IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 18 OF 2023

(Originating from Mpanda District Court in Criminal Case No. 110 of 2022)

SEIF SALUM.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

26/10/2023 & 04/12/2023

MWENEMPAZI, J.

Before the District Court of Mpanda, the appellant was arraigned for an offence of rape c/ss 130 (1) (2) (e) and 131 (3) of the Penal Code Cap. 16 [R.E. 2022] it being alleged that, on the diverse dates between 01st of September 2022 to 17th of September 2022, at Msasani area within Mpanda District in Katavi Region, the appellant, did rape one O.M (named concealed) aged 11 years to be referred in this judgment as the victim. When the charge was read over to the accused/appellant, he protested his innocence.

However, at the end of the trial the appellant was found guilty, convicted and imprisoned for 30 years. The appellant was also sentenced to pay a compensation to the victim in the tune of one million shillings (Tshs. 1,000,000/=).

The appellant was not satisfied with both, conviction and sentence. He therefore appealed to this court with the following grounds of appeal:

1. That, the trial court erred in fact and law to convict the appellant on the case which was not proved beyond reasonable doubts as required by the law.

2. That, the trial erred in law by convicting the appellant basing on the evidence of PW2 which was procured contrary to law.

3. That, the trial court erred in law and fact by convicting the appellant relying in uncorroborated evidence of PW2, who is the child of tender age.

4. That, the trial court erred in fact and law by taking judicial notice the issue of the age of PW2 (the victim) something which required evidence and it was not proved.

5. That, the trial court erred in fact and law by failing to determine the credibility of PW2, her demeanour before the court implies that she was telling lies.

6. That, the trial court erred at law and fact by disregarding the Evidence of the Appellant that there was a dispute between the appellant and PW1 (victim's mother) which instigated the scripting of this case.

7. That, the trial court erred in law and fact by convicting the appellant without considering his defence generally.

On the hearing day, when the appellant was invited to argue his appeal, he merely adopted all the grounds of appeal in his Petition of Appeal and prayed for this court to release him.

Mr. Mathias Joseph, learned State Attorney opposed the appeal. In his view, the offence of rape was sufficiently proved against the appellant.

It was the learned Senior State Attorney's submission that the victim testified on how the appellant raped her in his room twice. That, the appellant was a person known to the victim even before the incident hence there was no mistake in the appellant's identification as they were neighbours. He added that, the prosecution side was required to prove

age and penetration. That, PW1 proved age of the victim as seen at page 9 of the typed proceedings of the trial court. The learned counsel then referred this court to the case of **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015, CAT (Unreported) at page 8-9 where it was held that a parent or guardian of the victim may prove age of the victim, and in the proceedings at page 7 the victim's age was considered and in doing so the trial court complied with Section 127(2) of Evidence Act.

Mr. Joseph proceeded further that it is the position of the law that the best evidence in these cases is the evidence of the victim. He cited the case of **Donald Mwanawima vs DPP**, Criminal Appeal No. 352 of 2019, CAT Sumbawanga at page 11-12 where the Court referred to the case of **Seleman Makumba vs Republic** [2006] TLR 379 and went even further to cite **S. 127** of the Evidence Act, Cap 6 R.E. 2019.

Mr. Joseph argued further that, at the trial, the victim testified that she had sexual intercourse with the appellant more than once. That despite cross examination, the victim was firm on her position that she was raped. That, PW3 the Doctor at Page 12 of typed proceedings testified and corroborated the evidence that there was penetration. He added that, with the consideration of such evidence, the witness was credible and the court trusted on the offence was proved beyond reasonable doubt.

When the appellant rose to rejoin, he told the court that, PW5 testified that the victim had no bruises and her body had no injuries, and that he did not rape the victim.

Reading the trial court's judgment, it appears that, to a large extent the appellant's conviction was based on the testimony of the victim (PW2), PW1 and PW3. The important question that arises is whether the testimonies of PW1, PW2 and PW3 sufficiently proved the appellant's guilt before the trial court.

The appellant's complaint in the first ground of appeal is to the effect that his case was not proved to the required standard. It is in my belief all the other remaining six (6) grounds are swallowed by this first ground, and I do find that this ground would resolve this appeal amicably and in that, I will proceed to determine it for this entire appeal at hand.

