IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB REGISTRY
AT SHINYANGA

CRIMINAL APPEAL NO. 132 OF 2023
(Appeal from the Judgment of the District Court of Maswa in Criminal Case No. 38 of 2022)

BETWEEN

ELISHA S/O MASANJA ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

22nd May & 18th June, 2024

MASSAM, J:.

Before the District Court of Maswa at Maswa, the appellant herein above stood charged with the offence of Rape contrary to sections 130 (1) and (2) (b) and 131 (1) of the Penal Code, Cap 16, R.E. 2019. The particulars of the offence as per the charge sheet were as such that, on the 11th day of April, 2022 at Mwabalogi – Nguliguli village within Maswa District in Simiyu, the appellant did rape the victim one Grace Masanja Mboje.

The facts of the case were that, on the 11th day of April, 2022 at 16:00, both the victim and the accused met on the road while the victim was on her way to the field to pick vegetables. Thereafter, the appellant caught the victim with force and felt down. The appellant undresses the

victim and started to had sexual intercourse without her consent. After that, the appellant walks away while the appellant went straight to the street leader who started to look for the appellant unsuccessfully. The matter was then reported to the police and the victim was issued with PF3 for medical examination.

The accused was arrested and after investigation the matter was taken to court and when the charge was read over to him, he denied to have committed the offence.

At the trial, the prosecution prospered to prove their case beyond reasonable doubt and subsequently the appellant was convicted and sentenced to a term of thirty-(30) years imprisonment without fine.

Dissatisfied with both the judgment and sentence by the trial court, the appellant filed this appeal comprising five grounds of appeal as portrayed from the memorandum of appeal and prayed to this court to allow this appeal, the judgment and sentence be set aside and the appellant be released from imprisonment.

During the hearing of this appeal, the same was argued orally and the appellant appeared in person, unrepresented while the respondent was represented by Mr. Saguye learned State Attorney.

Arguing in support of his grounds of appeal, the appellant prayed for this court to consider his grounds of appeal and left him free.

In response, the learned State Attorney for the respondent strongly opposed the appeal and supported both conviction and sentence imposed by the trial court. With regard to the grounds of appeal submitted by the appellant, the counsel chooses to combine grounds 1 and 5 and urge it jointly while the rest chooses to urge it separately.

Mr. Saguya informed this court that in his reply to the ground of appeal he will start with second ground that the appellant was wrongly sentenced since at that time he was under the age of 18, the Counsel for the respondent claimed that, the sentence was given according to the provision of Section 131(1) of the Penal Code which gives such punishment for the charged offence. He added that PW1 the victim told this court how she met the appellant and raped her, also the victim told this court that on the commitment of that offence she was 45 years old.

Moving to the third ground that the appellant was convicted with the edition which was outdated as at that time there was new edition of 2022 and the appellant was convicted with the edition of 2019, the counsel for respondent did agree the same but he informed this court that court of appeal was already gave some direction in many cases that the

same was not fatal, in support of his submission he referred this court to the case of **Paulo Mtono V. Republic,** Criminal Appeal No 9 of 2022, HC at Tanga, Pg 10-15 together with Section 12(1) and (2) of Interpretation of laws Act that the court of appeal put it clear that, revise edition of 2022 change nothing from 2019 hence it is not fatal.

Responding to the fourth ground that the evidence testified by the doctor was weak and doubtfully, the learned state attorney succumbed that, the evidence testified by PW3 was strong enough to convict the appellant since after examined the victim, the result revealed that, there were bruises in the victim's vagina which caused by force used in penetration. Yet again, he submitted that, examination was conducted on the same date when the victim alleged to have been raped and according to the PF3 which was tendered as exhibit, the evidence which was also collaborated by the evidence of PW1 (the victim) hence this ground has no merit.

Answering grounds number one and five, appellant complained that the charge was not properly proved due to contradiction of the evidence tendered, it was from the learned state attorney that, not all discrepancies are fatal to weaken the prosecution case then can be disregarded by the court since they are normal errors which comes after elapse of time and

can cause differences in mentioning time or date the offence was committed and therefore can be ignored by the court as every human being can forget. The counsel went on arguing that, it is clear that this offence was committed in 2022, and according to the evidence of PW4, he mentioned 13th April and 2nd August 2022 instead of 11th April. He referred this court to the case of **Sano Sadik and Another V. Republic**, Criminal Appeal No. 623 of 2021 at Pg 23-24 where the court pointed out that, some small discrepancies are required to be disregarded, hence, this appeal is unmerited and should be dismissed.

