IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO. 39948 OF 2023

(Arising from Criminal Case No. 86 of 2023 in the District Court of Iramba at Kiomboi)

KASHASHA S/O NG'EIDA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25th April & 7th June, 2024

MUSOKWA, J.:

In the District Court of Iramba at Kiomboi (trial court), in Criminal Case No. 86 of 2023, the appellant was charged and convicted of the offence of rape contrary to sections 130(1) and (2) (e); and 131 (1) of the Penal Code, Cap. 16 R.E. 2022 (Penal Code). The alleged offence was committed during night time, on 27th July, 2023 and was repeated on 12th August, 2023. The facts of the case as recorded in the charge indicate that the unlawful act was committed at Ikolo Village, Mwangeza Ward, Kirumi Division, within Mkalama District in Singida Region. Further facts are that the appellant unlawfully had sexual intercourse with a girl aged twelve (12) years old. To protect her identity, I will refer to her as "the victim".

Following the conviction of the appellant herein, the trial court sentenced him to serve thirty (30) years imprisonment and to pay compensation of TZS 5,000,000/- to the victim. Being aggrieved the appellant timely filed a notice of appeal and petition of appeal, relying upon the following five (5) grounds of appeal reproduced verbatim: -

1. *That, the learned trial magistrate grossly erred in law and fact when he grounded his decision basing on the PW1 evidence which was neither credible nor reliable.*
2. *That, the trial learned magistrate grossly erred in law by convicting and sentencing the appellant basing on the evidence of PW1 with corroboration of hearsay evidence from other prosecution witnesses.*
3. *That, the learned trial court magistrate erred in law when convicting and sentencing the appellant with the offence of rape which was not proved beyond reasonable doubt.*
4. *That, the trial court magistrate erred in law and in fact by convicting the appellant basing on the weakness of the appellants defense which was mainly due to his inability to understand Swahili language.*
5. *That, the trial court magistrate erred in law and fact for failure to properly analyze, examine and evaluate the evidence adduced by both parties hence reached into erroneous decision.*

The matter was scheduled for hearing on 25th April, 2024 whereby the appellant appeared in person, unrepresented, while the respondent was represented by Ms. Magreth Tlegray, learned state attorney. The respondent

was the first to submit in response to the grounds of appeal, after the appellant waived his right to begin.

Ms. Tlegray prayed before the court to argue the 1st and 2nd grounds of appeal jointly and the remaining grounds of appeal, therefore the 3rd, 4th and 5th grounds were argued separately.

Contending the 1st and 2nd grounds of appeal, the counsel for the respondent asserted that the testimony of PW1 who is the mother of the victim, even if expunged from the record, shall not affect the case before this court. Citing section 127 (6) of the Evidence Act, Cap. 6, R.E. 2022, Ms. Tlegray submitted that in sexual offences, the testimony of the victim is the best evidence and suffices to prove the offence. In such circumstances however, the court must ascertain the credibility of the witness and must be satisfied that the witness is telling the truth.

Proceeding with her submission, Ms. Tlegray referred to the testimony of PW3, the police officer who recorded the cautioned statement of the appellant. The testimony of this witness is recorded at page 15 of the typed trial proceedings. PW3 testified, that the appellant confessed that he raped the victim twice. The PW3 further tendered the cautioned statement of the

appellant as recorded at page 17 of the typed trial proceedings. The learned state attorney further pointed out that the appellant did not contest to the admission of the cautioned statement. Ms. Tlegray stated that the appellant was granted the opportunity to cross examine PW3, but he waived his right to do so. The learned state attorney asserted that, the law provides that failure by the accused person to cross examine a witness, implies that he concedes to the testimony thereof. The case of **Issa Hassan Uki vs Republic,** Criminal Appeal No. 129 of 2017 was preferred in support of her position. In emphasis, Ms. Tlegray restated that even if the testimony of PW1 is questionable, the testimony of the victim including the testimonies of other witnesses sufficed to prove the case against the appellant.

Submitting on the 3rd ground of appeal, the respondent's counsel focused on the elements of the offence of rape, which the prosecution had to prove at the trial. In order to prove the offence of rape as provided under section 130 (1) and (2) (e); and 131 (1) of the Penal Code, the prosecution was supposed to establish the age of the victim. Further, the prosecution had to establish that there was penetration. Ms. Tlegray averred that PW2, the victim, testified that the appellant raped her. The victim however, did not explain the manner in which the appellant raped her. According to Ms. Tlegray, the

fact that the victim alleged to have been raped, was sufficient proof that indeed she was raped. Regarding the issue of penetration in rape cases, the respondent's counsel cited the case of **Hassan Kamunyu vs Republic**, Cr. Appeal No. 277 of 2016. Ms. Tlegray, referring to the aforementioned case stated that in certain circumstances, the victims may not be able to provide intricate details of the manner in which the unlawful act was committed against them. However, the testimony of PW4, the medical doctor is recorded at page 19 of the typed trial proceedings. This witness further tendered in court PF3, which was admitted as Exhibit PE2. The Exhibit contained the findings of the medical report that the victim had no "hymen" and that she was penetrated by a blunt object in her private parts.

