IN THE HIGH COURT OF TANZANIA

AT SONGEA

CRIMINAL APPEAL NO. 44 OF 2023

(Originating from Criminal Case No. 40/2021, Songea District Court)

LAURENT LAURENT NGONYANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

3rd to 27 November, 2023

E. B. LUVANDA, J.

The appellant above named was convicted for the offence of rape contrary to section 130 (1), (2) (e) and 131 (3) of the Penal Code, Cap 6 R.E.2019 and sentenced to life imprisonment.

In the petition of appeal, the Appellant grounded that; One, the identification of the Appellant by the victim (PW1) by moonlight and electricity light was weak and unreliable due to the fact that incident occurred during night, heavy darkness, PW1 did not explain the intensity of moonlight and electricity light; Two, the evidence of PW1 was contradictory, first she mentioned Kijo and Jasco, later mentioned Aladi, then mentioned the Appellant; Three, the evidence of PW4 (medical doctor) was unreliable as did not mention the instrument or object which caused the vagina to swollen, and to see bruises; Four, the evidence of prosecution was doubtful and failed to prove a charge.

The Appellant submitted that it is crystal clear that there was poor identification of the Appellant by PW1 on the material date and time when it occurred was during night time and PW1 was in stress, fear, worry and excited state that it was very difficult to concentrate on identifying the Appellant. He submitted that PW1 did not disclose how long the event occurred, clothes worn by the Appellant, how did she see the Appellant's penis, and whether the Appellant undressed his clothes before the incident. He cited the case of **Amani Waziri vs Republic,** (1980) TLR 250.

On the second ground, the Appellant submitted that PW1 at first mentioned Kijo and Jasco without stating their ages, then mentioned Aladi as the one who committed the offence, argued that the explanation by PW1 that she was forced to mention those people, was not corroborated. The Appellant argued the court to consider on merit his third and fourth ground of appeal, and no argument was further made.

In reply, the learned State Attorney submitted that the victim (PW1) managed to identify the Appellant due to moonlight and electricity light as transpired at page 14 of the proceedings, that the victim lived with the Appellant since 2021, to the date of incident, argued PW1 knew the Appellant before the incident as a person they stayed together, therefore the victim could not mistake the identification of the Appellant, argued the

Appellant admitted to be well known by the victim, referred to page 29 of the proceedings. He cited the case of **Mohamed Juma @ Kodi vs. Republic**, Criminal Appeal no. 273 of 2018, page 9. He distinguished **Amani Waziri** (supra) for reasons that therein, the Appellant was not known to the victim. He submitted that the fact that at the time of incident PW1 was stressed, fear and worry so could not concentrate on identifying the Appellant, argued has no merit, because is not supported by evidence on record.

For the second ground, the learned State Attorney submitted that the Appellant closed the victim's mouth and after finishing to rape the victim (PW1) the Appellant ordered the victim not to mention him as the one who committed the said offence, rather should mention others like Kijo and Jasco, and further ordered PW1 to mention one Aladi, as per page 12 to 13 of the proceedings. He submitted that PW1 was a minor, and the Appellant was her step father, arguing PW1 had nothing to do rather than complying with the directives of the Appellant taking into account the Appellant intimidated to kill PW1 if she could mention him.

Ground number three, the learned State Attorney submitted that the duty of PW4 was not to prove the kind of object used, rather to prove penetration, citing the case of **Robert Andondile Kombo vs DPP**, Criminal Appeal No. 465 of 2017, page 12.

With regard to the fourth ground, the learned State Attorney submitted that all elements of the offence to wit penetration, age of the victim and a male person raped a girl, were proved, citing PW4 to had proved penetration; the age of PW1 was proved by PW3, citing the case of **Leonard Sakata Vs. DPP**, Criminal Appeal No. 235/2019; the element that a male person raped a girl was proved by PW1 who asserted that the Appellant raped her.

