THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB – REGISTRY

AT MBEYA

DC. CRIMINAL APPEAL NO. 183 OF 2023

(Originating from Criminal Case No. 232 of 2022 in the district court of Mbeya at Mbeya)

JOHNSON KAJIGILI MWAMGONGWA @ BABA FARAJA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of hearing: 22/4/2024

Date of judgment: 24/6/2024

NONGWA, J.

The appellant Johnson Kajigili Mwamgongwa@ Baba Faraja was arraigned in the district court of Mbeya in Criminal Case No. 232 of 2022 with the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 R: E 2022]. It was alleged that on 23rd of November 2022 at kwa Mama John – Ilomba area within the district and region of Mbeya the appellant did have carnal knowledge of a girl of 13 years old. Name of the girl disguised to protect her dignity. She will be

referred as victim or PW1. He was convicted and sentenced to thirty years imprisonment.

The prosecution case based on four witnesses, the victim who testified as PW1, Joyce Edson (PW2), Happiness Amos Kabisali (PW3) and Dr. Richard Lucas (PW4). Also relied on one documentary evidence PF3 (exhibit P1). Substance of the prosecution evidence was that in November 2022 the appellant called the victim to help some works, after finishing requested her to suck his manhood on promise to be given Tsh. 5,000/=. Again, on another day the appellant called PW1 while PW2 stood outside took her to his room where they removed clothes, the appellant inserted his penis on PW1's vagina and also asked her to suck him. On other day the appellant called the victim removed clothes and inserted his manhood to private parts of the victim, this time in presence of Vanesa. Then the victim was advised by PW2 and Bratty to report the matter. PW2 narrated that the victim and appellant entered the room stayed for one hour and on the other day was told PW1 was raped and the matter reported to police.

On her part PW3 recounted that on 30/11/2022 received information from parents that the appellant was ruining children with some gifts and that PW1 was raped. She called the victim and inquired on

the matter and was told that 23/11/ 2022 was raped by the appellant. Then on 13/12/2022 went to the street office and the accused was there, when the appellant was interrogated, he admitted to the offence and was arrested. PW1 was sent to hospital where she was examined by PW4 on 15/12/2022 who found no bruises and hymen. The result was posted in PF3 which was admitted as exhibit P1.

In defence the appellant testified that on 24/11/2022 was called by street chairman on complaint that she was showing children his manhood, and he denied the allegations. The chairman called police who arrested him and after two weeks he was arraigned before the court. The appellant complained that the victim did not inform any person or parents of what was done to her. That no witness witnessed rape and that he was sickness in his male organ.

Upon full trial, the trial court was satisfied that the prosecution case was proved beyond reasonable doubt, consequently convicted and sentenced the appellant to serve thirty years' imprisonment. Aggrieved the appellant has filed the instant appeal fronting four grounds which are be paraphrased as; **one**, that the trial magistrate erred in law in convicting the appellant without properly analysing evidence of PW1 when she said she told PW2 and that Vanesa was not called to support PW1 while PW2

did not witness PW1 being raped; **two,** that the trial magistrate erred in law in convicting the appellant without warning that the doctor PW4 did not find PW1 to have been raped; **three,** that defence evidence was not considered by the trial magistrate and **four,** that the prosecution case was not proved beyond reasonable doubt.

When the appellant came on for hearing the appellant fended himself whereas the respondent Republic was represented by Mr. Emmanuel Bashome and with Ms. Lilian Chagula, both State Attorney.

The appellant adopted his grounds of appeal and prayed the appeal be allowed.

Resisting the appeal Ms. Lilian submitted that evidence of PW1 was corroborated by PW2 who saw the victim entering the appellant's room. That in sexual cases best evidence is that of the victim. The case of **Seleman Makumba vs republic** [2006] TLR 379 was cited to bolster the argument. State attorney argued that PW1 explained clearly what happened to her.

