IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SHINYANGA SUB-REGISTRY)

AT SHINYANGA

CRIMINAL APPEAL NO. 40526 OF 2023

(Originating from Criminal Case No. 32/2023 from the District Court of Meatu at Mwanhuzi)

DANIEL s/o MATHAYO@ NGURA .... APPELLANT

VERSUS

REPUBLIC.. RESPONDENT

JUDGMENT

Date of Last Order 30.04.2024
Date of Judgment: 17.05.2024

MWAKAHESYA, J.:

In the District Court of Meatu at Mwanhuzi, the appellant, Daniel s/o Mathayo @ Ngura, was charged with two offences: Rape c/ss 130(1)(2)(e) and 131 of the Penal Code (the first count); and Impregnating a schoolgirl c/s 60A of the Education Act (the second count). In the first count it was alleged that the appellant on unknown dates in January and February 2023

at Bukundi Village within Meatu District, did have sexual intercourse with **JB** (name withheld to protect her identity) a girl of 16 years old. In the second count it was alleged that the appellant in February, 2023 did impregnate JB a student of Bukundi Primary School.

At the end of the trial the appellant was convicted of the first count and sentenced to 30 years imprisonment. Meanwhile, he was acquitted of the second count. It is against the conviction and sentence of the first count that the appellant has preferred this appeal.

In his seven grounds petition of appeal, the appellant is challenging the trial court's judgment stating:

1. The prosecution failed to establish its case beyond reasonable doubt;
2. The age of the victim was not disclosed to the required standard in order to establish rape;
3. The evidence adduced was inadmissible. The victim was allegedly to have been raped in January and February, 2023 but the medical examination was conducted on 11th May, 2023. The

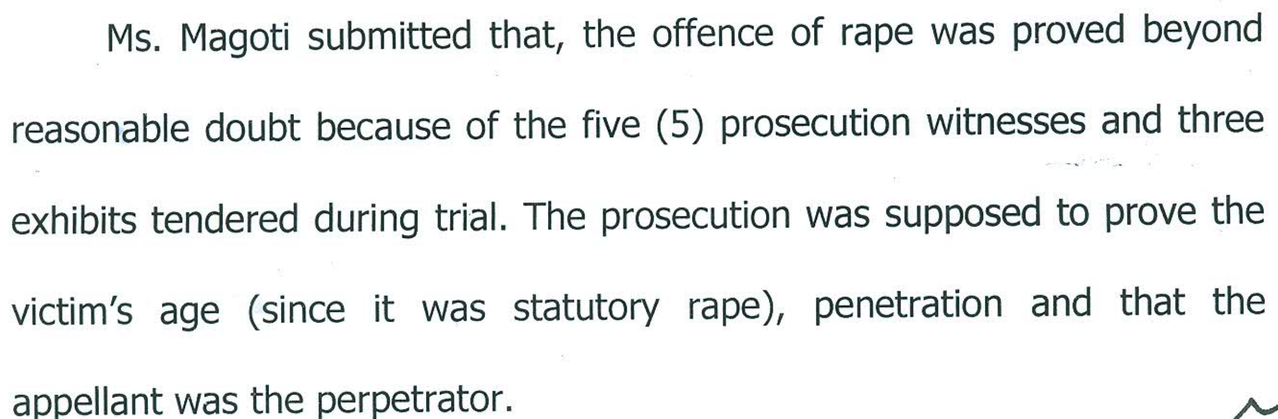
court ignored this fact and relied on weak and hearsay evidence;

4. The evidence adduced was at variance with the charge. Much reliance was placed on pregnancy but the trial court was dissatisfied with such evidence;
5. The appellant was convicted and sentenced without the trial court finding him guilty of the offence he stood charged;
6. The evidence adduced was contradictory. PW1 (the victim) stated that she was raped in January and February 2023, while PW2 (the victim's mother) stated that the victim was raped in February 2023. On the other hand, PW5 (the investigator) testified that the victim was raped between December 2022 and January 2023; and
7. The prosecution erred in law and fact to illegally detain the appellant in police lock-up from the moment he was arrested (on 16.04.2023) to judgment on 7.09.2023 after a full trial of about six months without acquiring an extended detention period approval from the court or without sending him to any neighboring prison custodial facility. Thus the appellant was

denied his fundamental right to bail as guaranteed by the laws; also he had no legal aid during trial.