On my part the first ground of appeal is wanting in substance. PW1 explained that she identified the Appellant because was assisted by moonlight and electricity light. It was the evidence of PW1 that the Appellant is her step father who have been living under the same proof for a considerable period of time. It was further explained by PW1 that the Appellant waylaid and grabbed her while taking bath, pushed her, fell down, topped her, inserted his penis into PW1 vagina, meanwhile closed PW1 mouth. After finishing, the Appellant had conversation with PW1, where he coached PW1 to say it is Kijo and Jasco who committed it, then the Appellant dressed his clothes and existed outside. The cumulative of these events, the proximity of a zero distance between PW1 and the Appellant, the latter being in top of PW1 meaning was well visible by the victim, the conversation and directives by the Appellant, to say the identification was weak on a mere fact that PW1 did not explain the

intensity of moon light or electricity light, will be uncalled for. A mere fact that the Appellant seized an opportunity to coach PW1 not to mention him, portray the duo were known to each other, being a step daughter (PW1) and step father (Appellant). On similar vein, shouldering PW1 an obligation to explain attire worn by the Appellant, or how did she see the Appellant's penis, to my view is unnecessary overstretching facts.

Above all it was the testimony of PW1 that after finishing, the Appellant dressed himself. This version is enough to demonstrate that at the time of committing rape, the Appellant was undresses.

The Appellant did not say the alleged stress, fear, worry and excited as to where were coming from. As allowed by the learned State Attorney, these facts are not supported by the evidence in record. What is in record is that at the time of committing rape, the Appellant plugged the mouth of the victim, there is no element of terror or intimidation which were deployed. The only threat made by the Appellant was made at the time of coaching PW1 not to mention his name, it is when he told PW1 he will kill her in case of disclosure of his name. That alone, to my view, cannot be said to have impacted identification of the Appellant by PW1. Therefore, ground number one is dismissed.

Ground number two, this too is unmerited. To my view the naming of Kijo and Jasco was consequential to the coaching by the Appellant. It was not

such a fact which crop up or taken at initiative of the victim or at her own accord. The evidence in record is very clear, PW1 stated that after finishing, the Appellant told her not to mention his name rather should mention Kijo and Jasco. It is when PW1 mentioned Kijo and Jasco to her mother (PW3). After PW1 was attended by PW4 at Peramiho Hospital, who established that the nature of swab on PW1 was not cause by a male child rather an adult male, and after disclosing that the same act was committed by a person within the community where the victim live, which words was uttered by PW4 in the presence Appellant who had escorted PW1 to hospital along a lady whose son were among those mentioned by PW1 as disguise (Kijo and Jasco), on the way home, it is when the Appellant re-coached and forced PW1 to mention a third person by the name of Aladi, who according to PW2 who is the victim's uncle, Aladi is aged 60 years.

Now, considering the Appellant is a step father of PW1, the biological father of PW1 passed away sometimes in 2013, PW1 by that time was living in the house of the Appellant, her (PW1) mother (PW3) was pregnant for nine months. Even at the hospital it is the Appellant who used to escort PW1. To my view, being PW1 aged eight years, a standard four pupil, had no choice other than to abide to the directives of and

coaching by the Appellant for mentioning Kijo, Jasco and Alaldi as the one who committed rape. To my view, this cannot be termed as amounted to contradictory evidence, neither can be said it rendered the testimony of PW1 incredible. Therefore, ground number two is dismissed.

Ground number three, the Appellant complained that PW4 did not mention a kind of equipment used to detect that the victim's vagina swollen and see bruises on the vagina of the victim. This complaint is unfounded. It is in record that PW4 explained that the victim under gone a first screening by the nurses, thereafter at 16:00 hours it is when she took the victim to the theater, inserted a catheter. I wonder as which equipment the Appellant wanted PW4 to explain, neither said if catheter was misapplied. Therefore, ground number three is dismissed.

Ground number four, I go along the argument of the learned State Attorney, that all three elements for the offence of rape leveled to the Appellant were proved. The first ingredient of penetration was proved by PW1 who said the Appellant inserted his penis into PW1's vagina, also PW4 supported it along with a PF3 exhibit A1, where PW4 remarked that there is evidence of vaginal penetration. The age of the victim was proved by PW3 who is the biological mother of PW1. According to PW3 the victim was born on 15/9/2012, meaning at the time of the ordeal on 18/4/2021,

PW1 was eight years old. A fact of rape was proved by PW1 that it is the Appellant who raped her.

Therefore, ground number four is dismissed.

Having premised as above, I find no merit whatsoever in the appeal. Henceforth a conviction and a sentence of life imprisonment is upheld.

The appeal is dismissed.

E.B. LUVANDA
JUDGE
27/11/2023

Judgment delivered through virtual court attended by the appellant and Mr. Alfred Maige learned State Attorney for Respondent.

E.B. LUVANDA
JUDGE
27/11/2023