

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TABORA SUB- REGISTRY

MSC. DC CRIMINAL APPEAL NO. 52 OF 2023

(Originating from the decision of the District Court of Urambo in Criminal Case No. 81 of 2021)

RASHID S/O JUMA @MWAMRASHI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Last Order: 12/12/2023

Judgement date: 1/3/2024

MANGO, J

The Appellant was arraigned before the District Court of Urambo for contravening the provisions of section 130(1) and (2)(e) of the Penal Code, [Cap. 16 R.E 2019]. It was alleged that, on 31st August 2021, during day hours at Manoleo area, Itonjanda Ward within Tabora Municipality in Tabora region, the Appellant had carnal knowledge of a girl aged 10 years. The name of the child is concealed to protect her dignity. She will therefore be referred as the victim child X as indicated in the judgement of the trial Court.

After full trial, the Appellant was convicted and sentenced to life imprisonment. Aggrieved by the decision of the trial court, he appealed to this court armed with four grounds of appeal which read as follows: -

1. That, the case for the prosecution was not proved against the Appellant beyond reasonable doubt as required by the law

2. That, the victim of the offence namely PW1 did not make prior promise of telling the truth and not telling lies to the trial court as required by section 127(2) of the Evidence Act, [Cap. 6 R.E 2019]
3. That, penetration as required by section 130(4) of the Penal Code, [Cap. 16 R.E 2019] was not cogently established since none of the prosecution witnesses inspected the victim's genital organs in order to satisfy themselves on allegations of rape and no medical examination report was tendered in court to support the same
4. That, the learned Trial Magistrate erred in law and fact to hold that the Appellant was properly identified by the victim to be "*partciep criminis*"

When the matter was called for hearing, the Appellant appeared in person while the Respondent was represented by Ms. Wivina Rwebangira , learned State Attorney. The Appellant simply adopted his grounds of appeal for consideration by the Court.

Submitting against the appeal, the learned State Attorney submitted that the first ground of appeal is meritless because the prosecution proved its case on the required standard. She argued that, the prosecution managed to establish the main ingredients of rape, the offence which the Appellant was charged with. She mentioned the main two elements of rape to be penetration and lack of consent where relevant. Regarding penetration, she submitted that the testimony of the victim child as it appears at page 10 of typed proceedings establishes that the child was raped by the Appellant. The second ingredient which is lack of consent is not relevant in this matter since the child who was raped was below 18 years, thus, she is incapable of granting valid consent. She is of the view that, the trial Court correctly relied

on the testimony of the victim child to convicted the Appellant. She referred the Court of appeal in the case of **Selemani Makumba vs Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006) in which the Court of appeal held that testimony of the victim of sexual offences is a good evidence enough to enter conviction against the accused person.

On the second ground of appeal, the learned State Attorney submitted that, court record indicates that the victim child promised to tell the truth. With that statement by the victim child, the requirements under section 127(2) of the Evidence Act has been complied with. She added that, with the recent amendments of the Evidence Act via GN 11 of 2024, the requirement to promise to tell the truth has been removed. In that regard, she is of the view that the second ground of appeal is unfound and it deserves to be dismissed.

On the third ground of appeal, she argued that medical evidence is not mandatory in proving that the victim was raped. She argued that, it is not mandatory to have testimony of any witness who examined the victim to prove that she was raped. According to her the testimony of the victim clearly establishes that, she was raped.

On the issue of identification of the Appellant as the assailant, the learned State Attorney submitted that the appellant was properly identified as the person who raped the victim child X. She referred the Court to the manner the victim child described the person who raped her and the fact that, the description given assisted PW2 and other teachers to arrest the Appellant few minutes after the incident. After his arrest, the victim managed to identify him as the person who raped her. The victim child was not familiar to the Appellant thus, identification made by the victim child was proper. To

cement her arguments, she cited the case of **Marwa Mwangiti Mwita and Another versus R** [2002] TLR 39. She then prayed the appeal be dismissed.

In his brief rejoinder the Appellant submitted that, the case was merely fabricated against him. According to him, he was arrested by the chairman while at home. He was then beaten at the Chairman's office and later sent to the Police station. According to him, the victim child found him at the police station. It was his first time to see her. He insisted that he has not raped the victim child.