Proceeding to address the age of the victim, Ms. Tlegray argued that PW1, the mother of the victim, testified that the victim is her child and is of the age of 12 years. This is recorded at page 12 of the typed trial proceedings. The age of the victim is further confirmed by the testimony of the victim herself as recorded at page 13 of the typed trial proceeding whereby she testified that she is 12 years old. Ms. Tlegray submitted that the age of the victim may be proven by the victim, the parent, a relative or a medical practitioner as rightly held in the case of **Isaya Renatus vs Republic,** Cr.

Appeal No. 542 of 2015. The learned state attorney vehemently argued that the offence of rape was proven by the prosecution at the trial, beyond reasonable doubt.

Attacking the 4th ground of appeal, Ms. Tlegray averred that there is no record of the appellant informing the court during the trial that he does not comprehend the Kiswahili language. In rebuttal, Ms. Tlegray argued that the appellant fully comprehended the proceedings in the trial court and was further able to submit his defense. The learned counsel submitted that the appellant had ample opportunity to raise this issue before the trial court and failure to do so, amount to an afterthought. On that basis, the learned state attorney concluded that this ground lacks merit and should be dismissed.

Addressing the 5th and final ground of appeal, Ms. Tlegray referred to the judgment at pages 2 to 5. The referred pages of the judgment indicate that the trial court carefully examined and analyzed the testimony of each witness of the prosecution. Further, it is evident that the trial court also analyzed the testimony of the defense as provided at page 5 of the judgment. Ms. Tlegray submitted that the claims of the appellant that the trial court failed to properly analyze the evidence adduced by the prosecution and the defense was unfounded. In winding up her submission, the counsel for the

respondent prayed that this court should dismiss the appeal and uphold the decision of the trial court.

In rejoining, the appellant prayed this court to adopt his grounds of appeal. The appellant reiterated that the testimony PW1, the mother of the victim was merely hearsay evidence. The appellant emphatically stated that PW1 was not present when the offence was being committed hence her testimony was unreliable. The testimony of the victim, PW2, was also attacked by the appellant who asserted that the said testimony was unfounded and that the victim was telling lies.

The appellant further expounded on the 4th ground of his appeal that he is not conversant with the Swahili language and that for the most part, he did not comprehend the language of the proceedings at the trial court. In addition, the appellant made an attempt to rely on the defence of *alibi* stating that he was not present at the scene of the crime on the date the alleged offence was committed. The appellant concluded his rejoinder submissions by asserting that the allegations against him have been instigated and are the result of existing marital conflicts between him and his wife. Thus, the wife is falsely accusing him of raping his daughter. The appellant insisted that he never committed the offence and he should be set free.

The pertinent issue to be determined by the court in this matter, is whether the evidence adduced by the prosecution during the trial sufficed to prove the case against the appellant beyond reasonable doubt. In so doing, the court shall direct itself towards the evidence that was adduced by the prosecution to prove their case.

To start with, the appellant was charged with the offence of rape as established under section 130 (1) (2) (e) of the Penal Code which provides as follows: -

> *"130 (1) It is an offence for a male person to rape a girl or a woman.*
>
> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

Where the victim of a rape case is below the age of 18 years, as it is in the matter before this court, the offence is commonly termed as statutory rape. In proving the offence of statutory rape, the prosecution must establish beyond reasonable doubt the age of the victim, and that there was in fact,

penetration. In the CAT case of **Alphonce Bisege Mwasandube vs Republic,** Criminal Appeal No. 630 of 2020 (unreported), it was partly held on page 12 that

> *"Apparently, the appellant was charged with statutory rape, thus the* ***prosecution only had the duty to prove penetration and the victim's age*** *as stated in the case of Alex Ndendya (supra)". [emphasis added]*

The appellant contends the evidence adduced by the prosecution during the trial, and challenges the credibility of the witnesses. The appellant further states that the case against him was not proven beyond reasonable doubt. This is reflected in the 1st, 2nd and 3rd grounds of appeal. In proving this case, the prosecution relied upon four witnesses. These witnesses include PW1, being the mother of the victim, the victim herself-PW2, a police officer-PW3 and a medical doctor-PW4. The testimony of PW1 is based upon information received from the victim who is her daughter, and from her son. PW1 testified that the victim is her daughter and the accused, the appellant herein is her husband. On both dates when the incidents occurred, PW1 was not at her home, the place where the offence was allegedly committed. Suffice it to say that PW1's testimony is indeed hearsay evidence, except on the evidence regarding the age of the victim.

