IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 966 OF 2024

(Originating from Criminal Case No. 03 of 2023 in the Resident Magistrate Court of Iringa at Iringa)

KELVIN KAHONGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of the Last Order: 08.04.2024
Date of the Judgment: 31.05.2024

A.E. Mwipopo, J.

Kelvin Kahonga, the appellant, was arraigned in the Resident Magistrate Court of Iringa at Iringa for the offence of Rape contrary to sections 130 (1) and (2) (e) and 131(1) of the Penal Code, Cap. 16 R.E. 2022. It was alleged that on the 28th January 2023, at Magombwe-Pawaga Village, within the District and Region of Iringa, the appellant had carnal knowledge of the victim (the name is concealed for her protection), a girl aged four (4) years old. The prosecution brought three (3) witnesses and tendered one exhibit marked P1 (PF-3) to prove the case.

The victim (PW1), a child of 4 years, was the first prosecution witness to testify. She testified without oath after promising to speak the truth and not lie. She said the appellant had carnal knowledge of her and she identified the appellant as the person who raped her. The mother of the victim (PW2) was the second witness to testify and said the victim is four (4) years old as she was born on 15th February 2018. On the morning of 28th January 2023, PW2 went to the village water tape to fetch water and left the victim at home playing with Cheselina, her friend. The distance from her home to the village water tape is about 100 meters. After some time, PW2 saw the victim crying coming at water tape from the house of the appellant's grandmother which was about 15 paces from the water tap. The victim was not walking properly. The victim told PW2 that the appellant raped her. PW2 inspected the victim and found a dust-like thing, white material and blood coming from her vagina. She reported the matter to the Pawaga Police Station. The police issued a PF3, and PW2 took the victim to Kimande Health Center for medical examination. The doctor confirmed that the victim was penetrated through her vagina. After the

incident, the appellant ran away from the village Later on the village militia found and arrested the appellant.

The third and last prosecution witness (PW3) was the Clinical Officer who examined the victim (PWI) on the 28th day of January 2023. PW3 testified that he examined the victim aged four years (victim) who was accompanied by her mother. He observed during the examination that the victim's vaginal area was wet and the hymen was perforated for about one centimetre. He filed his findings in the PF3 (exhibit P1). The content of exhibit P1 shows the victim's vaginal area was wet and the hymen of her vagina was perforated for about one centimetre. The prosecution closed their case and the trial court ruled that a prima facie case was made.

The appellant (DW1) defended himself on oath and said the case was fabricated by the father of the victim after he (the appellant) claimed the money he owed him. He denied raping the victim. He said the doctor who examine the victim (PW3) said the victim had no bruises or semen in her vagina. He was wondering how come the child of 4 years was raped without having bruises. He went on to say the prosecution promised to call seven witnesses, but only three witnesses were paraded. He said there are

doubts in the prosecution's case as he was not arrested at the scene of the crime, and the person who arrested him was not brought to testify before the trial court. DW1 admitted to committing the rape offence in the previous year (2022). He said the prosecution failed to prove his age as in the Criminal Case No. 26 of 2022 in the Iringa District Court of Iringa where he was found to be aged 17 years. He was still below 18 years old in 2018 when the offence was committed in the present case. The appellant closed his case.

In its judgment, the trial court was satisfied that the case was proved against the appellant and convicted him as charged. The trial court sentenced the appellant to serve life imprisonment.

The appellant was aggrieved with the decision of the trial court and filed the present appeal. The petition of appeal filed by the appellant contains eight (8) grounds of appeal as follows:-

1. *That, the learned trial magistrate erred in law and fact for convicting and excessively sentencing the appellant to serve life imprisonment without considering the appellant was 18 years old or less and was supposed to be given a lesser sentence under section 131 (2) of the Penal Code as the evidence shows he was born on December 2006.*

2. *That, the learned trial court erred in law and fact for convicting and sentencing the appellant to excessive punishment contrary to section 131 (2) of the Penal Code which provides that the punishment for the accused person aged 18 years or below is corporal punishment for first offender and twelve months imprisonment for the second offender.*
3. *That, the learned trial magistrate erred in law and fact for convicting and sentencing the appellant based on the evidence of PW1 which is insufficient to convict him as she did not mention the time, date, month, year, and place where the crime happened.*
4. *That, the learned trial magistrate erred in law and fact for convicting and sentencing the appellant without considering that the prosecution failed to bring to testify in court material witnesses namely Chese, militiamen and suburban chairman.*
5. *That, the learned trial resident magistrate erred in law and fact for failure to consider the material variance between the preliminary hearing and evidence adduced in the trial court. Most facts adduced during the preliminary hearing were not proved during the trial.*
6. *That, the learned trial magistrate erred in law and fact for failure to consider the distance between the house of the appellant's grandmother to where PW2 was selling water was just 15 paces and it was difficult for the appellant to pass with the victim without being seen by PW2.*
7. *That, the trial court wrongly convicted the appellant without considering that no independent witness testified from among the people who gathered after they heard PW2 calling for help, and those who*

witnesses PW2 inspecting PW1 and found dust and blood in the victim's vagina.

