THE UNITED RESPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB- REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 41180 OF 2023

(Originating from the District Court of Chunya at Chunya Criminal Case No. 94/2023)

WILE S/O AMOBKILE..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order 2nd April, 2024

Judgment 19th April, 2024

Kawishe, J.:

In the District Court of Chunya, the appellant, Wille Ambokile was charged with the offence of rape in contravention of section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2022. Following the trial, he was found guilty, convicted and sentenced to thirty years imprisonment.

Basing on the records available, briefly the facts of the case were that on 18th day of June, 2023 at Stamico area within Chunya District, Mbeya Region, the appellant did have canal knowledge of a 14 years old

girl, PW1 (name withheld). He was arrested and arraigned before the trial court. In proving the case, prosecution summoned five witnesses and tendered one exhibit. Defence had one witness, the appellant with no exhibit tendered. Upon conclusion of the trial, the appellant was convicted and sentenced accordingly. Dissatisfied with the decision, he now appeals before this court on the following grounds reproduced hereunder-

1. *That the trial court erred in law when convicted and sentenced the appellant without evaluating deeply the evidence of PW1 and PW2 which was lacks (sic) corroboration from the persons who mentioned by these witnesses.*
2. *That the trial court erred in law when convicted and sentenced the appellant taking into contradiction of the evidence of PW1 and PW2.*

(a) PW1 said that when the appellant raped her, he discharged and the appellant run (sic) away and then went to told (sic) PW2 according to such allegation.

(b) PW2 told the trial court that she saw when the appellant in Korongoni when were with PW1 in fact their testimonies were contradicted itself (sic) and unworthy to be believed before the law.

3. That the trial court erred in law when convicted and sentenced the relying on the OPINION EVIDENCE OF PW3 a Clinical Officer who lied the trial court that PW1 came to him with cut underpants full of clotting blood but the same was not tendered to the trial court to proof the same.

4. That the court erred in law when convicted and sentenced the appellant relying on the evidence of examination done by PW3 who failed to mention the modern instruments which enabled him to conduct a true and correct examination not by seeing only by his necked eyes.

5. *That the defence of the appellant was not considered by the trial court.*

During the hearing of the appeal, the appellant appeared in person unrepresented whereas, the respondent- the Republic was represented by Mr. Salmin Zuberi, learned State Attorney.

In arguing his appeal, the appellant prayed to adopt his grounds of appeal to form part of his submission. He argued that:

There was a contradiction between the evidence given by PW1 and PW2. That PW1 stated that when was raped by the appellant and released ran to inform PW2 about the incident. Whereby PW2 told the trial court that, she saw the appellant in the canyon (Korongoni) with PW1. As a result, he insisted that their evidence is full of contradictions thus, cannot be trusted by the court.

Further the appellant submitted that the trial court did not analyse his evidence and did not analyze the evidence of PW1 which lacked connection from the people mentioned by the witnesses. He continued to insist that the subordinate court erred in relying on the witnesses' opinion of PW3, Clinical Officer who lied in court that PW1 reached his institution holding her underpants with clotted blood. That the clothes were not produced in court as an exhibit. He averred that PW3 did not explain the

type of devices used in the examination and not by looking by eyes. He concluded by stating that the defence of the appellant was not considered during the trial.

In reply, Mr. Salmini Zuberi, learned State Attorney clearly stated that, the Republic is against all the reasons of appeal together with the appellant's submission. He submitted that the District Court of Chunya agreed with the Republic's evidence and convicted the appellant. That in replying, decided to argue the 1st & 2nd grounds together, the 3rd and 4th grounds together.

Replying to the 1st and 2nd grounds, Mr. Salmin stated that as far as the evidence of PW1, the victim is concerned, the law requires her to testify before the court that the accused (appellant) was the one who penetrated his manhood into her female organ and not otherwise. He referred the court to page 5 of the typed proceedings where, the victim told the court that the appellant undressed her, undressed his trousers half way, removed his pants, penetrated his manhood into her female organ and started having sexual intercourse. Mr. Salmin insisted that in law the requirement of proving raping case, the evidence the victim is sufficient to

convince the court to make a decision the same was done by the trial court.

Further Mr. Salmin submitted that even if this court finds that the evidence of PW2 is not credible, it can be expunged and still justice be done, where the appellant's conviction and sentence can still be upheld by this court. He cited the case of **Selemani Makumba vs. Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006). He prayed to the court to disregard the 1st & 2nd reasons of the appeal and dismiss them for lacking merit.

