IN THE HIGH COURT OF TANZANIA

SUB REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 38254 OF 2023

(*Originating From Criminal Case No. 56 of 2023, Mwanga District Court)*

JUMA ELINEEMA MGHAMBA..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

25th to 28th May, 2024

E.B. LUVANDA, J

The Appellant was convicted for the offence of committing rape to a teen girl aged thirteen years old which fall under the provision of sections 130(2)(e) and 131(1) of the Penal Code, Cap 16 R.E. 2022 and was eventually sentenced to a term of thirty years 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 to convict and sentence the Appellant without addressing the matter in the side of the prosecution to whether the party to that possibility adhered the principle that in criminal cases there must be prove of the case beyond

reasonable doubt, who allege must prove; Two, the trial court erred in law and fact to convict and sentence the Appellant without following the procedure in admitting evidence of the (sic) a tender age; Three, the trial court erred in law and fact to convict and sentence the Appellant while the evidence adduced by prosecution side possessed with a hear saying evidence; Four, the trial court erred in law and fact to convict and sentence the Appellant while there was lack of corroboration of evidence on the side of prosecution; Five, the trial court erred in law and fact to convict and sentence the Appellant while the evidence adduced therein was insufficient, cooked and fabricated; Six, the trial court erred in law and fact to convict and sentence the Appellant without evaluating, scrutinizing and analyzing (sic); Seven, the trial court erred in law and fact by directing (sic) itself in considering a defence of *alibi* in its decision.

Mr. Isack Samson learned Counsel for the Appellant consolidated grounds number three, four, five, six and seven to the ground number one, while ground number two was argued separately.

Ground number two, the learned Counsel submitted that the trial court mislead and contravened section 127(2) of the Evidence Act, Cap 6 R.E. 2022, for the explanation that evidence by a person of tender age is required

to promise the court to tell the truth and not lies, arguing there was no such compliance by the trial court, hence injustice. He cited page nine of the trial court proceedings, arguing nowhere PW2 promised to tell the truth. He cited the case of **Mohamed Ramadhani @ Kolahili vs R**, Criminal Appeal No. 396 of 2021 CAT.

He submitted that the evidence adduced was a hearsay evidence, no eye witness, faulted PW2 that she did not shout or seek help to other person while slept with others in the same house. He submitted that the evidence that there were bruises could be possible to find help including screaming or shouting for help. He cited **Shimbi Daudin and Others vs R**, Criminal Appeal No. 660 of 2020 CAT Tabora. He submitted that PW2 asserted that she was living in the same house where the offence was alleged committed with her uncle, aunt, grandmother, grandfather and sibling. He submitted that the trial court misled for failure to scrutinize and evaluate the evidence whether the girl was a virgin, arguing how was it possible for the victim failure to make noise. He submitted that the evidence of PW4 (medical officer) was not credible to convict, arguing the crime occurred on 8/03/2023 but medical examination was conducted on 13/03/2023. He submitted that PW3 stated that she had information for the crime on 10/03/2023, arguing

why she did not report to PW7. He submitted that PW7 had conflict with the Appellant, arguing that the case was engineered by family conflicts. He submitted that PW2 (victim) stated that crime scene occurred on 8/03/2023 and reported to the ten cell leader on 10/03/2023, while PW7 said that a meeting with the ten cell leader was convened on 9/03/2023, arguing why PW7 and PW3 did not report to the ten cell leader until 13/03/2023.

Mr. Frank D. Wambura learned State Attorney, in reply consolidated ground number one, four, five and six. The learned Counsel prefaced his argument by addressing on the burden and standard of proof in criminal cases, citing section 3(2)(a) of the Evidence Act, Cap 6 R.E. 2022; **Seleman Makumba vs R**, Criminal Appeal No. 94 of 1999 CAT for a proposition that true evidence of rape has to come from the victim. He submitted that PW2 the victim testified that on 8/03/2023 during night she slept with her grandfather, where she felt pain, awake up and found her grandfather inserting his penis to her vagina, in the morning PW2 reported to her grandmother who did not believe her. He submitted that since the principle needs the best evidence to come from the victim, arguing it is clear that what was adduced by PW1 (sic, PW2) proved the elements forming the offence of rape. He faulted the argument by the learned Counsel for Appellant for a call of corroboration,

arguing the evidence of the victim suffices to prove the offence committed by the Appellant. He submitted that PW4 (medical officer) testified that the victim had bruises and her vagina started to heal and had no hymen. He submitted that PW4 asserted that the bruises were caused by inserting blunt object, arguing PW2 stated that her grandfather inserted his dick on 8/03/2023 when she was sleeping during night hours. He submitted that the evidence of PW2 was corroborated by PW4. He submitted that the argument of the learned Counsel for Appellant that the evidence was insufficient, cooked, fabricated, has no merit and not supported by the evidence from the defence side.

Ground number two, he submitted that the argument by the learned Counsel for Appellant that PW2 did not promise not to tell lies has no merit for reasons that the witness promised to tell the truth, arguing it implies she could not tell lies.

Ground number three, the learned State Attorney submitted that the evidence used to convict the Appellant was direct evidence from PW2, arguing is the best evidence, citing **Seleman Makumba** (supra), also section 62(1)(a) and (b) of Cap 6 (supra).

On the last ground of appeal that the trial court did not consider the defence of *alibi*, the learned State Attorney submitted that during trial nowhere his defence of *alibi* was able to prove that on the material date and time the Appellant was at Maramba. He submitted that the Appellant did not notify the court that he could rely on the defence of *alibi*, citing section 194(4) and (5) of the Criminal Procedure Act, Cap 20 R.E. 2022, for a proposition that the Appellant ought to provide a notice to the court and prosecution that he intends to rely on *alibi*. He cited **Kubezya John vs R**, Criminal Appeal No. 488 of 2015 CAT, for a proposition that the Appellant's whereabout ought to be proved by himself.