8. *That, the prosecution failed to prove the case against the appellant beyond a reasonable doubt.*

The appellant appeared in person during the hearing, whereas Ms. Muzna Mfinanga, a learned state attorney, appeared for the Republic (respondent). The appellant being a layperson, asked the Court to consider all of his grounds of appeal, and he will rejoin after the respondent has replied to his grounds of appeal.

Replying to the grounds of appeal raised by the appellant, Ms. Muzna Mfinanga (leaned state attorney) opposed the appeal. She submitted jointly on the 1st and 2nd grounds of appeal that the appellant admitted on page 8 of the typed proceeding he is 19 years old. She said while praying for a severe sentence after conviction, the state attorney who prosecuted the case said the appellant was previously convicted of criminal offence when he was aged 18 years in 2022, meaning in 2023 he was 19 years old. The appellant claimed he was born on 25th December 2006 on page 31 of the typed proceedings. The same is an afterthought since other evidence proves the opposite. It was the duty of the appellant to prove his age to

benefit from the sentence after conviction. It was not the duty of the prosecution to prove the age of the appellant was below 18 years. The grounds have no merits.

The counsel for the respondent said in her response to the 4th and 7th grounds of appeal that material witnesses testified in this case. Cheselina was not an eyewitness, hence she was not a material witness. The appellant did not dispute his arrest as a result there was no need to bring Hamlet's Chairman or local militia as witnesses. For the people who gathered in the area (water tap), they did not participate in examining the victim. It was PW2 who examined the victim's private part and found the victim was raped. She cited the case of **Mawazo Anyandwile Mwaikwaja vs. D. P.P**, Criminal Appeal No. 455 of 2017, CAT at Mbeya, (unreported) to cement her argument. She said section 143 of the Evidence Act, Cap. 6 R.E. 2022 provides that there is no specific number of witnesses required to prove the case. Thus, the ground has no merits.

Regarding the claim that the victim failed to mention the time, date and place where the incident occurred, the counsel for the respondent said the victim's (PW1) age was 4 years old and the victim couldn't mention the

time, date and place where the incident occurred. PW1 explained how the appellant penetrated her. PW1 evidence was sufficient to prove the offence. PW2 in her evidence mentioned the time and date of the incident. The appellant knew the date of the incident and the appellant was not prejudiced in any way.

She said on the 5th ground of appeal that the prosecution evidence proved each ingredient of the offence needs to be proved after the preliminary hearing. The importance of Preliminary Hearing according to section 192 (4) of the Criminal Procedure Act is to speed up the trial. The prosecution case was proved by PW1, PW2 and PW3. The appellant cross-examined those witnesses and he defended himself on oath. The judgment of the trial court relied on the evidence on record and not the facts stated during the preliminary hearing. Respondent's response to the 6th ground of appeal is that the appellant heard PW2 testifying in court and he did not ask her questions on the issue. Bringing up the issue of PW2 not seeing him taking the victim to his grandmother's house at the appeal stage is an afterthought. By not cross-examining the material evidence from PW2 the appellant was admitting such evidence as it was held in **Mawazo**

Anyandwile Mwaikwaja vs. Republic, Criminal Appeal No. 455 of 2017, Court of Appeal of Tanzania at Mbeya, (unreported), at page 24. Sexual offences usually are committed in secrecy, hence it is not possible to have eyewitnesses apart from the victim.

In her response to the 8th and last ground of appeal, the state attorney said that the prosecution proved the case without doubt. The age of the victim was proved by the evidence of PW2 as seen on page 17 of the typed proceedings. PW2 testified that the victim is aged 4 years old as she was born on 15th February 2018. The act of penetration was proved by the evidence of PW1 on pages 16 and 17 of the typed proceedings. PW1 said in her evidence that it was the appellant who penetrated her. The evidence of PW1 is supported by testimony of PW3 as seen on page 21 of the typed proceedings. PW3 said the victim's vagina was wet, the hymen perforated for 1 CM and the presence of blood stain in her vagina. The evidence of PW2 also supports the evidence of PW1. PW2 said she examined PW1 and saw a white slippery discharge and blood coming from PW1's vagina.