Replying to the 3rd & 4th grounds, Mr. Salmini reiterated his submission made on the 1st & 2nd grounds, that legally the court may make decision rightly and justifiably in rape cases by relying on the sole evidence of the victim without basing on medical evidence. He argued that the reason that the trial court erred in relying on expert opinion of the medical practitioner, does not hold water, as the court will not err if it does not rely on the expert opinion. Clinical Officer in court is required to proof penetration and not otherwise. If he can proof to the court that after medical examination, he discovered that a blunt object penetrated in the female organ of the victim then, his duty is discharged accordingly. The

learned counsel referred the court to page 11 of the typed proceedings where the Clinical Officer after examined the victim testified that, he discovered bruises in her labia majora and labia minora. He also discovered that there were spermatozoa. Thus, he concluded that the victim was penetrated by a blunt object because the victim's hymen was perforated.

Mr. Salmin insisted that PW3 was required to tell the court whether the victim was penetrated and not about a special device used to see the bruises. He asserted that there is no a special device to examine whether the victim's hymen is broken or not. That the Republic prays to the court to dismiss the 3rd & 4th grounds as they are baseless before the eyes of the law. Regressing to the 5th ground of appeal, Mr. Salmini referred the court to page 7 of the typed judgment stating that the trial court considered the defence of the appellant. The accused in his defence denied to have known the victim. The court considered his defence and found out that could not convince the court to accept the evidence and acquit him. In that, the court found out that the prosecution proved the case beyond reasonable doubt hence, convicted and sentenced the appellant accordingly. Mr. Salmini prayed to the court to dismiss the 5th ground together with

appellant's submission, as they are baseless and cannot convince the court to set aside the sentence he is serving.

In rejoinder, the appellant did not have anything to add. He reiterated his submission in chief.

Having heard the submissions of the parties and gone through the court's record, this court will now determine if this appeal has merits. In digest to all the grounds of appeal filed and argued, I find them all revolving on the issue of evidence, which is a point of fact. This court will deliberate on it while consideration the prosecution's evidence, whether the case was proved beyond reasonable doubt.

In the case at hand, the appellant was charged under section 130 (1), (2) (e) and 131(1) of the Penal code. These provisions provide for the offence of rape committed to a girl below 18 years, it is commonly referred to as statutory rape. The said offence has two ingredients namely, penetration and age of the victim. Consent is never an issue when it comes to these provisions.

Therefore, this court will determine whether there was penetration and whether the age of the victim was established in proving the

prosecution's case. Starting with the age of the victim, it was not an issue in the trial case neither a ground in this appeal. The age was proved by the victim and her mother that she was bone on 8th September, 2009 that she was 14 years old when she was raped. Hence, the victim was under the age of 18 years when the alleged rape was committed.

Regarding penetration, PW1 testified at the trial court that the appellant (accused), held her mouth and threatened her not to raise alarm. That appellant undressed his clothes halfway to the knee, laid her down on the ground. The appellant inserted his male organ into her female organ and started having sexual intercourse with her. The law is settled that penetration however slight is sufficient to constitute sexual offence. In the case of **Omary Kijuu vs. Republic** (Criminal 39 of 2005) [2007] TZCA 9 (22 June 2007) at page 8 the Court of Appeal held that:

> *"... But in law, for the purposes of rape, that amounted to penetration in terms of section 130 (4) (a) of the Penal Code Cap. 16 as amended by the Sexual Offences Special Provisions Act 1988 which provides: "For the purposes of proving the offence of rape -penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*

In the case at hand the victim was the only person who was present when raped. Her grandmother came when the appellant had completed his

mission. She told the court that the appellant had sexual intercourse with her. That was sufficient to prove rape. Her evidence was corroborated with PW2, her grandmother who arrived at the scene of crime while, the appellant had finished the awful act and escaped. In other words, PW2 found the appellant at the scene of crime. In addition, the medical report depicted that the victim was penetrated with blunt object. That she had bruises in her female organ. To this extent the contradiction stated by the appellant does not exist. Even if there was a contradiction, the learned State Attorney submitted well that, the evidence of PW2 can be expunged and still the evidence of PW1 could suffice. The evidence on record shows that PW1 testified at page 5 of the typed proceedings that after the appellant discharged her while, her grandmother approached the scene of crime and saw the appellant thus, PW1 ran to PW2 and narrated the awful act. At page 7 of the typed proceedings PW2 told the court that when the appellant saw her (PW2) discharged the victim and took to his heels. Therefore, grounds 1 and 2 of the appeal lack merits and is hereby dismissed.

