IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

DC CRIMINAL APPEAL NO. 3281 OF 2024

(Originating from Criminal Case No. 551 of 2022 District Court of Temeke)

ALLY SAID KAULE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 13/05/2024
Date of Judgment: 27/05/2024

NGUNYALE, J.

The appellant was charged, tried and convicted for the offence of Rape contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2022. Earlier it was alleged that the appellant on unknown date of August, 2022 at Mwanamtoti area within Temeke District in Dar es Salaam Region did have carnal knowledge of one [name withheld] a girl of eleven years old. In order to protect her repute her proper name is hidden and for the purpose of this judgment she will be identified as PW2 or the victim of the offence.

The factual background is simple, the appellant is a teacher by professional; he was teaching by way of volunteering at Mbagala Kuu Primary School also he was engaged in the evening package to teach the victim in a tuition program. It seems early October 2022 PW4 the mother of the victim raised suspicious over the conduct of the victim because she happened to come home late. The mother shared her suspicious with PW1 and assigned PW1 to keep an eye over the behaviour and the manner the victim conducts herself. PW1 told the mother that in the victim's school beg she noted a love letter written by the victim intended to be send to the appellant and keys suspected to be of the door of the home of the appellant. Those items moved the parents to find the appellant. The same night of 4th October, 2022 the parents PW3 and PW4 and the local leaders engaged themselves in looking for the appellant. The appellant was arrested at his home and taken to police for further inquiry and investigation. It was alleged that around August 2022, he involved himself in commission of the offence of rape to the victim child thus the trial was invoked as already stated. Upon conviction the appellant was sentenced to serve thirty years imprisonment.

Aggrieved with conviction and sentence, the appellant preferred this first appeal premised in seven grounds of appeal which will be paraphrased in

order to make sense. The appellant complained that the trial court erred in law and fact by failing to; **one**, analyse the time from the date of the alleged rape and the time when the incidence was delayed to be reported to police linked with the quarrel between the victim's father and the appellant on payment **two**, shift the burden of proof to the appellant because the prosecution side failed to prove the charge against the appellant **three**, the prosecution failed to prove the charge beyond all reasonable doubt **four,** the defence case was not believed by the court **five**, to convict the appellant based on incredible witness PW2 **six,** to trace and parade PW2 friends who are purported to have escorted PW2 to the appellants residence **seven**, see that there was contradiction of evidence among the prosecution witnesses over the occurrence of the alleged offence and **eight**, disregard the defendants exhibit D1.

On 13th day of May 2024, the appeal was called for hearing, the appellant appeared represented by Boniface Erasto assisted by Peter Majanjala both learned Counsels whilst the respondent republic was represented by Adolf Kisima learned State Attorney.

The appellants Counsel argued the 2nd and 3rd grounds of appeal together. The complaint in those grounds of appeal was that the court erred to rule that the offence was proved by the prosecution side beyond all reasonable

doubt while they shifted the duty to prove to the accused person. The prosecution did not prove because there exist contradictions. The judgment contradicts itself about who opened the door. The prosecution did not tender the said keys or video showing the key was being used by the victim. The incidence was reported to police after expiry of long time though there is no record that the victim was threatened. The court did not go further to ascertain whether the evidence adduced by the prosecution was true or not. On the 8th ground of appeal, the magistrate disregarded the evidence exhibit D1 tendered by the defence. Once the magistrate disregards the evidence of the defence, the act vitiates the proceedings. He cited the case of **Abel Masikiti vs The Republic** Criminal Appeal No. 24 of 2015 Court of Appeal sitting at Mbeya where it was held that failure to consider the defence case vitiates the proceedings. The magistrate did not consider the evidence which is audio in exhibit D1, the court should quash conviction and set aside sentence.