The counsel went on to say that the victim named the appellant soon after the incident to PW2. Her ability to name the appellant to PW2 proved her reliability. In **Marwa Wangiti Mwita and Another vs. Republic,** Criminal Appeal No. 06 of 2015, Court of Appeal of Tanzania at Mwanza, (unreported), it was held on page 6 that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. PW1 named the appellant to PW2 immediately after the incident as seen on page 18 of the typed proceedings. The ground has no merits.

In his rejoinder, the appellant said when he was convicted for a criminal case in 2022 he was 17 years old. The evidence from the doctor (PW3) shows the victim was not penetrated. A young child of 4 years couldn't claim to see PW1 coming from the house of his grandmother walking improperly while the distance from the water tap to the house of his grandmother was 15 paces. He was wondering why PW2 did not see him taking PW1 or to see the appellant at his grandmother's house which is about 15 paces from the water tap. The people gathered during the

incident and Cheselina were not called as witnesses during trial. Chaselina could have proved it was the appellant who took the victim when they were playing together. He said the appellant claimed he was denied the right to bring witness by the trial court magistrate.

After hearing submissions from both parties the issue for determination is whether this appeal has merits.

Before determining the appellant's grounds of appeal in the petition of appeal, I find it pertinent to deal first with the appellant's submission that he was denied the right to bring his witnesses by the trial court. The issue was raised for the first time by the appellant in his submission as the same did not feature anywhere in the proceedings of the trial court. The proceedings show that after the appellant testified in his defence he closed his case. The proceedings of the trial court show that the appellant was afforded by the trial court the right to call his witnesses and to tender an exhibit in his defence, however, he did not use the opportunity. For that reason, this court is not going to discuss the issue as the same was not part of the record.

Now, turning to the grounds of appeal, I will consider each ground of appeal as found in the petition of appeal in the determination of the appeal. The appellant claimed in the first and second grounds of appeal that he was aged below 18 years old when he committed the offence hence he was excessively punished by the trial court contrary to section 131 (2) of the Penal Code. The appellant said that in his criminal case of the year 2022, the trial court found he was aged 17 years hence he is still under 18 years. The state attorney in contention said that the evidence in the record proved that the appellant is 19 years old and it is in the record that the appellant was convicted for a criminal case in 2022 and he was aged 18 years.

The court is aware that under section 131 (2) (a) and (b) of the Penal Code, Cap. 16 R.E. 2022, where the offence is committed by a boy who is of the age of eighteen years or less, if he is a first offender he shall be sentenced to corporal punishment only; and if he is a second-time offender, he shall be sentenced to imprisonment for a term of twelve months with corporal punishment. The appellant in this case was sentenced by the trial court to serve life imprisonment after he was convicted.

The proceedings show that during the preliminary hearing, the appellant admitted from the facts narrated by the prosecution that he is Kelvin Kahonga, Mndali Tribe, Muslim, 19 years old Tanzanian and resident of Magombwe. The Memorandum of the undisputed facts was read to the appellant and he signed to admit that the facts in the memorandum of facts are correct. It is a trite law under section 192 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2022, that when a fact presented by the prosecution is admitted by the accused person during the preliminary hearing, it does not need to prove the fact during trial. The section provides that any fact or document admitted or agreed in a memorandum of the matters agreed in the preliminary hearing shall be deemed to have been duly proved, save only if, during the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved. In this case, there is nothing to demand the court to order the admitted fact to be formally proved.

Further, the appellant said in his evidence that he is aged 19 years old and in the previous criminal case he was convicted in 2022 he said he

was 18 years old. However, he also said that he was born on 25th December 2006, which makes him to be 17 years old when the incident occurred. This court decided to peruse the record of criminal case number 26 of 2022 in the Iringa District Court between the **Republic vs. Kelvin s/o Kahonga**, where the appellant was charged with the offence of unnatural offence. The record shows that the age of the appellant at that time was 18 years old, and he was sentenced to corporal punishment. It is simple mathematics that if the appellant was 18 years old in 2022, he must be 19 years old in 2023. Thus, I'm satisfied that the evidence in the record proved that the appellant was 19 years old when he committed the offence hence he is not covered under section 131 (2) (a) and (b) of the Penal Code. The grounds have no merits.

