IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 46 OF 2023

(Originating from Criminal Case No. 114 of 2023 of Moshi District Court)

FRANCIS THEO FRANCIS ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

13/12/2023 & 22/01/2024

SIMFUKWE, J.

The appellant, Francis s/o Theo Francis, was charged before the District court of Moshi with the offence of statutory rape under section **130 (1) (2) (e) and 131(1) of the Penal Code Cap 16 R.E.2022.** The particulars of the offence were that on 19th day of March, 2023 the appellant had carnal knowledge of a fifteen years old girl who testified during the trial as PW1. I shall maintain reference to her as PW1 or victim.

The appellant pleaded not guilty to the charge, the prosecution called five witnesses and tendered one exhibit to prove their case.

Briefly, the prosecution case was that on the material day the victim was called by the appellant who was a trainee teacher at their school. The appellant asked her to go to his house to buy him some sugar. PW1 agreed and went with the appellant to his house where she stayed outside waiting the appellant to give her some money. Unexpected, the appellant pulled her inside the house, forcefully laid her on a mattress and removed PW1's clothes. Also, the appellant undressed himself and then inserted his male organ into the victim's vagina. It was alleged by PW1 that she resisted the act in vain. She even tried to call DW2 who was outside the house, who did not respond to her alarm. In the course of resisting, PW1 injured herself on the wall and did bite the appellant on his right hand.

After the incident, the appellant offered the victim some money but she refused and went directly home while crying where she found PW3 (her grandmother) and explained to her what the appellant did to her. PW3 testified that, after she had received that information, immediately she reported to the village chairperson who directed them to go to Himo police

station. At the police station, they were issued with a PF3 and went to Himo health center for medical examination. As it was night, PW1 was examined and referred to another hospital for further examination. Next day, PW2 the Headmistress was informed about the incident. PW2 went to Himo police station with PW1 where they were referred again to hospital for the PF3 to be filled. At Himo health center, PW1 was examined by PW4 (Dr. Scholastica Taji) who testified as an expert that, on 20/03/2023 PW1 went to hospital with PW2 who was introduced to her as the Headmistress. She testified that while examining PW1 she discovered that her hymen was not intact and saw some bruises on PW1's knee allegedly occurred while rescuing herself from the appellant.

PW5 was the investigator of this case. According to her, she visited the crime scene and interrogated the witnesses regarding the occurrence of the said offence. Among the witnesses she interrogated was DW2 who did not cooperate with them.

The appellant was found with a case to answer. In his testimony he totally denied the charges against him and asserted that the case was fabricated against him because he had conflict with PW2. He further explained that on

19th of March 2023 he was at his house at Mallex Secondary school with DW2 and nothing happened.

DW2 Twalib Juma Mohamed testified that he was with the appellant until 7:00 pm when he decided to go to watch a football match. That, he left DW1 at home and joined him later.

The trial court found the appellant guilty of the offence charged, convicted and sentence him to serve 30 years imprisonment. The appellant was aggrieved with the decision and filed the present appeal on the following grounds:

1. That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant on a statutory Rape charge despite the age of the victim of the alleged offence (PW1) being not proved to the hilt.
2. That, the learned trial magistrate grossly erred both in law and fact in using weak, tenuous, incredible and wholly unreliable prosecution evidence as a basis of the appellant's conviction.

3. That, the learned trial magistrate grossly erred both in law and fact by being adamant that, the strong and well supported defense evidence did not raise reasonable doubt on the prosecution's case.

4. That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellant on a charge which was not proved beyond reasonable doubt against the Appellant and to the required standard by the law.

On account of the above grounds of appeal, the appellant prayed this court to allow the appeal, quash the conviction, set aside the sentence meted on him and set him free.

When the appeal was called for hearing the appellant was represented by Mr. Mhyellah the learned advocate while the Respondent Republic was represented by Mr. John Mgave, the learned State Attorney. The hearing of the appeal was conducted by way of written submissions.

