

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**CRIMINAL APPEAL NO.40507 OF 2023**

(Originating from Criminal Case No. 11 of 2023 at the Sumbawanga District Court)

**EZEKIEL S/O MOSES @ MBWELO ..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**MWENEMPAZI, J:**

The appellant herein named was charged in the District Court of Sumbawanga with the offence of rape contrary to section 130(1) and (2)(e) and section 131(3) of the Penal Code, Cap. 16 R.E. 2022. It was alleged that the accused person on the 10<sup>th</sup> January, 2023 at Bangwe Area within Sumbawanga Municipality, in Rukwa Region had unlawful sexual intercourse with one HH (the identity withheld to protect the victim child) a girl aged nine (9) years old.

When the charges were read over and explained to the appellant (the accused person) he denied and the matter had to go for a full trial. The prosecution called four witnesses and also tendered two documentary evidence and the accused defended himself and he did not tender any

exhibit. At the conclusion of the trial, the trial magistrate found the accused guilty of the offence he was charged with and convicted him with the offence of rape as charged. He was sentenced to serve a term in jail for life imprisonment as per section 131(3) of the Penal Code, Cap. 16 R.E.2022. The trial court also ordered the convict to pay compensation to the tune of TZS 500,000/ to the victim. The appellant was not satisfied with the findings, conviction and sentence meted on him. He therefore filed a petition of appeal registering five grounds of appeal, praying that basing on them this court should allow the appeal, quash the judgment and conviction and set aside the sentence and release him from prison.

In this judgment, I do not see the need to reproduce all the grounds of appeal, however in a summary form, the appellant has faulted the judgment that it was an error in law and evidence as the conviction emanated from the case which was not proved beyond reasonable doubt; that the conviction relied on the hearsay evidence by PW1(Robert Mwang'ombe); that the prosecution evidence had no caution statement nor any police officer was called to testify; that the defence evidence was not considered and last that the other kids alleged to have been raped were not called to testify.

At the hearing the appellant was unrepresented and the respondent was being served by Mr. Mathias Joseph and Ladislaus Akaro, learned State Attorneys. The submission for the respondent was made by Mr. Mathias Joseph, State Attorney. Hearing was conducted viva voce and the appellant had a brief submission that he prayed this court to consider the grounds of appeal which he filed in the petition of appeal and allow the appeal.

In reply, the learned State Attorney submitted that the respondents are opposing the appeal; they have an opinion that the decision of trial court was properly reached and they pray that it be upheld. In reply to the 1st ground of appeal, he submitted that the appellant had faulted the prosecution that they did not prove the offence. He submitted that the record shows the appellant was charged with the offence of statutory rape. In the case of *John Ngusa Vs. Republic, Criminal Appeal No. 593 of 2020*, Court of Appeal of Tanzania at Shinyanga at page 13 – 14 two ingredients must be proved: **one**, Age and **two**; penetration. The age of the victim was established by PW1 at page 11 of typed proceedings. The victim was 9 years old. Penetration was proved and it is reflected at page 19 of proceedings. The victim said that the 'dudu' was put into her vagina. It was done four times.

It is a principle of law that witnesses should be seen credible unless there are other reasons. The evidence was coherent. The victim told her grandfather PW1 that the appellant did rape her four times. He invited this court to refer page 9, 11 – 12 of proceedings. The counsel has argued that if we follow the rule that best evidence comes from the victim, then we find that the victim did show what actually happened in detail. The counsel for the respondent submitted that the first ground as no merit. He prayed this court to dismiss the same.

Submitting on the 2<sup>nd</sup> ground of appeal, he stated that in convicting the appellant, the trial court considered the evidence of all witnesses, including PW1. He prayed that the ground be dismissed as the same has no merit.

On the 3rd and 5th ground, the counsel for the respondent submitted that the appellant is complaining that some of witnesses were not called and caution statement was not tendered. It is the duty of prosecution to call witnesses who would prove the offence. In the case of ***Justus Evarist Vs. The Republic, Criminal Appeal No. 242 of 2021, Court of Appeal of Tanzania at Bukoba*** at page 13: -

*"It is the law that, in terms of section 143 of the Evidence Act, the prosecution is not bound to parade before the trial court a specific number of witnesses to support its case".*

The witnesses called proved the offence. And at page 7 – 8: -

*"The court can convict the accused based on the evidence of the victim if it believes it to be the truth of what transpired".*

The counsel prayed that the grounds 3 and 5 be dismissed.

