IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 25 OF 2023

YAKUBU MSAFIRI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Kahama at Kahama.]

(Hon. D.D. Msalilwa SRM)

dated the 11th day of November, 2022
in
Criminal Case No. 277 of 2022

JUDGMENT

3rd & 25th April, 2024.

S.M. KULITA, J.

This is an appeal from the District Court of Kahama. The appellant herein above was charged for Rape, contrary to the provisions of section 130(1) and (2)(e) and section 131(1) of the Penal Code [Cap 16 RE 2019]. It was alleged that, on the diverse dates between February, 2022 and 29th

day of July, 2022 at Nyasubi area within Kahama District, in Shinyanga Region, the appellant herein had sexual intercourse with one VM (not her real name), a girl of 15 (fifteen) years of age. The Appellant was convicted and sentenced to serve the imprisonment of 30 (thirty) years.

The story behind this matter in a nutshell is that in 2019 the Appellant herein was employed by the victim's father as a Shopkeeper. In July, 2022 the Appellant quitted the job and went back to his home place at Geita. It is alleged that, it then happened that the victim who was a Primary School student was missing at home and that she was not attending school regularly. It is further alleged that, upon the follow up being made, the victim's mother noticed from the victim's cell phone that she had love affairs with the Appellant. She observed love affairs massages texted between them. That led the Accused person to be arrested and accordingly charged for this matter.

Aggrieved with both, conviction and penalty, the Appellant herein raised 4 (four) grounds of appeal before this court which can be summarized into 3 (three) as follows;

1. That, the trial Magistrate was wrong to convict the Appellant while he denied to have committed the offence.
2. That, the case at the trial court was not proved beyond all reasonable doubts.
3. That, the defense case was not considered in the impugned judgment.

While the Respondent (Republic) is represented by Ms. Rose Kimaro, State Attorney, the Appellant use to appear in person. He is unrepresented.

In his submission in support of appeal the Appellant herein sought for the grounds of appeal that he has raised in the petition be adopted as the submission for his appeal. He concluded by praying for his appeal to be allowed and he be accordingly acquitted.

In the reply thereto, the State Attorney resisted the appeal.

In her reply to the 1st ground of appeal the State Attorney stated that it is misconception on the Appellant's mind that the trial court was wrong to convict him while he had pleaded Not Guilty to the charge. The counsel narrated that, plea of Not Guilty is used to be followed with trial of the case whereby each party calls its witnesses to testify for it, before the court making judgment, which can be for either of the parties.

Submitting on the 2nd ground, that the case at the trial court was not proved beyond all reasonable doubts, the State Attorney stated that the prosecution case at the subordinate was proved beyond all reasonable doubts. She said that PW1 who is the victim in this matter testified that she had sexual relationship with the Appellant and that they ever conducted it about five times. The said witness stated that she was 15 years old by that time. The counsel further submitted that the victim also stated that she ever travelled to Geita for the Appellant after he had left the job at their homestead where he had been employed as a Shopkeeper. It was the further submission of the State Attorney that the Appellant never cross-examined PW1 during trial. She thus led this court to note that, the said scenario implicates that the Appellant was in admission of all what was testified by the said witness, hence precluded to deny the same.

Further submitting on this ground of appeal, Ms. Rose Kimaro, State Attorney, stated that PW2 who is the victim's father tendered to court the victim's (PW1's) birth certificate (exhibit P1) to prove that the victim was under 18 (eighteen) years old. She said that the said exhibit shows that the victim was born on 7th day of March, 2007 which means that by the time the crime was committed in 2022 she was 15 (fifteen) years of age. The Counsel

also stated that sometimes in July, 2022 PW1 was not present at home and that PW2 was unaware of her whereabout.

The Counsel further clarified that PW4 who is the PW1's Teacher testified that sometimes in July, 2022 PW1 was absent at school and that he notified her father (PW2) on that. As for the testimony of PW5, a Police Officer who purported to have noted down the Accused's (Appellant's) caution statement (exhibit P4), the State Attorney submitted that the Appellant confessed before PW5 that he actually committed the alleged crime, consequently his caution statement was noted down by him. She added that the said document was admitted to court with no objection from the Appellant. As for PW5, the Doctor who had medically examined the victim, the Counsel stated that she found her not virgin, which means that she ever had carnal knowledge before. She added that the PF3 (exhibit P2) transpires that position.