On the outset, Mr. Mhyellah prayed to adopt the grounds of appeal to form part of his submission. Arguing the first ground, Mr. Mhyellah strongly submitted that the learned trial magistrate erred in law and fact by convicting and sentencing the appellant basing on a statutory rape charge

in which the age of the victim was not proved. That, **section 130(2) (c) of the Penal Code** (supra) defines statutory rape as having carnal knowledge with a woman below the age of majority of 18 years with or without her consent. He stated that, there was no evidence tendered to prove the age of the victim during the trial. To support his argument the learned counsel for the appellant cited the case of **OMARY HASHIM vs REPUBLIC**, Criminal Appeal No. 63 of 2022, H.C, at Morogoro (Unreported) and the case of **GEORGE CLAUD KASANDA vs REPUBLIC**, Criminal Appeal No. 376 of 2017 (unreported). The learned counsel continued to insist that, the prosecution failed to bring the school register to prove the age of the victim and failed to show whether the victim was in form one or form two due to contradictory statements. That, during the preliminary hearing, it was stated that the victim was in form two while at the hospital the victim said that she was in form one. Hence, making it difficult to deliberate the age of the victim. That, on that logic, this court lacks proceedings to re- asses the possible age of the victim and the prosecution never bothered to deal with the issue of consent.

On the second ground Mr. Mhyellah contended that the trial magistrate erred in using wholly unreliable prosecution evidence. The fact that

evidence of the victim of tender age is enough and admissible with or without being corroborated is indeed unjust. The court of law should not believe in its totality that the victim of tender age tells nothing but the truth. Instead, it should also be considerate in evaluating both the victim and the accused's testimony as far as if they were the only people at the crime scene. The learned counsel for the appellant referred the case of **MOHAMED SAID vs THE REPUBLIC,** Criminal Appeal No. 147 of 2017, in which it was observed that:

> *"We think it was never intended that the word of the victim of sexual offence should be taken as a gospel truth but that her/his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and* ***section 127 (7) of the Evidence Act [Cap 6 R.E 2022]*** *in particular. And that, such compliance will lead to punishing the offenders only in deserving cases."*

Mr. Mhyellah continued to state that the trial court convicted the appellant on the weakness of the evidence of the defence side instead of the strength of the prosecution evidence. That, it is settled law that the best

test for quality of evidence is based on credibility of witnesses. Assessment of credibility of witnesses cannot be made in isolation of other pieces of evidence on record and surrounding circumstances. He cited the case of **SHABAN DAUD vs REPUBLIC,** Criminal Appeal No. 28 of 2001 (unreported) which held that:

> *"The credibility of a witness can also be determined in two other ways. One, when assessing the coherence of the testimony of that witness is considered in relation with the evidence of other witnesses including that of the accused."*

Further reference was made to the case of **HUSSEIN IDDI & ANOTHER vs REPUBLIC [1986] TLR 166** where it was held that:

> *"It was a serious misdirection on part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

The learned counsel continued to aver that, evidence of the victim is not true because many rules and principles of giving evidence were broken especially ***res-gestae.*** Also, the said evidence lacks credibility because prosecution testimonies were fully tainted with doubt thus should be

corroborated. It was argued further that, the expert report did not show that the victim was penetrated. He also alleged that PW4 was unprocedurally re-called on 25/04/2023 to tender the exhibit and added new facts and there was no order for re-calling the said witness.

Concerning the 3rd and 4th grounds, Mr. Mhyellah, referred to **Section 110 (1) & (2) of Evidence Act [Cap. 6 R.E 2022]** which requires the alleging party to prove. He said that, it is a canon principle in criminal justice that the standard of proof is beyond reasonable doubts. It should have therefore been a key factor in determining evidence of the prosecution if it did meet the canon standard. The trial court convicted the appellant based on the evidence of the victim alone. No any other eye witness testified in court. However, the learned counsel admitted that under **section 127 (7) of the Evidence Act,** (supra) evidence of the victim of sexual offence can base conviction with exceptions. That, one of the exceptions is where there are contradictions. Hence, evidence cannot be relied upon. That, in the instant matter, evidence of PW1 had contradictions and a lot of doubts; thus, cannot be relied upon. It was the opinion of the learned counsel that evidence of PW2, PW3, PW4 and PW5 was hearsay which is not admissible under **section 61 and 62 (i) (b) of**

the Evidence Act, (supra). That the trial magistrate used weak evidence from prosecution to convict the appellant.