At the hearing of the appeal the appellant appeared in person, unrepresented, while the respondent Republic enjoyed the services of Ms. Nyamnyaga Magoti, learned State Attorney. The appellant adopted his grounds of appeal and opted for the respondent to reply while reserving the right to make a rejoinder, albeit when the chance came he held his peace.

The learned State Attorney intimated that the respondent was resisting the appeal thus supported the conviction and sentence meted out by the trial court. She opted to argue grounds 1 to 3 collectively and the rest seriatim as they appear in the petition of appeal.



Ms. Magoti submitted that, the offence of rape was proved beyond reasonable doubt because of the five (5) prosecution witnesses and three exhibits tendered during trial. The prosecution was supposed to prove the victim's age (since it was statutory rape), penetration and that the appellant was the perpetrator.

In proving age, the same was done through PW1 (the victim/JB) whose evidence is corroborated by PW2 (her mother). The two witnesses testified that PW1 was sixteen years old. PW1 testified that she was born on 24.05.2007 and PW2 testified the same. Moreover, PW4 who is a medical doctor that attended PW1 also stated that PW1 was 16 years old.

It was the learned State Attorney's submission that, those are persons who can prove age according to the case of **Isaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal (unreported), where the Court of Appeal held that the age of a victim can be proved by the victim herself, a parent or medical doctor. In the appellant's case the age of the victim was proved through the victim and her parent (PW1 and PW2).

Regarding penetration, it was submitted that the same was proved through PW1 where she testified that the appellant had sex with her, she felt pain and that the appellant did not use a condom. She also testified that the appellant had sex with her on another day as well and he did not use a condom as well.

The learned State Attorney submitted that, PW1's evidence was direct evidence and it is corroborated by PW4 who examined her and found out that she was pregnant. PW4 also testified that in order for a girl to get pregnant there must be an act of sexual intercourse. PW4 also filled a PF3 which was tendered in court as Exhibit P3.

As to who was the perpetrator, it was the learned State Attorney's submission that it is the appellant and the same was proved by PW1 when she testified that she knew him as a tenant at their house and that in January, 2023 he had sex with her.

Ms. Magoti submitted further that, PW1's evidence is the best evidence because she is the victim, and she cited the case of **Selemani Makumba vs Republic [2006] T.L.R. 379**, to butress her position.

Regarding the appellant's suggestion that, the evidence of PW4 was weak because she examined PW1 on 11 May, 2023 the learned State Attorney submitted that, other witnesses, such as PW1, testified that rape was committed prior to that day. The learned State Attorney urged the court to dismiss the 1st, 2nd and 3rd grounds of appeal.

The 1st, 2nd and 3rd grounds need not detain us. As submitted by the learned State Attorney, the age of PW1 was proved by her testimony whereby she put her birth date at 24.05.2007 meaning by simple reckoning she was 16 years old at the time of commission of the offence. The offence charged was statutory rape c/ss 130(1)(2)(e) and 131 of the Penal Code thus proof of age was of the essence. In the case of **Isaya Renatus vs Republic** (*supra*) the Court of Appeal held that (at page 8-9), *"...it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate."* Also see, **Ado Aron @ Nziku vs The Republic**, Criminal Appeal No. 449 of 2021.

Therefore, I am satisfied that the age of PW1 was amply proved through her oral testimony and was corroborated by PW2 who also testified that PW1 was born on 24.05.2007.

Regarding penetration, PW1 who is best placed to testify as to what happened gave evidence that on two occasions, the first being in January 2023 and the second in February 2023, the appellant had sexual intercourse with her and on both occasions he did not use a condom. In

the case of **Selemani Makumba vs Republic** (*supra*) it was held 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"* (pg. 384). PW1 falls into the latter category, and in the absence of anything to impeach her credibility, as is the case, then she duly proved that there was penetration through the act of the appellant having sexual intercourse with her. Therefore, I find that penetration was duly proved.