He went on to argue the ground of appeal that the court erred to consider extraneous matters. In the judgement the magistrate says that a witness PW5 was the one who was given phone by the father of the victim but in the evidence the victim says that the phone was given to Chacha who was never called as a witness. In such a circumstance the magistrate

considered the evidence of a witness who was not called to testify. He prayed the court to expunge such evidence and quash conviction. In the last ground of appeal, he submitted that the magistrate erred to evaluate evidence thus she ended with a wrong conclusion. He cited the case of **Agasto Emmanuel vs The Republic,** Criminal Appeal No. 08 of 2020 High Court at Mbeya on the necessity of evaluation of evidence. He was of the view that the accused defence ought to be considered. The court ought to show how such evidence was evaluated and come out with points of determination. The evidence of DW1, DW2 and DW3 was not considered.

He went on to submit the 7th ground of appeal about contradictions. He complained that the prosecution evidence was contradicting each other because the father of the victim said that he was told by his friends that her daughter had been raped but the victim says he never told the friends of his father. They prayed the court to give weight to this ground of appeal.

On the 1st ground of appeal on the complaint that the court failed to analyse the evidence and match the relationship between the appellant and the victim. The victim tendered exhibit D1 containing recorded device saying that the friend of the father of the victim insulted the appellant.

The appellant was not paid money by the father of the victim and he was reminding to be paid. The event is alleged to have occurred around August, 2022 but it was reported to police around October, 2022. They complained that the duration between August, 2022 and October, 2022 was the time used to fabricate the case against the appellant. The 4th ground of appeal they submitted that the appellant was illegally convicted because the evidence on record was weak. He ought to be convicted on the strength of evidence which prove the offence beyond all reasonable doubt and nothing else.

The 5th and 6th grounds of appeal were argued by the defence Counsel jointly. He submitted that the court relied the case of **Habibu Mtilla vs Republic**, Criminal Appeal No. 116 of 2018 Court of Appeal of Tanzania but such case is distinguishable to the case at hand because in that case the appellant was found ready handed in the room having sex. The facts in the present case are different, basically the event was very circumstantial. They cited the case of **Amon Nickolaus @ 3 Others vs DPP,** Consolidated Criminal Appeal No. 91 and 92 of 2022 where the court said that the evidence of person with interest of its own must be approached with caution unless corroborated with other piece of evidence. PW2 the victim had interest to the case. PW2 did not prove

what he said. Such evidence ought to be approached with caution. The victim said that he was escorted with his friends but those friends were not called to testify.

In reply the learned State Attorney started by declaring his stance that he does not support the appeal filed by the appellant. Alternatively, the appeal was proved beyond all reasonable doubt the standard acceptable in criminal cases. The victim in this case was 11 years old, her age was proved by herself, her mother and the birth certificate. The trial court convicted the appellant based on the best evidence of the victim under the best evidence rule. PW1 detected the keys and a letter in the beg of the victim. The letter was tendered by PW1 as exhibit No. P1. PW2 testified in detail how the whole trend of events in their relationship with the appellant until the fate of having sex. The series of events were corroborated by PW3, PW4, PW5 and PW7 the doctor who examined the victim PW2. The doctor detected that she was not virgin. The best evidence in rape cases is the evidence of the victim which is enough to ground conviction. He went on to submit that there are several decisions about best evidence including the case of **Tumain Mtayomba vs R**, Criminal Appeal No. 217 of 2012. The girl was able to locate the house where she was raped. The keys were not a subject matter of a case. The

prosecution side were able to screen and realize relevant witnesses to parade in this case. The State Attorney cited Section 143 of **Evidence Act** which state that there is no specific number of witnesses needed to prove a specific fact. The claim of wages/payment raised by the appellant is an afterthought. The contradictions raised were not fatal because the evidence of PW2 is enough to prove the case. Under Section 127 (6) of the Evidence Act the offence was proved beyond all reasonable doubt, the grounds of appeal as raised by the appellant have no merit.

In a brief rejoinder the appellant Counsel submitted that the evidence of the child is considered with other evidence. The court at this juncture cannot rely to the evidence of the State Attorney.

Immediately I proceed to determine the appeal sufficiently by considered the grounds of appeal in answering issues **one**, whether the victim PW2 was raped and **two**, who raped the victim PW2.

