IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA SUB- REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 64 OF 2023

(Arising from Misenyi District Court at Misenyi in Criminal Case No. 67 of 2023)

FLORIAN S/O JONATHAN@MARCO..... APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

9th February & 23rd February 2024

A.Y. Mwenda, J

The appellant appeared for the first time before the District Court of Missenyi, charged for rape contrary to Section 130(1)(2) (e) and 131(1) of the Penal Code, [Cap 16 R.E 2022].The particulars of offence as per charge sheet alleges that between 21st and 23rd day of April 2023,at Mbale Village within Missenyi District in Kagera Region, the appellant had carnal knowledge of the victim(Name withheld), a girl of fifteen(15) years old. He pleaded not guilty. Since the onus and burden of proof in Criminal cases lies on the prosecution's side, the trial/hearing commenced. The prosecution paraded six (6) witnesses; the victim inclusive. It also tendered three documentary exhibits i.e. the victim's PF-3, the victim's school attendance registers and the appellant's cautioned statement, exhibits P1, P2 and P3, respectively. On his part, the appellant fended for himself as DW1 and paraded two other witnesses, his wife who stood

as DW2 and his brother who stood as DW3. At the end of the judicial day, the trial court found him guilty as charged. He was convicted to serve a term of thirty years jail imprisonment. He was also ordered to compensate the victim to a tune of Tanzanian Shillings two Million (TZS 2,000,000/=) only.

Aggrieved, the appellant preferred the present appeal with three grounds, to wit: -

1) That, the learned trial magistrate erred both in law and fact when ruled that the prosecution proved the offence of rape against the appellant beyond reasonable doubt. (sic)
2) That the learned trial magistrate erred both in law and fact when ruled out that the PF3 produced during the trial was suffice enough to convict the appellant. (sic)
3) That the trial magistrate erred both in law and fact to convict and sentence the appellant basing on the fabricated evidence as the matter of age was not proved beyond the standard required by law no any document procured to support the age of the victim. (sic)

The Court fixed the hearing date, and both parties were in attendance. The appellant appeared in person without any legal representation whilst the

respondent (the republic) was represented by Mr. Elias Subi, learned State Attorney.

During submission in chief, the appellant had nothing of essence to submit. Otherwise, he prayed the grounds of appeal to be adopted as part to his oral submissions. Also, while retaining the right to rejoinder, he prayed this appeal to be allowed with an order releasing him from prison.

On his part, Mr. Elias Subi, informed the court that the grounds of appeal focus on one point challenging the failure by the prosecution to prove its case beyond reasonable doubt.

In his submission, while citing the case of JOSEPH JOHN MAKUNE V. R [1986] TLR at page 44 and Section 3(2) (a) of the Evidence Act, [Cap 6 R.E 2022], Mr. Subi said that the onus and burden of proof in criminal cases lies on the prosecution. He added in that in statutory rape cases, the prosecution is bound to prove penetration, age of the victim and the appellant's /accused's involvement in the alleged crime.

Regarding the proof of the victim's age, while citing the case of JAFFARI MUSSA V. DPP, CRIMINAL APPEAL NO. 234 OF 2019 he submitted that the same can be proved through birth certificate, the evidence by a relative, a parent or a medical practitioner. In that regard he said that in the present matter, the victim's age was proven by PW1's and PW3's evidence in that the victim was

born on 06.06.2008 thus meaning she was 15 years old by the time rape was committed against her.

