THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 000001350 OF 2024

(Originated from Criminal Case No. 98 of 2023 of the District Court of Chunya at Chunya [Hon. J.J. Mhanusi, SRM dated 12th October, 2023)

AYUBU s/o STEPHANIA SCHONE.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

13th & 27th February, 2024

KAWISHE, J.:

In the District Court of Chunya the appellant Ayubu s/o Stephania Schone was charged with the offence of rape against the provisions of section 130 (1), (2)(e) and 131(1) of the Penal Code, Cap. 16, R.E 2022. At the end of the trial the appellant was convicted and sentenced to imprisonment for thirty years.

Aggrieved, the appellant appealed to this court with six grounds which are-

1. *That, the trial magistrate erred in law and fact in convicting the appellant on charges which were not proved beyond reasonable doubt.*

2. *That, the trial magistrate grossly erred in law and in fact in convicting the appellant for the offence of rape without any medical evidence proving that the victim was carnally known.*

3. *That, the trial Magistrate erred in law and fact in convicting the appellant without proving age of the victim.*

4. *That, the magistrate erred in law and in fact for failure to make a proper analysis of evidence.*

5. *That, the trial magistrate erred in law and in fact in disregarding the defence of the appellant.*

6. *That, the magistrate erred in law and fact by convicting the accused based on the evidence of PW1 which was uncorroborated and which was unreliable and doubtful.*

At the hearing of the appeal the appellant was represented by Mr. Kamru Habib Msonde learned counsel assisted by Ms. Jackline Massawe learned counsel whereas the respondent the Republic had the services of Mr. Lodgud Eliamani, learned State Attorney.

Mr. Msonde, learned counsel for the appellant before arguing the appeal, prayed for a leave of the Court to add ground number three to the grounds of appeal. The application was not objected by the Republic. He added and argued the 3rd ground of appeal singly and combined the rest. He kicked off with the third ground of appeal which states that, the trial Magistrate erred in law and fact in convicting the appellant without proving

age of the victim. He contended that, the offence which the appellant was charged with is a statutory rape under sections 130 (1) and (2) (e) of the Penal Code, Cap. 16 R.E 2022, which requires one to prove sexual intercourse, and that the victim was under 18 years of age at the commission of the offence. He added that proof of age of the victim has been insisted in various cases. He beefed up his argument with the case of **Solomon Nzala vs. R** Criminal Appeal No. 36/2012. He stressed that there has to be tangible proof of the age of the victim that was under the age of 18 years. He cemented his argument with the following authorities, **George Claud Kasanda vs. DPP** Criminal Appeal 376/2017 and **Ally Rashid vs. Republic** Criminal Appeal No. 540/2016.

Mr. Msonde further claimed that, in the case against the appellant there was no proof age. That only the victim (PW1) stated that she was born on 5th February, 2006 and PW2, her biological mother repeated that she gave birth to the victim on 5th February, 2006. Apart from the evidence of PW1 and PW2 there was no tangible evidence to prove the same. He defaulted the learned trial magistrate for basing his decision on the case of **Isaya Renatus vs. Republic,** where the victim was of tender age hence,

does not apply to the present case. Concluded ground three by insisting that there was no proof of age of the victim.

After he has argued ground three, Mr. Msonde decided to combine and argue together grounds 1, 2, 4, 5 and 6. He filtered the grounds and came up with one issue that is, whether the charge was proved beyond reasonable doubt. He started by laying the foundation of his argument by stating that, rape cases are distinguished from other cases by the principle that the best evidence in a rape case is the victim's evidence. He warned that, such evidence should not be taken lightly. He lamented that, the appellant was convicted basing on the victim and her mother's evidence as shown on page 5 of the typed proceedings. The learned counsel referred to the victim's statement that, they came to know each other in 2019 and started sexual relations in December 2021. He continued by arguing that the relationship lasted up to June 2023. He submitted that in the evidence adduced, there is no place they stated when they had sexual intercourse. He stressed that there are mere words by the victim stating that, "we have been dating three times at his home Tankini Makongolosi." To him, there is no other evidence to prove the commission of the act.