On failure to call Vanesa, it was submitted that under section 143 of the Evidence Act, the prosecution had strong evidence. That the court can convict even on single witness provided he or she is credible witness. On this he supported the point by the case of **Tahfifu Hassan@ Gumbe vs**

Republic, Criminal Appeal No. 436/2017 CAT Shinyaga. According to state attorney failure to call Vanesa did not shake in any way the prosecution case.

In second ground on evidence of PW4 not showing PW1 was raped, it was submitted that doctor confirmed that the victim had no hymen which is evident of rape. Further that sexual offences can be proved even without the medical doctor's evidence. Here state attorney cited the case of **Chritopher Marwa Mturu vs Republic,** Criminal Appeal No. 139/2017, CAT Shinyanga (TanzLII). She was convinced that PW4 evidence corroborated that of the victim.

On whether defence evidence was considered in ground two, the state attorney argued that it was considered by referring to page 8 and 9 of the trial court judgment and that gave reasons for not giving weight to the defence evidence.

Regarding proof of the case beyond reasonable doubt in fourth ground, it was submitted all major ingredients of rape that is penetration, age and the perpetrator were proved. That age of the victim was not disputed. Regarding penetration, it was submitted that PW1 explained how the appellant inserted his penis and the victim felt pain evidence of which was corroborated by PW4. Further that evidence of PW1 was clear

that it was the appellant who penetrated her and was supported by PW2 who witnesses the victim entering the appellant's room and stayed for one hour. The state attorney added that the appellant admitted before PW3, evidence which was not cross examined. Ms. Lilian was content that the prosecution proved the case beyond reasonable doubt.

Before she took her sit, the court asked her on whether section 127(2) of the Evidence Act was complied. Responding the state attorney stated section 127(2) of TEA, requires that a child of tender age can testify without taking oath or affirmation, but she or he should promise to tell the truth. That in the instant case the victim took an oath before testifying, therefore the magistrate was satisfied that witnesses understood the meaning of oath, despite the fact that the magistrate did not show in the proceedings that the witness understood the meaning of oath and was not fatal.

In rejoinder the appellant had nothing to add, but his appeal grounds to be considered and I be released.

Having considered the record, grounds of appeal and submission of parties, the appeal can be determined on only two grounds one, whether defence evidence was considered; and two whether the prosecution proved the case beyond reasonable doubt.

Starting with whether defence evidence was considered, the complaint is founded under section 235(1) of the Criminal Procedure Act [Cap 20 R: E 2022] which provides;

> *'The court, having heard both the complainant and the accused and their witnesses, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code.'*

The above provision directs the trial court to compose a judgment after hearing both the complainant and the accused and their witnesses and either convict and pass a sentence or acquit and make an order dismissing the charge. For evidence of both parties to be taken as considered there must be a balanced consideration and evaluation of evidence by weighing the prosecution evidence visa viz the accused defence. In the case of **Mkulima Mbagala v Republic**, Criminal Appeal No. 267 of 2006 (unreported) the court stated;

> *'For a judgment of any Court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case .... is more cogent. In short, such an evaluation should be a conscious*

process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at.'

In the present appeal, the appellant's evidence apart from general denial raised the issue of one, victim not telling any person or parent of what she was undergoing, and two that he had problem of sickness in his male organ.

In the judgment of the trial court, the trial magistrate at page 9 of the judgment after considering evidence of PW1 which he found was supported by PW2 and PW4 found that defence evidence that the case was fabricated against him and sickness of his male organ was an afterthought and was not proved. Further to that the magistrate found that the appellant admitted before PW3 who was not cross examined on that aspect.

From what I have tried to discuss, in the circumstances of this case the defence evidence was considered by the trial court only that it was not believed and was found to be devoid of any prove. The second ground is therefore dismissed.