Regarding proof of penetration, the learned state Attorney, while citing the case of SELEMAN MAKUMBA V. R, CRIMINAL APPEAL NO.94 OF 1999 [2006] opined that true evidence in the present matter came from the victim who stood as PW2. According to him, the victim testified on how the appellant, who was her teacher, raped her in three incidents. He said that the victim testified that the appellant, on 21.04.2023 at 7.00 pm, while she was with her young sister, called her and led her to a nearby farm where raped her. In his further reference to the victim's evidence, the learned state Attorney said that again, on the 22.04.2023 at the same time and place at 7.00 PM, he took her to the same area(farm) and raped her, the act which was further repeated on 24.04.2023 at the same time and place(area).The learned State Attorney stressed that after the last rape incident, the victim was inspected by her mother when she arrived home and it was discovered that she came from making love. The learned State Attorney was of the opinion that this type of evidence, which is supported by the appellant's cautioned Statement (exhibit P3) proved that there was penetration. Further to that, learned state Attorney submitted that further corroboration of the victim's evidence regarding penetration came from the Doctor (PW1). In his concluding remarks, the learned state attorney prayed this appeal to be dismissed.

In rejoinder, the appellant challenged the victim's credibility. He wondered, if at all the victim was a witness of truth, why was she also detained at the police station on the date when he (the appellant) was arrested. He also doubted the failure to examine the victim early on the date of incident. Again, the appellant challenged the evidence by PW6 who recorded the cautioned statement that the appellant was brought at police station on 24.04.2023 at 7.00 am while he was send at police station on the 23.04.2023 evening. According to him, this was meant to circumvent the requirement of recording the cautioned statement within four hours.

In his further rejoinder, the appellant faulted the victim's credibility when she testified that on 17 and 18.04.2023 she offered him (the appellant) tea in his office, while PW5, the head teacher testified that by that time his services at that school had already expired as his contract ended in January 2023.

Further to that he rejoindered that the victim never told her mother that she came from making love. The appellant asserted that the victim testified that when she returned home her mother asked her where she came from and responded that she was at the toilet but her mother jumped into conclusion that she (the victim) came from making love while that was not the victim's reply.

The appellant went further to rejoinder in that he believes the victim was raped by somebody called "Kachelo", the name which the victim's mother testified

that it was mentioned by the victim when she discovered the victim came from making love. He also stressed that there were contradictions between the PF-3 and the victim's evidence on their consummation. He said that while the victim testified that she and the appellant consummated, the PF-3 showed that there were neither bruises nor sperms. In the same footing he wondered, if at all the victim was raped in the previous evening and was taken to the village authority and later, in the same evening to the police station where she spent the night, then why her private parts had no sperm?

In conclusion, the appellant, reiterated to his previous prayer by praying his appeal to be allowed, quashing conviction meted against him and set aside the sentence.

That marks the end of the summary of then submissions for and against the present appeal. The task which is left before the court is to determine the merits and demerits of this appeal. Before delving into that, it is apposite to discuss, albeit briefly on what triggered the Hon. trial magistrate reach to the findings of guilty against the appellant. From the copy of judgement, the Hon. Trial Magistrate, was satisfied with the victim's evidence that she was raped by the appellant. He relied on the principle that true evidence in rape cases is that of the victim as propounded in SELEMANI MAKUMBA V. REPUBLIC, [2006] TLR NO.376 and MOHAMED SAID V. REPUBLIC, CRIMINAL APPEAL NO. 145 OF 2017 where emphasis was on passing the said evidence on the test of truthfulness. While relying on the contents of exhibit P1 (the PF-3) which

indicate that the victim's hymen was not intact due to repeated sexual intercourse, the Hon. Trial magistrate concluded that the victim was raped. In further support of the prosecution's case, the trial magistrate accorded weight on accused person's cautioned statement (Exhibit P.3) as bearing a true account of what transpired, that he (the appellant) raped the victim. With the said evidence, and without considering the defence case, the trial magistrate concluded that the prosecution side proved its case beyond reasonable doubt. As hinted, it is unfortunate that the Hon. trial magistrate did not consider the Appellant's defence. This was fatal as it was illustrated in the case of MSAFIRI ISSA DODO & 1 ANOTHER V. THE REPUBLIC, CRIMINAL APPEAL NO. 255 OF 2006. In this case the Court held inter alia that:

> "First, is on issue of failure to consider the appellant's/accused defence at the trial. With due respect to the principal District Magistrate, we have seen the judgment written by him. Clearly the record shows that he failed to consider the appellant's defence. This was serious error. Several decisions of this Court have ruled that failure of the court to fully consider the entire defence evidence in the judgment before finding the appellant guilty is a serious error. See for instance **Charles Samson V. R.** [1990] TLR 39 and **Alfeo Velentino V. R**, Criminal Appeal No. 92 of 2006 (unreported)."

