IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

CRIMINAL APPEAL NO. 51 OF 2023

(Original Criminal Case No. 21/2021 of the District Court of Mufindi at Mafinga before Hon. Nkomola, SRM)

THEOBAT LAMECK MLYUKA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

22nd Nov. & 29th Dec. 2023

I.C. MUGETA, J:

The appellant, who is represented by Jonas Kajiba, learned advocate, was convicted of two counts of rape. Allegedly, he had carnal knowledge of his granddaughter (the victim) aged 11 years. The respondent is represented by Yahya Misango, learned advocate.

The major complaint is that the charge was not proved beyond reasonable doubts. However, going by the evidence of the victim (PW1), her grandmother (PW2) and that of the medical doctor (PW4) I am satisfied that the victim is, indeed, aged 11 years and that she was carnally known. The medical doctor found her without hymen. I have, however, to gripple with the issue whether the appellant had had carnal knowledge of her.

The charge sheet has it that the carnal knowledge occurred on 21/2/2022 and 29/2/2022 at Ihegela village which constitutes the two counts of rape charged. The victim said on 21/2/2022 it occurred in the house at evening hours and on 29/2/2022 it happened in the field where she had gone with the appellant to harvest ulanzi.

The trial court believed the victim. Relying on the principle that the best evidence in rape cases comes from the victim, the trial magistrate convicted the appellant who at the incident time was aged 62 years and sentenced him to 30 years imprisonment in each count. The sentence runs concurrently.

Counsel for the appellant has attacked this finding for a reason, among others, that the victim is unreliable. Yahya Misango, learned State Attorney supports the finding on account that the victim was coherent in her evidence and penetration and age of the victim was proved. I have already held that, indeed, age and penetration were proved.

Counsel for the appellant has submitted that the offence was not proved for several reasons. **Firstly**, on the incident dates she referred to 21/2/2022, 29/3/2022 and 29/3/2020. It is my view that 29/3/2020 is a

recording error because in the handwritten proceedings it is inserted as something which had been omitted. Therefore, I go with 21/2/2022 and 29/3/2022 as stated in the charge sheet. **Secondly**, inconsistency of evidence. That while the victim said that she reported the rape to her grandmother (PW2) the said PW2 testified that the victim told her nothing about the rape. Indeed, PW2 did not say that the victim reported the rape. However, she testified that when she inquired about the victim's production of foul smell, she responded that it is because *"nilifanya kitendo kibaya na babu"*. Therefore, indeed, their evidence is inconsistent. The other inconsistency is that the victim said that upon informing the grandmother, she also reported to the teacher. On their part the teacher (PW3) said she received a phone from a villager that there are rumors that the victim had been raped while the grandmother (PW2) said she did not report the incident to anybody. It is my view that these inconsistencies goes to the credibility of the victim to the extent of affecting her reliability.

Thirdly, that the victim delayed to name the culprit. I find this complaint unfounded because both PW2 and PW3 said the victim named the appellant upon their inquiry of the rapist.

Following medical examination, the victim was found without hymen. The examination was conducted on 31/3/2022 by Anjelina James Yohana who testified as PW4. The medical doctor did not encounter the foul smell which the grandmother and the teacher (PW3) smelt. According to the teacher, she smelt it on 30/3/2022 which is one day before the examination. The grandmother did not mention the date of her discovery. The medical doctor found vaginal discharges and did not refer to foul smell. Since the smell was the major indicator leading to the discovery and since at the time of examination the victim had not been treated, then the same smell ought to have been noticed by the doctor.

In his defence the appellant made a general denial. His defence is very brief but there is a statement worth attention. He testified:

> *"The victim is notorious in criminal matters connected to rape events".*

This evidence is uncontroverted and it suggests that the victim was experienced in sexual intercourse despite her tender age. Sadly, the said defence is just in the above one sentence without elaboration. The learned trial magistrate, despite the fact that the appellant was unrepresented old man, did not bother to ask for details from the witness. Further, the

appellant summoned Grace Mbigi to testify on his side. Her evidence is in one sentence too. It simply reads:

> *"Your Honour the allegation against the accused is not correct".*

Again, no follow up questions were put to her by the trial magistrate to clarify why she thinks the allegation is false. While I understand it is not upon the court to prosecute a party's case, I am fully aware that the court must record evidence in a manner which makes sense. Some witnesses have court phobia. Such witnesses ought to be assisted to get the best evidence from them. In the circumstances of this case the trial court was supposed to ask questions for clarification in order to bring out from the witnesses meaningful evidence on the victim being *"notorious in rape matters"* and falsity of the allegation against the appellant.

Be as it may, there is no connection in the prosecution evidence as to how the appellant was brought to justice. The victim's story ends with telling PW2 that the appellant had had sex with her. PW2 denies to have reported the matter to the police. On her part, the teacher (PW3) testified that she received information from an informer about rape and therefrom she reported to the village leadership and the police. A chain of how the

events unfolded was important in order to bolster the credibility of the victim. The evidence of what the appellant said at the village office and the police is missing. While under section 143 of the Evidence Act [Cap. 6 R.E 2022] no particular number of witnesses is required to prove a fact, in this case the story of the appellant was important in determining whether there were reasonable grounds to prosecute. This deficiency, coupled with the outlined inconsistencies in the evidence of the victim, PW2 and PW3 on how the rape was discovered creates reasonable doubts in the prosecution's case.

It is my view that if the evidence of the appellant is something to go by, that the victim was notorious in sexual affairs, the possibility of her lying against the grandfather cannot be eliminated. If neither the victim nor her grandmother (PW2, the wife of the appellant) reported the incident who on earth spread the rumours which caught fire up to the teacher (PW3)? Conflicts at family level could be probable which means the evidence of the victim and PW2 ought to be attended which circumspection. Consequently, I find victim's evidence that it is the appellant who had carnal knowledge of her wanting. As the victim's

evidence is the only evidence about the sexual affairs, I hold that the appellant was wrongly convicted.

The appeal is allowed. The conviction is quashed and the sentence is set aside. The appellant has to be released from prison unless otherwise lawfully held for another offence.

I.C. MUGETA

JUDGE

29/12/2023

Court: Judgment delivered in chambers in the presence of Mr. Kajiba, learned advocate for the appellant and in the absence of respondent.

Sgd. M.A. MALEWO

DEPUTY REGISTRAR

29/12/2023