Resting his submission, the appellant maintained his prayers and added that, even the trial court received his birth certificate which prove that he was under 18 but was abandoned.

Having caught the submissions from both parties, this court will now make determination on the merit of this appeal, and the issue to resolve is **whether this offence has been proved beyond reasonable doubt.**

It is well detailed under Section 3(2)(a) of The Evidence Act, Cap 6 R:E 2022 that in any criminal case the prosecution has the duty to prove the case beyond reasonable doubt. Again, the facts which proclaimed by anyone who desires the court give judgment on his/her favour, those facts

must be proved properly that they are existing. This is according to the provision of Section 110 (1) and 111 of The Evidence Act (supra).

In the instant case, this court will direct its mind under the provision of Sections 130 (1) (2) of the Penal Code Cap 16, R: E 2022, which provides for the basic components of the offence charged.

For clarification, *Section 130 (1) provides that "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 failing 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." Emphasis is mine.***

Accordingly, for the offence of rape to be established, ***first,*** male penis should penetrate to a girl or woman reproductive organ, and that act should be properly proved, ***second,*** if a girl was below the age of 18 years, it is immaterial whether the girl gave consent or otherwise, if a woman was above the age of majority, that is above 18 years old then such penetration should be without her consent to constitute rape ***third,*** if it was the accused who raped that girl. This was well elaborated in the case of **Festo Lucas @Baba Faraja@ Baba Kulwa V. R,** Criminal

Appeal No. 27 of 2022 the court made clarification on the above sections at Pg 5.

Guided by the above provisions and the cited case, this court will commerce with grounds number 1, 4 and 5 that the prosecution case was not proved to the required standard since the evidence of a medical doctor was weak and the prosecution evidence was contradictory. The records reveal that, PW3 after examined the victim's vaginal he discovered that she had bruises inside her vagina and had mucus white in colour, and again the said bruises were not supposed to be in a normal person but happened to a person who had been penetrated without her consent. This was supported by PF3, a medical report which reveals the same results.

From this evidence this court had not seen the so-called glaring gaps as complained by the appellant because a person may be penetrated and neither the sperms nor blood or fresh wounds will be seen as it was properly elaborated in the case of **Kayoka Charles vs Republic,** Criminal Appeal 325 of 2007 [2010] TZCA 42 (4 June 2010) at Pg. 7-8 when the court cited the case of **Mathayo Ngalya @ Shabani V. R,** Criminal Appeal No. 170 of 2006 (unreported) which elaborated the point of penetration by stating that:

"The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) of section 130 (4) of the Penal Code Cap 16 as emended by the Sexual Offences (Special Provisions) Act 1998 provides;- ***"for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence……."*** ***Emphasise is mine.***

Therefore, if a person had been penetrated slightly it is difficult to see blood, or bruises or the sperms hence the allegations by the appellant that there was no sperms or blood is an afterthought.

Moreover, the evidence of PW3 emanated from the victim herself (PW1) who explained how the appellant grabbed her left hand and kicked her, thereafter she felt down and the appellant undressed her and started to rape her.

Further to that, the evidence on record shows that the appellant was clearly identified by the victim, and this matter was not disputed as the Appellant's testimony shows that he used to graze her cow hence this court is blessed to term this as a visual identification as it was stated in different cases includes the case of **Raymond Francis V. Republic**, [1994] TLR 100 where the Court stated: -

"It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring correct identification is of utmost importance. "

Likewise, in situations where a person being identified is familiar to the identifying witness, the Court, in the case of **Shamir John V. Republic,** Criminal Appeal No. 166 of 2004 (unreported) which was cited in the case of **Frank Joseph @ Sengerema V. Republic,** Criminal Appeal No. 378 of 2015 (unreported), warned that: -

" ... recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."

In the present case the identifying witness was the victim herself who explained on how she met with the appellant on her way to pick vegetables on the material date of 11/04/2022 at 16:00 hours and after they had greet each other, the appellant come back grabbed her left hand and felt down, thereafter the appellant raped her as explained earlier.

