IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB- REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 7751 OF 2024

(Originating from Criminal case No. 43 OF 2023 of Karagwe District Court)

FAUSTINE MKAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

23/05/2024 & 31/05/2024
E. L. NGIGWANA, J.

Before the District Court of Karagwe sitting at Kayanga (the trial court), the appellant was arraigned and convicted of the offence of Rape contrary to sections 130 (1), 2 (e) and 131 (1) of the Penal Code [Cap 16 R: E 2022].

At the trial court, it was alleged that, on 9th day of March, 2023 at Katawoka Street within Karagwe District in Kagera Region, the appellant had carnal knowledge of a school girl aged 14 years old. To conceal the victim's identity, I shall henceforth refer to her as PW2 as she so testified before the trial court. The appellant pleaded not guilty to the charge.

In a bid to prove the charge, the prosecution marshaled a total of five (5) witnesses and tendered three (3) exhibits to wit; School admission register (Exhibit P1), School attendance Register (Exhibit P2) and PF3 (Exhibit P3).

On the other hand, the appellant defended himself under oath and called two other witnesses.

Upon hearing the case, the trial court was satisfied that the case against the appellant was proved beyond reasonable doubt therefore, he was convicted and sentenced to thirty (30) years imprisonment.

Aggrieved by both conviction and sentence, the appellant appealed to this court. In the memorandum of appeal, he raised four (4) grounds of appeal on the basis of which he asked this court to quash the conviction and set aside the sentence of thirty (30) years imprisonment meted against him. However, before the commencement of the hearing, the appellant abandoned the 3rd ground and remained with three grounds as follows;

(1) *That, the trial Magistrate erred in law and fact to convict the appellant on the offence of rape while the prosecution did not prove the charge against the appellant beyond reasonable doubt.*

(2) *That the trial Magistrate erred in law and facts for failure to consider the defence of the appellant and his witnesses hence occasioned miscarriage of justice to the appellant.*

(3) *Abandoned*

(4) *That, the trial Magistrate erred in law and facts for failure to evaluate the evidence on record hence resulted to miscarriage of justice.*

Wherefore, the appellant prays to this court to allow the appeal by quashing the conviction and setting aside the sentence of thirty (30) years imprisonment meted against him.

At the hearing, the appellant appeared in person and represented by Mr. Ibrahim Mswadick learned advocate. On the adversary side, the respondent /Republic had the services of Ms. Gloria Lugeye learned State Attorney.

On the 1st and 4th grounds, Mr. Mswadick submitted and argued that in criminal cases, the burden of proof is on the prosecution to prove the charge beyond reasonable doubt. He cited section 3 (2) (a) of the Evidence Act, [Cap 6 R: E 2022] and the case of **Jonas Nkize v. Republic** [1992] TLR. 213 to support his argument. He further submitted

that in the trial court the prosecution side featured five witnesses and that, save for PW2, the rest of the witnesses were not eye witnesses of the incident.

Mr. Mswadick went on submitting that in sexual offences, the best evidence comes from the victim, however, his/her evidence should not be taken as gospel truth; it has to meet the required tests. To bolster his argument, he cited the case of **Mohamed Said versus Republic,** Criminal Appeal No. 145 of 2017 CAT (unreported) where the Court emphasized that the word of the victim was never intended to be taken as gospel truth; her or his testimony should pass the test of truthfulness. According to him, the Court arrived at that position after considering that rape cases are easily fabricated but difficult to prove.

He further submitted that the evidence of PW2 that she started having sexual intercourse with the appellant since she was in standard one and that she was given money by the appellant to not disclose their relationship is unreliable. He added that the evidence adduced by PW2 that she was raped by the appellant on 09/03/2023 during night hours is fabricated evidence because the defence evidence is very strong to the effect that on 09/03/2023, around 18:00hours, PW2 was sent by the appellant (DW1) to

buy cigarette for business, but she came back very late that is to say at mid night (2:00hours), the fact which was confirmed by DW3, and as a result, the victim was beaten by the appellant to discipline her since prior to the said delay, she escaped from home for two weeks, so PW2 revenged by fabricating this case. According to him, the trial court wrongly treated the evidence of the PW2 as a gospel truth otherwise the decision would have been different. He invited this court to find that PW2 was a witness who had no good morals and therefore not a credible witness.

On the 2nd ground, Mr. Mswadick submitted that the defence evidence was not considered. He added that in the trial court the appellant testified under oath and featured two witnesses; DW2 and DW3. He went on to submit that DW2 testified that on 09/03/2023, the appellant sent PW2 to buy cigarettes for DW2's shop but the victim returned at midnight and as a result, she was beaten by the appellant as a way of disciplining her while DW3 added that, on the date of the alleged incident, she was at home.

