IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB - REGISTRY
AT SHINYANGA

CRIMINAL APPEAL NO. 123 OF 2023
(Arising from the decision in Criminal case No. 64 of 2023 before Shinyanga District Court)

CHARLES LUNYEMBE ..... APPELLANT
VERSUS
REPUBLIC .....RESPONDENT

JUDGMENT

26th March & 10th May 2024

MASSAM, J:.

The appellant herein was arraigned before the trial Court with two counts to wit; Rape C/S 130 (1) & (2) (e) of the Penal Code, Cap 16 RE 2022, and unnatural offence C/S 154 (1) (a) and (2) of the same Act. It was further contemplated that the appellant on diverse dates between January 2022 to 26 February 2023 at Kizumbi area within Shinyanga Municipality had sexual intercourse with a victim aged 10 years and thus the appellant on the similar material dates had sexual intercourse against the order of nature of the victim. The trial court after a full consideration convicted the appellant and sentenced him to suffer thirty years imprisonment.

Aggrieved by the conviction and sentence, the appellant has approached this Court armed with nine grounds of appeal which fall under the question of evidence. Before the matter has not taken a recourse the appellant counsel added other ground which is on defectiveness of the charge.

During the hearing of this appeal, the appellant enjoyed legal service of Mr. Frank Samweli learned advocate while the respondent/Republic had legal representation of Ms. Mboneke Ndimubenya learned Stated Attorney.

Arguing in support of the appeal, Mr. Frank submitted that according to the charge sheet, the appellant was charged with two counts, which are unnatural offence and rape, but the charge of natural offence, the appellant was acquitted as there was no proof of that charge, but for 2nd charge, which is rape, the appellant was convicted with that, But the same was brought by wrong citation, as it was brought under section 130 (1) (a) while the right citation is Section 130 (1) (2) (e) which is quite different, paragraph (a) talks about an adult who is above 18 years and it is section which require proof of consent, paragraph (e) deals with, if someone is under 18 years and consent is not required, because appellant was wrong charged. Mr. Frank also boosted those proceedings and judgment that

required to be nullified. He referred this Court to the case **Edward Yusuph @ Gao versus Republic**, Criminal Appeal 496/2020, CAT-DSM where the Court ruled that the said section was not right, so it declared that appellant was wrongly convicted, thus the Court nullified the proceedings and judgment, and acquitted the convict.

With regard to grounds of appeal No 9, Mr. Frank stated that according to the judgment, the appellant was convicted only by looking what the victim testified to the court, the court failed to consider that, victim testified lies to the court, for instance the victim told the court that, appellant did sodomize and raped her but the same victim told PW2 who was her mother that, the last time to be penetrated it was on 26/02/2023. The evidence of PW3 who was a doctor, at page no. 30, told the court that he had experience on that issue and he examined the victim on 27/02/2023 which was the next day, at page no. 14 paragraph 3, the doctor said that the victim was penetrated with the blunt object but it was not within 72 hours. In his view Mr. Frank submitted that the said evidence shows that, the victim was raped on 26/02/2023, and examined on 27/02/2024, but she was not penetrated within 72 hours, and thus she was not virgin. So, from 26/02/2023 to 27/02/2023 was 24 hours. Therefore,

the version of the victim that she was raped on 26/02/2023 was not true. So, according to that piece of evidence penetration was not proved by the doctor. Further, to that at page no 14 of the proceedings the doctor said that he examined the victim to her anus there was no bruises, and anal muscles was normal. Therefore, the victim testified lies that she was sodomized, as if that was true, the findings could be different. He cited the case of Said **Ahmad Said V.R., DC Criminal Appeal No. 8 of 2023;** which cited a case of Ahmed Said V.R. Criminal Appeal No. 291/2015 CAT to that effect, similarly the case o**f Bahati Makeja V.R, Criminal Appeal No. 118 of 2006 (unreported)** on the effects of speaking lie before the court.

