IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 40 OF 2022

(Originating from Criminal Case No. 48 of 2021, Mbinga District Court)

SIMON HYERA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

08/02/2023 & 17/02/2023

E. B. LUVANDA, J.

The Appellant, Simon Hyera preferred an appeal to this court against the decision of district court where he was charged, convicted and sentenced to serve 30 years in presentment for the offence of rape contrary to sections 130(1), (2) (e) and 131 (1) of the Penal Code [Cap 16 Revised Edition 2019]. Being aggrieved by the decision of the trial court he presented his petition of appeal which comprise three grounds of appeal, thus;

1. Honourable trial court erred in law and fact by convicting the Appellant without the case being proved beyond all reasonable doubt as required by the law due to the contradictory evidence of PW1 whose her

evidence of identification was not proper as it has doubt due to identification of the Appellant using clothes instead of face and appearance.

2. The learned trial magistrate erred in law and fact basing on the evidence of exhibit which was not admitted as evidence before the court of law because the procedure of tendering exhibit was not adhered according to the law and it was not in connection with the Appellant who was not examined by a doctor.
3. The learned trial magistrate erred in law and fact to uphold the Appellant conviction founded on the evidence of PW1 which was taken on the contravention of *section 127 (2) of the Evidence Act [Cap 6 Revised Edition 2019]* the procedure of taking the evidence of PW1 on oath without giving the promise to tell the truth without telling lies was invalid this was reiterated in the case of **Selemeni Moses Sotel @ White v. Republic** , Court of Appeal of Tanzania at Mtwara, Criminal Appeal No. 385 of 2018 (unreported).

Background of the matter is as follows; on 13th April, 2021 during evening hours the victim while on her way home from school when she reached at Malikwisha's house alone, she met with the Appellant (accused person at the trial court) who is her neighbour, hold her right hand, closed her mouth by using his hand and pulled her to the forest. After insulting her verbally he pushed her down to the grasses and he laid on top of her. He threatened to cut her neck and hurt her head if she will make noise. Then he opened his trouser, removed the victim skirt and underwear. He took his penis and inserted into the victim's vagina. He pulled his penis up and down. He ordered her not to look back. When he left, the victim dressed and went back home. She was in pain. She narrated the entire odeal to her mother who later explained to her father. They took her to the Hospital for examination and the next day they went to the Police Station.

At the date scheduled for the hearing of appeal, the Appellant appeared in person while Ms. Tulibake Juntwa, Senior State Attorney appeared for the Respondent, the Republic.

The Appellant who was fending for himself submitted briefly that, the lower court did not comply with the terms and condition of the law of the United Republic of Tanzania and he prayed this court to accept his grounds of appeal and acquit him.

In response, the learned Senior State Attorney opposed the appeal. She argued the grounds of appeal one after another as it was lodged by the appellant. For ground number one, the learned Senior State Attorney referred this Court at pages 10, 11 and 12 of the typed proceedings of the trial court where the victim (PW1) claimed to know the Appellant for years on account of being their neighbour. That PW1 insisted to be raped by the Appellant, and maintained her claim even when she was cross examined by the Appellant.

It was the submission of the learned Senior State Attorney that immediately after the incident, PW1 mentioned the Appellant by his name to be the one who raped her when she was explaining to her mother. The learned Senior State Attorney contended that the victim mentioned the attire to add weight to her identification but she identified the Appellant by his face and the act was committed during evening hours.

The Appellant re-joined that, PW1 lied to court, if she was his neighbour she could have identified him by face and name not by his attire. He further claimed that, PW1 was supposed to identify him by everything.

It is in the record that, PW1 testified to have been raped when she was resuming home from school during evening hours. By implication, it connote it was before sunset. This is because the victim was able to

identify the Appellant being her neighbour, whom she is familiar with for quite long time. PW1 had ample time to observe the Appellant from the time he pulled and dragged her in the bushes, insulted her, pushed her down, lied in top of her, offered threats, opened his trouser, peeled off victim skirts and panties, took and inserted his phallus into PW1 vagina followed by thrusting. In that way, a plea by the Appellant that the victim had merely identified him by attire, is unmerited.

It is evident from the record that, PW1 is familiar to the Appellant. The atrocity was committed during broad day light and the Appellant was in a zero proximity with the victim (PW1) within a reasonable time all enabled proper identification.

Moreso, PW1 mentioned the Appellant by his name to her mother to be a perpetrator at the earliest opportune immediately after arriving at her house. Apart from his name and neighbourhood, the victim mentioned the Appellant attire to insist on what she saw. This shows that her identification is not only reliable but watertight. In the case of **Salum Seif Mkandambuli v. The Republic**, Criminal Appeal no. 128 of 2019 Court of Appeal of Tanzania at Dar es Salaam (unreported). My undertaking is grounded on a fact that, in rape cases the best evidence is the evidence of the victim because she is the one who experienced what befallen her, as per decision in the case of **Mariko Thomas v.**

The Republic [2020] TLR 459. Therefore, the argument by the Appellant that he was identified by the victim by attire is unmerited as there is no evidence to suggest any possibility of mistaken identification. From the reason argued above, the Appellant first ground of appeal succumb.