I have considered submissions made by both parties, grounds of appeal and Court record. I will start with the first, third and fourth grounds of appeal collectively. It is true that, the duty to prove the case against an accused person is vested in the prosecution and the proof should be beyond reasonable doubts. Court record indicates that, the prosecution managed to prove the case against the Appellant beyond reasonable doubt. As correctly submitted by the learned State Attorney, the main ingredient for the offence of rape is penetration and lack of consent where relevant. Consent is not relevant for rape committed to a child under 18 years.

Evidence on record, especially the testimony of the victim child, establishes clearly that the Appellant who was the accused before the trial court raped her. The victim child testified as PW1 during trial. She explained well what did the Appellant do to her on the incident day. According to her testimony, the Appellant undressed her and inserted his penis into her vagina. With such testimony, the victim proved that she was raped. She stated clearly that she did not know the Appellant before the incident day, thus, she does

not know his name. She however, managed to describe physical appearance and dress colour of the person who raped her to her teacher immediately after the incident.

The said teacher, Adamson John Kibona, testified as PW2. According to his testimony he is a teacher at Manoleo Primary School. On 31st August 2021 at around 0830am, while in his office, the victim child came crying. She told him that somebody has urinated in her genitals. She also described the person who raped her to be an adult, short brown and he wore a blue shirt with white strips. The child also mention the area where the incident took place. The area was about 100 meters from their office. It is the description given by the victim child that enabled PW2 and other teachers identify and arrest the Appellant. After he was arrested, the victim child confirmed that he was the man who raped her. The Appellant was taken to the Ward Executive Officer for other procedures of taking him to the police station.

It is trite law that in sexual offences, the testimony of the victim is enough to prove the case against the accused person. The Court of Appeal of Tanzania have in several cases ruled that, evidence of the victim in sexual offences if reliable can be relied upon to convict the accused person. See the case of **Selemani Makumba** (supra) and the case of Filbert **Gadson @ Pasco vs Republic** (Criminal Appeal 267 of 2019) [2021] TZCA 360 (5 August 2021).

The age of the victim is very important in proving rape committed under section 130(1)& (2) (e). The age of the victim child was proved by her father, Issa S/O Maulid @Zoleka who testified as PW3. According to him, the victim child was aged 9 years at the time he was testifying before the Court.

Evidence of the parent is among the modes of proving the age of the child. See, the case of **Issaya Renatus vs Republic** (Criminal Appeal 542 of 2015) [2016] TZCA 218 (26 April 2016).

In addition to testimony of the victim, there was also uncontroverted testimony of PW2, the person to whom the incident was reported for the first time. His testimony regarding the alleged rape, identification of the Appellant and his arrest incriminates the Appellant. Court record establishes that, the Appellant did not cross examine PW2. It is a settled principle that, failure to cross examine a witness amounts to acceptance of the testimony of that witness. See the decision of the Court of Appeal of Tanzania in the case of **Emmanuel Saguda @Sulukuka and Another V R** Criminal Appeal No. 422b of 2013 CAT at Tabora and Issa **Hassani Uki vs Republic** (Criminal Appeal 129 of 2017) [2018] TZCA 361 (9 May 2018). Applying the same principle, I find the first, third and fourth grounds of appeal to be unfound because the un-contradicted testimony of PW2 establishes that the Appellant was properly identified to be the person who raped the victim child while the victim child's testimony establishes penetration and the fact that it was the Appellant who inserted his penis into her vagina.

On the second ground, the Appellant challenges evidential value of the testimony of the victim for being recorded contrary to the provisions of section 127 of the Evidence Act. The section requires a witness of tender age to promise to tell the truth before testifying. Court record establishes that the victim child promised to tell the truth as it appears at page nine of the typed proceedings. Thus, the testimony of the victim child was recorded in compliance of section 127(2) of Evidence Act.

For those reasons, I find no reason to fault the decision of the trial Court.
The appeal is hereby dismissed.

Dated at Tabora this 1st day of March 2024



A handwritten signature in black ink, appearing to read "Z.D. Mango", written over a faint grid.

Z.D.MANGO
JUDGE

Right of Appeal explained