IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 32 OF 2022

MASUNGA JAMES.....APPLELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of the District Court of Kahama at Kahama.]

(Hon. C.L. Chovenye, RM)

dated the 11th day of March, 2022
in
Criminal Case No. 308 of 2021

JUDGMENT

16th April & 28th December, 2023.

S.M. KULITA, J.

This is an appeal from Kahama District Court. The appellant herein above was charged for two counts, namely; Unnatural offence, contrary to section 154(1)(a)(2) of the Penal Code [Cap 16 RE 2019] and Rape, contrary to the provisions of sections 13(1)(2)(e) and section 131(3) of the Penal Code [Cap 16 RE 2019].

It was alleged that, on 19th June, 2021 during the evening hours at Wigehe area within Kahama District the Appellant herein did have both carnal knowledge and sexual intercourse with YM (not her real name) a girl aged 10 years old.

In a nut shell, the prosecution case as was unfolded by four witnesses and two exhibits is that, on the material date, mother of the victim left for weeding meeting leaving the victim at home. When she came back home, she did not find the victim. In her struggles to find her, she succeeded to meet with a good Samaritan who told her that the victim was seen with the appellant. The victim's parents started looking for the appellant. They came to meet the appellant and the victim together on their way. The appellant was arrested thereof and taken to Police. After the interrogation, the Medical Examination Report (PF3) was issued and the victim was medically examined. The results showed that the victim was sodomized and raped. While under the police custody, the appellant was further interrogated and confessed to have committed the said two offences. In connection to the said allegations, the appellant was arraigned to court. In his defense, the appellant denied to have committed the alleged offences, though he claimed to have met and walk together with the victim to their homes. He said that he had decided to take the

victim to the Street Chairman as she was not knowing their home's location. He further alleged that, no sooner than he accomplished his goal, people caught him and put him under arrest.

Though he denied to have committed the offence, at last, the appellant was convicted and sentenced to serve a term of life imprisonment. That decision aggrieved the appellant, hence this appeal with four grounds which can be summarized as follows; **one,** the trial court erred to convict the appellant while he denied the charge, **two,** the trial court erred to pass an excessive punishment of life imprisonment, **three**, the case was not proved at the required standard as no one testified to have seen the appellant committing an offence, **four,** the trial court erred in law for not considering the appellant's defense.

On 8th February, 2023, the Appeal was scheduled for hearing. On that day, the Appellant appeared himself, unrepresented, whereas the Respondent, Republic, had the service of Ms. Gloria Ndondi, learned State Attorney who resisted the appeal.

Submitting in support of the appeal, the appellant only prayed for his grounds of appeal to be adopted and the same be regarded as the submission for his appeal.

In reply thereto, Ms. Ndondi started with the allegations that the case was not proved at the required standard. On this the Counsel said that, in all counts, the law required prosecution to prove penetration, age of the victim and identification of the culprit. She added that, in rape cases the best evidence comes from the victim, who in this case testified as PW2. and the evidence that the appellant confessed to have committed the offences. With the evidence that the appellant confessed to have committed the offences, in connection with the testimony of the Doctor who examined the victim and proved that she was penetrated in her private parts, that is vagina and anus, it was her considered opinion that, the trial court was correct to convict and sentence the appellant.

As for the 1st ground of appeal, the State Attorney replied that the Accused's plea of Not Guilty does not conclude that he is innocent and hence should not be convicted. She said that it is the evidence which determines guilty or innocence of the Accused.

Concerning the 4th ground, Ms. Ndondi was of the views that, the same lacks merit. He gave reasons that, on page 8 and 9 of the trial court's judgment, the defense evidence was taken into consideration, only that it lacked short.

Concerning excessive sentence, Ms. Ndondi stated that, age of the victim is what determined the sentence that the appellant has been given. She said that, the trial court was correct to pass the sentence it has given to the appellant as per section 154(2) of the Penal Code.

That was the end of both parties' submissions, hence the analysis follows hereinafter. In doing so I have taken into consideration both parties' submissions, cited authorities and the available records.

