IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 4713 OF 2024

(*Originating from Criminal Case No. 98 of 2023 of Morogoro District Court*)

ALEX MARTINE JACOB ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

JUDGMENT

09/04/2024 & 27/05/2024

KINYAKA, J.:

The appellant's present appeal is against the decision of the Morogoro District Court hereinafter "the trial court" in Criminal Case No. 98 of 2023 in which he was found guilty and convicted of the offences of Rape and Abduction contrary to sections 130(1), (2)(e) and 131 (1); and 134 of the Penal Code, Cap. 16 R.E. 2022, respectively. Following the said conviction, the trial court sentenced the appellant to serve a term of thirty years imprisonment and two years' imprisonment for the first and the second count, respectively. The sentences were ordered to run concurrently. Discontented with the conviction and sentence meted to him by the trial court, the appellant preferred the present appeal based on seven grounds of appeal as reproduced below:-

1. That, the trial court erred in law and in fact to convict me by not taking into account the fact that "exhibit PE2" does not relate to the facts adduced. The PF3 showing the examination done on 22/2/2023 while charge allege offence committed on 20/2/2023. No any indications that on the material date the offence of rape committed;
2. That, the trial court erred in law and fact to convict me without taking consideration my defense and witnesses. The accused manage to dispute the alleged committed offence;
3. That, the trial court magistrate erred in law and facts by convicting me without taking into account the ex-part evidence in relation to offence. No any indication of bruises, sperms or blood/bleeding as per doctor opinion;
4. That, the trial court magistrate erred in law and fact for relying his conviction on the unknown age of complainant as evidence of sworn affidavit is defective one. No any prove or indication as why there was no valid birth certificate;
5. That the trial court erred in law by considering the circumstantial evidence which is contrary to the elements to prove the offence of rape and abduction. Contradictory evidence was never considered at all;

6. That, trial court magistrate erred in law and fact in relying conviction while the complainant had failed to established its case beyond reasonable doubt as the complainant/prosecution evidence is irrelevant; and
7. That the learned trial court magistrate erred in fact and law by convicting on offence of abduction without any evidence adduced by prosecution. No any indications adduced or stated by any witness in relation to abduction.

On the date of hearing of the appeal, the appellant was represented by Mr. Mkilya Daudi, learned Advocate whereas the respondent entered appearance through Mr. Shaban Kabelwa, learned State Attorney. The appeal was canvassed by written submissions.

In his submissions in support of the appeal, Mr. Daudi consolidated the 1st, 6th, and 7th grounds and argued them jointly. He also combined the 2nd and 3rd grounds and argued them together while silently dropping the 5th ground.

In respect of 1st, 6th, and 7th grounds, the learned counsel for the appellant contended that the prosecution side failed to prove to the required standard on the issue of examination of the victim which was done on 22nd February 2023 while the offence was alleged to have been committed on 20th February 2023. He further complained that there was a delay by

the complaint in reporting the matter to the relevant authority. In his view, the complainant's act of delaying to report the incidence has created serious doubts on the guilt of the appellant.

He referred the Court to the case of **The Director of Public of prosecutions v. Simon Mashauri, Civil Application No. 394 of 2017 (2019] TZCA 22; (28 February) 2019** where the Court found the evidence of the victim unreliable after the incident was reported sometimes later after the victim had shower, slept and went to church the next morning instead of reporting the same to the police station at the earliest opportune time.

As regards to the 2nd and 3rd grounds, the learned counsel made reference to section 130 (1) (4) (a) of the Penal Code, Cap. 16 R.E. 2022 hereafter "the Penal Code" and averred that PW3 failed to establish how the appellant raped PW1 by not establishing and prove penetration. He submitted that the lack of such proof creates serious doubts on the guilt of the appellant as he did not establish that the alleged penetration was through the appellant's penis or any other object. He cited the case of **Fahid Khalifa v. Republic in Criminal Appeal No. 573 of 2020, CAT at Dodoma,** and told the Court that although there is an established principle that the best evidence in rape cases comes from the victim, the

said principle does not apply without consideration of the circumstances of the case.

Arguing in support of the 4th ground of appeal, Mr. Daudi complained that the age of the victim in the instant matter was unknown. He cited the holding in the case of **Leonard s/o Sakata v. DPP, Criminal Appeal No. 235 of 2019**, and elucidated that age in statutory rape is fundamental element and must be established and proved beyond reasonable doubt and therefore the persecution was bound to prove the age of the victim by concrete, viable and reliable evidence. In conclusion, the appellant's counsel prayed for the appeal to be allowed and the appellant be released from jail.