The State Attorney, Ms. Rose Kimaro concluded her submission in respect of this issue by saying that the case at the subordinate court was proved beyond all reasonable doubts. She thus prays for this ground to be dismissed for having no merit.

As for the ground that the defense case was not considered, the counsel submitted that the said allegation is false. She said that the impugned judgment at page 5-6, as well as page 10-11, transpire the defense evidence being considered. The counsel winded up this issue by summing up that, it just happened that the said defense arguments had been found to have no merits.

That was the end of submission by the State Attorney. She concluded by praying for the appeal to be dismissed. The Appellant had no rejoinder, hence submissions of both parties ended up there.

From the above submissions, I find the core issue to be determined is whether the case at the trial court was proved at the required standard. That being the case, I am going to start with analyzing the 2nd ground of appeal.

The standard of proof in the criminal cases has been stated in several cases including that of **WOOLMINGTON V. DPP [1935] AC 462** in which it was held that, the prosecution side has to prove its case beyond all reasonable doubts.

In order to ascertain if this standard had been met during trial at the subordinate court, I went through the record and noticed the following;

The lower court's proceedings at page 14 transpire the victim's father, PW2, to have testified that the victim's mobile phone was found with massages which show that she had sexual relationship with the appellant. But the witness never made it out on the wordings of even a single massage among them, to show that it was there in the victim's phone and that the same is a love massage. As well, he never mentioned the said mobile phone number. Further, the said phone was not tendered to court as exhibit.

Another thing that I have noticed from the lower court record is that, the testimony of PW2 on that issue is hearsay. According to the evidence in the record, including that of PW2 himself, it was not him who had noticed the presence of the said text messages in the victim's (PW1's) phone, but he was so told by his wife, who had never appeared to testify before the trial court. The said evidence by PW2 being hearsay is unwealthy of credit. It is the evidence with no evidential value, hence it was wrong for the trial court to regard it and use the same to convict the appellant. It is a principle of law under **section 62(1) of the Evidence Act [Cap 6 RE 2019]** that evidence must be direct. That, it should involve the facts which have been perceived by the witness' own sensory organ. See also **VUMI LIAPENDA MUSHI V. R, Criminal Appeal No. 327 of 2016, CAT at Arusha.**

In my perusal over the lower court record I have come across a letter authored by the victim's Teacher (PW4) to Police dated 02/09/2022. The same was admitted and marked as Exh. P3. That said letter is just the identification of the victim's father (PW2) to Police. It does not corroborate his (PW4's) testimony that sometimes in July, 2022 the Victim was absent at school. At least he could have tendered the attendance Register to prove the said allegation. In short, I don't see the relevance of that said exhibit in connection with the allegation of Rape against the Appellant.

It is the submission of the State Attorney that the victim was found to have no virgin. Though in his analysis the trial Magistrate said nothing on this issue, the Doctor's (PW3's) opinion that the victim has no virgin does not necessarily lead to a conclusion that she must have been carnally known by the Appellant. The said piece of evidence in the trial court record does not show as to when the said virginity was broken. Further, the victim (PW1) herself never stated that the Appellant is the one who was responsible for it. Hence, the absence of virginity in the victim's sexual organ should not be used as a ground to convict the Appellant.

Another thing that I have noted from the trial court's record is the story by PW1 that she met with the Appellant and had sexual intercourse at

Kahama when the Appellant had gone back there after he had quitted the job. I find this piece of evidence with no proof. The said witness never stated on the date and time that they actually met each other and had sexual intercourse. As for her testimony that they also met at Geita for the same purpose, it is a fact which is irrelevant to the case at hand, as the said township is located outside the territorial jurisdiction of Kahama District court which tried the matter.

In his defense during trial the appellant alleged that this case was fabricated by PW2 who had decided to use his daughter to incriminate him for Rape, the offence that he didn't commit. He averred that the source of the matter was his act of quitting the job as a Shopkeeper that he had been serving for him (PW2) at his shop. The appellant alleged that he had to leave the job because PW2 who was his employer had not paid him the salary for 6 months' frequent period. That the Appellant confronted PW2 on that but he declined. He thus decided to quit the job. It was the further testimony of the Appellant during trial that, having so decided PW2 insulted him and promised to deal with him for his decision.