With ground no. 5, Mr. Frank testified that, the appellant evidence was not considered, the trial court did not consider it and gave it weight.

On the first ground of appeal that the trial court did not analyze well its evidence before convicting the appellant. According to the evidence given, especially to the evidence of PW3, which disproof the penetration nor unnatural offence, at page 15 doctor said that virginity can be lost by many reasons, but the most one is penetration, the other can be strong exercise and some children are born without it. So according to the

doctor's evidence, loss of virginity cannot be a proof of rape. Again, the doctor said that he saw some water coming from her vagina, but he examined her and proof that the victim had no infection. Lastly Mr., Frank therefore pressed for the appeal to be allowed and the appellant be acquitted.

On the side of respondent, Ms. Mboneke resisted the appeal and thus supported the conviction and sentence. Ms. Mboneke Submitted that the law is very clear that in sexual offences three things need to be considered; age, penetration, and who did that penetration. She further testified that in this case, the age of victim was not disputed, so the things which prosecution required to prove were penetration and who penetrated the victim. She added that the facts shows that the victim while at school told her teacher that she used to be raped for sometimes and the last time was on 26/02/2023, that piece of evidence signify that the victim was being raped. Similar position, the victim maintained it to PW5 also a teacher thus the evidence of victim is collaborated with the evidence of the doctor, (PW3) which proved that, the victim was used to be raped for sometimes, that is why she was found with no virginity and no bruises. Further, to that the doctor informed the court that, the victim was not

virgin and was penetrated with blunt object, and it was not within 72 hours, and there was dirty water which was coming from her private parts.

On the issue of DNA, doctor said that, if someone wash herself in her private parts, DNA, cannot be tested thus the victim was not lying. At page no 11 when the victim was cross-examined, she said that, no one told her to testify what she was testifying, but all witnesses who were relatives supported the appellant and no one sided with the victim. She added by testifying that the victim knows who raped her as she mentioned him to her mother and teacher.

In regard to ground no. 5 the appellant complained that his evidence was not considered, Ms. Mboneke in her reply submitted that the trial did analyze the evidence, in Court judgment from page no. 13 – 15 the trial court wa swell analyzed that, the victim teacher was the first person to discover that victim was raped, she therefore paused that the ground has no merit as the mother did not dessert, the victim and she used to come time to time to visit the victim. Therefore, the Court considered the defence evidence.

With ground of defectiveness of the charge raised before this Court, which is concerning the charge sheet, it is true that, the court wrote subsection (a) of section 130 instead of subsection (e) that is very true, by considering that section 130 is general section of rape, and particulars of offence, directs the same and that show that the same did not prejudice him for anything. Being the case, the appellant was convicted under section 130 (1) (2) (e) of the Act.

The appellant was aware with the charge from the beginning which was all about contravening section 130 (1) (2) (e) of the Act. Ms. Mboneke also stated that the mentioned case of **Edward Yusuph Gao Versus R,** is distinguishable, as the appellant was charged with incest by male, but the appellant herein and victim had no blood relationship. She therefore concluded that the appellant was well charged, hence the appeal should be dismissed.

In his rejoinder Mr. Frank submitted that the charge against the appellant was defective. It true that, the section was right but paragraph written was not, the trial court had bias, the charge was brought under section 130 (2) (a) but the judgment delivered basing on section 130 (2) (e) of the Penal Code. Therefore, since the respondent counsel did not

pray for retrial, let the appellant be acquitted for being charged under wrong provision.

Mr. Frank also added that the issue of penetration,PW3, did not prove it as he said that, victim was raped within 72 hours ,and there was no any evidence showing that PW3 examined the victim, and found out she had no hymen and absence of it, shows that victim was used to be raped, but the doctor told the court that absence of hymen does not prove the penetration, if the victim was raped on 26/02/2023 and examined on 27/02/2023, doctor could find it, but in the instant case doctor did not find it.

