IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA SUB-REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 64 OF 2023

(From the District Court of Nzega, Original Criminal Case No. 74 of 2021

DAVID MAULID @ RASHID ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 06/05/2024
Date of Judgment: 17 & 24/06/2024

KADILU, J.

In the District Court of Nzega, the appellant was charged with two counts; rape contrary to Sections 130 (1), 2 (e), and 131 (1) of the Penal Code [Cap. 16, R.E. 2019], and impregnating a school girl contrary to Section 60A (3) of the Education Act, Cap. 353 of the laws. The prosecution alleged that on diverse dates between June and July 2021, at Lububu Village, Kasela Ward in Mwakalundi Division within Nzega District in Tabora Region, the appellant had carnal knowledge of the victim, a girl aged 17 years, and impregnated her. After the charge was read over to him, he pleaded not guilty. The prosecution paraded four witnesses and tendered three exhibits whereas the appellant fended himself without tendering any exhibit. Ultimately, the trial court convicted the appellant and sentenced him to thirty (30) years imprisonment.

Aggrieved by both the conviction and sentence, he filed the instant appeal praying for the court to quash the conviction, set aside the sentence, and release him from prison for the following grounds:

1. *That, the prosecution did not prove the case against the appellant beyond reasonable doubt.*
2. *That, having acquitted the appellant in the 2nd count, the allegation of the sexual relationship between him and the victim (rape) lost relevance.*
3. *That, exhibit P2, the cautioned statement allegedly made by the appellant before PW3 which was heavily relied upon by the learned trial Magistrate to find conviction, was made after the expiry of the time prescribed under Sections 50 and 51 of the Criminal Procedure Act.*
4. *That, exhibit P2 was obtained after torture.*
5. *That, penetration, as required by Section 130 (4) of the Penal Code, was not cogently established by the prosecutrix.*

During the hearing of this appeal, the appellant appeared in person whereas the respondent was represented by Ms. Aziza Mfinanga, the learned State Attorney. Concerning the 2nd ground of appeal, Ms. Aziza submitted that the argument is baseless because the two offences are distinct as they are created under different laws and each has its own ingredients. On the 3rd and 4th grounds in which the appellant complains that his cautioned statement (Exhibit P2) was wrongly admitted, the learned State Attorney considered them as baseless and new grounds that cannot be dealt with at the appellate stage. She argued that these are points about the admissibility of exhibit P2 which the appellant had room to challenge at the trial stage.

She supported her argument with the case of ***Nyerere Nyangue v. R.,*** Criminal Appeal No. 67 of 2010 in which the Court of Appeal stated that matters not discussed during the trial cannot be raised during the appeal. Regarding the 1st and 5th grounds, Aziza submitted that the evidence presented before the trial court proved sufficiently the penetration of the victim by the appellant so, the case was proved to the standard. The Counsel elaborated that the victim, PW2 described clearly how the appellant raped her and the circumstances that were prevailing at the scene.

The State Attorney added that the Medical Doctor, PW4 proved through medical examination that the victim was raped. She argued that as the victim was below 18 years, it was statutory rape and the consent of the victim was irrelevant. She explained that since the age of the victim was proved by her father, PW1, there is no way the appellant can claim that the offence was not proved to the required standard. According to Ms. Aziza, the evidence of the victim was sufficient as was held in the case of ***Bashiru Salum Sudi v. R.,*** Criminal Appeal No. 379 of 2018. She urged this court to dismiss the appeal for lacking merits.

When the court prompted the appellant to submit on his grounds of appeal, he stated that the victim's father did not prove the age of the victim because the father told the trial court that the victim was born in 2004 but she got lost in 2002 which is not possible. The appellant added that the police stated that his cautioned statement was recorded on 20/09/2021 but in the judgment, it was shown that the statement was recorded on

29/09/2021. He argued that the evidence is contradictory and there is the possibility that it relates to different accused persons.

According to the appellant, the medical doctor explained that she examined the victim on 19/09/2021 and filled PF3, something which implies that the doctor examined the victim before the matter was reported to the police. Also, the medical doctor informed the trial court that the victim was pregnant but he did not state if the appellant was responsible for that pregnancy. He alleged further that the victim's father claimed that he employed the appellant but there was no evidence to prove it from any person. In addition, the appellant submitted that the Chairman of Hamlet was not called to testify that the appellant was arrested while with the victim.

After having examined the case file, grounds of appeal, and submissions from both sides, the task before me is to determine whether the appeal has merits or not. In doing so, I will confine myself to the grounds of appeal and I will consider the parties' submissions in the course of discussion. At the outset, I wish to state that the 3rd and 4th grounds of appeal are misplaced because as correctly argued by the learned State Attorney, they had to be raised when the respective exhibits were sought to be tendered.

