IN THE HIGH COURT OF TANZANIA

SUB-REGISTRY OF GEITA

AT GEITA

CRIMINAL APPEAL NO. NO. 10340 OF 2024

(Appeal from the Decision of the District Court at Chato District in Criminal Case No. 445 of 2023 dated 4 March, 2024, before Hon. Kagimbo, SRM)

BETWEEN

ISMAIL JONATHAN..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 27/05/2024
Date of Judgment: 26/06/2024

K. D. MHINA, J.

This is the first appeal by Ismail Jonathan, the appellant, who was before the District Court of Chato at Chato, charged with and convicted of rape contrary to sections 130 (2) (e) and 131 of the Penal Code, [Cap. 16 R.E. 2022] (the Penal Code).

It was alleged that, on 24 June 2023, at Nyantimba Village, within Chato District, the appellant had unlawful carnal knowledge of MR, a girl of 17 years.

The appellant was sentenced to thirty (30) years imprisonment term.

Though the victim was identified by her full name at the trial, to conceal her identity in this appeal, I shall henceforth refer to her as 'MR' or simply 'PW1' as she testified before the trial court.

The appellant denied the charge laid against him, so the case had to proceed to a full trial. To establish its case, the prosecution marshaled four witnesses. The appellant relied on his own evidence as he did not summon any witnesses.

In a nutshell, the evidence at the trial was that the appellant, aged 27 years old, and PW1 were persons who knew each other in that they were village mates and neighbors at Nyantimba Village. According to PW1, who at that day was a secondary school student at form III, on 26 May 2023, the appellant started to seduce her by convincing her to have sex, but she refused.

On 23 June 2023, she went to the appellant's workplace, and that day, the appellant told her that he was sick. The next day, PW1 went to see

the appellant in his rented room because of the story from the previous day, which stated that he was sick.

Inside the room, she found the appellant lying on a mattress, and she sat on a traditional three-legged stool known in Swahili as "kigoda". At that time, the appellant switched on the Television and started to touch her breasts. Then she joined the appellant on the mattress, where the appellant undressed her, distended her legs, laid on top of her, and put his pennis into her vagina. PW1 told the trial court that since it was her first time to have sex, she felt pain.

After a short period, while already dressed in their clothes, she heard a knock on the door. Upon opening the door, she saw her father, the village executive officer, and a militia.

They were taken to the village office, where she confessed to having sex with the appellant, and they both prayed to be released. However, they were taken to Buziku police station, where the PF3 was issued, and she was sent to Ihayanga Dispensary for medical examination.

PW2 Rajab Selemani, the father of the victim, stated that the victim was born on 19 August 2005. On 24 June 2023, after her daughter was missing, he started to search for her. During that search, he asked the

children who were playing near his home, and those children revealed that PW1 had entered a certain house, and they showed him that house. After that information, he reported to the Village Executive Officer (PW3), and they went together militias to that house, and they found PW1 sitting on that mattress wearing clothes. Later, PW1 narrated how the appellant took her to her room for sexual intercourse. Then, they were issued the PF3 by Buziku police station and went to Ihayanga Dispensary for examination.

In his testimony, PW3 Johavaness Bayona (Village executive officer) confirmed PW2's evidence by stating that they found PW1 inside the appellant's room. He added that when he interrogated the appellant, he asked for forgiveness and claimed that PW1 was his long-time lover.

At Ihayanga Dispensary, where PW1 was medically examined by the Clinical Office, PW4 Msilanga Malaghu on 24 June 2023, found that PW1's hymen was not intact and had bruises. However, he found a whitish discharge and signs of penetration. Fortunately, PW3 was neither found to have associated diseases nor HIV positive.

In his oral evidence, PW4 stated that PW1 seemed to be experienced in sexual transactions because when he put two fingers in her vagina, the fingers penetrated.

In his defence, the appellant denied involvement in the commission of the offence and challenged the evidence of the prosecution witnesses that they gave untrue stories at the trial court.

He said the case against him had been fabricated because he refused to give the VEO, TZS, 800,000/= to rescue him from the allegations of rape and also because, on 10 April 2024, he sent her child to Nyantimba Health Centre, where PW2, the father of the victim was on duty that day. The treatment for the child was TZS. 30,000/=, but he paid PW2 only TZS. 15, 000/= with the promise to pay the remaining amount later, but he did not pay.

At the end of the trial, the trial court found that the charge against the appellant was proved to the hilt and consequently found the accused person guilty, convicted him, and sentenced him to thirty (30) years in jail.