Before dealing with whether the prosecution proved the case beyond reasonable doubt, I have first to put clear the way evidence of the victim

and PW2 was recorded by the trial court. According to the charge when the offence was committed to the victim, she was aged thirteen and at the time of testifying in court she was fourteen years. In terms of section 127(4) of the Evidence Act, the victim was underage, her evidence was supposed to be recorded in compliance with section 127(2) of Evidence Act. It provides;

> `*A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.'*

As rightly submitted by the state attorney, the above provision enjoins that evidence of a child of tender age may be taken on oath or affirmation if the court is satisfied that she or he understands the meaning of oath or affirmation and if not then must promise to tell the truth and not to tell any lies. In this case PW1 and PW2 were not tested if they knew the meaning of oath for reception of their evidence to be under oath. This was irregular, however, section 127 was amended in 2023 by Act No. 11 of 2023 and a new subsection (7) was added which provides:

> *'Notwithstanding any other law to the contrary, failure by a child of tender age to meet the provisions of subsection (2) shall not render the evidence of such child inadmissible.'*

Therefore, regardless whether PW1 and PW2 understood the nature of testifying on oath or not, by giving evidence on oath, they complied with the requirement of promising to tell the truth and not lies. See **Badi Salehe vs Republic,** Criminal Appeal No. 375 of 2020 [2024] TZCA 209 (20 March 2024; TanzLII).

Now moving to whether the prosecution proved the case beyond reasonable doubt. The appellant was charged with statutory rape of a girl under section 130(1)(2)(e) of the Penal Code.

To prove the offence under the above section, the prosecution is required to establish that the accused had sexual intercourse with a girl, with or without her consent. The sexual intercourse is proved by penetration of her vagina, even a slight penetration is sufficient to constitute sexual intercourse under section 130(4) of the Penal Code. Two, it must be proved that, the girl is under 18 years of age and that, if she is 15 or more years of age, it must be shown that she is not his wife.

In this case the age of the victim posed no difficult to the appellant it was not disputed, that however PW1 testified that she was born in 2008 by simple arithmetic in 2023 she was fifteen or less, bringing to the law that the victim was under eighteen years of age. Regarding penetration PW1 explained in detail that *dudu* was inserted to her private parts. There

is litany authority that *dudu* refers to penis. See **Mathayo Laurance William Mollel vs Republic**, Criminal Appeal No. 53 of 2020 [2023] TZCA 52 (20 February 2023; TanzLII) and **Hassan Kamunyu vs Republic,** Criminal Appeal No. 277 of 2016 [2018] TZCA 259 (21 August 2018; TanzLII). PW1's evidence of penetration was corroborated by PW4 who testified that the victim had no hymen as evidenced by exhibit P1. With those evidence I am satisfied penetration was proved.

The glaring question is who did the act, I have noticed there was no dispute that the victim and appellant knew each other well, however that is not a grantee that the appellant committed the offence. In sexual offence cases true evidence of rape comes from the victim however, the conviction should be the result of assessment of the evidence, credibility of the victim and other circumstances of the case. In **Mohamed Said vs Republic**, Criminal Appeal No. 145 of 2017 [2019] TZCA 252 (23 August 2019; TanzLII) the court stated that it was never intended that the word of the victim of sexual offence should be taken as gospel truth rather her or his testimony should pass the test of truthfulness and that justice in cases of sexual offences requires strict compliance with rules of evidence and that such compliance will lead to punishing the offenders only in deserving cases.

In the instant case, I have given weight it deserves evidence of PW1 who unequivocally stated that rape was committed to her not at once but at best twice and in the presence of other persons. However, there are several doubts which touched on the credibility of the victim and the surrounding circumstances corroborating the evidence of the victim.

One, the victim failed to report the incident at the earliest opportunity. PW1 testified that she was raped by the appellant two times without mentioning dates; the first time was taken to the appellant's room by being laid on the sulphate material while PW2 remain outside and the second time was done while standing and in presence of Vanesa. PW1 never reported the incidents to anyone. The inability of the witness to disclose the name of the perpetrator at the earliest time following the commission of the offence adds doubt to her evidence. See **Damian Manyika @ Babu Tanga vs Republic**, Criminal Appeal No. 306 of 2022 [2024] TZCA 451 (13 June 2024; TanzLII). To be noted is PW2 did not witness the victim being raped, therefore her evidence on first occasion has little value.