On his part, Mr. Kabelwa was in support of the trial court's findings. Submitting against the 1st, 6th, and 7th grounds of appeal in his efforts to make a justification of the alleged delay, the learned state attorney referred the Court to the records of appeal and elaborated that PW2 left home from 20th February 2023 around 20:00 hrs to her work place at Mazizi and came back at 21st February 2023. Further on the morning of 22nd February 2023, PW1 returned home and immediately after her mother saw her she asked her where she was but she refused. PW2 took the victim to PW5, a Ward Executive Officer where she named the

appellant during interview. It was the counsel's contention that the records are very clear on what caused PW1 to remain to the appellant and the reason as to why she refused to name him. According to him, that the victim's reluctance to name the appellant which led to the delay in reporting the matter to the authority was caused by the fact that the two were lovers and that they both consented to the sexual act as the trial court's records speak.

He distinguished the case of the **Director of Public Prosecutions v. Simon Mashauri** (supra) as in that case the victim was 27 years old and it was her conduct that led the court to discredit her evidence, while in the present case the victim is a child of 15 years old and the conducts of the victim's mother are not the same as in the cited case. He further added that PW1's testimony clearly show what happened between the appellant and her.

He submitted further that from the evidence on records and the circumstances in the present case, PW1 and PW2 are credible witnesses. The state counsel relied on the cases of **Goodluck Kyando v. Republic [2006] TLR 393, Mohamed Seleman Kidari @ Ndwata v. Republic, Criminal Appeal No. 82 of 2022 [2024] TZCA 137 (23 February 2024)** which subscribed to the case of **Abdala Teje @ Mallma Mabula**

v. **R., Criminal Appeal No. 195 of 2005** (unreported), to fortify his assertions.

As to the complaint on the 2nd and 3rd grounds that the element of penetration was not proved, Mr. Kabelwa was fortified by the case of **Seleman Makumba v. Republic [2006] TLR 149** where it was emphasized 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. On such basis, he said, in the present case PW1 stated that he knew the appellant and that they were lovers as depicted on page 7 of the typed proceedings where the victim also testified to have had sexual intercourse with the appellant.

He further attacked Mr. Daudi's reliance on the case of **Fahadi Khalifa v. Republic** (supra) contending that the same is irrelevant to the fact of the present case since in **Fahadi's case**, the records were silent as to whether the victim knew the appellant before the incidence, but in the present case, PW1 clearly stated that she knew the appellant and they were lovers.

Coming to the 4th ground, it was the learned state attorney's argument that the appellant's learned counsel had misdirect himself on the ground.

He submitted that PW2, the victim's mother testified on the age of the victim as it appears on page 9 of type proceedings and further that the victim herself in her testimony clearly stated that she is 15 years old. To add weight to his submission, Mr. Kabelwa referred the Court to the cases of **Amos s/o Zacharia v. Republic, Criminal Appeal No. 74 of 2021 [2023] TZCA 17709 (4 October 2023); Ezra John v. Republic, Criminal Appeal No. 51 of 2021 [2023] TZCA 17687 (2 October 2023);** and **Issaya Renatus v. Republic, Criminal Appeal No. 642 of 2015 [2016] TZCA 218 (26 April 2016)** which underlined as to who may prove the age of the victim.

He went on submitting that the appellant during trial did not cross examine both PW1 and PW2 on the victim's age and furthermore he did not reject the admission of the affidavit that proved the age of the victim. He reminded the Court of a settled principle that failure to cross examine on important matter is tantamount to admission, as well stated in the case of **Nyerere Nyague v. Republic, Criminal Appeal No. 67 of 2010 [2012] TZCA 103 (21 May 2012);** and **Shihoze Seni and Another v. Republic (1992) TLR 330**. Mr. Kabelwa concluded his submission by contending that the evidence on record proved the offence charged against the appellant to the standard required by the law, and thus prayed

for the appeal to be dismissed, and the conviction and sentence meted by the subordinate court against the appellant be upheld.

The appellant did not file rejoinder submissions.

Having carefully gone through the trial court's records, the appellant's grounds of appeal and the submissions by the attorneys of the appellant and the respondent, I am of a respective view that the crucial issue for determination is whether the appellant's appeal has merits. I will determine the grounds in the manner presented in the parties' submissions for and against the appeal.

