IN THE HIGH COURT OF TANZANIA

SUB REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 8538 OF 2024

(Originating From Criminal Case No. 107 of 2023, Same District Court)

HAJI S/O ABDUEL @ MCHOME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

14th to 28th May, 2024

E.B. LUVANDA, J

The Appellant was convicted for the offence of committing rape to a school-aged child girl nine years old which fall under the provision of sections 130(1) and (2)(e) and 131(3) of the Penal Code, Cap 16 R.E. 2022 and was eventually sentenced to life imprisonment.

In the petition of appeal, the Appellant is challenging both conviction and sentence on the following grounds: One, the trial court erred in law and fact for failure to analyze and evaluate Appellant's evidence and testimony adduced before it; Two, the trial court erred in law to held that the Respondent herein has proved her case beyond reasonable doubt.

The Appellant submitted that the trial court erred in merely stating that he was satisfied that the victim (PW2) was of the age below ten years, arguing failed to note that the age of PW2 which was among the crucial elements for the offence, was not proved to the hilt. He submitted that PW1 victim's mother only stated that PW2 is nine years old, also PW2 and PW3 testified that the victim was nine years old, arguing none of the prosecution witnesses testified on the date, month and year of PW2's birth, citing **Marekeano Ramadhani vs R**, Criminal Appeal No. 202 of 2013, CAT. The Appellant faulted the trial court for silently amending the charge by introducing subsection (3) to section 131 Cap 16 (supra) and imposed mandatory sentence against the Appellant. He submitted to have been prejudiced for reason that he failed to prepare his defence.

He submitted that the victim stated that she had been doing the said act with the Appellant where on 16/06/2023 was the fifth time, he queried as to why PW2 hold on such information for quite long period and failed to disclose and name the Appellant at the earliest possible moment, arguing has something to do with her credibility. He cited **Sadiki Hamis @ Rushikana and Two Others vs R**, Criminal Appeal No 381 consolidated with 382 and 383 of 2017, CAT page 13 to 16.

He submitted that the trial court did not comply with a requirement of asking simplified questions to PW2 before receiving her evidence, for purpose of ensuring whether she understand the nature and meaning of an oath. He cited **Amour Hamis Madulu vs R**, Criminal Appeal No. 322 of 2021. He asked for the testimony of PW2 to be expunged.

He submitted that it is the law that the accused person need not to prove his innocence, rather raise reasonable doubt on the prosecution's case. He faulted the trial court for holding that the Appellant failed to summon the medical officer/report to substantiate his claim that he cannot erect his penis, arguing it was a misdirection on the part of the magistrate, for explanation that the magistrate shifted the burden of proof to the Appellant.

In reply, Ms. Grace Kabu learned State Attorney opposed the appeal, she submitted that at page twelve and thirteen of the impugned judgment the trial court evaluated the defence evidence adduced by the Appellant to the effects that the Appellant did not cross examine PW1 regarding those accusation. She submitted that the trial court went to evaluate the defence by the Appellant alleging that he is an impotence, holding that the Appellant did not summon the medical officer to prove that fact.

For ground number two, the learned State Attorney submitted that the Appellant was charged for rape, arguing the prosecution ought to prove three elements: age of the victim, penetration and identification of the perpetrator (Appellant).

She submitted that PW1 who is the victim's mother explained that the victim is aged nine years and was born in 2014. She submitted that although she did not explain a date and month, as complained by the Appellant, according to the learned Attorney, by mentioning a year of birth 2014 proved that the victim was below the age of ten years. She submitted that the age of the victim was not in dispute, arguing the Appellant did not cross examine regarding the age of PW2. Regarding penetration, she submitted that PW2 explained that on the material date, she proceeded alone to Madiveni Secondary School for purpose of learning how to read and write, where on arriving there the Appellant took her to his timber hut, undressed PW2 as well as his clothes and inserted his penis into her vagina and committed sexual intercourse with her. She submitted that these wording prove that the victim had sexual intercourse. She submitted that this fact was supported by the medical officer (PW3) who attended and examined PW2. She submitted that PW3 explained to had revealed PW2 had sexual intercourse

more than one. She submitted that PW2 explained that she had sexual intercourse with the Appellant five times.

Regarding identification, the learned Attorney submitted that PW2 mentioned the Appellant by name of Babu Haji as the one who raped her, adding that she was familiar to the Appellant even before the material date. She submitted that the testimony of PW2 was supported by PW1, who asserted that on 16/06/2023 she saw PW2 and the Appellant in a timber hut, where PW2 said they were having sexual intercourse. She submitted that this prove that the Appellant is the one who committed this incident.