It is undisputable and the Appellant himself alleged in his defense that he was employed by the victim's father (PW2) as a Shopkeeper from 2019

to July 2022. That, this saga arose after the said Appellant had left the job. The doubt that persists in my mind is that, why it started after the appellant having quitted the job?

Under these circumstances where the appellant complained that the crucial prosecution evidence, particularly that of PW1 and that of PW2 involves family members, that is the victim (PW1) and her father (PW2), though the law does not limit the evidence of family members, but that should not be totally disregarded. It is advised that the same should be taken and acted upon, but with a reasonable care. The reason behind is that, such persons can make evidence with an interest to serve. In the case of **Hassan Mzee Mfaume v. Republic [1981] TLR 167,** it was held;

> *"Furthermore, it would appear that the witness Asha (PW5) whose evidence tends to implicate the appellant, was a person with an interest of her own to serve in the matter..... Once it is held that Asha was a witness with an interest of her own to serve, then her evidence requires close scrutiny and, as a matter of procedure, corroboration".*

Basing on the above stated circumstance of the case, I find it that, PW1 is a witness with an interest to serve, hence her evidence ought to have acted upon with great caution. The authority in the case of **Abraham Saiguran V. The Republic [1981] TLR 265 HC** is to the effect that, the evidence given by a witnesses with interest to serve must be approached with care and should not be acted upon unless corroborated by some other independent evidence. To me, I find the PW1's evidence unworthy of credit. In the case of **SELEMAN MAKUMBA V. R [2006] TLR 379** it was held that the best evidence in sexual offences comes from the victim. The fact that the evidence of the victim herein has been found to be unworthy of credit, it means the prosecution case misses the evidence which could be the best to convict the appellant.

The record transpires that there was also a caution statement of the Appellant. PW5, a Police Officer purported to have noted down the Accused's (Appellant's) caution statement (exhibit 4) said that the Appellant confessed before him that he actually committed the crime, but the said document cannot be valuable for lack of other evidence to corroborate the same. It is a position of the law that the court can convict the accused basing on uncorroborated confession, but it is desirable for the court to warn itself

before acting on it. The court must satisfy itself that the said confession is nothing but true. I am aware with the position of the law that, it is dangerous to convict the Accused person relying solely on the retracted/repudiated confession without corroboration. See, **Dickson Elia Nsamba Shapwata and Another v. Republic, Criminal Appeal No. 92 of 2007, CAT at Mbeya** in which it was held;

> *"With respect, we agree with Mr. Mkumbe that, it is always desirable to look for corroboration in support of a confession which has been retracted/repudiated before acting on it to the detriment of the appellant."*

The quoted excerpt presupposes that, conviction may however base solely on the retracted/repudiated confessions without corroboration. On that situation, the law provides, as per **Tuwamoi v. Uganda (1967) EA 84** in which it was held;

> *"The present rule then as applied in East Africa, is regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement that has been retracted in the absence of corroboration in some material*

particular, but that the court might do so ***if it is fully satisfied that in some circumstances of the case that the confession must be true****" (Emphasis* supplied*).*

See also **Hemed Abdallah v. Republic [1995] TLR 172.**

With the above reasoning, it follows therefore that, in order to act on the retracted/repudiated confession of the accused person in Exhibits P4, the trial court must be fully satisfied, basing on the circumstances of the case, that those confessions are nothing but the truth.

The question is, are there some circumstances in this case that make this court to be fully satisfied that those confessions are nothing but the truth? Here I must admit that, in this case, there are no circumstances to convince this court that the confessions are true. More so, failure of the prosecution side to call as a witness, the victim's mother during trial to prove that she actually found the victim's mobile phone with love massages texted between the victim and the Appellant, and the fact that the testimony of the victim is unwealthy of credit, they all make me to declare that the accused's caution statement was not supposed to be acted upon without corroboration.

On that account, I am of the settled mind that, this case was not proved at the required standard in the trial court. I thus find it unnecessary to deal

with the other grounds of appeal. **The appeal is therefore allowed**. Consequently, I hereby order for the immediate release of the Appellant from the Prison House, unless he is held for any other lawful cause.

S.M. KULITA
JUDGE
25/04/2024

DATED at **SHINYANGA** this 25th day of April, 2024.

S.M. KULITA
JUDGE
25/04/2024