He further submitted that; the trial magistrate failed to evaluate defense's evidence when he made reference at page 11 of the trial court judgment. The learned counsel opined that it was unprocedural for the victim to be examine on 20/03/2023 while she alleged to have been raped on 19/03/2023. He referred the case of **RAMADHAN ISMAIL vs THE CROWN 7 ZLR 36.** He continued that, the victim slept and spent almost a day before she met the doctor and PW4 did not detect any sperm and no injuries were seen. Thus, the trial court relied on unreliable evidence from the prosecution and did not consider the rule of res-gestae. To cement his argument the counsel for the appellant referred **section 8 of the Evidence Act** (supra) to put more emphasis on time and events forming the same transaction.

In his reply; on the first ground regarding the age of the victim, Mr. Mgave the learned State Attorney submitted that, the prosecution side proved the age of the victim through the victim herself who was PW1 also through PW3 the victim's grandmother and PW2 the victim's teacher. Mr. Mgave

submitted further that, it's trite law that proof of age in sexual offences as expounded by case laws is proved by the production of victim's birth certificate or proof may come from the victim herself, relatives, parent, medical practitioner, a teacher or close friend. He stressed his argument by referring the case of **JAFARI S/O MUSSA vs DPP, Criminal Case No. 234 (Tanzlii) at page 9,** Court of Appeal of Tanzania. He continued to aver that, in this case proof of age is clearly shown at page five of the court proceedings where the victim testified before the court and stated her age to be 15-years-old. The same was corroborated by PW2 the teacher of the victim and PW3 the victim's grandmother. The learned counsel was of the view that the issue whether the victim was the student of form one or form two is immaterial as it cannot determine the age of the victim in any form.

On the 2nd ground, Mr. Mgave insisted that **section 127 (6) of the Evidence Act** (supra) provides that in sexual offences the best evidence is that of the victim and such evidence does not need corroboration in order for it to form credible basis of conviction where the court is satisfied that the victim is telling nothing but the truth. That, the trial court after evaluation of evidence of PW1, her demeanor and the ability of the victim

to name the accused person at the earliest possible opportunity after the incident, found the victim's evidence credible and reliable. Evidence of the victim although it did not need corroboration still it was corroborated by the evidence of other witnesses including PW2, PW3 and PW4.

Elaborating further, the counsel for the respondent Republic continued to argue the 3rd ground of appeal by opposing the argument from the appellant's counsel that the prosecution evidence was unreliable due to the fact that the appellant was convicted basing oh his weak defense and not the strength of the prosecution case. That, the prosecution was able to prove its case beyond reasonable doubt. The age of the victim was proved by PW1, PW2 and PW3. The prosecution was able to prove that the victim was penetrated by the appellant through the evidence of PW1 and PW4 the medical expert. That, the court proceedings show at page 11 that on 25th April 2023 the medical expert appeared, testified before the court that there was penetration and the hymen was not intact. Thus, the assertion by the advocate of the appellant that the expert witness was not called are false and misleading.

The Counsel for the respondent stated further that, page 13 of the court proceedings shows that on 25th April, 2023 PW4 testified before the court and on the same date PW4 tendered Exhibit P1. After tendering Exhibit P1, she continued while in examination in chief and testified that she discovered that the victim had bruises on her knee. That, the appearance of two dates on the court record is a mere typing error and not contradiction or fabricated information as stated by the appellant's counsel.

Arguing on the assertion by the appellant's counsel that the court did not consider the testimony of DW2 who was at the crime scene, the counsel for the respondent strongly disputed the assertion on the basis that DW2 was acknowledged by the prosecution through PW1 and PW5's testimony. It was also stated by the prosecution witnesses that DW2 was not cooperative with the police. Moreover, when the trial court evaluated DW2's evidence it found his statement to be contradictory and did not support evidence of DW1.

