IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 42 OF 2022

(Originating from Criminal Case No. 09 of 2021, Namtumbo District Court)

ALLY SAID SANGU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

08/02/2023 & 17/02/2023

E.B. LUVANDA, J.

The Appellant, Ally Said Sangu was arraigned before Namtumbo District Court (herein after the trial court) for the offence of rape contrary to sections 130(1), (2) (e) and 131 of the Penal Code [Cap 16 Revised Edition 2019] in Criminal Case No. 09 of 2021. After a full trial, the trial court was satisfied that the prosecution proved the offence beyond the shadow of doubt whereby convicted and sentenced the accused (Appellant herein) to serve a term of thirty years for raping the prosecutrix aged 7 years old.

Being aggrieved by both conviction and sentence, the Appellant lodged appeal comprising three grounds as follows; One, the trial court erred in law and fact by admitting cooked evidence adduced by PW1. Two, that

the uncorroborated evidence adduced by PW4 and PW1 left a lot of doubt. Three, that the trial court erred in law by convicting the Appellant 30 years in jail contrary to the law. That, PW2 testified that her clothes were not removed, the question is that, how does sexual intercourse/rape done without removing clothes?

At the date scheduled for the hearing, the Appellant appeared in person while the Respondent (the Republic) was represented by Ms Tulibake Juntwa, learned Senior State Attorney.

The Appellant consolidated his grounds of appeal while submitting. He refuted to have committed the crime. He claimed to have stayed alone but over sudden he was accused for rape. The Appellant submitted that there was no examination/test conducted to prove if he committed the crime. He went further and alleged that, he denied to have committed the crime before the police and the magistrate.

Moreover, the Appellant submitted further that, the evidence was cooked so that he could be convicted. He explained to have a family and submitted that he was not sure if he committed the crime or not. Therefore, the Appellant prayed for the court to either acquit or reduce the sentenced imposed against him.

In reply, the learned Senior State Attorney opposing the appeal and she argued the Appellant's grounds of appeal separately. Starting with the

first ground, the learned Senior State Attorney submitted that, the Appellant claimed that the evidence was cooked but he did not explain as to how he think the evidence was cooked. She submitted that after PW1 had testified, the Appellant did not ask any question though he was given a chance to do so. The learned Senior State Attorney referred this Court at page 8 of the trial court proceedings, reflecting that the Appellant failed to cross examine PW1. The learned Senior State Attorney added that, it is the law that failure to cross examine the witness amount to acceptance of what the witness said. She submitted that even during the hearing of the appeal, the Appellant did not raised any ground showing doubt on the testimony.

The learned Senior State Attorney submitted further that, the answer of the Appellant before the trial court when he was cross examined during defence, tally with the evidence of PW1, where he alleged that PW2 seated on top of the Appellant's private parts, that's why sperms was seen to the child. She submitted that PW1 testified to have seen the victim seated on top of the Appellant at the bench, where the Appellant was moving and he discovered that there was something going on. It is the State Attorney contention that the Appellant ground of appeal is unmerited and an afterthought.

On rejoinder, the Appellant embarked on crying for absolution and mercy repenting committing wrong.

According to the evidence in the record, in particular the evidence of PW2 the victim, explained that she was raped by the Appellant who penetrated his penis through PW2's pants. This evidence was corroborated by the evidence of PW1 who caught the Appellant red-handed raping the victim, where on seeing PW1, he withdraw his member. PW1 explained that she saw the victim seated on the top of the Appellant whose attire were wet and sperms scattered on the victim's dress. Also, it was supported by PW4 the arresting officer, who arrested the Appellant at the scene of crime, and found the accused wet on his private parts and saw the sperms on the bench. PW4 stated that the Appellant confessed to have raped the victim, as per a caution statement exhibit P2. As submitted by the learned Senior State Attorney, the Appellant did not bother to cross examine PW1, 2, 4 neither objected exhibit P2 when it was tendered for admission.

It is a cardinal rule that, failure to cross examine the witness on material facts amount to acceptance of the said facts. This was the decision in the case of **Paschal A. Plonal v. The Republic** [2019] TLR 615, where the Court of Appeal sitting at Tabora had this to say:

In the event the Appellant does not cross examine the crucial witness whose account incriminated him on the charged offence that is tantamount to acceptance of the evidence accurate.

The court went further and stated that:

The victim evidence is the best because she is better placed to explain the manner in which she was raped by the Appellant. See the case of ***Selemani Makumba v. The Republic*** *[2006] TLR 384*

From the record, during the hearing the accused did not cross examine the victim who is the crucial witness in this case. Also he did not object the tendering of the exhibit P2 in which he admitted to have raped the victim. Therefore, the Appellant assertion that the prosecution evidence was cooked, is an afterthought as he accepted it wholly.