In the first ground of appeal the appellant complained that the incident was not reported to police timely the idea which has a relationship with the quarrel between the appellant and the father of the victim about payment. The appellant complained that the period of delay to report the matter to police was used by the prosecution to fabricate this case against the appellant. About the issue of payment as alleged by the appellant the

learned State Attorney considered the same as a mere afterthought. It has been proved on evidence through PW2 that the event of rape occurred around August, 2022 but according to PW1, PW3 and PW4 the fact that the victim was raped came to the knowledge of the parents on 04th October, 2024. The parents of the victim are the one who moved the wheels of justice against the appellant from the time the event came to their knowledge. The victim of the offence managed to prove that she was raped around August, 2022. In her evidence, she testified in part; -

> *"Then he came, took off my tight and under pant. He shouted (sic) my mouth. I told him I never wanted. He laid over me, then took his penis to my vagina. I cried but he shouted mouth with his hand. I felt pain I saw blood coming out..."*

Her evidence as correctly submitted by the State Attorney supports conviction under the best evidence rule. PW2 was consistency in her evidence that she was raped by the victim in August, 2022. In her evidence there is nothing which fault her credibility likewise the defence case. The defence case does not raise any doubt about the credibility of PW2. Every witness is credible and reliable unless there are reasons to challenge, this was held in the case of **Goodluck Kyando v. Republic** [2006] T.L.R. 367 that: -

"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good, and cogent reasons for not believing a witness..."

Her failure to report to police does not suggest the view that the offence was not proved, but the important position to note is that there is no time limitation in criminal justice. The defence evidence as received during trial does not raise any doubt against the prosecution case specifically on the credibility of PW2. I just noted the mere allegations that the prosecution side used such period of delay to fabricate the case against the appellant. The complaint of the appellant in his defence that he had quarrel with the father of the victim on payment of monies was well considered by the trial magistrate and found to have left the prosecution case intact. From what has been analysed above, the prosecution evidence proved the offence beyond all reasonable doubt the standard required in criminal justice, there is nothing suggesting that the burden of proof was shifted to the appellant. Therefore, the first and second grounds of appeal have no merit.

The third ground of appeal, the appellant complaint is that the prosecution failed to proved the charge beyond all reasonable doubt because the prosecution case was tainted with contradictions. The appellant was

charged, tried and convicted with the offence of rape. The offence of rape is sufficiently proved once the prosecution proves that there was penetration to the girl of under age and penetration was done by the accused. In the present case PW1 proved with direct evidence that in August 2022 the appellant took his penis and penetrated it to her vagina. In that view, the offence of rape was proved to the satisfaction of the law. There was penetration by the manhood of the appellant to the victim's vagina. The learned State Attorney submitted that the age of the victim was proved to be 11 years old as testified by the mother of the victim and the victim himself. Such evidence was corroborated by the birth certificate which was tendered as an exhibit. I support the view that age of the victim was proved in accordance with the law. PW3 the mother of the victim her evidence was enough to prove age of her daughter PW2. In the case of **Emmanuel Kibona and another Versus Republic** (1995) TLR 241 stated that evidence of a parent is enough to prove age of the victim. He submitted further that the offence was proved based on the best evidence rule i. e the true evidence of rape comes from the victim himself. Her evidence was enough to ground conviction. I subscribe to the position submitted by the respondent that the best evidence in sexual offences comes from the victim himself as stated in the case of **Sulemani Makumba versus Republic** TLR (2006) 379. In the present case the

victim testified expressly that the appellant was the one who raped her in August 2022 which means the offence was proved beyond all reasonable doubt.

In the present case as already noted, the prosecution was duty bound to prove two elements of the offence of rape; **one,** penetration and **two,** the victim was a child. See the decision of the Court of Appeal in **Selemani Mkumba v. R** supra where the court stated that-

> *"The evidence o f rape has to come from the victim, if an adult, that there was penetration and no consent,* ***and in case of any other woman, consent is irrelevant that there was penetration.*** *" (emphasis added)*

In the instant case the victim of the offence was able to prove the two basic ingredients of the offence by her direct evidence. The complaints of the appellant that the prosecution case was tainted with contradictions has raised no doubt to the prosecution case on proof of rape. The issue of keys and who opened the door has no merit because it does not go to the substance and the root of the offence. The issue of minor contradictions was exemplified in the case of **Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported) where it was stated:

"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."