Furthermore, Mr. Mgave said that page 11 of the trial court judgment shows clearly that the trial court evaluated the defense evidence and continued to disregard it due to the fact that the said evidence was

unreliable and an afterthought. That, the argument that the appellant was a layman while the prosecution side was guided by experts, is baseless as the appellant was convicted based on the fact that the prosecution proved their case beyond reasonable doubt and not the weakness of the defense case. Also, the appellant was fully aware that he had the right of legal representation as he has on appeal but glaring on the record of this case the appellant neither applied for legal aid for the purpose of preparation and conduct of his defense at trial court nor informed the trial court that he wished to engage an advocate. Mr. Mgave cemented his argument by referring the case of **JONAS LESIDOO vs REPUBLIC, Criminal Appeal No. 51 of 2020** (Tanzlii) at page 10.

Reverting the 4th ground of appeal, the counsel for the respondent insisted that the prosecution side managed to prove their case beyond reasonable doubt that no one else raped the victim but the appellant on 19th March, 2023. That, in order to prove the offence of statutory rape, first the prosecution proved the age of the victim through the victim herself, her grandmother and her teacher. Second, the prosecution managed to prove that there was penetration as stated by PW1 at page 7 of the proceedings of the trial court. The same was corroborated by PW4 the medical expert

who examined the victim and confirmed that her vagina was penetrated as seen at page 13 and 14 of the court proceedings. The counsel for the respondent continued to submit that the victim testified on what she witnessed herself as provided under section **62 (1) (a) of the Evidence Act (Cap 16 R.E 2022).** At page 7 and 8 of the court proceedings, she stated that on the fateful date DW1 raped her and DW2 was present but he did not help her. Relying on the case of **SELEMAN MAKUMBA Vs REPUBLIC [2006] TLR 379**, the court held that the best evidence comes from the victim. Whereas; in this case the victim's evidence irresistibly pointed to the guilt of the appellant. It was Mr. Mgave's view that the assertion by appellant's advocate that there was no proof of the appellant shirt (sic) or injuries on part of PW1 and DW1, lacks merit since the key elements to prove statutory rape is the age of the victim which was already proved by the prosecution side and penetration which was proved by PW1 and PW4.

Addressing the issue of res-gestae, the counsel for the respondent submitted that there was no need of proving res-gestae since the said principle is applicable only where the evidence available in the case is circumstantial evidence. That, in the present case, the prosecution

presented direct evidence of the victim herself and her evidence does not need corroboration as stated by the law. To fortify his argument the learned counsel made reference to the case of **HAFAN NDUMBASHE vs REPUBLIC, Criminal Appeal No. 493 of 2017** (Tanzlii) at page 9.

Expanding his argument, Mr. John Mgave for the Republic submitted that, it is a cardinal principle that who alleges must prove and it is a duty of the prosecution side to prove its case beyond reasonable doubt. In this case, the prosecution was able to prove all the elements of the offence of rape as provided under **section 130 (1) (2) (e) and 131 (1) of the Penal Code** (supra). That, the prosecution paraded five witnesses who managed to prove all elements of statutory rape.

Having gone through the proceedings of the trial court, the grounds of appeal and the parties' rival submissions, the issue for determination is whether this appeal has merit.

According to **section 130 (2) (e) of the Penal Code** (supra) statutory rape means a male person having sexual intercourse with the female person who is younger than the age of majority (i. e 18 years), unless the woman is his wife who is fifteen years old or more. In the case of **George**

Claud Kasanda v. R, Criminal Appeal No. 376 of 2017 (unreported), in an endeavor to describe statutory rape, this court stated that:

> *"In essence that provision (section 130 (2) (e) of the Penal Code) creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense age is of great essence in proving such an offence."*

The crucial element to be proved in statutory rape is age. The victim must be under the age of eighteen years. In which case, proof of the age of the victim must be done by either the victim, relative, parent, medical practitioner or through proof by birth certificate, if available. See **Oyombo Ochieng @ Julius vs Republic,** Criminal Appeal No. 135 of 2020 (2022) TZCA 341 (CAT at Musoma, www.tanzlii.org.tz; 14 June 2022).