Two, the victim never raised alarm before, during or after the rape was committed against her on all occasions. While PW1 testified that she was raped while PW2 outside and on second occasion in presence of

Vanesa she never raised alarm. Further, there is no evidence that, the victim was under any threat from the appellant not to report the matter. It is now settled that in the deserving case of sexual offence absence of threat diminish credibility of the victim. In **Athumani Mussa Zoazoa vs Republic**, Criminal Appeal No. 151 of 2023 [2024] TZCA 347 (9 May 2024; TanzLII) it was stated that in a situation where a victim of rape is not threatened to be killed or harmed or the like threats, deferment to report the incident weakens her credibility and eventually undermines the charge of rape.

In this case record are silence if the victim was threatened not to reveal the act to any person. More so, it is alleged to have been done in presence of other persons.

Three, failure to summon some material witness to wit Vanesa, the state attorney submitted that they had no obligation to call her and sought shelter under section 143 of the Evidence Act. I have scanned the record and find that the said Vanesa was the material witness because she is said to have witnessed the victim being raped by the appellant. It is settled law that failure to call a person who is in good opportunity to link the commission of offence with the accused, the court is entitled to draw adverse inference. Vanesa was important witness who would have added

credence to PW1 that she really saw the appellant raping the victim, her absence casted further doubt on whether the appellant is the perpetrator of the offence. This was also the position in **Straton s/o Steven Mboya vs Republic,** Criminal Appeal No. 576 of 2020 [2024] TZCA 349 (10 May 2024; TanzLII).

Four, contradictions, while PW1 said to have reported the matter to gender desk, PW2 said they reported to police and PW3 testified he received information from parents, inquired on the matter and on 13/12/2022 was called to street office, found the appellant who was then eventually arrested. If indeed PW3 became aware of rape incident on 30/11/2022, why did she remain silence until on 13/12/2022 when she was called by street office. Uncertainty as to whom and where the matter was reported first casts doubt that prosecution witnesses were not telling the truth. This is more because in his evidence the appellant said was arrested on 24/11/2022 and no police was summoned who could have explained when the appellant was arrested.

Five, delay to examine PW1, the charge is clear that the offence was committed on 23/11/2022, PW1 did not mention the date she was raped but recalled to be November. According to PW3 on 30/11/2022 when she inquired the victim over the rape allegation was told it was on 23/11/2022.

Per PF3 exhibit P1 was issued on 13/12/2022 but the doctor, PW4 examined the victim on 15/12/2022. There is unexplained delay to examine the victim. If on 30/11/2022 PW3 was aware that PW1 was raped on 23/11/2023, being from gender desk why did she not take action immediately. Again, if PF3 was issued on 13/12/2022, why did it take two clear days for PW1 to be sent to hospital. The delay is not explained as the result it water down the prosecution case.

From the above, while I feel sorry to what happen to the victim, this being the court of law, evidence in record has failed to link the accused with the commission of the offence. It is the position of the law that in order to base a conviction on the evidence of a sole eye witness, his or her evidence must be absolutely watertight. In **Lorence Kinyaga vs Republic**, Criminal Appeal No. 450 of 2021 [2024] TZCA 218 (19 March 2024; TanzLII) the court stated;

> *'It is therefore of particular importance especially considering the heavy sentences attendant to sexual offences, that the cases be investigated, prosecuted and decided with the deserving sobriety.'*

In the current appeal, with the pointed holes in prosecution case, I cannot say with certainty that, the prosecution proved the case beyond

reasonable doubt. The identified doubts as the law stands are resolved in favour of the appellant.

In the event, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. I hereby order immediate released of the appellant from prison forthwith unless he is lawfully held.

V.M. NONGWA

JUDGE

24/6/2024

DATED and DELIVERED at MBEYA this 24th day of June 2024 in presence of the appellant himself and Ms. Veneranda Paul State Attorney for the respondent.

V.M. NONGWA

JUDGE