Undaunted, the appellant has preferred this appeal with five grounds in his memorandum of appeal as follows;

1. *The trial court erred both in law and fact in deciding against the Appellant. The prosecution did not prove that the victim was under 18 when the offence was committed.*

2. *The trial court erred in law and fact in convicting and sentencing the Appellant to thirty years imprisonment based on contradictory evidence of the prosecution.*

3. *The trial court erred in law and facts to convict and sentence the Appellant on two pieces of evidence of, circumstantial and hearsay adduced by PW2 (one* ***Rajabu s/o Seleman)*** *and PW3* ***(Village Executive Officer).***

4. *The trial court erred in law and fact in determining the matter against the Appellant, basing its decision on the victim's baseless and unjustified evidence (PW1).*

5. *The trial court erred in delivering the judgment in favour of the Respondent, while the case was not proved beyond reasonable doubt.*

At the hearing of this appeal, the appellant appeared in person, unrepresented, whereas the respondent/ Republic was represented by Ms. Scolastica Teffe, learned State Attorney.

Faulting the trial court's decision in the first ground of appeal, the appellant submitted that the prosecution side did not tender the victim's birth certificate.

Regarding the remaining grounds, he submitted that the prosecution case contained contradictions. PW1 stated that she was wearing a long dress (gauni) when she went to his home. On the other hand, PW 2, the victim's father, testified that the victim was wearing a blouse and skirt.

On the third ground, he submitted that when PW2 stated that there were no civilians at the time of his arrest, but PW3 testified that there were civilians. Therefore, their evidence was contradictory.

Faulting the trial court on the fourth ground, he stated that no eye witness proved that he committed that offence.

Regarding the last ground, he submitted that no witness tendered any exhibit at the court to prove the offence, such as a birth certificate or any school teacher, and testified to prove that the victim was a student.

On her side, Ms. Teffe resisted the appeal, and in her submission, she argued the first ground alone and the remaining grounds jointly.

Supporting the first ground, Ms. Teffe submitted that PW2, the victim's father, testified in his evidence that the offence was committed on 24 June 2023, and at that time, the victim was 17 years old. Therefore, the father of the victim proved the victim's age to be 17.

Therefore, there was no need to tender the birth certificate because a parent or a doctor may testify about the victim's age.

Regarding the remaining grounds, she submitted that in sexual offences, as per the **Seleman Makumba vs. Republic**, Crim Appeal No. 94 of 1999 at page 8, the law is clear that the best evidence comes from the victim.

She further submitted that the issue at the trial was whether there was penetration and whether the victim was below 18 years old. That was

proved beyond a reasonable doubt, and the trial court was satisfied with the evidence from PW1.

Further, the PF 3 was tendered by PW4 at the trial, which proved that the victim was raped.

On my part, having carefully considered the grounds of appeal and the submissions made by the parties and examined the record before me, I will start straight with the first ground of appeal regarding proof of the age of the victim.

The rival submissions here are that while the appellant stated that no birth certificate was tendered to prove age, the prosecution submitted that the age of the victim was demonstrated by the evidence of PW2, the father's victim.

This should not detain me long. I am conscious of the fact that age is of great essence in sexual offences whose victims are under the age of 18 years. Therefore, where it is alleged that the victim of sexual offences is under the age of 18, the age of the victim must be proved in the required standard. This is because of the provision of section 130 (2) (e) of the Penal Code, which provides that;

> *"(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman 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."*

The law relating to the proof of age of the victim is already settled by the Court of Appeal in **Salu Sosoma vs. Republic**, Criminal Appeal No. 32 of 2006 (unreported), where the father of the victim had testified as to the victim's age cited in **George Maili Kemboge vs Republic**, Criminal Appeal No. 327 of 2013 (Tanzlii) where the Court observed that;

> *"We are mindful of the fact that a parent is better positioned to know the age of his child".*

At the trial PW2, the father of the victim testified that the victim was born on 19 August 2005; therefore, on 24 June 2023, she was 17 years old.

Therefore, the first ground of appeal is devoid of merits.

Reverting to the second ground of appeal regarding contradictions, the appellant pointed out the following contradictions: one, PW1 stated that she was wearing a long dress (gauni). PW2, the victim's father, testified that the victim was wearing a blouse and skirt. Two, PW2 testified

that there were no civilians at the time of his arrest, while PW3 testified that there were civilians.

This also should not detain me long because the trial court records do not reveal what the appellant complained of.

Regarding clothes, PW1 stated that she was wearing long cloth, while PW2 stated that they found PW1 wearing clothes.