Just to highlight what transpired during the trial, on page 22 of the proceedings it is indicated that when PW3 prayed to tender the appellant's cautioned statement, the court asked him if he had an objection to which he

replied in negative. For that reason, he cannot be heard complaining at this stage that the statement was wrongly admitted for it was obtained after he was tortured. I consider the two grounds as afterthoughts which this court cannot condone as they are bad in law. I, thus, dismiss the 3rd and 4th grounds of appeal for being misconceived.

As for the 2nd ground of appeal, I hasten to rule out that it is baseless because pregnancy is not an ingredient of rape. Even without pregnancy the perpetrator of rape may be convicted as charged as long as the ingredients of rape have been established. Section 130 (4) of the Penal Code provides that for the purposes of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence. In the case at hand, the victim gave a detailed account of how the appellant had sexual intercourse with her as displayed on pages 14 to 16 of the trial court's proceedings. Her evidence was corroborated by her father's (PW1) testimony and PF3, Exhibit P3. After the medical examination, it was revealed that the victim had no hymen as stated by PW4. In the circumstances, I find no legal base on the appellant's argument that since he was acquitted of impregnating the victim, he could not be convicted of rape.

The 2nd ground of appeal which I have just resolved is closely linked with the 5th ground in which the appellant laments that penetration was not cogently established by the prosecutrix. It is common knowledge that when someone rapes a girl who is below 18 years of age, that is statutory rape.

See the case of ***Adam Rajabu v R.,*** Criminal Appeal No. 369 of 2014, Court of Appeal of Tanzania at Dodoma. Statutory rape is created by Section 130 (2) (e) of the Penal Code which states:

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

Luckily, the law is now settled in our jurisdiction that in sexual offences, the best evidence is that of the victim provided that the court satisfies itself about the credibility of the said evidence. In the matter at hand, apart from the victim, the prosecution summoned other three (3) witnesses who proved the ingredients of statutory rape and linked it with the appellant. For example, the age of the victim was established by herself, her father, and exhibit P1, her clinic card. Though I have refrained from dealing with the appellant's grievances concerning the admissibility of his cautioned statement, let me point out albeit in passing that even in the absence of the alleged statement, the charged offence could still be proved sufficiently by the adduced oral evidence.

I am alive that the accused is never convicted due to the weaknesses in his defence, but based on the strength of the prosecution evidence. Nonetheless, the scrutiny of the appellant's defence leaves a lot to be desired. I was unable to comprehend why all the prosecution's water-tight evidence linked him with the charged offense in the exclusion of any other person of his caliber around Lububu Village. The appellant submitted during

the hearing of the appeal that the school attendance register was tendered by a police officer instead of a teacher hence, an incompetent witness. With due respect, the trial court's judgment is very clear about this point. The trial Magistrate found impropriety in how the victim's studentship was proved which is why he acquitted the appellant on a count concerning impregnating a school girl.

The appellant has raised numerous doubts in the prosecution evidence but I have observed that the alleged contradictions are minor and do not go to the root of the case. There are several decisions of the Court of Appeal to the effect that where the testimonies of witnesses contain inconsistencies, the court is obliged to address them and decide whether they are only minor or they go to the root of the matter. In ***Metwii Pusindawa Lasilasi v R.,*** Criminal Appeal No. 431 of 2020, Court of Appeal at Arusha, it was held that:

"The general rule is that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case and are healthy as they show that the witnesses were not rehearsed before testifying."

Thus, the inconsistencies regarding a PF3 and the employment issues between the appellant and the victim's father are ancillary to the instant case. In the case of ***Mussa Ally Onyango v. R.,*** Criminal Appeal No. 75 of 2016, the Court of Appeal at Arusha held that rape can be established even if there is no medical evidence provided that there is other evidence pointing to the fact that it was committed. As hinted earlier, all the prosecution

witnesses gave detailed testimonial accounts about how the appellant maintained a sexual relationship with the victim for quite a long time. For the foregoing reasons, I am satisfied that the prosecution established that the appellant committed the charged offence.

I do not have any legal justification for interfering with the trial court's finding that the prosecution proved the case against the appellant beyond reasonable doubt. Consequently, I dismiss the appeal in its entirety for being devoid of merits. The right of appeal is fully explained to any party aggrieved by this decision.

Order accordingly.

KADILU, M.J.
JUDGE
24/06/2024.

Court:-

Judgment delivered in open court on the 24th Day of June, 2024 in the presence of the appellant and Mr. Steven Mnzava (State Attorney) for the Respondent.

G.P. NGAEJE
AG. DEPUTY REGISTRAR
24/06/2024

Court:-

Right of appeal fully explained.

G.P. NGAEJE
AG. DEPUTY REGISTRAR
24/06/2024