Mr. Msonde questioned the credibility of the evidence of PW1 and PW2 without corroboration of PF. 3, and the medical doctor who examined the victim (PW1). He supported his argument by the case of **Aziz Abdalla vs. R** 1991 TLR 71 where it was insisted that, "it is thus now settled law that, where a witness who is in a better position to explain some missing links in a party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one." He stretched out to querying why the prosecution called 3 witnesses out of the 4 witnesses listed, and produced no exhibit out of the two stated that would be produced during the hearing. The learned counsel averred that, since the victim stated that she was medically examined, PF.3 was important to state that the victim was carnally known, non-production of the PF.3, non calling of the medical examiner should have led the trial court to draw an adverse inference to the prosecution.

Mr. Msonde further, faulted the learned trial magistrate for accepting that the victim promised to state the truth and used section 127 (6) of the Evidence Act which concerns a child of tender age. That, section 127 (4) of Evidence Act defines child of tender age to be below the age of 14 years.

That the section is applied where the evidence of such child may be used to convict the accused. Hence, the learned trial magistrate erred in treating the 17 years old victim like a child of tender age. He referred to page 4 of the typed proceedings where the victim was sworn like an adult. He added that in the analysis of evidence the victim was considered to be of tender age. As a result, he faulted the learned trial magistrate for misdirection and prejudicial to the appellant. He supported his argument with the case of **Hamisi Halfan Dauda vs. R** Criminal Appeal No. 231 of 2009 at pp. 11-12. Further, Mr. Msonde asserted that, given the shortcomings of the analysis of the evidence, and since this is the first appellate court, may re-evaluate the evidence and come with a different conclusion.

Mr. Eliamani, State Attorney for the respondent in his reply to the grounds of appeal stated that, he has gone through all the 6 grounds and found out that, in general the appeal is on the issue, whether the case was proved beyond reasonable doubt. He stressed that the case was proven beyond reasonable doubt, and the court was right to convict the appellant. He responded to the question of Mr. Msonde learned counsel for the applicant, that there is no prove that the victim was raped. He informed the court that, these offences are committed in secret, the one who can

prove its occurrence is the victim and the accused only. He supported his argument with the case of **Selemani Makumba vs. R** Criminal Appeal No. 94/1999 TLR 2006, where it was stated, 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.

In replying to the question whether the victim stated that she was raped, Mr. Eliamani claimed that, the learned counsel for the appellant insisted that PW1 has not shown that they had sexual intercourse with the appellant. He challenged the submission and referred the court to page 5 of the typed proceedings which reads, "***We started to have sexual intercourse in December 2021"*** He insisted that, with such sentence it is clear that the victim and the appellant had sexual intercourse. He further made reference to page 6 of the proceedings where the victim was cross examined by the appellant and replied- ***"Me and you we have sexual intercourse at your home."***

On the age of the victim, Mr. Eliamani reacted to the allegation by Mr. Msonde learned counsel who submitted that the age of the victim was not proved and produced many authorities, to show that in proving age of

a victim there has to be tangible proof. Mr. Msonde relied on the case of **Solomon Nzala,** (supra) which elaborated on the need for a tangible proof. Mr. Eliamani submitted that, 'tangible' means tangible in the eyes of law and not by hands. He added that, proof of victim's age is not necessary to be by document. It can be by guarding, parent, relative, medical practitioner or certificate or the victim. He insisted that the victim stated that she was born 5th February, 2006. Thus, counting from 2006 to 2021 the victim was 15 years of age during the commission of the offence of rape. He added that, the issue of age is not in dispute, the date, month and year is known. That, PW2 the biological mother of the victim, at the 2nd line from the top of the typed proceedings stated that the victim is her daughter and she was born on 5th February, 2006. The appellant did not cross examine PW2, since he failed to cross examine, he did not dispute the evidence. From that, Mr. Eliamani stated that, the ground is meritless hence be dismissed.

Replying to the point raised by the learned counsel for the appellant on non-calling of witnesses, Mr. Eliamani referred the court to section 143 of the Evidence Act, Cap 6. R.E 2022, that there is no particular number of witnesses required to proof a fact. He maintained that he did not see the

essence of the learned counsel querying on non-calling of witness or non-production of exhibit. He posits that the purpose of preliminary hearing is to speed the hearing. That no legal requirement that witnesses mentioned at preliminary hearing have to be called and exhibits listed have to be produced. It is the discretion of the prosecution to decide on the witnesses to be called and exhibits to be produced. Therefore, non-calling of a medical doctor to testify on the examination of the victim and non-production of the PF. 3 did not prejudice the trial against the appellant. He fortified his argument with the position of the case of **Selemani Makumba vs. R** (supra) and **Yuda John vs. R,** Criminal Appeal No. 238 of 2017 decided in 2021 that, the cases set the principle that the evidence of the victim is the best. That, the assessment of the admissibility of the victim's evidence is in the ambits of the trial court which observes her demeanor. He further argued that, since the evidence given by PW1 and PW2 did not contradict each other on the occurrence and discovering of the offence the evidence was sufficient to prove the case beyond reasonable doubt.