On the issue of witnesses, neither PW2 nor PW3 mentioned civilians; both stated that the persons who went to the scene were PW2, PW3, and the militia.

Therefore, this ground also must fail.

The remaining grounds revolve around the issue of whether the prosecution proved the case beyond reasonable doubt.

In convicting the appellant, the trial court relied on the case of **Seleman Makumba** (Supra) by believing that the evidence of PW1 was the best to sustain a conviction.

Further, it relied on corroborative evidence when it held that PW1's evidence was corroborated with PW2, PW3, and PW4.

Thus, the trial court accepted PW1's story that she was carnally known by the appellant and considered the medical evidence of PW4 as supporting the fact that there was penetration.

On this, it is trite as per the cited case of **Seleman Makumba** (Supra) and **Nimo Samu vs. Republic**, Criminal Appeal No. 31 of 2019 (Tanzlii); the best evidence of sexual offences comes from the victim.

However, the Court of Appeal in **Mohamed Said vs. Republic**, Criminal Appeal No. 145 of 2017 (Tanzlii) where it was held that;

> *"We wish to emphasize the need to subject the evidence of such victims to security in order for courts to be satisfied that what they state contains nothing but the truth."*

The Court of Appeal gave that caution in the cited above-cited case of **Mohamed Said** (Supra) while noting the old English saying dated back to the 17th Century by Lord Chief Justice Mathew Hale in **People vs. Benson**, 6 Cal 221 (1856), that;

> *"Rape is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent."*

At the trial, PW1 stated that she had sex with the appellant on 24 June 2023, and that was her first time. However, that was contrary to what PW4, the medical practitioner, found when medically examining her.

The medical practitioner stated that PW1's vagina had no bruises; it was open and seemed to be experienced in sexual transactions because when he put two fingers in her vagina, the fingers penetrated. That was the evidence from the prosecution witness. Therefore, the contention that that day was her first experience with sex was not true.

In the case of **Goodluck Kyando vs. The Republic** (2006) TLR 363, it was held that;

> *"It is a trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

In addition, section 127(7) of the Evidence Act Cap. 6 provides:

> *"Notwithstanding the proceeding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of a sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if, for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*

However, before convicting a suspect, there are ways in which the credibility of a witness can be assessed. The Court of Appeal in the cited case of **Nimo Samu (Supra),** while citing its earlier decision of **Shabani Daudi vs. Republic**, Criminal Appeal No. 28 of 2001(unreported), held that;

> *"The credibility of a witness can also be determined in other two ways, that is one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses".*

Having directed my mind to the cited case laws and the provision of the law above versus the scrutiny of PW1's evidence in relation to the evidence of PW4, I find that the evidence of PW1 is not only doubtful but also not coherent.

I find that PW1 was not a truthful and credible witness. She had an interest to serve when her father found her sitting in the appellant's room.

Further, in the PF3, the medical practitioner wrote that he saw signs of penetration, which means he did not detect penetration. The law is clear that penetration, however slight, may lead to a conviction, but in the circumstances of this case, where the evidence of PW1 is doubtful, it was not safe to rely on the PF3 as corroborative evidence to PW1's evidence.

In addition, contrary to the trial court's holding, I found that PW2 and PW3's evidence corroborated PW1's evidence on the offence charged. Both testified that they found the appellant and the victim wearing their clothes and sitting in the room and that in any way cannot prove the offence of rape.

Before I conclude deliberating this issue, I wish to state that the decision of **Seleman Makumba** (Supra) and of the same holding should not be misinterpreted. I don't think the intention was once the victim said that she was raped; that automatically can lead to conviction. Scrutiny is very important before relying on the evidence of the victim.

In the cited case of **Mohamed Said** (Supra), when the Court of insisted on the importance of scrutinizing the evidence of the victim of sexual offences. The Court held that;

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases".*

Therefore, it is my firm view that the third, fourth, and fifth grounds of appeal revolve around the prosecution's failure to prove that the offence in a required standard of law has merits because the conviction relied on evidence that was not credible and doubtful.

Thus, the prosecution case was not proved against the appellant to the hilt, and that disposed of the appeal in favor of the appellant.

Flowing from above, I accordingly allow the appeal, quash the conviction, and set aside the sentence. The appellant shall be released from prison forthwith unless his continued incarceration is due to any other lawful cause.

It is so ordered.

K. D. MHINA
JUDGE
26/06/2024

Court.

Right to appeal explained to the parties.

THE HIGH COURT OF TANZANIA
GEITA

K. D. MHINA
JUDGE
26/06/2024