I have entirely gone through earnestly all the parties' submissions, authorities supplied and the available records. The issue for determination is **whether the appellant's appeal is meritorious.**

Having heard both parties on merit and upon scanning the trial court's records, my deliberation of this appeal to the best, I find the major contention between the parties is on the burden of proof and standard of proof. However, before squiring to the grounds of appeal dully filed before this court start by addressing the ground raised by Mr. Frank on the

wrong citation of the charge. Looking at the charge the appellant was charged under Section 130 (1) & (2) (e) and Section 131 of the Penal Code Cap 16 RE 2022. For clarity let me reproduce it;

" *130.-(1) It is an offence for a male person to rape a girl or a woman.*

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

Section 131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person"

With the particulars of the offence and evidence of the case it is undisputed that the victim's age was of the age of 10 years thus fall under tender age. If the offence therefore was proved then the charged provision was proper. The only mistake done by the trial magistrate is on its judgment preamble which do not prejudice the findings. Yet even when compiling her analysis of the case, the trial Magistrate convicted on proper provision as the convict charged. Therefore, this grounds of defectiveness of the charge is fortune had room and consequently is dismissed.

I now proceed to determine the rest grounds of appeal, it is a trite law that, prosecution bears the burden to establish and prove the offence beyond reasonable doubt, Section 3 (2) (a) of The Evidence Act provides the standard of proof in the following words:

Section 3 (2*) "A fact is said to be proved when (a)*

"In criminal matters, except where any statute or other law provides otherwise/the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

Likewise, section 110 of The Evidence Act, also provide in a clear manner as quoted hereunder:

Section 110 (1) *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

These sections received a considerable legal breath by the Court of Appeal in the case of **Anthony Kinanila Enock Anthony Vs. R, Criminal Appeal No. 83 Of 2021** when it held:

> *"As to the standard of proof which we shall also have the opportunity to consider in the instant case/ the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and here/ one should not waste time trying to invent a new wheel as that is exactly what was stated by the House of Lords in England way back in 1935 in Wooimington Vs. DPP [1935] AC 462 from where our present general principles of criminal law and procedure emanate"*

Clearly, the offence of rape is established when the following ingredients are proved beyond reasonable doubt: One- when there was

male penis penetration to a girl's reproductive organ; two- if a girl was below the age of 18 years, is immaterial whether the girl gave consent or otherwise. If a woman was above the age of majority, that is, above 18 years old, then such penetration should be without her consent to constitute rape.

In the instant case there was no complaint of age and thus the same is undisputed. The other complaint was on reliability of evidence of PW3 the doctor who examined the victim. According to the appellant the said witness did not prove the offence against the appellant. I have looked for the testimony of Pw3, the same was really questionable, at page 14 of the typed proceedings, PW3 stated the following;

" *..... I examined her private parts; her vagina had no bruises. Her labia minora and majora was normal, but she had no hymen and the vagina was discharging a very bad smelling dirties but there was no any wound. I also examined her anus there were no any bruises and anal muscles was normal...."*

Now, it was the victim's evidence that the appellant had raped for several times and promised her to be given monies. PW3 a medical doctor

provided in his finding he found that there was no penetration, no bruises no hymen. The same was reflected in Exhibit P1 (PF3). PW1 only averred hearsay evidence. And the rest evidence are police officers who only involved in investigation of the saga and others were victim teachers.

Notably, I am aware that the best evidence in sexual offences comes from the victim herself/himself. However, despite of that paradigm the same is complimented where there is medical evidence to prove the same. Therefore, Corroboration of other independent evidence is a paramount to the effect. Therefore, the issue to consider is whether a child of tender age; estimated to be 10 years old been is considered raped if found to have no bruises and no swellings in her genital part? In anyway a mere absence of hymen is not conclusive proof that it was caused by a sexual act. Further, the medical report (exhibit PI) among others, show that there was no recent traumatic penetration of vagina and anus. However, it is alleged that the victim was used tohave sexual intercourse several times. It would therefore suggest that is why she did not tell anyone that she was being raped for all these times (if at all).