The appellant was complaining in the 4th and 7th grounds of appeal that the prosecution failed to bring Chesi, the suburb chairman, militia and people who witnessed the victim during examination by the PW2 who are material witnesses to testify in the trial court. He is inviting the court to draw adverse inferences to the prosecution for the failure to call these

witnesses to testify. In her reply, Ms. Muzna Mfinanga said the mentioned persons were not material witnesses since their evidence was hearsay.

In the case of **The Director of Public Prosecutions vs. Sharif s/o Mohamed @ Athumani and Six Others,** Criminal Appeal No. 74 of 2016, Court of Appeal of Tanzania at Arusha, (unreported), the word "material witness" was defined as a person who has information or knowledge of the subject matter which is significant enough to affect the outcome of a trial. This being a rape case, material witness is the victim or eye witness of penetration during the offence. The best evidence in sexual offences comes from the victim as stated by the Court of Appeal sitting at Iringa in the case of **Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2018, (unreported). None of the persons mentioned by the appellant possessed information or knowledge of the subject matter (that is rape of the victim), which was significant enough to affect the outcome of the appellant's trial. Failure of the mentioned witnesses to appear in court to adduce their evidence will never affect the outcome of the trial. The Court is also aware that under section 143 of the Evidence Act, Cap 6, R.E. 2022,

what matters is the credibility of the witnesses and not the number of witnesses. Thus, the 4th and 7th ground of appeal is hereby dismissed.

The appellant is faulting the trial court in the 3rd, 5th, 6th and 8th grounds of appeal that the prosecution's case was not proved beyond reasonable doubt. The appellant in this case was charged with rape offence of a girl below the age of 18 years under sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2022. The elements to be proved in the rape offence of a girl below 18 years includes the presence of penetration of a male organ into the victim's vagina, the age of the victim to be below 18 years, and it was the accused person who committed the rape offence (identification of the penetrator).

The age of the victim can be proved by the victim, parent, and medical practitioner or by birth certificate as it was held in **Bashiri John vs. Republic**, Criminal Appeal No. 486 of 2016, Court of Appeal of Tanzania at Iringa, (unreported). In our case, the victim's age was proved by PW2 (victim's mother) and she was four years old at the time of the incident. PW2 said the victim was born on 15th February 2018. The incident

occurred on 28th January 2023, meaning the victim was 4 years old. Thus, the evidence proved the victim was below 18 years old.

The evidence of penetration is found in the testimony of PW1. PW1 testified that on material day she was at home playing with her friend Cheselina. The appellant came and raped her. On page 16 of the typed proceeding victim testified that I quote:-

> ***"Kelvin alichukua kidudu chake akaniwekea huku mbele (akiashiria sehemu ya uke wake). Alinivua nguo zangu kisha akachukua kidudu chake akaniingizia huku mbele, alivyomaliza akakimbia."***

PW1 evidence proved the presence of penetration of the appellant's penis into the victim's vagina. PW1 who is a child of tender age testified after she promised to tell the truth and not lie under section 127 (2) of the Law of Evidence Act, Cap. 6 R.E. 2022.

The evidence of PW1 is supported by the evidence of PW2, PW3 and exhibit P1. PW2 said after seeing the appellant coming while crying and improperly walking. She asked her what happened and the victim said Kelvin (the appellant) has raped her. PW2 examined PW1's vagina and she

saw a dirty slippery liquid and blood coming from the victim's vagina. She reported the incident to the police station before she took the victim to the hospital for examination. PW3 (the Clinical Officer) examined the victim and found the vaginal area of the victim was wet and her hymen was perforated for about one centimetre. PW3 was of the opinion that the victim was penetrated. He filed PF3 (exhibit P1) which supports his testimony.

PW1 said she knew the appellant and she identified him in court. The PW1's ability to name the appellant to PW2 immediately after the incident is assurance that she identified the appellant. In **Mohamed Juma @ Kodi vs. Republic**, Criminal Appeal No. 273 of 2018, Court of Appeal of Tanzania at Mtwara, (unreported), it was held that the ability of witnesses to name a suspect at the earliest opportunity is an all-important essence of his reliability, in the same way as unexplained delay as complete failure to do so should put a prudent court to inquiry. A similar position was stated in **Jaribu Abdallah vs Republic [2003] TLR 271.** The evidence of PW1 on the identification of the appellant is watertight, and all possibilities of

mistaken identity were eliminated. I'm satisfied that the victim properly identified the appellant as the person who raped her.

The appellant's defence that the case against him was fabricated after he went to the victim's father to claim his money failed to cast any doubt on the prosecution's case. Consequently, the appeal is dismissed for want of merits. It is so ordered accordingly.

Dated at Iringa this 31st May, 2024.

A.E. MWIPOPO

JUDGE