In the records, the victim had testified that it was the appellant who raped her in his room twice. That, the first time it hurt her but the second time she was used to it, and that she was threatened by the appellant never to utter a word about the incidence to anyone. The victim also testified that she knew the appellant even before the incident, as they are neighbours and that after her father had left them, the appellant was the one who was giving her mother money and they sometimes were eating

at the appellant's grandmother's house. The appellant does not dispute the fact that he was indeed a person known to the victim before the alleged incident.

It is true that, the ability of a witness to name a suspect at the earliest opportunity is an assurance of his reliability. See: **Marwa Wangiti Mwiata & Another vs Republic (2002) T.L.R, 39**. In the present case, the victim named the appellant she was threatened at the ten-cell leader's office, where she named the appellant as the person who usually sends her to steal money from her mother. Straight away, I do not agree that the appellant was freely named at the earliest opportunity as the case above suggests, as the victim was threatened as clearly submitted by PW1.

PW1 testified that on the 17th of September 2022 as she took her hand bag and she was off to her work, she realised that her Tshs. 5000/= was missing as she had Tshs. 35,100/= before. While she is at her work place, the victim came and behold, she had the missing Tshs. 5,000/= with her. Thereafter, as they went home, PW1 punished the victim on that habit of stealing money and banished from the house, and the victim ran to the house of the appellant.

That, after a while PW1's former house maid came to her and she told her what the victim did. The maid went after the victim, she found her at the appellant's house and took her to the ten-cell leader's office, where she was asked who had sent her and after being threatened, she then mentioned the appellant. The victim then added that the appellant sometime takes her to his room and he gets undress and undresses her and he starts inserting his penis in her vagina and that she felt pain at first but at the second time she got used to it. PW1 then testified that, they looked at the victim's private part and it was emanating bad smell and that is when they to reported to the police station where they were given a PF3 and then they went to the hospital for medical examination.

PW3 who medically examined the victim on the same date that is the 17th of the September, 2022. PW3 testified that, despite the fact that the victim alleged to be raped three days ago, PW3 did not see fluid, sperms, bruises or blood into the victim's vagina. According to PW3, the vagina had no hymen but it was hard for her to conclude that the victim has been raped as she testified that the event has allegedly taken place three days ago.

Again, at this point it is deeply difficult for me to agree that the charge of rape was proved against the appellant. Here is why. The charge sheet has clearly pointed that, on diverse dates of 1st September, 2022 and 17th

September, 2022 the appellant is alleged to have sexual intercourse with the victim.

Meanwhile, PW1 realised her daughter has been raped on the 17th of September, 2022 and, PW2 (the victim) in her testimony testified to have been raped twice by the appellant, but being a standard four pupil, she never mentions the dates of the incidences to any one, not alone in her testimony she never testified anywhere that, before taken for medical examination on the 17th, she was either raped on the same date or three days ago as suggested by PW3. To that extent PW3's testimony did not support the prosecution's case. In view of the medical officer, it is as if the victim was not penetrated. See Exhibit P1 (PF.3).

This puts reliability of PW1 and PW2 into question. And, as a matter of fact, when the two testimonies are weighed along the medical evidence which the prosecution opted to put on record, one may be tempted to hold as I do that the two witnesses were not truthful regarding, **one**, that there was bad smell emanating from the victim's vagina in which PW3 never testified on it, **two**, that the victim was raped specifically by the appellant.

In the case of **Mohamed Said vs Republic, Criminal Appeal No. 145 of 2017** CAT - Iringa, the Court was of the view that, the words of the victim

of sexual offence should not be taken as gospel truth, but her or his testimony should pass the test of truthfulness. In this case at hand, the testimony of the victim has failed the test of truthfulness, and to make it even worse, none of the testimonies from the remaining witnesses corroborated her testimony as PW1 was a hearsay testimony.

For the foregoing reasons, I uphold the first ground of appeal in place of all the remaining six grounds of appeal, for it sufficed to resolve this appeal amicably as hinted above.

Having upheld the particular ground of appeal, I proceed to quash the appellant's conviction. Sentences earlier imposed upon the appellant are both set aside that is, the custodial sentence and payment of compensation. I then order the appellant's immediate release from custody unless he is otherwise lawfully held.

It is so ordered.

Dated and signed at **Sumbawanga** this 04th day of December, 2023.

T. M. MWENEMPAZI

JUDGE

Judgment delivered in Court in the presence of both parties.

T. M. MWENEMPAZI

JUDGE

04/12/2023