Further, the testimony of PW3 is recorded at pages 15 to 17 of the typed trial proceedings. This witness stated that the appellant confessed that he raped the victim, his daughter, on two separate incidents. In support of his testimony, the PW3 tendered the cautioned statement of the appellant and it was admitted as Exhibit PE1. Notably, the appellant did not contest to the admission of the cautioned statement. In addition, the appellant opted not to cross-examine PW3, the police officer. In that regard, I am inclined to agree with the learned state attorney that failure by an accused person to cross examine a witness, implies acknowledgment of the testimony of the witness. Dealing with a similar issue, the CAT case of **Issa Hassan Uki vs Republic,** Criminal Appeal No. 129 of 2017 on page 16 and 17 held that: -

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter* ***is deemed to have accepted that matter*** *and will be estopped from asking the trial court to disbelieve what the witness said...Likewise, in Damian Ruhele, again relying on the case of Cyprian Athanas Kibogoyo (supra), we underlined: "We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But* ***it is also trite law that failure to cross-examine a witness on an important matter ordinarily***

implies the acceptance of the truth of the witness's evidence." *[emphasis added]*

Going further, I will assess the testimony of PW2, the victim. It is the position of the law that the best evidence in sexual offences comes from the victim (See the case of **Selemani Makumba vs Republic,** [2006] TLR 379). Similarly, the principle was expounded in the CAT case of **Alphonce Bisege Mwasandube** (supra) that: -

> *"The other principle relevant to this case is that,* ***in sexual offences, the best evidence is that of the victim*** *(see Selemani Makumba v. The Republic, [2006] T.L.R. 379). Moreover, in terms of section 127 (6) of the Evidence Act Cap. 6 R.E. 2019, the court can ground conviction based on the evidence of victim of sexual offence if it forms an opinion that her evidence is credible." [emphasis added]*

In the case at hand, PW2 testified under oath. The testimony of PW2 is recorded at pages 13 to 14 of the typed trial proceedings. PW2 testified that she was raped by her father, the appellant herein, on two separate occasions. The first incident occurred on 27th July, 2023 and the second incident occurred on 12th August, 2023. The testimony of the victim is detailed and coherent. The victim further narrates that both incidents

occurred during the night hours, at her home where she lives with her parents. However, on both incidents when the alleged offence was committed, her mother was not at home. Truly, the victim fluently narrated what happened to her.

The testimony of PW2 shall be partially reproduced hereinafter as recorded at pages 13 to 14 of the typed trial proceedings:

> *"I am the **victim,** I am 12 years old, my father is Kashasha s/o Ng'eida my mother is Tabu, we live at Ikolo Village in Mkalama. I am living with my parents. I was born in 2011 at Ikolo Village....*
>
> *On 27/07/2023 during the night I was at our home at Ikolo Village, my mother was at Mnada at Matala. But during that night my father came at the room I was slept he raped me by force. I raised alarm of help whereby my brother namely (...) appeared to help me. I told him that I was raped by my father Kashasha s/o Ngeida. At that moment my father was still inside that house.....On 12/08/2023 my mother went to wedding ceremony at Ikolo Village, also my father was at that wedding but during the night of 12/08/2023 my father Kashasha s/o Ngeida went back home and met me, he entered at my room and repeated again to rape me that night...."*

Corroborative evidence as to the age of the victim was produced through the testimony of her mother, PW1 as recorded at page 12 of the typed trial proceedings as quoted herein below:

"The victim was born in 2011, for the time being she is 12 years old...".

In the CAT case of **Haruna Mtasiwa vs Republic,** Criminal Appeal No. 206 of 2018, it was observed that: -

> *"As we held in Bashiri John v. Republic (supra) in which, relying on our previous decision in Isaya Renatus v. Republic, (supra), we observed that* ***proof of age may be by parents,*** *medical practitioner or by a birth certificate". [emphasis added]*

The aforementioned evidence adduced by the prosecution, sufficed to establish that the victim was below the age of 18 years. Indeed, the appellant being the victim's father did not dispute the age of his daughter.