In proving that the appellant raped the victim, Mr. Eliamani prayed to the court while determining this appeal to take into consideration the

defence of the appellant; specifically, at page 16 of the typed proceedings, where the appellant was cross examined and agreed to all what was stated by PW1. That, the appellant agreed to have given the victim a smartphone, who is a secondary school student. This supports all what was said by the prosecution witnesses. He marinated his argument by stating that, the appellant said that he left PW1 with his mobile phone for a long time. Hence, this bonds with the allegations by PW1 & PW2 that they had sexual relations. He stressed that the learned trial magistrate analysed the evidence rightly. In closing his argument, he referred to **Alex Ndendya vs. Republic** Criminal Appeal No. 340 /2017 at page 11 which reiterated the position of **Selemani Makumba** (supra) that the best evidence in rape cases is that of the victim. He prayed to the court to dismiss the appeal for lack of merit.

In rejoinder Ms. Jackline Massawe learned counsel assisting Mr. Msonde started by arguing that, Mr. Msonde rightly referred the court to the sentence that they were dating since, there is no proof that the accused raped the victim. If there is no proof it will be very hard for the court to accept it. She agreed with Mr. Eliamani that, the best evidence is from the victim as stated in the case of **Selemani Makumba** (supra), but

she was quick to disassociate herself by stating that it is not so in all cases. That it is used mostly in victims of tender age who always tell the truth and nothing but the truth. Mr. Msonde took over and stated that, the mere allegation that they started dating, that evidence alone cannot suffice to proof the offence, it has to be corroborated. He reiterated the cases he cited, that there has to be tangible proof and not to be proved by words. He added that the case of **Yuda John** cited by Mr. Eliamani is distinguishable from the case at hand. The victim in that case was a child of 7 years, that this case is distinguishable because the victim is not of tender age. He argued that, the case of **Selemani Makumba** (supra) referred by the learned State Attorney, on best evidence of the victim has to be read together with the case of **Hamis Halfan** (supra).

Mr. Msonde objected allegation that the appellant confessed to have committed the offence during the trial of the case. He argued that, there were three answers, "*it is true that Hadija named me and mentioned me as her love and we had love affairs.*" He stressed that, such response cannot be taken to be a confession and agreed to the offence. Finally, he prayed that the appeal grounds be accepted, set aside the sentence by the lower

court and set the appellant free unless there is another lawful reason to hold him.

I have keenly followed the antagonistic submissions made by both learned counsels for the parties, and I have gone through the records available and realized that, the main issue before this court to be answered is whether the prosecution proved the case beyond reasonable doubt. I will adopt the formula created by the counsels from both sides. I will start addressing ground three of appeal and combine the rest as they did. The 3rd ground, that, the trial Magistrate erred in law and fact in convicting the appellant without proving age of the victim. Mr. Msonde, learned counsel argued that, PW1 and PW2's evidence should have been corroborated in proving the age of the PW1 (the victim). That, proving age by mere words was not sufficient, there should be tangible evidence. This was strongly disputed by Mr. Eliamani, learned State Attorney argued that, the age of the victim can be proved by the victim, parent, guardian, practitioner or a certificate. In my view, Mr. Msonde did not raise any reason to show that the trial court should have not believed the evidence of PW1, and PW2 the biological mother of the victim rather, he dwelt on tangible evidence to corroborate the evidence on age of the victim. It is a settled principle that,

unless there is a reason for the court to doubt the evidence, the court should believe in the evidence of a witness. As it was reasoned in the case of **Director of Public Prosecutions vs. Jilala Mahembo Jihusa** (Criminal Appeal No. 539 of 2021) [2024] TZCA 38 (14 February 2024) at Mbeya, page 10 – 12 where the Court held that, powers of the Court not to accept evidence by a witness are no longer unconditional. It is until when it meets the threshold which has been set by the Court, on several occasions including in **Goodlack Kyando v. R** [2006] T.L.R 363, that every witness is entitled to credence of his evidence if there is no good cause for a court to hold vice versa. In other words, corroborating evidence does not necessarily need to meet the standards of evidence by a first-class eye witness but rather, such evidence which may add value, however remotely beefing up and strengthening the otherwise insufficient evidence. In that reasoning the trial court had no reason to doubt the evidence produced by the prosecution's witnesses.