Therefore, the third ground of appeal is also worth of being dismissed as it will be done shortly.

The fourth ground of appeal, the appellant complains that the defence case was not believed by the court. This ground of appeal I will not detain long on it because the trial magistrate took time to consider the defence of the appellant which was based on the complaint that the case was flamed because the father of the victim did not pay him money in consideration of the work of teaching the victim, even exhibit D1 was not considered. That piece of defence was ruled to be an afterthought. That piece of complaint cannot stand in a circumstance where there is direct evidence proving that the appellant raped the victim. The defence case including exhibit D1 was given enough weight but could not convince the trial magistrate. I upheld the position reached by the trial magistrate adding that the defence case did not raise any doubt to the prosecution case. The offence was proved against the appellant beyond all reasonable doubt.

The appellant in the fifth ground of appeal complained that the court erred to convict the appellant based on incredible witness PW2. I think the issue of credibility of PW2 has been considered herein above while dealing with the first ground of appeal. I have expressly stated that every witness is treated to be credible unless there are reasons to the contrary. In the present case there is no evidence or facts discrediting the testimony of PW2. The appellant counsel submitted that the victim evidence should not be taken as gospel truth, but he could not raise doubts to make the court not to believe the testimony of PW2. The appellant Counsel submitted that the evidence of a person with interest must be considered with caution by the court, unfortunately he could not lay foundation on the interest which the witness will be serving weighed with the best evidence rule. But that complain carries no weight in a circumstance where the court has ruled about the credibility of the witness in question. In criminal justice the offence is to be proved beyond all reasonable doubt as stated in a number of cases including the case of **Samson Matiga versus Republic**, Criminal Appeal No. 205 of 2007 Court of Appeal of Tanzania at Mtwara. In case of any doubt, such doubt is resolved in favour of the accused person. In this case there is no such doubt. In the other Court of Appeal of Tanzania case of **Anton Kinanila and Another versus The Republic** the court sitting at Kigoma insisted that the prosecution side

bears the essential burden to prove beyond reasonable doubt that the offence was committed and it was committed by the accused person to the extend prescribed by the law. In the present case it has already been ruled that the offence was proved beyond all reasonable doubt against the appellant, I have nothing to fault the settled position against the prosecution case.

The sixth ground of appeal contain a complaint that the alleged friends of the victim were not called to testify that they escorted PW2 to the appellants residence. The prosecution submitted that they have discretion to select witnesses guided by section 143 of the **Evidence Act** Cap 6 R.E 2022. The very provision provides that there is no specific number of witnesses necessary for proving a specific fact. It means there was no need to call those witnesses suggested by the defence. In short proof of criminal offence by proving all the ingredients of the offence. In the present case I am satisfied that the prosecution proved the offence of rape as established by Section 130 (1) (2) (e) of the **Penal Code** Cap 16 R.E 2022. The issue of additional witnesses is an afterthought.

In the seventh ground of appeal, the appellant complaint is that the trial court erred because it failed to see that there was contradiction of evidence among the prosecution witnesses over the occurrence of the

alleged offence. The appellant Counsel submitted that the prosecution evidence was contradicting because the father of the victim said that he was told by his friends that her daughter had been raped but the victim says he never told the friends of his father. This ground also is unmerited because it does not disturb the root of the case. Such contradiction even if it exists it is a minor contradiction which leaves the prosecution case intact. Those are minor discrepancies which does not affect the substance of the case. The offence has been proved beyond all reasonable doubt as held herein before, these minor discrepancies does not fault the fact that the offence was proved. To that end, the two issues raised are answered in affirmative that the victim PW2 was raped and the rapist was the appellant.

Having said and done, I am satisfied that the offence was proved beyond all reasonable doubt the standard required in criminal justice. The appeal is hereby dismissed entirely for want of merit. order accordingly.

Dated at Dar es Salaam this **27th** day of **May, 2024**.

D. P. Ngunyale

JUDGE

Judgment delivered this **27th** day of **May, 2024** in presence of the appellant represented by Mr. Boniface Erasto and Peter Majangala and the respondent represented by Mr. Adolf Kisima.

D. P. Ngunyale

JUDGE