Regarding the issue of penetration, as pointed out by the learned state attorney, the victim did not provide intricate details of how the sexual act was committed. In the matter before this court, the appellant herein is the father of the victim. Under the circumstances, it is unexpected that the victim, at the trial, could have been able to freely provide details of how the sexual act was committed against her in the presence of her father. It is not expected that in all incidents, the victim will be able to provide a graphical explanation of the manner in which penetration was effected. This was

stated in the CAT case of **Hassan Kamunyu vs Republic, Criminal Appeal No. 277 of 2016** as follows: -

> *"the new development of the interpretation of the provisions of section 130(4) (a) of the Penal Code, has been brought into being taking into consideration, inter alia, cultural background, upbringing, religious feelings, the audience listening and the age of the person giving the evidence. Thus, in Joseph Leko (supra) the Court instructively observed:*
> *"Recent decisions of the court show that what the court has to look at is the circumstances of each case including* ***cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence.*** *The reason is obvious. There are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina.* ***This is because of cultural restrictions mentioned and other related matters...****". [emphasis added]*

In view of the foregoing, the evidence that was adduced by the prosecution through PW2, other witnesses, and the cautioned statement sufficiently established the elements of the offence of statutory rape, to wit, the fact that there was penetration and age of the victim. Therefore the 1st, 2nd and 3rd grounds of appeal are hereby declared to be devoid of merit.

The appellant, under the 4th ground of appeal alleges that he does not comprehend the Swahili language. I should point out that ordinarily, proceedings in the trial court are conducted in Swahili language. However as per the records of the trial court, when the charge was read over for the first time and explained to the appellant, he never raised a concern regarding the challenges with Kiswahili language. The records provide that on 16th August 2023, the charge was read over to the appellant, he entered his plea as follows: -

> ***PP***
>
> *This is fresh case; I pray to read a charge against the accused.*
>
> ***COURT***
>
> *Prayer granted, the charge against the accused is read over and fully explained to him who is asked to plead thereto.*
>
> ***PLEA OF THE ACCUSED PERSON***
>
> *"It is not true."*
>
> *Signed by accused.*
>
> ***COURT***
>
> *Plea of not guilty entered by accused.* "

Further, on 30th August 2023, when the matter was before the trial court for the preliminary hearing, the appellant still did not inform the court that he does not understand the Swahili language.

When the matter came before this court for the hearing, the appellant in rejoining, submitted that he is not familiar with the Swahili language. Interestingly, the appellant proceeded to counter the arguments of the learned state attorney, in fluent Swahili signifying that the appellant fully comprehended the appeal proceedings. Undoubtedly, that was also the position before the trial court, considering the fact that the trial proceedings were conducted between August 2023 and November, 2023 which is less than a year ago. I am therefore of the settled view that this ground of appeal is merely an afterthought and is unfounded.

In respect to the 5th ground of appeal, the appellant claims that the trial court failed to properly analyze, examine and evaluate the evidence adduced by both parties. I have carefully scrutinized the judgment issued by the trial court. The trial court had this to say at page 9 to 10 of the judgment in respect of the evidence of the appellant: -

> *"In responding to the defense argument of the accused Kashasha s/o Ng'eida that the case against him was planted by his wife because they have matrimonial disputes,* ***this defense lacks prove*** *because the accused lacked supporting evidence to prove his defense that, he is at matrimonial dispute with his wife.*
>
> *In* ***regarding the alibi defense*** *of the accused that he was at Matala village when the alleged offence was committed,* ***the***

> ***said defense lacks merit,*** *because the accused himself testified that he was back from Mtala village on 11/07/2023 while the alleged offence of rape was committed on 27/07/2023 and 12/08/2023 the dates which proves that the accused Kashasha s/o Ng'eida was at Ikolo village.* ***Therefore, this court find that, the defense of the accused is weak and cannot exonerate him from the allegation of rape.*** *[emphasis added]*

Based on the above, it is clear that the trial court properly analyzed and evaluated the prosecution evidence as well as the evidence adduced by the defense, contrary to the appellant's assertion. Therefore, this ground of appeal also lacks merit.

Importantly, under section 127 (6) of the Evidence Act, Cap. 6 R.E. 2022, the court can enter conviction based on the evidence of a victim of sexual offence if it forms an opinion that her evidence is trustworthy. In this matter, the testimony of the victim corresponds with the evidence of other witnesses, therefore PW1, PW3 and PW4. Furthermore, the testimony of the victim corresponds with the confession by the appellant contained in the cautioned statement that he raped the victim on two separate occasions. The cautioned statement was admitted by the trial court without objection from the appellant. In addition, the appellant's failure to cross-examine PW3 who tendered the cautioned statement implies that the appellant accepted the

truth of the evidence that he raped his daughter, as correctly held in the case of **Issa Hassan Uki** (supra).

Guided by the above cited authorities, and for the reason stated herein, the case against the appellant was proven beyond reasonable doubt. It follows therefore that the conviction and the corresponding sentence entered against the appellant was in accordance with the law. Consequently, I hereby dismiss the entire appeal for lack of merits.

Order accordingly.

Right of appeal explained.

DATED at **DODOMA** this 7th day of June, 2024.

I.D. MUSOKWA

JUDGE

Judgment delivered in the presence of the appellant and in the presence of Ms. Magreth Tlegray, learned state attorney representing the respondent.

I.D. MUSOKWA

JUDGE