The appellant is also challenging the conviction based on the fact that the medical examinations were conducted in May 2023 while PW1 alleges that the offence took place in January 2023 and February 2023. This ground seems baseless, as PW1 gave succinct evidence that her ordeal came to light when in March 2023 she started to get stomach pain and how treatment failed to alleviate the pain and in April 2023 she went to the hospital and was found to be pregnant. This evidence was corroborated by PW2. Thus, it is clear that the stomach pain is what made PW1 seek medical attention only to be found pregnant and undergo an examination through PW4 in May 2023. PW4 testified that, based on the ultrasound, subsequent to the Urine Pregnancy Test – UPT, PW1 was 15

weeks pregnant surmising that the pregnancy was conceived between 06 and 12 February 2023.

Perhaps I should add that, even if we were to discard the evidence of PW4, on the strength of **Ado Aron @ Nziku vs The Republic** (*supra*), rape could still be proved. The Court had this to say:

> *"...In addition, sexual offences may be proved in the absence of medical examination and absence of such evidence cannot always dent the prosecution case."*

In light of the above, the 1st, 2nd and 3rd grounds of appeal lack merit and I proceed to dismiss them.

On the fourth ground of appeal, Ms. Magoti submitted that, the trial court acquitting the appellant of the offence of impregnating a school girl does not mean that rape was not committed. The victim, PW1, testified that she was raped by the appellant. The appellant, having sex with a child below 18 years amounted to rape regardless whether she got pregnant or else.

Indeed, the charge of impregnating a schoolgirl was found wanting. However, contrary to what the appellant is presenting, the evidence

adduced covered the offence of rape as well, actually a big part of the evidence that was adduced concerned the offence of rape. This court also finds no merit on the fourth ground of appeal and dismiss it.

On the fifth ground of appeal the learned State Attorney conceded that the judgment did not conform with section 312(2) of the Criminal Procedure Act (the CPA), because the provision of the law regarding the offence that the appellant was convicted of was not stated by the trial magistrate. However, she argued that the appellant was duly convicted, in accordance with section 235(1) of the Criminal Procedure Act. The learned State Attorney went further to beseech the court to invoke section 388 of the CPA since the error has not occasioned a failure of justice. She submitted that the Court of Appeal decision in **Abubakar Msafiri vs Republic**, Criminal Appeal No. 378 of 2017 (unreported), held that such an error does not nullify the conviction and sentence.

The trial magistrate at pages 12-13 of the judgment stated:

> "In the event, the prosecution has amply proved the first count of rape. His first statement uttered in this Court during his plea, that *he is not guilty*; and his defence are waters-down by Prosecution evidence (*sic*). As a result, I convict him

to (*sic*) accordingly to **Section 235(1) of the Criminal Procedure Act, Cap. 20**".

[Emphasis in original].

Section 235(1) of the CPA reads:

"235. -(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused person and pass sentence upon or make an order against him according to law or shall acquit or discharge him under section 38 of the Penal Code.

(2) N/A."

Meanwhile section 312 reads:

312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.

