IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 31 OF 2023

(Arising from Criminal Case No. 178 of 2022 District Court of Karagwe)

SHUKURU SIMEO @ KIDUKU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

26th March and 12th April, 2024

BANZI, J.:

Shukuru Simeo@ Kiduku, the appellant herein, has lodged this appeal against the judgment of the District Court of Karagwe where he was indicted for raping a girl of 9 years (the victim) contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap. 16 R.E. 2022] (the Penal Code). The offence was committed on 4th August, 2022 at Rwambare area, within Karagwe District in Kagera Region.

In order to prove the charge against the appellant, the prosecution side paraded seven witnesses and produced three exhibits; Clinic card, PF3 and sketch map of the scene of crime, exhibit P1, P2 and P3 respectively. In the main, the body of evidence by prosecution presented a case that, on the

fateful date, 4th August, 2022, the victim, her young brother (PW6) and the appellant were grazing goats. Around 18:00 hours, while in their preparation to take goats back home, the appellant told PW6 to take the goats home leaving behind the victim. The appellant pulled the victim to the bush where he ordered her to undress her pants threatening to cut her by bush knife. The victim obeyed the order, she undressed her underwear and lied down. The appellant came on top of her, covered her mouth and he inserted his male organ into her female genitals the act which caused her to feel pain and start bleeding. After satisfying his desire, he let her go home. Upon returning home, she narrated the ordeal to her mother (PW2) who examined her genitals and found with blood. PW2 informed her husband (PW3) on what happened to their daughter. PW3 reported the matter to the village chairman, Fidelius Paul (PW7) and then they went to Kayanga Police Station where they were given PF3. At Karagwe District Designated Hospital, Derick Mathew (PW4) examined her and found there was bruises and blood stains on her genitals indicating that, she was penetrated by a blunt object. He filled in the PF3 (exhibit P2). On 5th August, 2022, the appellant was arrested by PW7 in assistance of militiamen and taken to Kayanga Police Station where he was interrogated by F.3035 D/SGT Kengela (PW5) but he denied raping the victim.

In his short defence, the appellant who was the sole witness for the defence, he denied to have raped the victim. He further testified that, this case was concocted by his neighbour, PW3 because he is successful for having managed to build a house and owning ten goats.

After receiving the evidence of both sides, the trial magistrate was satisfied that, the charge against the appellant was proved beyond reasonable doubt. As a result, he convicted and sentenced to 30 years imprisonment. Aggrieved with his conviction and sentence, he preferred this appeal with five grounds which can be summarised as **one**; *voire dire* test was not conducted before taking the testimony of PW1 and PW6, **two**; his conviction was based on contradictory testimony of PW2 and PW4, **three**; his defence about having grudges with the relatives of the victim was not considered, **four**; his conviction was based on prosecution witnesses who were not credible and **five**; PW2 and PW3 had common interest to serve. On 2nd November, 2023, with leave of the court, the appellant filed six additional grounds which contain the following complaints, **one**; he was convicted in the absence of DNA report from Government Chemist despite samples being drawn from both sides, **two**; there was no proof that the victim was studying at Rwambale Primary school, **three**; his conviction was

based on defective charge, **four**; exhibits P1, P2 and P3 were not read out after being admitted, **five**; his conviction was based on dock identification and **six**; the victim was examined in the absence of women police officer.

At the hearing of this appeal, the appellant appeared in person unrepresented, whereas, Mr. Erick Mabagala, learned State Attorney appeared for the respondent. When the appellant was invited to amplify his grounds, he urged this court to consider all grounds and opted for the learned State Attorney to start and he would rejoin later, when the need arises.

Starting with the first ground, Mr. Mabagala submitted that, with the amendment of the law in 2016, *voire dire* test is no longer a requirement of the law before reception of evidence of a child of tender age but rather, the child is required to promise to tell the truth. Both PW1 and PW6 promised to tell the truth before they were allowed to testify. He added that, although they were not asked preliminary question to determine if they understood the nature of oath, such omission does not invalidate their testimonies as was stated in the cases of **Mohamed Juma vs Republic** [2023] TZCA 17648 TanzLII and **Mathayo Laurence William Mollel vs Republic** [2023] TZCA 52 TanzLII. Concerning the second ground, he argued that,

there was no contradiction between the evidence of PW2 and that of PW4. PW2 examined the victim and found her with blood on her genitals which was supported by the evidence of PW4 who also examined the victim and found her genitals with stains of blood proving penetration.