Mr. Mswadick added that had the trial court considered the defence evidence, it would have reached at a different conclusion. It is his further submission that failure to consider the defence case is a fatal irregularity and, it vitiates the proceedings as stated in the case of **Daniel Severin**

versus Republic and others, Criminal Appeal No. 431 of 2018 CAT of Bukoba page 7 and **Fulgence Kibuga @ Frugence Guzeye versus Republic**, Economic Appeal No. 4 of 2020 High Court Bukoba. He added that this court being a first appellate court, it enjoys the mandate to re-evaluate the evidence on record and arrive at its own conclusion. He concluded his submission praying to the court to quash the conviction, set the sentence, and set the appellant free.

In reply, Ms. Gloria Lugeye opposed this appeal standing firm that the prosecution had proved the case beyond reasonable doubt. Ms. Lugeye conceded that in sexual offences, the best evidence comes from the victim, and she cited a land mark case of **Seleman Makumba verus Republic** [2003] T.L.R 379. She went on submitting that, the trial court relied on the evidence of the victim (PW2) after being satisfied that the witness was credible. As regards the argument by the appellant's advocate that PW2 was not credible, Ms. Lugeye submitted that the credibility and demeanor of the witness is the empire of the trial court and not of the appellate court. To support her stance, she cited the case of **Waziri Shabani Mizoye versus Republic,** Criminal Appeal No.476 of 2019 CAT (unreported).

She added that in the trial court PW2 explained how she was raped by the appellant and how she reported to PW1 and DW3 and how she was disbelieved by PW1, DW2 and DW3. Ms. Lugeye further stated that delaying reporting the incident of rape due to shame or death threats does not affect the credibility of the witness of undermine the charge of rape. She cited the case of **Seleman Hassan versus Republic,** Criminal Appeal No.203 of 2021.

As regards the complaint that the defence evidence was not considered by the trial Magistrate, Ms. Lugeye submitted that the complaint is baseless because the judgment of the trial court speaks for itself from page 18-19. She finalized her submission urging the court to dismiss this appeal for being devoid of merit.

In his brief rejoinder, Mr. Mswadick submitted that there was misapprehension of evidence/ facts because the judgment revealed that on the material night, PW2 and DW1 were the only persons present in the house in which the alleged offence was committed while the evidence of DW1, and DW3 revealed that in the said house, people were three, that is to say PW2, DW1 and DW3. He added that there is no evidence on record

to the effect DW1 ever threatened to kill PW2, and therefore the case of **Seleman Hassan versus Republic** (Supra) is distinguishable.

He further added that, the appellate court can still look on the demeanour of the witness as stated in the case of **Mohamed Said versus Republic,** (Supra).

After carefully considering the grounds of appeal, the trial court record and the rival submissions of both sides, the issue for determination is whether this appeal is meritorious.

However, before embarking on the merits of appeal, I would like to state that it is trite law that in criminal law, the corner stone of any criminal case is a charge. The charge is both a heart and a brain of a criminal justice and a fair trial which plays the role of informing the accused person on the nature of the accusations and allow him or her to prepare his or her defence, and assist the court to determine whether it has jurisdiction and prepare the procedure to be applied during the trial. See **Iliney Molaskus and Another versus the Republic,** Criminal Appeal No. 23 of 2022 HC-Morogoro (Unreported).

Again, where there is a variation of the charges and the evidence, the charge must be amended forthwith, and if no amendment is effected, the charge will remain unproved.

In the matter at hand, the evidence of PW2 is to the effect that the appellant started having sexual intercourse with her since she was in standard one but the charge sheet filed before the trial court mentioned a specific date in which the alleged offence was committed to wit; 09/03/2023, and it was never amended to include the incidents prior to 09/03/2023. For that reason, I will confine myself to the charge brought against the appellant to see whether there is evidence on record proving the same beyond reasonable doubt.

Reading section 130 (1) (2) (e) of the Penal Code [Cap 16 R.E 2022], it is apparent that, for statutory rape upon which the appellant was charged with, the vital ingredients which the prosecution must prove are;

(a) The age of the victim

(b) Penetration of the penis into the vagina of the victim;

(c)That, it is the accused who is responsible for such act.

In the case of **William Ntumbi versus Director of Public Prosecutions**, Criminal Appeal No.320 of 2019, CAT (Unreported) it was held that;

"It cannot be gainsaid that, the law requires that in statutory rape cases like the instant case, the age of the victim must be proved.....There is a considerable body of case law to show that this Court has emphasized in imperative terms that proof of age may be by parents, medical practitioners, or where available by a birth certificate-see for example, ***Bashiri John versus Republic,*** *Criminal Appeal No.486 of 2016,* ***Isaya Renatus versus Republic,*** *Criminal Appeal No.542 of 2015 and* ***George Claud Kasanda versus Republic,*** *Criminal Appeal No.447 of 2016 (all unreported)"*

Now, as far as the case at hand is concerned, the first issue which needs to be determined is whether before the trial court; the age of the victim was proved. Going through the trial court record, it is apparent that the age of PW2 was proved by the PW2's mother (PW1) who testified that her daughter (PW2) was born on 26/11/2009, and PW2's teacher (PW3) who tendered the school admission register and school attendance register both showing that the victim was born on 26/11/2009.