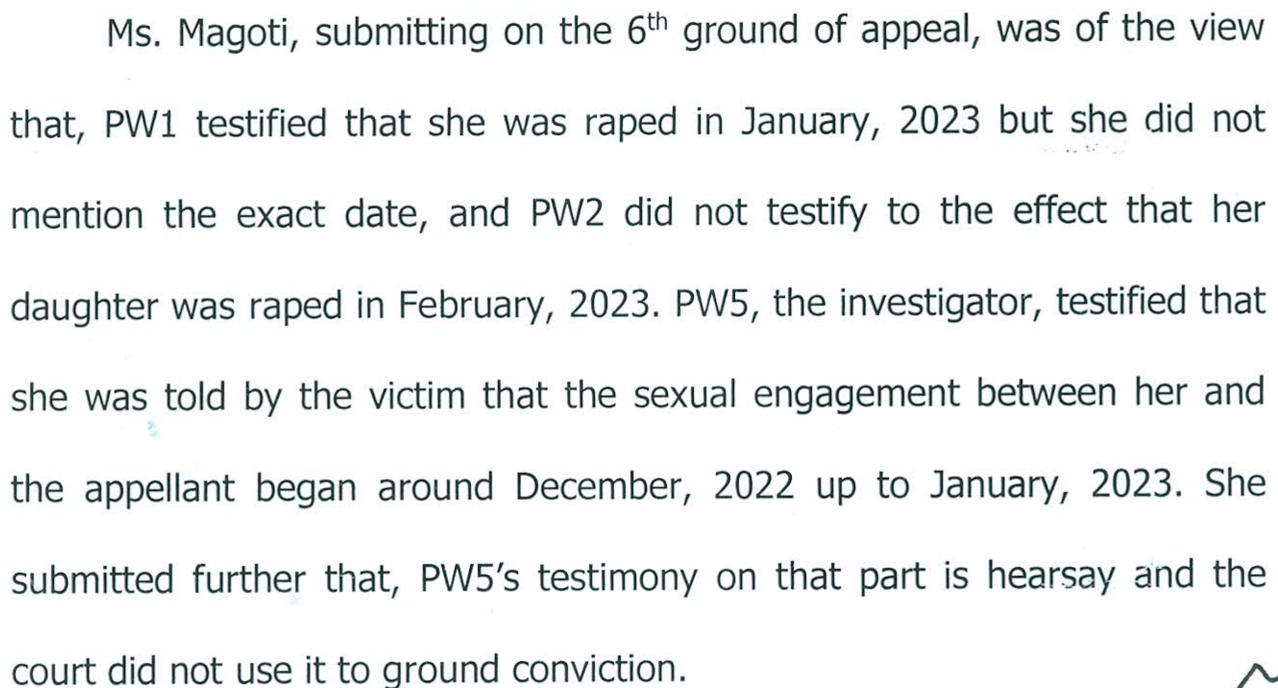
(2) ***In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.***

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty.

(4) N/A."

[Emphasis supplied].

It is clear that the judgment offended section 312(2) of the CPA by not mentioning the section of the Penal Code which the accused was convicted. However, as submitted by the learned State Attorney, the decision of the Court of Appeal **Abubakar Msafiri vs Republic** (*supra*) held that the omission is not fatal. Thus, as long as the appellant was made aware that he was convicted of the offence of rape, the 5th ground of appeal fails and is hereby dismissed.



Ms. Magoti, submitting on the 6th ground of appeal, was of the view that, PW1 testified that she was raped in January, 2023 but she did not mention the exact date, and PW2 did not testify to the effect that her daughter was raped in February, 2023. PW5, the investigator, testified that she was told by the victim that the sexual engagement between her and the appellant began around December, 2022 up to January, 2023. She submitted further that, PW5's testimony on that part is hearsay and the court did not use it to ground conviction.

Alternatively, the learned State Attorney submitted that, contradictions in witness' testimony, as long as they are immaterial, are healthy because they prove that the witnesses were not coached. She made reference to the Court of Appeal decision of **Metwii Tusindawa Lasilasi vs Republic**, Criminal Appeal No. 431 of 2020, Court of Appeal (unreported), where the Court held that contradiction in witness' testimonies cannot be avoided.

As stated in the appellant's petition of appeal, PW1 testified that she twice had sexual intercourse with the appellant, the first time being in January 2023 and the second time in February 2023. She gave a detailed account on how the appellant approached her both times and engaged in sexual intercourse with her, without using a condom. PW1 gave direct evidence. Undoubtedly, both PW2 and PW4 not being present at the commission of the offence gave hearsay accounts when they testified as to the sexual engagement between the appellant and PW1, therefore their testimonies with regards to the dates of the rape are unworthy of consideration. However, the evidence of PW1 remains unshaken, and for the appellant to suggest that the contradictions in the dates created doubts