In respect of the third ground, Mr. Mabagala was quick to admit that, the trial magistrate did not consider the defence of the appellant about having grudges with PW3. However, he argued that, this being the first appellate court, it can step into the shoes of the trial court and consider the defence evidence which, according to him, did not shake the prosecution evidence considering that, the appellant did not cross-examine PW3 about the alleged grudges. In the light of the authority in the case of **Nyerere Nyague vs Republic** [2012] TZCA 103 TanzLII, since the appellant failed to cross examine PW3, it implies that he accepted the truthfulness of witness' testimony. Submitting on the fourth and fifth grounds, Mr. Mabagala stated that, the prosecution witnesses were coherent and consistent, hence, deserved to be believed as there was no cogent reason for not believing them. He cited the case of **Goodluck Kyando vs Republic** [2006] TLR 363 to support his submission. He added that, although PW2 and PW3 had common interest, the law does not prohibit two witnesses either relatives or

with common interest to testify before the court. Referring to the case of **Justine Hamis Juma Chamashine vs Republic** [2023] TZCA 214 TanzLII, Mr. Mabagala argued that, the prosecution has the right to choose which witness to call in order to prove its case. Therefore, the trial court was right to receive the evidence of PW2 and PW3 because by doing so, it did not cause any injustice to the fairness of the trial. According to him, the evidence of PW2 was important in order to prove the age of the victim.

Reverting to the first additional ground, Mr. Mabagala argued that although during the preliminary hearing it was stated that the samples were drawn and taken for further examination, however, that fact does not feature in evidence. Besides, according to him, there was no need to produce DNA evidence because of presence of ample evidence against the appellant that sufficed to sustain conviction. Submitting on the second additional ground, he stated that, the fact that the victim was a student of certain school is not the requirement of the law to prove the offence of rape. Responding to the third additional ground, he conceded that, there was wrong citation of punishment section but such anomaly is curable under section 388 of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA) as it did not cause

injustice to the appellant. He supported his argument by the case of **Jamal Ally Salum vs Republic** [2019] TZCA 32 TanzLII.

Turning to the fourth additional ground, he stated that, the same has no merit as the records show that, all exhibits were read aloud after being admitted. On the fifth additional ground, Mr. Mabagala submitted that, the appellant was known by the victim and to her family for being their neighbour who was also selling bananas and grazing goats. This fact was not refuted by the appellant. Also, PW6 told the trial court that, on the fateful date, he saw the appellant who ordered him to return goats home leaving him behind with the victim. Likewise, when the victim returned home, she mentioned the appellant to her mother immediately after the incident. Therefore, the issue of dock identification has no merit. Concerning the last additional ground, Mr. Mabagala contended that, there is no law prohibiting any doctor to examine the victim in the absence of the female police officer. Finally, he urged this court to dismiss the appeal for want of merit.

In a brief rejoinder, the appellant insisted that, this case was concocted by PW3 due to grudges between them as PW3 wanted to purchase his land but he refused and that was the source of everything. He also denied to have been grazing goats on that date of the incident contending that, he

was at Kayanga selling bananas. That was the submission from both sides. However, in the course of composing this judgment, I noticed a legal issue concerning the sentence of thirty years imposed on the appellant as the victim was below the age of ten years. As a result, I requested the parties to address the court whether the sentence of thirty years was legal in the light of section 131 (3) of the Penal Code. The appellant being a layman had nothing to say. On his side, Mr. Mabagala submitted that, the sentence was illegal because according to section 131 (3) of the Penal Code, the punishment for the convict of rape on a girl below ten years is life imprisonment. Thus, he prayed for this court to invoke its revisionary powers under section 373 of the CPA and enhance the sentence to life imprisonment in case the conviction is upheld.

Having thoroughly considered the all grounds of appeal and rival submissions of learned counsel of both sides in the light of evidence on record, the main issue for determination is whether the charge against the appellant was proved beyond reasonable doubt.

It is settled law that, this being the first appellate court, it has a duty to step into the shoes of the trial court in order to re-evaluate its evidence and where possible to come out with its own findings. This position was

stated in the case of **Vuyo Jack vs the Director of Public Prosecution** [2018] TLR 387 where it was held that:

> *"...we are aware of a salutary principle of law that a first appeal is in the form of a re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact."*

Also, it is a well-known principle of the law that, in criminal cases, it is the duty of the prosecution side to prove the charge against the accused beyond reasonable doubt and it never shifts to the defence. See the cases of **Richard Otieno @Gullo vs Republic** [2021] TZCA 120 TanzLII. Equally, the law is settled that, in rape cases of persons under the age of eighteen years which is commonly known as statutory rape, the prosecution has the duty to prove two ingredients; age of the victim and penetration. See the cases of **Alex Ndendya vs Republic** [2020] TZCA 201 TanzLII and **Wambura Kiginga vs Republic** [2022] TZCA 283 TanzLII. In the latter case, it was stated that:

> *"In all categories of rape, the basic ingredient for the prosecution to prove is* ***penetration of the female genitals by the male sex organ.*** *When it comes to*

statutory rape, there is an additional burden of ***proof of age of the victim*** *in order to ascertain that at the time the offence was committed, she was below 18 years of age since birth."*(Emphasis added).