I now turn to the issue of penetration. As a matter of law, rape is proved by penetration however slight. In terms of Section 130 (4) of the Penal Code Cap 16 R: E 2019, penetration however slight is sufficient to constitute rape.

It is trite law that in sexual offences, the best evidence in sexual offences comes from the victim who is better placed to explain how she was raped and the person responsible. **See Selemani Mkumba versus R (Supra).** In other words, it is trite that the evidence of one solitary credible witness can establish a case beyond reasonable doubt because truth is not discovered by a majority vote.

In another case to wit; **Mohamed Said verus Republic,** Criminal Appeal No.145 of 2017 CAT (Unreported), while addressing the evidence of the victim in sexual cases, the Court observed,

"We think that it was never intended that the word ***of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness.....***"

The emphasis here is that, in order to convict an accused person basing on the evidence of the victim, the trial court must be satisfied that what the victim has testified is nothing but the truth because human experience has shown that in these cases, victims do sometimes tell an entire false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, and sometimes for no reason at all. This court through the case of **Elipius Rwezahula versus Republic,** Criminal Appeal No.107 of 2020 had this to say;

"..It is without doubt, the easiest case to frame against a person is a rape case because a victim may easily be coached against an innocent person. Therefore, though it is important to trust the testimony of the victim, the court should always ensure that the demeanour is assessed and all possibilities of fabrication are eliminated"

In the case at hand, the trial record reveals that PW2 is the appellant's niece hence her guardian. DW3 is the wife of the appellant hence PW2's aunt and her guardian too. It is on record that the appellant and DW2 started taking care of PW2 when she was eight (8) years. DW3 is the biological daughter of DW1 and DW2. In that premise, before convicting that appellant, the trial court was duty bound to ensure that the

testimony of PW2 had passed the test of truthfulness, and that the defence had not raised any reasonable doubt on the prosecution case.

PW2 told the trial court that on 09/03/2023 at 23: 00hours, the appellant called him into his room and upon entering the said room; the appellant locked it, and then put off his clothes and PW's clothes and ordered her to lay and the bed and went on having sexual intercourse until the victim was satisfied. She added on the material night, there was no any other person in appellant's house except the appellant and herself.

According to the medical practitioner (PW5) who examined PW2 on 10/03/2023, PW2 had no hymen since because her vagina was used several times, and there was whitish smelling discharge. The evidence of PW5 proved that that PW2 was penetrated and she was penetrated several times, but it does not go further to prove who penetrated her and when. Therefore, there must be credible evidence linking the appellant with the offence because human experience has shown that sometimes victims fabricate cases for different reasons; be it for social or economic reasons.

On the other hand, the appellant (DW1) testified that around 09/03/2023 19:00hours he sent PW2 to buy cigarettes for business but she delayed to

come back as she came around 2:00hours and DW3 opened the door for her. DW1 went on telling the trial court that, as guardians, they punished PW2 for her unexplained delay. He went on to testify that he was later arrested by the police on allegation that he raped PW2.His evidence was supported by the evidence of DW2 to the same effect. On her side DW3 told the trial court that on 09/03/2023, PW2 came back home at midnight, and after being punished for her delay, she slept with her on the same bed until morning.

When the charge was read over to the appellant he pleaded not guilty. In his defence he disputed to have raped PW2. PW3 who is the investigator of this case testified that she interviewed the appellant and he denied to have committed the offence of rape.

Upon considering the defence evidence, the trial Magistrate ruled out that there is no strong evidence to prove that the allegations levelled by the DW1, DW2 and DW3 against PW2 were true. Undoubtedly, the trial court was wrong because it is a cardinal principle of law that the accused person has no duty to prove his innocence but rather, his duty was just to cast doubt on prosecution case.

Considering the defence evidence adduced in the trial court, it is my considered view that the same has managed to cast doubt on the prosecution case. As a matter of law, such doubts ought to be resolved in favour of the appellant.

In the premise, I am constrained to allow the appeal and, respectively, quash the conviction and set aside the sentence of thirty (30) imprisonment years meted against the appellant. I further order for an immediate release of the appellant from prison custody unless if he is held for some other lawful cause. It is so ordered.

Dated at Bukoba this 31st day of May 2024.

E.L. NGIGWANA

JUDGE

31/05/2024.

Judgment delivered this 31st day of May 2024 in the presence of the appellant and his advocate Mr. Ibrahim Mswadick, Ms. Matilda Assey

learned State Attorney for the Respondent/Republic, Hon. A. A. Madulu, JLA, and Ms. Queen Koba, B/C.

E.L. NGIGWANA

JUDGE

31/05/2024.