of any fact including the age of the victim on the authority of section 122 of the Evidence Act. See **Issaya Renatus vs R*supra.***

In the instant case, since the mother of the victim, PW2 testified with respect to the age of the victim, in my considered view, that was enough and sufficient evidence.

Going through the evidence from both sides this Court finds that the trial court rightly convicted the appellant with both counts since the prosecution evidence was strong and proved the case beyond reasonable doubt. Consequently, in view of this Court's findings in determining the grounds of appeal, I hold that this appeal has no merit and I dismiss it in its entirety.

It is so ordered.

THE HIGH COURT OF TANZANIA

A. J. MAMBI

JUDGE

07/12/2023