Likewise, in proving rape cases, the best evidence comes from the victim as it was observed in the case of **Selemani Makumba vs Republic** [2006] TLR 379. However, in the case of **Mohamed Said vs Republic** [2019] TZCA 252 TanzLII it was emphasised that, the word of the victim of sexual offence should not be taken as a gospel truth but rather her or his testimony should pass the test of truthfulness.

Basing on the underlining principles above, it is now pertinent to determine the grounds of appeal. In doing so, I will begin with complaints concerning non-compliance with the law. The appellant is challenging exhibits P1, P2 and P3 claiming that, after being admitted, they were not read out aloud as required by law. However, as correctly submitted by learned State Attorney, this complaint lacks merit because the proceedings of the trial court at page 16, 21 and 23 clearly indicate that, exhibit P1, P2 and P3 respectively were read out aloud after being admitted in evidence. In that regard, the fourth additional ground lacks merit.

Reverting to the complaint concerning failure to conduct *voire dire* test, I agree with Mr. Mabagala that, the appellant's complaint is unfounded because following the amendment of section 127 (2) of the Evidence Act in 2016, the child of the tender age is allowed to give evidence without oath or affirmation after promising to tell the truth and not to tell lies. In other words, *voire dire* test is no longer a condition precedent for the admissibility of the evidence of a child of tender age. The record shows that, at page 13 and 24 of the proceedings, the victim and PW6 respectively, promised to tell the truth before giving their evidence. Although the trial magistrate did not ask any preliminary questions to determine if the victim and PW6 understood the nature of oath for them to qualify to give evidence on oath, it is clear that, they promised to speak the truth in compliance with the law before they were allowed to testify. It was stated in the case of **Mohamed Juma vs Republic** (supra) that:

> *"Likewise, in the current appeal, since from the record it is clear that, PW2, before giving his evidence, promised to tell the truth to the court, the fact that the trial court did not ask preliminary questions to determine the manner in which he would give evidence does not have any effect as regards the validity of his evidence."*

The same position was held in the case of **John Ngonda vs Republic** [2023] TZCA 23 TanzLII. In that regard, so long as the trial magistrate in the case at hand extracted the victim and PW6' promise to speak the truth in compliance with the law, they were rightly allowed to testify after such promise. Therefore, the first ground lacks merit.

Returning to the complaint concerning defective charge raised in the third additional ground, although the appellant did not explain the defect in question, a thorough scrutiny of the charge laid down against the appellant reveals that, the same was pegged under the wrong punishment provisions considering that, the victim was under the age of ten. It is common knowledge that, the process of framing the charge is governed by section 132 of the CPA. According to this section, for every charge or information to be sufficient, it must contain, a statement of the specific offence together with such particulars which give reasonable information as to the nature of the charged offence. So far as what the statement of offence is concerned, section 135 (a) (ii) of the same Act provides that:

> *"the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and,* ***if the offence***

charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;"

In the light of the extract above, the law is now settled that, the statement of the offence must refer to the section that creates the offence in question and it does not require to indicate punishment provisions. This was stated in various cases including the case of **Abdul Mohamed Namwanga @ Madodo vs Republic** [2022] TZCA 123 TanzLII where it was stated that:

"...it is our view that the citation of wrong penalty provision in the statement of offence in the instant case was not a violation of any express provision of the governing law, that is the CPA, but a necessity born out of laudable practice and caselaw. Even if it were so, it would still be curable under section 388 of the CPA as we are unpersuaded that the appellant in the instant case was prejudiced or embarrassed in preparing and mounting his defence. Nor is it discernible that a failure of justice was occasioned because the punishment which was ultimately imposed on him was levied in terms of the law as the mandatory penalty."

See also the cases of **Joseph Kanankira vs Republic** [2022] TZCA 688 TanzLII and **Mohamed Juma vs Republic** (supra). Although in our case the charge did not indicate subsection (3) of section 131 of the Penal Code which is punishment provisions, since it is not a legal requirement to indicate punishment section on the charge, its omission does not render it defective considering that, the particulars are clear enough to enable the appellant to fully understand the nature and seriousness of the offence of rape he was charged with. In that regard, such omission is curable under section 388 of the CPA. Thus, the third additional ground also lacks merit.