On rejoinder, the learned Counsel for Appellant submitted that the Respondent's Attorney failed to counter his argument in chief that there was failure to report the alleged offence in time. He submitted that the virginity of the victim was supposed to be established whether she was virgin or not. He submitted that in establishing penetration the victim did not scream for help at the time when the offence was committed, where she immediately awake and saw her grandfather inserting penis into her vagina, arguing it create doubt whether the Appellant had already inserted or was in process of inserting. He submitted that the evidence of a child of tender age need

corroboration. He submitted that the expert evidence cannot corroborate for reason that was not there when the offence was committed. He submitted that under section 127(2) of Cap 6 (supra) the victim was supposed to promise to tell truth and not to tell lies.

On my part, I will align my findings along the flow adopted by the learned Counsel for Appellant in his submission in chief.

For ground number two, the main contention here was that the trial magistrate was supposed to record that PW2 had promised to tell the truth also along a promise not to tell lies. Arguably the records reflect that PW2 was recorded to had promised to tell the truth, but the version for not telling lies is missing. On my part I am not seeing any mischief there. The bottom line, PW2 promised to tell the truth, to me it sounds enough to serve the purpose and compliance to the law. Above all, the learned Counsel for Appellant was unable to say which facts adduced by PW2 was falsified lie. In other words, there is nothing to suggest that PW2 was telling lies. Indeed, the provision of subsection (2) should not be read in isolation. Going by the provision of subsection (6) to section 127 Cap 6(supra), is more elaborate, that what matters is for the court to be satisfied that the child of tender age

is speaking the truth. Therein the word not telling lies, was eliminated. For brevity, I reproduce the provision of subsection (6) to section 127

> *'Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth'*

Therefore, to my respective view, omission to record that the child of tender age did not promise not to tell lies, is not fatal, regard being to the whole context above captioned.

Regarding the rest grounds of appeal which were combined into a single ground, the first complaint was that the prosecution evidence was a hearsay. The learned Counsel for Appellant faulted PW2 that she did not shout or seek help to other person while slept with others in the same house. This ground

is out of context. It is the evidence of PW2 upon awaking and seeing the Appellant inserting his penis into her vagina, she tried to kick out the Appellant and early in the morning she reported the whole ordeal to her grandmother who was not cooperative at all. Indeed PW2's grandmother showed her true colour, being not a neutral lady, and appeared to defend the Appellant as defence witness number two. It is Lukwaro Elinaza Malaki (PW7) who is PW2's uncle who heard PW2 when was narrating to DW2 who appeared to be not interested as aforesaid, then PW7 decided to pursue the matter, I quote his testimony,

> *'I remember on 9/3/2023 I heard my mother told (sic) the victim that "unadanganya babu hawezi kukufanyia hicho kitendo" After I heard the said words I felt pain and I started to make follow up'*

That implies PW2 was almost about to be rendered helpless and DW2 was determined to shut down her mouth. Therefore, a story by the learned Counsel for Appellant that the testimony of prosecution was hearsay, is without substance. PW2 evidence was credible and reliable. An argument that why the matter delayed to be reported, to my view this fact is is taken care by the explanation above, that DW2 whom PW2 took up the matter for the first time, misbelieved her instantly without any further inquiry. Indeed,

DW2 proceeded to pursue her agenda of defending the Appellant on all fours and whenever her complaint was reported, even to the ten cell leader where PW7 disclosed it, DW2 was about to frustrate it. This finding also take into board the argument as to why PW2 could not shout or scream for help, although PW2 explained to have took initial necessary steps to defend herself by kicking out the Appellant.

Regarding an argument that the evidence of the expert John Ibrahim Mgano (PW4) and his report PF3 exhibit P1 could not corroborate PW2. This is a misplaced idea. This incident was committed on 8/03/2023, by the perpetrator who is a step grandfather to the victim. The matter was delayed to be reported for reasons explained above, the perpetrator was a paramour to the victim's grandmother. Until on 13/03/2023 when it was reported and PW2 attended and examined by PW4. To my view, in the circumstances like the instant matter, it is when the idea of seeking for an expert opinion comes in to establish if at all the act was committed and when. Therefore, to say the testimony of PW4 could not corroborate PW2 is a phantom argument. In exhibit P1, PW4 made it clear that on examination there PV discharge with bad smell, no hymen and simple bruises on vagina. As alluded by the learned State Attorney, this fact corroborates and confirm a fact by PW2 that on

8/03/2024 the Appellant inserted his penis into vagina. This adumbration takes into board an argument by the learned Counsel for Appellant wo queried as to whether PW2 retained her virginity or was penetrated by the Appellant.

Regarding an argument that PW7 had conflict with the Appellant, or that the case was engineered by family conflicts. It is true that the Appellant when cross-examining PW7 he asked a question accusing PW7 to had fabricated this case in furtherance of separating the Appellant with DW2. However, no such question was asked to PW2 if she was planted by PW2 to accomplish such a mission. To my view, a fact of existence of family quarrel here was invoked as a mere defence by the Appellant and allies to distance from the accusation. This is because throughout the testimony in chief and cross examination of PW2 by the Appellant, there is no element suggesting hate or framing the Appellant.

Regarding the *alibi*, it was unfounded, because during preliminary hearing the Appellant admitted a fact that he was living under the same roof with PW2.

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 Mr. Emmanuel Antony Advocate holding brief for Mr. Isack John Advocate for the Appellant and Mr. Frank Dauddi Wambura learned State Attorney for the Respondent.

E. B. LUVANDA
JUDGE
28/05/2024