As the trial court failed to consider the appellant defense, this court is enjoined to step into the shoes of the trial court and consider the evidence from both sides. The back up to this is the findings of the Court of Appeal in KAIMU SAID V. THE REPUBLIC, CRIMINAL APPEAL NO. 391 OF 2019 where the Court adjudged that a High Court, being a first appellate Court has powers to step into the trial court's shoes and reconsider the evidence of both sides and come up with its own finding of fact. The Court, having further cited the case of SIZA PATRICE VS. REPUBLIC, CRIMINAL APPEAL NO. 19 OF 2010 (unreported) held:

> "We understand that it is settled law that a first appeal is in the form of rehearing. As such, the first appellate court has the duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary."

Back to the merits and demerits of the present appeal, the appellant was charged for rape under section 130(1), (2)(e) and 131(1) of the Penal Code [CAP 16 RE. 2022]. In rape cases charged under this section, the consent of the victim is immaterial. In the said circumstances the prosecution is obliged to prove that the victim was raped(penetration), that she was a minor (proof of her age) and lastly that the victim was raped by none other than the accused person/appellant.

As hinted above, the prosecution tendered three types of evidence, viz oral testimony (from the victim PW2, her father and mother who stood as PW3 and

PW4, respectively, the Doctor who testified as PW1 and tendered the victim's PF-3 and PW6 and a police officer who tendered accused's cautioned statement) the victim's PF-3(Exhibit P1) and accused person's cautioned statement (exhibit P3).

Regarding oral evidence, this court is in agreement with the learned State Attorney, although with reservations, that true evidence of rape is that of 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 (See SELEMAN MAKUMBA V. R, CRIMINAL APPEAL NO.94 of 1999 [2006]. In applying this principle, scrutiny of the said evidence to satisfy that what they state contains nothing but the truth is crucial. In MOHAMED SAID V. THE REPUBLIC, CRIMINAL APPEAL NO. 145 OF 2017 the court ruled so, while citing Section 127(7) of the Evidence Act, [Cap 6 RE. 2022]. That being the legal position, I have gone through the victim's evidence and noted the same as being tainted with doubts. It is on record, (from the victim's evidence (PW2) and that of her father (PW3)) that after the appellant arrest, the victim was also taken to Bwajani Police Station where she was detained and spent the night. Since PW2 was the victim, she ought to be protected and treated fairly and not otherwise. One may wonder why the victim was detained? Bad indeed there is not any single prosecution's witness who adduced evidence as to why she was detained at the police station and not left at home where both her parents were around. This has made the court draw an inference under section 122 of the

Evidence Act, [CAP 6 RE 2022], that the victim was detained at police station to coerce her to provide false evidence. Another doubt with her evidence is where she alleged rape occurred in the three incidents i.e. on 21.04.2023, 22.04.2023 and lastly on 23.4.2023 and in all occasions she alleged that all the incidents occurred at the same area in her parents' farm at 7:00 PM and time spent was 15 minutes. With this type of evidence this court is of the view that she testified lies since in her evidence she did not say if she had a watch with her. No wonder when she was cross examined by the appellant if she had a watch to ascertain if they spent 15 minutes in each incident so as to be trusted by the court, she shaded tears which made this court believe the same as being tears of guilty consciences and not otherwise. Another doubt in the prosecution's evidence is that of PW4. This witness said that having noted that the victim came from making love in the evening of 23.04.2023, she asked her as to whom did she made love with only to be told that it was one Mwl. Kachero. However, in the record, there is no clear evidence that the appellant is also known as Mwl. Kachero. Interestingly, the appellant's other name in the record is Marco and not Mwl. Kachero. If the appellant's other name was Mwl. Kachero, the record would have indicated so.