In the case of **Amani Yusuph vs Republic**, Criminal Appeal No. 124 of 2019 (2023) TZCA 48 at Arusha; www.tanzlii.org.tz; (23 February 2023) the Court held that:

"In statutory rape, proof of age is fundamental. In fact, the age of a woman is determining factor which differentiate between normal rape and statutory rape. Even punishment depends on the age of a woman,"

In the instant case, on 19th, April 2023 the victim stated before the court that she was 15 years old. This can be revealed at page 7 of the trial court proceedings. Her evidence was supported by PW3 who is the victim's grandmother at page 11 and PW2 who is victim's teacher at page 10. Both witnesses stated clearly that the age of the victim was 15 years. Guided by the well-established principles stipulated in the case of **Oyombo Ochieng @ Julius** (supra); it is my firm opinion that the prosecution side through PW1, PW2 and PW3 managed to prove the age of the victim to be 15 years, which lead the matter before me to fall under statutory rape without any doubt. The argument that was raised by appellant's counsel that the prosecution failed to establish the age of the victim by failing to establish whether the victim was the student of form one or form two is misplaced as it's not the requirement of the law nor case law.

The second issue is whether the prosecution side proved the offence of rape beyond reasonable doubts, which covers the second, third and fourth grounds.

It is settled law in criminal cases that the burden of proof lies on the prosecution and the standard of proof is beyond reasonable doubts. The phrase "proof beyond reasonable doubt" was discussed in the case of **Magendo Paul and Another v Republic [1993] TLR 216,** where the Court stated as follows:

> *"For the case to be taken to have been proved beyond reasonable doubt its evidence must be strong against accused person as to leave a remote possibility in his favor which can easily be dismissed".*

In this case, the learned state Attorney strongly argued that the case against the appellant was proved beyond reasonable doubts. For the offence of rape with which the appellant stood charged, the prosecution was required to prove three ingredients which are: age of the victim, penetration and the person who committed the offence. The first ingredient of the age of the victim has positively

already been discussed hereinabove. The second ingredient is penetration. The appellant's counsel lamented that the expert report (PF3) said that the victim did not have any bruise and scratch inside her genital area and the outer part of her genitals, she was not pregnant, she did not have HIV and that the hymen was not intact.

In addressing the issue of penetration, I make reference to PW1's testimony at page 7 of the court proceedings where she stated that:

> *"…Mr. Fransis took me to the room, there was a mattress there he removed my clothes; I shouted and bite him on his right arm. The accused person forced me and managed to insert his male organ into my vagina. I continued shouting but he told me to keep quite that my fellows does not shout while doing the same act. I tried to move where I was and I was hurt…."*

PW1's evidence was supported by the evidence of PW4 who was the doctor who examined her. PW4 appeared before the trial court, explained to the court that there was penetration and revealed that the hymen of the victim was not intact.

On the issue of penetration, I agree with Mr. John Mgave the learned State Attorney on the argument that in sexual offences the best evidence comes from the victim. **Section 130(4) of the Penal Code** provides that:

"130 (4) for the purpose of proving the offence of rape;

(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence".

The above provision directs that even slight penetration suffices to prove sexual intercourse. Therefore, the argument by Mr. Mhyellah that the victim did not have any scratch inside her genital area, she didn't have any bruises or scratch in the external part of her genitals, she was not pregnant and she didn't have HIV is misplaced. The victim's evidence was very clear that the appellant inserted his penis in her vagina. Her evidence was supported by the evidence of the doctor (PW4). The contention by Mr. Mhyellah that there was no evidence to corroborate the victim's evidence on the issue of penetration is misplaced. I am of considered opinion

that basing on the evidence of the victim and that of the doctor, penetration was proved.

Moreover, even if exhibit P1 which was tendered by PW4 did not prove penetration as alleged by the appellant's advocate, still the offence of rape can be proved even in absence of medical report as per the case of **Salu Sosoma v. R,** Criminal Appeal No. 4 of 2006 (unreported) in which the Court of Appeal stated that:

> *"…. likewise, it has been held by the Court that lack of medical report does not necessarily in every case have to mean that rape is not established where all other evidence points to the fact that it was committed."*

In this matter, even if it presumed that there is no PF3, still other evidence points to the fact that rape was committed by the appellant. In addition, the appellant is not challenging the credibility of witnesses particularly the victim.