On rejoinder, the Appellant submitted that he attempted to cross examine the age of PW2, but he was told that what was said by PW1 was enough. He submitted that he asked for the teacher of PW2 to appear, but the court did not consider his request.

On my part, I will tackle the appeal by aligning to the grounds of appeal as appearing in the petition of appeal.

For ground number one. This ground is without substance. As alluded by learned State Attorney that at page twelve last paragraph and page thirteen of the impugned judgment the trial court evaluated the defence tendered by the Appellant including a fact that a case was framed by PW1 for reason of

love affairs, demand for money a sum of Tsh 10,000, along his defence of impotence, where the trial court evaluated it vis-à-vis prosecution evidence and ruled that it failed completely to cast doubt on the prosecution case. To my view the trial court was justified to disregard the defence by the Appellant, this is for reason that the question of planting case, love affairs, demand for cash money Tsh 10,000 were all not tested to PW1 by the Appellant on cross examination. A fact that he is impotence was not cross-examined to any of the prosecution witness. It is on defence when the Appellant introduced a fact that he was impotence. On cross examination, the Appellant conceded that he did not tender any medical report to that effect, neither visited at the hospital for examination. Therefore, the Appellant was merely alleging. On similar vein, an argument by the Appellant that the trial court shifted a burden for faulting him for failure to summon the medical officer or tender a medical report, is unfounded. This is because, that argument was born from the proceedings where the Appellant was tasked by the prosecuting officer during cross examination.

For ground number two, I go along the argument of the learned State Attorney that the case for prosecution was well presented, witnesses were credible and all elements for the offence of rape leveled to the Appellant were proved to the required standard. It is in record that the age of PW2

(victim) was proved by PW1, PW2 and PW3. A mere fact that PW1 did not mention a specific date and month when PW2 was born, is immaterial. This is because the Appellant did not say arithmetically if someone who was born in 2014 by 2023 could not be nine years. The argument that he was prevented to cross examine regarding the age of PW2, is a concoct. This is because the Appellant failed to state as to whom he intended to ask such question. Neither stated as to who prevented him.

Regarding penetration, PW2 explained vividly that the Appellant inserted his penis into her vagina while they were hiding into his timber hut. In the PF3 exhibit PE1, the medical officer in-charge commented that PW2 had no vagina hymen and vagina is open wide that indicate it is not the first time doing sex. Indeed, PW2 explained that he did sexual intercourse with the Appellant five times. All these facts were not cross examined by the Appellant, irrespective a fact that contents of exhibit PE1 was read aloud and explained in Swahili language to him.

It was the testimony of PW1 that on the material date she caught the Appellant locking inside a timber hut along PW2. The Appellant did not have enough and tenable explanation as to why he took PW2 into his watchman box, and what entailed of him to lock the door. A fact that PW2 was feeling cold and wanted to stay near a hut for warming from fire was not cross

examined to PW2. An argument that he was sleeping like log at a guarding place is novel, to me I think this explanation was taken or raised by the Appellant as a lame attempt to rescue the otherwise capsized sinking boat.

A complaint that the trial magistrate allowed PW2 to adduce evidence without conducting a *voire dire* test. The same is misconceived. Although *voire dire* test is no longer a requirement of law, however the trial magistrate conducted both a *voire dire* test including asking PW2 to make a commitment and promise to tell the truth and not to tell any lies. This is reflected at the preface after the introduction made by PW2.

A complaint by the Appellant as to why PW2 hold on the information regarding engaging into sexual with the Appellant for more than five times, is out of context. One, immediately after the Appellant was caught on 16/06/2023 the matter was reported to the hamlet chairperson then police, where the Appellant was apprehended the following day. Two, in her testimony the victim (PW2) explained that the Appellant warned her not to tell or disclose to anyone and threatened to kill her with his bush knife which was inside the hut. This fact was not cross examined by the Appellant.

An argument that the trial court attempted to amend a charge by way of introducing sub section (3) to section 131 Cap 16(supra) in view of

sentencing the Appellant with mandatory sentence, is misconceived. In a charge sheet indicate clearly that the Appellant was indicted for rape contrary to sections 130(1) and (2)(e) and 131(3) Cap 16 (supra). And a charge sheet was signed by the public prosecutor on 23/06/2023 and received by the registry officer on 23/06/2023. The Appellant did not say if the public prosecutor and registry officer were also accomplice to the purported misnomer.

That said, the appeal is devoid of merit. The trial court decision is upheld.

The appeal is dismissed.

E.B. LUVANDA
JUDGE
28/05/2024

Judgment delivered in the presence of the Appellant and Ms. Frank daud Wambura learned State Attorney for the Respondent.

E. B. LUVANDA
JUDGE
28/05/2024