Mr. Msonde faulted the trial magistrate for basing proof of age in line with the case of **Issaya Renatus vs. Republic** (Criminal Appeal No. 542 of 2015) [2016] TZCA 218 (26 April 2016) where the victim was of eleven

years old while, the victim in the present case is seventeen years old. In **Issaya Renatus** (supra) the Court of Appeal among others stated-

> *"True, apart from the charge sheet and the fact that PW1 introduced herself in the witness box to be eleven years old before she gave her testimony, there was no direct evidence on the fact of her age. We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, 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. We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence."*** *[emphasis is mine].*

For the reasoning of the Court of Appeal in **Issaya Renatus** (supra) and since the victim was able to state her age and the same was stated by her biological mother, I concur with the reasoning of the learned trial magistrate that the age of the victim was sufficiently established. This ground lacks merit and is hereby dismissed.

Mr. Msonde questioned whether the charge was proved beyond reasonable doubt. He stated that, in the evidence there is no place they stated when they had sexual intercourse. He stressed that there are words by the victim, 'we have been dating three times at his home Tenkini Makongolosi.' He stressed that, dating is not having sexual intercourse. As was argued by the prosecution, at page 5 of the typed proceedings the

victim stated clearly that they had sexual intercourse relationship. Page 6 of the proceedings, when cross examined by the appellant, the victim responded that, *"it is true that you raped me", me and you have sexual intercourse at your house"* and the victim added that, *"it is you who gave me your mobile phone"* the victim testified under oath that, they had sexual intercourse, the argument by Mr. Msonde that there was no proof of rape is weighed against the principle in the case of **Selemani Makumba** (supra) at page 8 where the Court of Appeal stated-

> *"We can find no merit in the complaint by the appellant that the prosecution had failed to prove the offence beyond a reasonable doubt. A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape, that is unconsented sex, even if bruises are observed in the female sexual organ.* ***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." [emphasis added]*

From the reasoning of the Court, the non-calling of a medical doctor and non-production of the PF.3 did not dent the evidence of victim. See **Saidi Majaliwa vs. R** Criminal Appeal No. 2 of 2020 CAT (Unreported) and **Filbert Gadson @ Pasco vs. R** Criminal Appeal No. 267 of 2019 CAT (Unreported) where the Court of Appeal set a principle that in sexual offences the best evidence must come from the victim, and the true and

reliable evidence in sexual offences is that of the victim who is required to prove penetration. Also, in the case of **Filbert Gadson** (supra) the Court of Appeal stated that-

> ***"if the evidence of the victim could stand alone to convict, there is no need to corroborate it."*** *[emphasis added].*

In the instant appeal, the victim's evidence was sufficient to convict the accused, there was no need for corroboration. This ground also lacks merit and dismissed.

Mr. Msonde raised a concern that the learned trial magistrate erred in law by accepting that the victim promised to state the truth and used section 127 (6) of the Evidence Act which concerns a child of tender age. I have gone through the typed proceedings of the trial court and at page 4 shows that PW1 affirmed and gave her testimony. This shows that, the trial magistrate did not record the evidence of PW1 in accordance with the provisions of section 127 of the Evidence Act. In his judgment at page 3, he referred to section 127(6) that the court can rely on what is stated by the victim as long as promised to tell the truth.

The question is whether during the time when the victim gave her evidence the trial magistrate applied the procedures under section 127(6)

of the Evidence Act. From the proceedings, the victim affirmed and gave her evidence. Since, the trial magistrate did not apply such section, as the victim was above 14 years, and the victim affirmed before giving her evidence, in my view, citing the aforementioned section in the judgment did not go to the root of the matter hence, the appellant was not prejudiced.

In totality of the above, this appeal fails as the prosecution proved its case beyond reasonable doubt. Accordingly, I uphold the conviction and sentence of the trial court and dismiss the appeal in its entirety.

Dated at **MBEYA** this 27th day of February, 2024.

Right of appeal explained.

E.L. KAWISHE

JUDGE

Court: Judgment delivered in the Chambers this 27th day of February, 2024 in the presence of Mr. Kamru Habib Msonde learned counsel for the appellant and in the presence of the appellant and the in the presence of Ms. Upendo Lyimo State Attorney for the respondent.

E.L. KAWISHE

JUDGE