Again, the victim's evidence contradicts that of the doctor (PW1). While she alleged that in all the three incidents, they spent 15 minutes in making love meaning the appellant reached orgasm, the doctor (PW1), despite examining her on the following day, did not find anything. Since the victim alleged she was

raped contrary to what is indicated in the PF3 then this court is of the view that the her evidence is improbable and inconceivable. This is so because there is no evidence that after rape she had showered. Her evidence fits in the ambit of the principles set in the case of TUMAINI FRANK ABRAHAM V. REPUBLIC, CRIMINAL APPEAL NO. 40 OF 2020 where the Court of Appeal, while citing the case of MATHIAS BUNDALA V. R, CRIMINAL APPEAL NO. 62 of 2004(unreported) quoted in TOYIDOTO KOSIMA (supra) held inter alia that:

> "Good reasons for not believing a witness include the fact that the witness has given improbable evidence, or the evidence has been materially contradicted by another witness or witnesses." [Emphasis added]

Regarding accused's cautioned statement (Exhibit P.3) which was admitted in court after conducting an inquiry, it is apposite to point out that admission of a cautioned statement is one thing and the weight to be given to the evidence in it is another thing. This entail that upon admission of the same, the court must consider the same, together with other pieces of evidence. The back up to this position is in the case of STEVEN S/O JASEN and 2 OTHERS V. THE REPUBLIC, CRIMINAL APPEAL NO. 79 OF 1999, (CAT), where it was held that:

> "Admission of an exhibit such as cautioned statement in question is one thing and the weight to be given to the evidence contained therein is another thing. This depends

on the total evaluation of evidence at issue and other pieces of evidence available on record."

That said, this court considered the weight of exhibit P3 only to find that it contradicts with the victim's evidence. While the victim testified that on 23.04.2023 she made love with the appellant to the end just as it was for the previous two incidents, in exhibit P3 the appellant alleged they did not finish that exercise which means he did not ejaculate. With these contradictions it is thus unsafe to conclude that the duo consummated as was alleged by the victim.

Lastly, in his submissions, the appellant alleged that his defence was not considered when he said he had grudges with the victim's mother, (PW4). In his defence, the appellant alleged that the source of their grudges is the punishment he inflicted onto the victim twice in the past days. Although the prosecution's side cross examined him in that regard, based on other pieces of evidence, this court is made to believe his story. The reasons are that, firstly, detaining the victim at police station after the alleged incident was not normal which entail that there was something fishy cooking up in support of the prosecution's case. As stated earlier, there is not reasons which were advanced by the prosecution's for detaining the victim at police station. As such vide section 122 of the Evidence Act, [Cap 6 R.E 2022] I believe that that, the evidence against the appellant was framed by coercing the victim to testify lies. Secondly, the victim's mother was consistent in her testimony that the victim

mentioned one Mwl. Kachelo as her paramour but there is no evidence that the appellant is also Mwl Kachelo. On that basis this court is of the view that the victim's mother also testified lies against the appellant due to grudges they had.

From the foregoing observations, this court is of the view that the prosecution's case was not proved beyond reasonable doubt. That said, this court finds merits in this appeal, and it is hereby allowed. The conviction against the appellant is quashed and sentence set aside. The order for compensation is also reversed. The appellant is to be released immediately from prison unless he is lawfully held.

Right of appeal fully explained.

It is so ordered.

A.Y. MWENDA

JUDGE

23.02.2024

Judgement delivered in chamber under the seal of this court in the presence of Ms. Gloria Rugeye learned State Attorney and in the presence of Mr. Florian Jonathan @ Marco the appellant.

HIGH COURT OF TANZANIA BUKOBA

A.Y. MWENDA

JUDGE

23.02.2024