Concerning the allegations that the appellant was convicted though he pleaded not guilty, this will not retain us, **section 228(3) of the Criminal Procedure Act** provides;

> *"Where the accused person does not admit the truth of the charge, the court shall proceed to hear the case....."*

As the Accused Person (appellant herein) did not admit the charge, the law set it that, the court is required to conduct trial in determining the truth of the charge. According to the record, that is what exactly the trial court did. To its finality, the trial court made a decision as to the complaint laid in the charge. On that note, though the appellant denied the truth of the charge, he was found guilty. When the Accused Person pleads not

guilty, it does not mean the court should not convict him. It is the evidence which determines the verdict.

Concerning the argument that the case was not proved at the required standard, I hasten to admit submissions by the Defense Counsel herein that, for Unnatural Offence and Rape cases, the prosecution was required to prove three ingredients which are, penetration, age of the victim as well as identification of the culprit.

When I went through the records of the trial court and noticed the testimony of PW1 who is mother of the victim testified that, the age of the victim was 10 years old as she was born on 3rd September, 2011. In the case of **Issaya Renatus V. Republic (Criminal Appeal 542 of 2015) [2016] TZCA 218 (26 April 2016) tanzlii** it was held that testimony of the parent of the victim was taken to enough proof on the age of the victim. I quote;

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130(l)(2)(e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent,*

medical practitioner or; where available, by the production of a birth certificate. We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact including the age of the victim on the authority of section 122 of TEA which goes thus....."

Concerning the issues of penetration and identification of the culprit, prosecutions tendered the PF3 and the same was admitted as exhibit P1. This said exhibit shows that, the victim's virgin and anus have been penetrated by a blunt object. Moreover, the Doctor who filed the PF3 testified to that effect as PW3. This evidence corroborated the testimony of the victim who testified as PW2, stating that she was at their home when the appellant went, took her to his pad farm, undressed her and inserted his penis into her vagina and anus.

This prosecution evidence has been concretized with the exhibit P2 which is the appellant's caution statement. In it, the appellant confessed voluntarily to have committed the charged offences. The voluntariness is also seen during the tendering of the caution statement in court whereby

the appellant never objected to the same. He is therefore barred from denying the same.

From the said prosecution evidence, the appellant defended that, he just happened to meet with the victim, and in the course of taking her to the Street Chairman, it is when he was met with people who arrested him. Could this evidence exonerate the appellant from the charge levelled before him?

As her mother (PW1) left the victim at home, we expected that she could have found her (the victim) there at home. Meeting the victim on the way shows that, she was taken away from home by someone. If the victim had not been taken away by someone, obvious she could have stated so. Had the victim been sexually assaulted by someone else the victim (PW3) would not have to mentioned the Accused person. Mentioning the one who had assaulted her was just a sense of paying to the one who gave her pain as it can be seen in her testimony, that she felt pain. Further, if the appellant is not the one who sexually assaulted the victim, he could have not volunteered to confess before the Police Officer in his caution statement? All these show that, the appellant herein committed the charged offences as correctly found by the trial court. On that note, the prosecution case was proved at the required standard.

On the issue as to whether the trial court did not consider the appellant's evidence, it is not true. As correctly submitted by the State Attorney that pages no. 8 through 9 of the trial court's decision shows the trial Magistrate to have considered the appellant's defence. The appellant even wondered as to why the appellant went with the victim up to Bukondamoyo looking for a Chairman's house while the victim had shown him the house he lives? This being part of the analysis for the defence case, it means the appellant's evidence that he had adduced during trial at the subordinate court was considered. With this reasoning too, I find this ground with no merit.

On the issue of punishment being excessive, I can briefly analyse it as follows; as the Rape cases and Unnatural Offence have been proved to have been committed against the minor of 10 (ten) years of age, **section 154(2) of the Penal Code** provides for a life imprisonment punishment. Thus, not excessive.

> *"**154**.-(1) Any person who-*
>
> *(a) has carnal knowledge of any person against the order of nature; or*
>
> *(b) .....N/A.....*

(c) .....N/A.....

(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."

All said and done, as long as all the appellant's grounds of appeal have failed, I find this appeal unmeritorious, hence **dismissed.** The trial court's conviction and sentence against the appellant are hereby upheld.

S.M. KULITA
JUDGE
28/12/2023

DATED at **SHINYANGA** this 28th day of December, 2023.

THE HIGH COURT OF TANZANIA

S.M. KULITA
JUDGE
28/12/2023