Submitting on the 4th ground of appeal the appellant faults that the defence was not considered. He was in opposition to the statement. He pointed out that the trial magistrate considered the defence at page 8 – 9 of the judgment of the trial court. In general, the respondent submit that the appeal has no merit.

In rejoinder the appellant prayed that this court to considers the grounds presented in the petition and allow the appeal as prayed.

I have as well gone through the record of the trial court and reviewed the submission made by the respondent's counsel during hearing of an appeal. The main issue for consideration is whether the appeal has merit as lightly submitted by the appellant. Going along the path as submitted by the counsel for the defendant, I do agree that due to the age of the victim, there is no question on the issue of consent, as the offence under consideration is rape. Obviously, by operation of law, the victim being a minor we do not expect consent to be of any aid if sexual intercourse between the appellant and the victim will be proved. This is a case for statutory rape. In the case cited by the counsel for the respondent, ***John Ngusa vs. The Republic, Criminal Appeal No. 593 of 2020, Court of Appeal of Tanzania*** sitting at Shinyanga at page 13 it was observed that:

*"Indeed, to prove the offence of rape contrary to sections (130(1), (2)(e) and 131(1)(3) of the Penal Code for which the appellant was charged, the prosecution side was expected to prove one, the age of the victim; two, penetration; and three that it is the appellant who was the culprit."*

Section 130(1) of the Penal Code, Cap. 16 R.E 2022 provides for general rape and section 130(2)(e) provides for Statutory. The provisions provide as follows:

***"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:*

*(a) –(d) N/A;*

*(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."*

I have read the record as earlier observed herein, the PW2 is the victim of the offence by the appellant. She has stated categorically that the appellant is the one who had sexual intercourse with her in his house where he called the victim and her friends. He undressed her and entered his 'dudu' into the vagina of the victim. In her evidence she had similar instances four times on various days. The evidence by PW3 Salumu Plined Jopena proves that the victim had a broken hymen a sign there was penetration into her vagina. That was also shown in Exh. P1 the PF3 issued to the victim and filled by PW3.

In the testimony of the victim, she did not disclose earlier because she was threatened to be slaughtered. It is a reasonable explanation of the delay in reporting. The appellant alleged to have dispute with his neighbors who promised to deal with him. That was considered in the

Judgment of the trial court and it did not raise any doubt to the case by the prosecution.

It is the principle in sexual offences, due to their nature, the best evidence comes from the victim of the offence. She is the person who have a direct experience of what actually transpired at the scene. That is supported by numerous decisions such as ***Selemani Makumba vs Republic*** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006) where it was 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"*

According to the record and in particular the impugned judgment, the evidence relied to convict the appellant not only from PW1. In fact, the only point relied from the testimony of PW1 is the age of the victim which was also corroborated by the testimony of the victim herself (PW2). Other witnesses such as the Doctor who examined the victim had her contribution to the conviction and sentence meted to the appellant. It is clear, even if the victim would like the defence evidence to feature in the judgment, the fact that he had other conflict cannot be a reason as the evidence relied mostly is from witnesses who were not parties to the scuffle; in my view, the material evidence is that of

the victim and the doctor, PW2 and PW3 and the possible enemy to him is PW1 whose material evidence was that on the age of the victim.

In my considered view, after going through the evidence and the judgment of the trial court, I am satisfied that the prosecution proved their case and the appellant herein was rightly convicted by the trial court. The trial courts decision is hereby upheld. The appeal is dismissed forthwith. It is ordered accordingly.

Dated and signed at Sumbawanga this 23<sup>rd</sup> day of May, 2024



**T.M. MWENEMPAZI**

**JUDGE**

Judgement delivered in Judge's chamber this 23<sup>rd</sup> day of May, 2024 in the presence of the appellant and Mr. David Mwakibolwa, learned state attorney for the Respondent.



**T.M. MWENEMPAZI**

**JUDGE**

Right of further Appeal explained.