In the 1st, 6th and 7th grounds of appeal, the appellant is complaining of the complainant's delay in both having herself medically examined and reporting the incidence which in his view, has created serious doubts on the guilt of the appellant. I am aware that the requirement to report the crime without delay has been emphasized times without a number by this Court and the Court of Appeal, and that this Court has been extremely reluctant to sustain convictions of accused persons in cases where such a delay have not been accounted for by the prosecution. [See the cases of **Maxmillian Augustino Malima v. Republic, Criminal Appeal No. 82 of 2022; Michael Petro v. The Republic, DC Criminal Appeal No. 79 of 2021;** and **Emmanuel Thomas Msemakweli v. Republic,**

Criminal Appeal No. 91 of 2019]. For instance in the case of **Emmanuel Thomas Msemakweli** (supra), the medical report indicated that the victim was examined on 10th May 2019, while the alleged offence was committed on 5th April 2019, 35 days from the day of the commission of the alleged offence. Doubting the appellant's involvement in the said offence, this Court observed as follows:-

> *"....The victim was examined by a Medical Doctor after 35 days from the date of event. The question is whether the appellant was the one who committed the offence, if at all. Whether there was no possibility that someone else could have committed that offence and allege same to be done by the appellant? Is it safe to convict an accused person in such unexplained delay of more than a month since the occurrence of the offence? There are many more questions which answers are not forthcoming."*

In the present appeal, from the records and as rightly submitted by both counsels, it is apparent that the reporting of the occurrence of the crime as well as the medical examination of the victim was made on 22nd February 2023. In my reading of the victim's testimony on page 7 of the typed trial court's proceedings, which I find reliable, I do not find a delay that is complained of by the appellant. The excerpt of PW1's testimony reads:-

".....On 20th February 2023 when I was at Bwawani the accused came and took me at Darajani area, he took me to his house at Gwata area, when I reached there, I went to the bathroom and have a bath to my body. Then we had dinner together. After that, we entered into the bed room. ***We had a talk there then we did sexual intercourse. Accused did enter his penis into my vagina. Then I took a bath again and we slept together until 21st February 2023. In the morning I told him to take me back home but he denied to do that. He left me there in the room and he went to his work. He came back in the night and we did sex again. Then we had bath together. We slept together until 22nd February 2023 when he took me back home*****....."*** [Emphasis added].

Both PW1 and PW2 testified that the victim returned home on 22nd February 2023 when the incident was reported to the Ward Executive Officer and the medical examination was conducted on the same day that the victim returned from the appellant after having sexual intercourse the previous night. In my considered position, the delay if any, is of few hours from the night of 21st February 2023 towards the 22nd February 2023 when the victim and the appellant had sexual intercourse.

Even if there was such as delay, which I do not find any, I would concur with Mr. Kabelwa that in the present matter, the victim explained the

cause of her delay to name the appellant. In her testimony, PW1, the victim, testified on page 8 of the proceedings that:-

> *"I did not tell anyone since the accused did not force me, we all agreed to do sex. I consented to do sex with him"*

All the same, even in the absence of the said explanation, I find the delay, if any, was not extravagantly long under the circumstances of the present matter involving sexual offence. I fully subscribe to what the Court of Appeal underscored on page 17 of its judgment in the case of **Selemani Hassani v. Republic, Criminal Appeal No. 203 of 2021**, where it categorically stated:-

> *"However, we must hasten to say that the above principle must not be made to apply reflexively without having due regard to the particular circumstances of the case concerned. We think that while it can apply fairly unrestrictedly in respect of, say, cases involving property offences, it will not apply with equal force in cases concerning sexual offences where immaturity of the victim, death threats or shame associated with such offences may dissuade the victim from reporting the matter with promptitude."*

It could not be possible for the victim, a school girl of 15 years who was in a secret love relationship with the appellant, to disclose her love affair with the appellant. And that is why she went to sleep with the appellant

when her mother was on a night shift on 20th February 2023. She was not ready to tell her mother about the appellant until she was taken to the Ward Executive Officer. This reveal that the victim was immature but also tried to hide the name of the appellant as she was in love with him. It follows that the 1st, 6th and 7th grounds of appeal are dismissed for lack of merit.