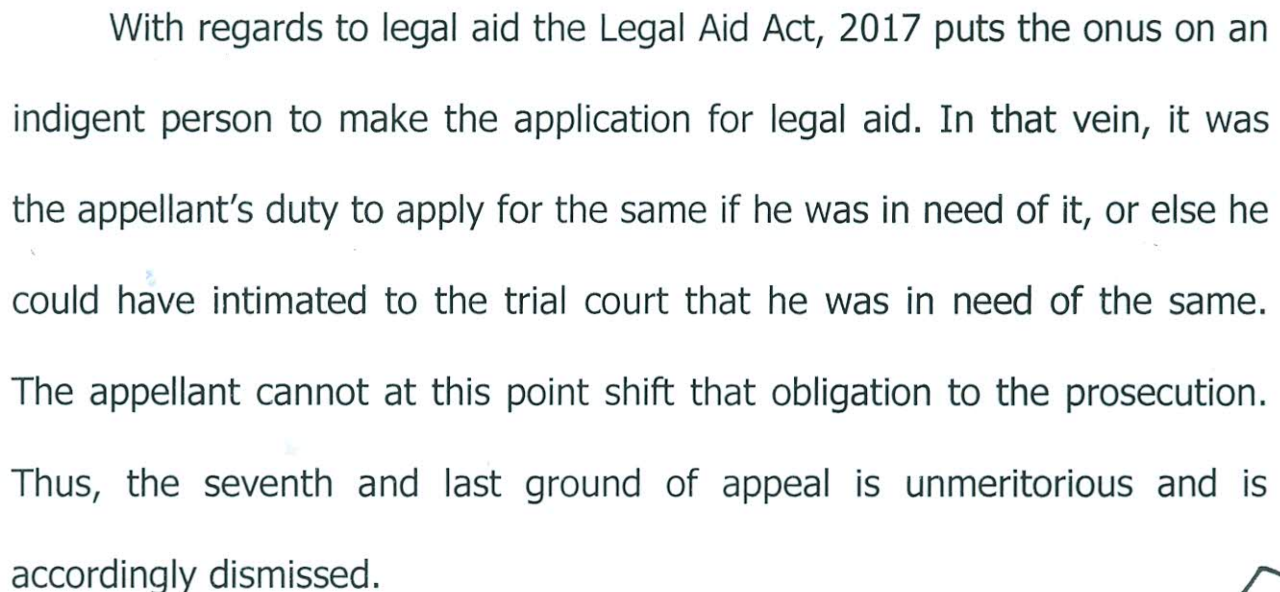
in the trial is erroneous. The 6th ground of appeal lacks merit and is dismissed.

Submitting on the 7th and last ground of appeal, Ms. Magoti briefly responded that, this ground has no connection with the appellant's conviction and sentence, and if he is aggrieved, he can institute a civil suit.

It is on record that, the appellant did not dispute that he was arrested on 16.04.2023 when the preliminary hearing was conducted on 24.04.2023. I take that fact to be the position with regards to his arrest. On the same date (of the preliminary hearing) when the trial court intimated that bail was open for the appellant, the public prosecutor requested the court to defer the granting of bail since investigation was still being conducted, to which the accused responded that: *"No objection; if time will come; I will get that right"* (page 3 of the trial court's typewritten proceedings).

It seems from then on the appellant never requested for bail and neither the prosecution nor the court informed the appellant that bail was open. This is rather unfortunate and I discourage such practice. Bail should not be wantonly denied to an accused person especially on flimsy grounds

that investigation was still underway. Paradoxically at page 2 of the typewritten proceedings the prosecution had gone on record to inform the court that investigation was complete and made a prayer, that was granted, to conduct the preliminary hearing. Indeed, the preliminary hearing could not have been conducted if investigation was incomplete. So what did the prosecution mean when it stated that investigation was still underway when it sought to deny the appellant bail? The appellant's right to bail was unreasonably curtailed and I make a clarion call to magistrates to refrain from taking part in such violation of a person's rights. Regardless, the appellant has failed to demonstrate how the same has prejudiced him during trial.



With regards to legal aid the Legal Aid Act, 2017 puts the onus on an indigent person to make the application for legal aid. In that vein, it was the appellant's duty to apply for the same if he was in need of it, or else he could have intimated to the trial court that he was in need of the same. The appellant cannot at this point shift that obligation to the prosecution. Thus, the seventh and last ground of appeal is unmeritorious and is accordingly dismissed.

In light of the above, I find that the appeal lacks merit in its entirety and is hereby dismissed.

It is so ordered.

DATED at **SHINYANGA** this 17th day of May, 2024

N.L. MWAKAHESYA

JUDGE