Coming to the second ground that, the evidence of PW4 and PW1 was not corroborated. This ground is unmerited, PW1 is eye witness, and she saw the Appellant raping the victim (PW2) while sitting on the bench. PW4 was an arresting officer and somehow eye witness, in a sense that he saw the accused at the scene, his private parts were wet, and saw sperms on the bench. Therefore, the argument that it required corroboration, is misplaced.

Ground number three, the learned Senior State Attorney argued the third ground into two limbs. On the first limb, she submitted that, the

Appellant alleged that the sentence of thirty years imprisonment (30) imposed to him was unlawful. That the Appellant asserted further that, how rape can be committed while the victim was not undressed? The learned Senior State Attorney questioned which type of the dress the Appellant claimed was not undressed for the rape to have seen not done. The learned Senior State Attorney referred this court to the victim's evidence which was adduced before the trial court that, the Appellant did not undress her but he penetrated his penis in her underpants. The learned Senior State Attorney believes there was a penetration, in that in rape cases penetration however slight it is enough to prove rape.

To my view, the evidence of PW2 on issue of penetration was corroborated with the evidence of PW3 medical Doctor who examined the victim and found sperms and bruises at the victim's vagina.

Indeed there was no dispute that the victim was raped. The evidence of PW2 was corroborated with the evidence of PW1 and PW3 a doctor who examined the victim and proved the presence sperms and bruises at the victim vagina as it was portrayed in exhibit P1. The victim explained clearly that the Appellant did not undress her but he just penetrates his penis under her underpants. That was the best evidence to proof as she was the only one who knows for sure who, what and how it happened.

The Appellant question on how the victim was raped without being undressed was answered undoubtedly by the victim herself. The case of **Niyonzimana Augustine v. Republic**, Criminal Appeal No. 483 of 2015, at page 6 (unreported) Court of Appeal of Tanzania sited at Bukoba, insisted that the best evidence in rape cases is the evidence of the victim herself.

On the second limb, the learned Senior State Attorney joined hands with the Appellant that the sentence of 30 years imprisonment imposed to him was unlawful. He referred this court at page 11 of the trial court typed proceedings which revealed that PW2 aged 6 years. She submitted that a proper provision for sentence was section 130(e) read together with section 131 (3) of the Penal Code. That section 131 (3) of the Penal Code (supra), provides for the punishment for anyone who commit rape to the girl under ten years.

The learned Senior State Attorney submitted that the charge sheet shows that the Appellant was charged under the provision of section 130 (1) and (2) (e) and section 131 cap 16. She submitted that the afore mentioned sections penalise a man who commit sexual intercourse with a girl below 18. The learned Senior State Attorney submitted that section 131 (3) provides the punishment for any person who rape a girl below ten years to be sentenced to life imprisonment. The learned

Senior State Attorney nodded with the Appellant that the trial court erred to sentence the Appellant 30 years, instead of life imprisonment. She prayed the Court to vary sentence and impose a proper sentence as provided in the law.

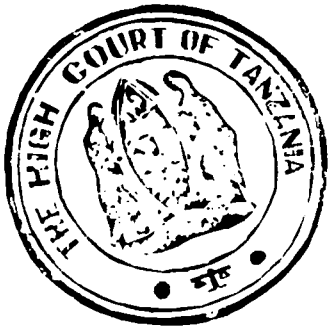
In rejoinder, the Appellant instead of arguing in relation to his ground of appeal he confessed and beseeched the court to have mercy either to acquit or reduce the sentence imposed upon him. Also he claimed to have dependants.

The Penal Code provides for the offences and the punishment thereto. Section 130 (1) and (2) (e) deals with rape. Section 131 (1) it caters for punishment to whoever is convicted with the offence of rape. However, section 131 (3) provides for the punishment for a person who rape the girl under 10 years. For easy reference section 131(3) provides:

> *Subject to the provision of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment.*

Being guided by the quoted provision of the law and as rightly submitted by the learned Senior State Attorney that the sentence of 30 years imprisonment was below the prescribed penal measure. Hence, by virtual of sections 372 and 373 (5) of the Criminal Procedure Act [Cap

20 Revised Edition 2022] I hereby vary the sentence of 30 years meted to the Appellant by the trial court and substitute with life imprisonment. The appeal is dismissed.



E. B. LUVANDA
JUDGE
17/02/2023