This court has considered the fact that the victim mentioned and described the appellant at the earliest possible moment. In discussing her credibility, I am guided by the decision of the Court of

Appeal in the case of **Chacha Jeremiah Murimi and 3 Others V. Republic,** (CA) Criminal Appeal No. 551 of 2015 in which the Court had time to consider the ability of a witness to name a suspect at an early stage. The Court had this to say at page 20-22:

> *"The ability of PW1 to mention and describe the second appellant person at the earliest possible moment is an assurance of her reliability…..We took the same position in our earlier decision of Jaribu Abdalah v Republic (2003) TLR 271 and Marwa Wangiti Mwita & Another v. Republic (2002) TLR 39; In Marwa Wangiti Mwita (supra), this court observed thus; " The ability of witness to name a suspect at the earliest opportunity is an important assurance of her reliability, in the same way as unexplained delay or complete failure to do so, put prudent court to inquiry".*

See also **Mafuru Manyama & Two Others v. Republic**, Criminal Appeal No. 256 of 2007, **Kenedy Ivan v. Republic** Criminal Appeal No. 178 of 2007**, John Gilikola v. Republic, Criminal** Appeal No. 31 of 1999 and **Yohana Dionizi & Shija Simon v. Republic,**

Criminal Appeal No. 114 and 115 of 2009 mentioned in **Chacha Jeremia Murimi** (supra). (All unreported).

The trial court which had opportunity to assess the credibility of PW1 believed her. I find no reason to discredit her. Her evidence was corroborated by the evidence of the doctor (PW4) who said that her hymen was missing and she had bruises.

Furthermore, the appellant was the person known to her leaving no room for mistaken identity. She said "teacher Francis" because she knew him as the appellant was a trainee teacher at her school for six months.

The appellant's argument that he had grudges with PW2 was not proved. There is no evidence to support his allegations. The appellant's advocate contended that evidence of the prosecution was hearsay while there was direct evidence from PW1 who is the key witness and PW4 a doctor who examined the victim. There was therefore sufficient evidence to prove the case against the appellant on the required standard.

Moreover, it is settled principle that the best proof of rape must come from the victim whose evidence, if credible, convincing and consistent can be acted upon alone as the basis of conviction. **Section 127 (6) of the Evidence Act** (supra) provides that:

> *"….where in criminal proceeding involving sexual offence the only independent evidence is that of the child of tender years or of the victim of the sexual offence, the court shall receive the evidence and may, after assessing the credibility of the evidence of the child of tender years as the case may be the victim of sexual offence on its own merit, notwithstanding that such evidence is not corroborated, proceed to convict, if for reason to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the offence is telling nothing but the truth."*

See **Seleman Makumba vs Republic** (supra). In the case at hand, as stated above PW1 narrated that, the appellant asked her to go to his house to buy him some sugar. PW1 agreed and went with appellant to his house where she stayed outside waiting

appellant to bring money. Then, she was pulled inside the house where she was raped by the appellant. Her evidence was corroborated by PW3 her grandmother who saw her coming home while crying. PW3 asked her why she was crying, PW1 narrated what the appellant did to her. Moreover, the victim's evidence was supported by PW2 the teacher of the victim who took the victim to hospital and made effort in arresting the appellant. This version of evidence was supported by PW4 the doctor who examined the victim and tendered **"Exhibit P1".** PW4 discovered some bruises on PW1's knee, an indication that she tried to help herself and got injured as alleged.

In his defense the appellant totally denied the charges levelled against him and alleged that the offence was fabricated against him due grudges which he had with PW2 the Headmistress. However, the appellant failed to explain and prove what kind of conflict which he had with PW2 had and how the said conflict related to the matter at hand.

From the foregoing analysis, I am satisfied that the prosecution case was proved beyond reasonable doubt. I therefore find the appeal has no merit. I dismiss it in its entirely. Conviction and sentence of the trial court is hereby upheld.

Dated and delivered at Moshi, this 22nd day of January 2024.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE
22/01/2024.