The above testimony from PW1 was also supported by the testimony of PW2 who received the complains from the victim on the same day after she had been raped and he was the one who took her to the hospital for medical examination, hence the so complained by the appellant is not existing as the evidence of the victim itself is enough to prove the case. See for instance the case of **Seleman Makumba V. Republic,** Criminal Appeal No.94 of 1999 (unreported), the Court 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 there was penetration."***

Besides, the appellant complained that the evidence of PW2 and PW3 contradicts with the evidence of PW4, when Pw2 and PW3 testified that, the offence was committed on 11/04/2022 while PW4 on his testimony pointed out that the offence was committed on 13/04/2022, this court is agreeing with the appellant in this discrepancies, though, even if the evidence of PW4 will be expunged from the records, the remaining evidence preferably that of PW1, PW2, PW3 and the PF3

narrated clearly on how the offence was committed and established that the offence of rape was actually committed.

Approaching the third ground that the appellant was convicted with the wrong edition of 2019 instead of 2022. After a thoroughly perusal of the charge sheet, it is not in dispute that, the prosecution cited Penal Code Cap 16 R: E 2019 while the same was revised on 15 th June, 2022 under the section 4 of the Laws Revision Act, Chapter 4. It was therefore wrong for the prosecution to cite the dead law thus the question is whether that error prejudice the appellant.

This court is aware with the principles which were set down in the case of **Jamal Ally @ Salum V. Republic**, Criminal Appeal No. 52/2017. [2019] TZCA 32 at Pg 15 where by the appellant was charged with similar offence and the prosecution failed to cite the proper provision of the law, hence the court questioned that;

> "***Whether the defect arising from wrong citation and citation of inapplicable provisions, prevented the appellant from understanding the nature and seriousness of the offence of rape and prevented him from entering his proper defence thereby occasioning him injustice".***

Again, the court went on arguing by making reference to the decision of the Court in **Deus Kayola V. Republic, Criminal Appeal** No. 142 OF 2012 (unreported), at Pg 18 that,

> "It *is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices.* ***Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA." [Emphasise is mine].***

From the above cited cases and since it has been argued that the particulars of the offence the appellant was charged with were fully explained to him and met all the essential ingredients of rape, this court is of the view that the said irregularities are curable to the extent explained above as it does not go to the root of the case.

Approaching the last issue which complained by the appellant that the appellant was wrongly sentenced since at the time of commitment of the offence he was under 18, this court in perusal of the proceedings of this case found out that in his defence appellant told the trial court that

he was 17 years old but I saw nowhere prosecution side objected it, also it never find any information or evidence to proof the age of the appellant failing to do so this court has its view that prosecution did admitted what the defence side was alleging. This court also found out that appellant in ground No 2 stated that he was wrongly convicted but the respondent replied by saying that it was afterthought as he did not raised it before, when the charge was ready over to him, this court is in support of appellant submission that the issue of age was raised by appellant but prosecution said nothing about it, this court is aware that failure to cross examine a witness on any party of his testimony tantamount to an acceptance of that testimony by the party against whom the evidence is adduced ,this issue was well elaborated in the case of **Nyerere Nyague vs. Republic ,**criminal appeal no 67 of 2010 at page 5-6 the court held that

''*A party who fails to cross examine a witness on a certain matter deemed to have accepted that and will be estopped from asking the trial court to disbelieve what the witness said*''

Coming to this case the failure of the prosecution to cross examine appellant concerning the issue of his age make this court to believe that what appellant said was true that he was below 18 years. So this court

after admitting the same made reference to the provision of Section 131 of the Penal Code which provides the followings.

131.-(1) N/A

(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall-

(a) if a first offender, be sentenced to corporal punishment only;

(b) if a second time offender, be sentenced to imprisonment for a term of twelve months with corporal punishment;

(c) if a third time and recidivist offender, be sentenced to five years with corporal punishment.

From the above provisions of the law since the appellant was admittedly below eighteen years of age, this court has no doubt that the sentence imposed to him was illegal while at the time of committing such an offence, he was under the age of 18, thus the arguments by the counsel for the respondent that the sentence was given according to the provision of section 131(1) of the Penal Code which gives such

punishment for the charged offence is to deceive this court and this ground is found to have merit.

Therefore, as it has been shown herein above, the appellant was supposed to be sentenced to imprisonment for a term of twelve months with corporal punishment since he is a second time offender and the appellant was convicted and sentenced since 15/09/2022, which means he has already served one year and almost 9 months in jail, this court is of the opinion that the appellant had served the sentence he deserves according to the law. In the result this court is constrained to impose another sentence but rather to order immediate release of the appellant from prison unless he is otherwise lawfully detained. In the result this appeal is therefore allowed to the extent explained above.

It is so ordered.

DATED at **SHINYANGA** this 18th day of June, 2024.

R.B. Massam
JUDGE