Reverting to the grounds concerning proof of rape, it is the principle of the law that, where the offence is committed in absence of other witnesses, the victim is the one who is in a good position to narrate how the incident befell on her. Her evidence has to be considered critically in proving the offence against the accused person before reverting to other evidence which, normally, corroborates her evidence as it was stated in the case of **God Kasenegala vs Republic** [2010] TZCA 5 TanzLII.

Now, looking at the evidence on record, PW1 stated how she was pulled into the bush by the appellant and being raped. PW6, clearly stated how he was told by the appellant to take goats home leaving behind the

victim with the appellant. Also, PW2, PW3 and PW7 stated how they were informed of the incident and how the appellant was arrested on 5th August, 2022. The evidence of PW1 concerning penetration was corroborated by PW2 who stated that after inspecting her genitals, she found blood. Even PW4 in his examination, he found the victim with bruises and remains of blood in her genitals. Also, her hymen was not intact. He concluded that, the victim was penetrated by a blunt object. Apart from that, the victim named the appellant immediately after meeting her mother, PW2 which is assurance of her reliability. See the case of **Wangiti Marwa Mwita and Others vs Republic** [2002] TLR 39. Besides, the appellant was not a stranger to the victim and the offence was not committed at night. With such naming, I am satisfied that the appellant was properly named as the assailant.

Under these circumstances, there was no need of DNA evidence in order to prove that, it was the appellant who raped the victim considering the fact that, the evidence of the victim was sufficient to prove the charged offence. Besides, as stated in the case of **Justine Hamis Juma Chamashine vs Republic** (supra), the Evidence Act which governs admissibility of evidence, does not make the DNA evidence compulsory. Similarly, the complaint concerning contradiction among PW2 and PW4 is

baseless because, there is no contradiction on their testimonies in respect of what was found in the victim's genitals after being examined by the two witnesses on different occasions. Moreover, the fact that, there was no evidence proving the victim is studying at Rwambale primary school, does not prove the offence of rape. Apart from that, it is not the requirement of the law for the woman police officer to be present during examination of the victim by the doctor. Equally, there is no law which prohibits witnesses with common interest like PW2 and PW3, the parents of the victim to testify against the appellant. Moreover, as submitted by Mr. Mabagala, taking the prosecution evidence as the whole, there is nothing to suggest that, the witnesses were not credible as their evidence was coherent and consistent. In the view thereof, it is the finding of this court that, the prosecution had managed to prove both penetration and age of the victim which are essential requirement in proving statutory rape. This concludes ground number two, four and five as well as additional grounds number one, two, five and six which lack merit too.

Reverting to the complaint concerning his defence was not considered, it is undoubted that, the trial magistrate did not consider the defence evidence. However, as alluded above, the first appeal is in a form of re-

hearing and thus, it can enter into the shoes of the trial court. The appellant in his defence claimed that, this case was planted by PW3 because of his success that, he has managed to build the house and had ten goats. If his defence was genuine and he really believed that this case was planted by PW3, it was expected to be revealed in the course of testimony of PW3. However, he did not ask PW3 any question concerning his claim that, this case was planted. Basically, the appellant did not cross-examine PW3 at all which connotes that, he accepted the veracity of PW3's testimony. Likewise, PW1, PW2, PW6 and PW7 were not cross-examined on the alleged grudges between the appellant and PW3. In that regard, the appellant's defence was nothing but an afterthought Thus, it is the finding of this Court that, the defence evidence did not raise any doubt on the evidence of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 who were coherent and credible. Hence, the third ground lacks merit.

Having said so, I am satisfied that the charge against the appellant was proved beyond reasonable doubt and hence, he was properly convicted. So far as the sentence is concerned, I am constrained to agree with Mr. Mabagala that, the sentence of 30 years was illegal because pursuant to section 131 (3) of the Penal Code the mandatory sentence for a person who

commits an offence of rape of a girl under the age of ten years is life imprisonment. Since the particulars of the charge show that the victim was of the age of nine years and the evidence of PW2 proved that fact, I invoke my revisionary powers under section 373 (1) (a) of the CPA by enhancing the sentence from thirty years to life imprisonment. Consequently, this appeal is devoid of merit and is hereby dismissed.

I. K. BANZI
JUDGE
12/04/2024

Delivered this 12th day of April, 2024 in the presence of Mr. Erick Mabagala, learned State Attorney for the respondent, the appellant in person, Mr. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala B/C. Right of appeal duly explained.

I. K. BANZI
JUDGE
12/04/2024