Coming to the determination of the 2nd and 3rd grounds of appeal on the appellant's complaint that penetration was not proved, I am at one with Mr. Daudi, Advocate for the Appellant that under section 130(1) (4) (a) of the Penal Code, penetration however slight, is sufficient to constitute sexual intercourse necessary to the offence. That is, in order for the offence of rape to be established, one of the elements to be proved is that the accused had sexual intercourse with a girl or woman under the circumstances provided under section 130(2) (a) to (e) of the Penal Code.

The evidence of PW1, the victim to whom the best evidence in rape cases comes from, clearly reveal how she met the appellant on the material day and how the two got involved in the sexual act both on 20th February 2023 and 21st February 2023. PW1 unhesistantly testified to know the appellant who resides at Gwata area whom she had sexual intercourse at his house.

The victim's evidence was corroborated by PW3, Patrick Mussa, the medical doctor from Kingolwira Health Centre who examined her and testified that although he found no bruises on the victim's private parts, the vagina was so loose signifying that the same was penetrated by a blunt object that could have been a carrot, finger or penis. To fortify his testimony, the records reveal that PW3 tendered before the trial court PF3 as exhibit without objection from the appellant. With that piece of evidence on record, coupled with evidence of PW1, the victim, I am satisfied that the element of penetration was irresistibly established by the prosecution side.

I don't accept Mr. Daudi's assertion that the fact that the medical doctor, PW3 was unsure of the specific kind of object that penetrated the victim's vagina, the same created doubts on the appellant's involvement in the commission of the crime. In my firm view, so long as a man's penis was amongst the possible objects that PW3 mentioned to have penetrated the victim's vagina, it suffice to hold that the element of penetration was proved since even when left to stand alone without both the PF3 and PW3's testimony, the victim's oral account of what happened was sufficient that her female private part was penetrated by the appellant's penis. It follows that, the 2nd and 3rd grounds also fail.

Turning to the fourth ground, I need not be delayed on the same as upon reading the grounds in line with the trial court's record, the issue as to the uncertainty of the age of the victim was not raised at the trial court that would have prompted examination of the age of the victim. As such, I am inclined not to consider the ground based on the settled position that at the appellate level, the court is only enjoined to look into matters which came up in the lower courts and were decided, and not matters which were neither raised nor decided by the trial court [see the case of **Nurdin Musa Wailu v. Republic, Criminal Appeal No. 164 of 2004** (unreported)].

However, considering that the ground is premised on the appellant's complaint on the want of proof of the victim's age as a crucial element in proving the offence of statutory rape in which the appellant was charged, I have found myself constrained to determine the same.

The trial court's records reveal that the victim is 15 years and was a Form One secondary school student. In her testimony in chief, PW2, the victim's mother told the court that her daughter was 15 years of age and thereafter tendered an affidavit which was not objected by the appellant. The said affidavit which was admitted as Exhibit PE1 and deponed by PW2 on 27th February 2023, reveal that the victim was born on 8th August 2008

at Gwata village evidencing that during the alleged incident, the victim was aged 15 years. As to who can prove the age of the victim, the Court of Appeal underlined in the case of **Abel Changwe v. Republic, Criminal Appeal No. 546 of 2019** on page 6, that:-

> *"apart from proving penetration and that it was the appellant who committed the act, proof of the victim's age was critical. Consistent with the Court's decisions, amongst others, Issaya Renatus v. Republic (Criminal Appeal No. 54 of 2015) [2016] TZCA 218 (26 April 2016, TanzLii), proof of age could have been through, any of the following; the victim, parent, guardian, teacher, medic or birth certificate, if any.."*

Linking the above authority to the present matter, as it was the victim's mother who testified on the age of the victim, the testimony which was fortified by Exhibit PE1, the victim's affidavit of birth, I unhesitatingly hold that the age of the victim was proven on the required standards as highlighted earlier above. It was held by the Court of Appeal in the case of **George Claud Kasanda v. R, Criminal Appeal No. 376 of 2017** (unreported) that:-

> *"In essence that provision (section 130(2)(e) of the Penal Code) creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18*

years whether or not there is consent. In that sense age is of great essence in proving such an offence."

Again, the fourth ground is dismissed for lack of merit.

With the above findings, it is my firm conclusion that the offence of statutory rape was proved by the prosecution beyond reasonable doubt. It means that all grounds of complaint as submitted in support of the appeal are without merit, and the same are dismissed. In the final analysis, the appeal is without merit and is dismissed in its entirety.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 27th day of May 2024.

H. A. KINYAKA

JUDGE

27/05/2024