As for the ground number two, the Appellant claimed that the issuance of the Police Form No. 3 (PF3) did not comply with the law. But no any explanation as to how the exhibit did not comply with the law. The Appellant went further and claimed to have not been examined. As rightly submitted by the learned Senior State Attorney, that their duty is to prove if the victim was raped or not, that's why she was taken to the hospital for examination. A mere fact that the Appellant was not examined to connect him with sperms found in the complaint's vagina it does not eliminate the truth that the victim was raped. Indeed there is ample evidence implicating the Appellant as a rapist.

In his brief rejoinder, the Appellant insisted that PW2 who was a medical doctor, did not prove before the court to be the one who examined the victim. The Appellant also alleged the medical doctor proved absence of penetration.

Going through the trial court records reflect that; PW2 was not a medical doctor but the victim's father one Henrick Hyera. The medical doctor

who examined the victim was Elia J. Makala who testified as PW3. At pages 16 and 17 of the typed proceedings, PW3 was recorded to have stated that he examined the victim and discovered minor bruises and hymen perforated by a blunt object inserted into the victim's vagina, as also depicted in exhibit P1. Essentially, the purpose of examining the victim is to establish if she was really sexually abused. In the case at hand the one who was sexually abused was PW1. In the context, PW1 was the one who was supposed to be examined and not the Appellant, given the available incrimination evidence against him as aforesaid.

Furthermore, the Appellant assertion that the procedures of tendering the exhibit were not adhered to before the trial court is un merited. I have gone through the trial court typed proceedings and it is evident that all exhibit were tendered in compliance with the procedures. The trial court records reflect exhibit P1 was tendered by PW3 who authored it and therefore PW3 is a competent witness to tender. Again during tendering, the Appellant was asked if he object, where he was recorded to have accepted it to be admitted. Finally, exhibit P1 was read aloud in court. Therefore the Appellant's complaint is without substance.

As for the third ground, the Appellant objected the modality on how the evidence of PW1 was received. It is the Appellant assertion that, PW1 is a child aged 11 years old, her evidence was receive contrary to section

127(2) of the Evidence Act (supra), because she did not promise to explain the truth. The learned Senior State Attorney, was in agreement with the Appellant on the requirement of the provision of section 127 (2) of the Evidence Act (supra), that the child has to promise to tell the truth. The learned Senior State Attorney submitted that PW1 before she gave her testimony she promised to tell the truth as reflected at page 10 of the typed proceedings. Therefore, it is her contention that the prosecution believes that the evidence of PW1 was taken in compliance with the law.

It is true that the law dictate a child of tender age to promise to speak the truth in case he/she is giving the evidence without taking an oath. For easy reference section 127(2) provides that, I quote,

> *A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.*

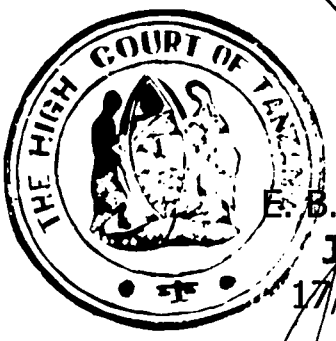
This was also insisted by the High Court and Court of Appeal of Tanzania in plethora of its decisions, to mention the few the case of **Alberto Kibamba v. Republic** [2020] TLR 13, the case of **Issa Salum Nambaluka v. Republic** [2020] TLR 397, where the court has this to say:

Where a witness is a child of tender age a trial court should at the foremost ask few pertinent questions so as to determine as to whether or not the child witness understand the nature of oath. If he replies in affirmative, he/she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, she/he should before give evidence be required to promise to tell the truth and not to tell lies.

It is evident from the record at pages 9 to 10, the trial magistrate put some questions to PW1 for *voire dire* examination and thereafter she promised to tell the truth and only the truth. In this regard, the requirements provided under the provision of section 127 (2) of the Evidence Act was complied with contrary to the Appellant allegation. The third grounds of appeal has no merit too.

In addition, this court found as rightly as submitted by Ms Tulibake Juntwa that the sentenced of thirty years imprisonment imposed to the Appellant is proper sentence as prescribed by the law as per provision of section 131 (1) of the Penal Code [Cap 16 Revised Edition 2022].

In view of above adumbration the Appellant's appeal is dismissed for want of merit. The conviction and sentence imposed to the Appellant by the trial court are hereby upheld. Order accordingly.



E. B. LUVANDA
JUDGE
17/02/2023