The evidence of the victim is sufficient to prove the offence and did not mistake the appellant as she testified that the appellant threatened her not to raise alarm. I quote:

> ***"Ukipiga kelele nitakuuwa' then he pulled me to a canyon, took of my underwear and he took off his trousers halfway to his knee together with his underwear and then he laid me down on the ground and inserted his male organ into my female organ and had sexual intercourse with me."***

With this excerpt I am convinced that the victim identified the appellant. First it was around 09hours. There was enough light of the day. Second, the appellant held the victim's mouth and took her to a canyon, undressed her and himself, laid her down and had sexual intercourse. That time taken is enough for the victim to identify the rapist. Also, with the time taken to have sexual intercourse she had an opportunity to see the face of the rapist. In that the evidence of the victim is the best evidence in this case as it was held in the case of **Selemani Makumba vs. Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006) where at page 9 the Court held that:

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. In the case under consideration the victim*

- PW1 - said the appellant inserted his male organ into her female organ. That was penetration and since she had not consented to the act, that was rape, notwithstanding that no doctor gave evidence and no PF3 was put in evidence"

Aligning to the principle laid down by the Court, in this case at hand, even if the doctor could not give evidence still penetration could be proved. In that, the appellant's 3rd ground that the trial court erred in law for convicting him basing on the opinion of PW3 clinical officer and that the victim's pants were not tendered in court lack merit and is equally dismissed.

The 4th ground of appeal on the instruments used to examine the victim, lacks legs to stand on as stated in the case of **Selemani Makumba vs. Republic** (supra) that the victim's evidence is the best evidence in rape cases. See the case of **Ally Mpalagama vs. Republic**, Criminal Appeal No. 213 of 2018, CAT at Mtwara. It is the victim who is sure whether there was penetration into her female organ. Machines or instruments to measure whether there was a penetration are yet to be legislated as a mandatory requirement if they are available in Tanzania. Had it been that he questioned the spermatozoa found in the victim's female organ to have belonged to someone else could have been different.

Yet, the victim's evidence is the best in this case at hand. In that, this ground also fails.

The 5th ground of appeal is that the appellant's evidence was not considered by the trial court. At page 5 of the typed judgment, the learned trial magistrate stated:

> *"This court is pretty aware that at the defence stage the accused attempted to attack prosecution case that it was occupied with contradictions from the witnesses. Luckily! This court had a liberty to go through the prosecution witnesses' testimonies and in (sic) unable to go along with DW1 defence especially on the contradictions he alleged to exist."*

In my view, the trial magistrate considered the evidence of the appellant. If at all this court being the first appellate court could find necessary to evaluate the evidence of the appellant which is that, PW1 did not raise alarm when raped. This defence is watered down with the victim's evidence that she was threatened by the appellant and her mouth was covered by the appellant. This defence could not shake the prosecution's evidence. He claimed that the victim was not taken to hospital thus, the case is fabricated. PW3 is a clinical officer who testified before the court that the victim was taken to hospital, hence waters down his claim that that victim was not taken to hospital. This question lacks strength as well.

He added that, the doctor testified before the court that the female organ of the victim had spermatozoa in the form of liquid, that not every liquid is from spermatozoa. This defence is far from shaking the prosecution's evidence. As I observed earlier, even if the medical doctor was not called to testify the evidence of the victim was sufficient to convince the court to convict and sentence the appellant.

Given the evidence of PW1, PW2 and the PF3, the appellant's defence did not shake prosecution's evidence. Therefore, as per the case case law, in this case, the evidence of PW1 was sufficient to convict and sentence the appellant. In **Omary Mohamed v. Republic** [1983] TLR 52 it was held that:

> *"The trial Court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances which call for reassessment of their credibility."*

From that excerpt, I neither have any reason to interfere with the finding of the trial court.

From the above reasoning, the issue is answered in affirmative, the prosecution proved its case beyond reasonable doubt.

All considered, and since all the grounds of appeal are devoid of merits, this court dismisses the appeal in its entirety. Consequently, conviction and sentence of the trial court are upheld and confirmed.

It is so ordered.

Right of appeal is explained to any aggrieved party.

E.L. KAWISHE

JUDGE

19/4/2024

Dated and Delivered at **MBEYA** this 19th day of April, 2024 in the presence of the appellant and in the presence of Ms. Upendo Lyimo, learned State Attorney for the respondent, the Republic.

E.L. KAWISHE

JUDGE