Over and above, what caused the victim to reveal the incidence if at all times she had remained silent when raping incidence took place. Based

on the testimony of PW3 and exhibit P 1, do they suggest any penetration as core elements in proving offence of rapesto have found in genital female organ of the victim? the answer would be in negative.

Though I acknowledge the established principle that the best evidence in rape cases comes from the victim, a proper approach to deal with the victim's best evidence, is to examine the evidence properly to find credibility, coherence and compatibility of that evidence of the victim. The principle in **Selemani Makumba's** case does not apply without consideration of the circumstances of each case. This is what was cautioned in the case of **Fahadi Khalifa Vs. R, Criminal Appeal No. 573 of 2020**, CAT at Dodoma where it was held inter alia:

"*In sexual offences the best evidence comes from the victim see:* ***Selemani Makumba v. Republic*** *[2006) TLR 149. However; we should remark that it is not always the case that such evidence is taken as wholesome, believed and acted upon to convict an accused person without considering other evidence and circumstances of the case"*

I must therefore conclude that penetration as ground of proof of rape was not proved beyond reasonable doubts. On the allegation that the

defense testimony was not considered by the trial court, going through the impugned decision, I sincerely agree with the appellant that his defense testimony was not considered by the trial court. Leave apart the analysis of the evidence by the trial Magistrate while composing her judgment, she did not refer anyhow the defence evidence even to negate or reaffirm it. The position of the law is, failure to consider the defense testimony vitiates the trial and the resulting effects are nullity. See **Leonard Mwanashoka vs. Republic, Criminal appeal No. 226 of 2014 (unreported)** where, while discussing the appellant's complaint that his defence was not considered and after reciting an extract from learned judge's judgment showing how he dealt with the defence evidence, the Court of Appeal stated that:

"We must quickly and respectively point out here that where the learned first appellate judge got wrong. accept that the learned trial Resident Magistrate summarized the defence evidence much as he/she did summarize the prosecution evidence. But that was not the complaint of the appellant it is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from

the grain. Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing hot to consider the evidence at all in the evaluation or analysis. The complaint of the appellant was that in the evaluation of the evidence, his defence case was not considered at all "

The Court then went further to expound the obtaining consequences in these unambiguous words:

"The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriage of justice. It is unfortunate that the first appellate court judge fell into the same error and did not re-evaluate the entire evidenceas she was duty bound to do. She did not even consider that defence case too. It is universally established jurisprudence that failure to consider defence is fatal and usually vitiates the conviction... "

See also **Hussein Idd and Another vs. Republic, [1986] TLR 166** where the Court said:

"It was a serious misdirection on the 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".

In the case of **Kaimu Said V. Republic, Criminal Appeal No. 391 of 2019, CAT at Mtwara,** insisted that when a trial court disregards the defence testimony, the trial is vitiated as it is a nullity.

But strictly, in prosecution cases, where defense testimony is not considered, the trial is vitiated. This is the general rule. As what is the way forward, depending on each case, there is a mixed approach. Strictly, in the current case, what the trial magistrate did was merely summarizing the defense testimony.

I am settled in my mind that, the fact that the appellant had carnal knowledge with the victim was not established and proved beyond reasonable doubt. Though I may accept that the victim may have been raped by somebody some days, the condonation of the PW1, PW3 and the

victim all together, add more doubt to the prosecution's case to make this court to find out that the offence was not proved beyond reasonable doubt.

According to that, I find this appeal to have been brought with sufficient cause, I allow it and order the appellant's immediate release from the custody unless otherwise lawfully held. It is so ordered.

DATED and **DELIVERED** at **SHINYANGA** this 10th May 2024.

R.B. Massam
JUDGE
10/05/2024

Right of appeal explained.

R.B. Massam
JUDGE
10/05/2024

THE HIGH COURT OF TANZANIA