IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA SUB- REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO.60 OF 2023

(Arising from the District Court of Ngara at Ngara in Criminal Case No. 101 of 2022)

VYAMUNGU S/O JASTIN@BABU ..... APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

5th March & 08 March 2024

A.Y. Mwenda, J

Before the District Court of Ngara at Ngara, the appellant was arraigned for allegedly committing rape to three victims contrary to section 130(1), (2) (e) and 131(1) of the Penal Code [Cap 16 R.E 2022].

On the first count, the prosecution alleged that on 17th day of August ,2022 at Mkiromero Village within Ngara District in Kagera Region, the appellant had carnal knowledge of the first victim (name withheld), a girl of 07 years old, a standard I pupil at Mkiromero primary school. On the second count, the republic alleged that on the same date and place, the appellant had carnal knowledge of the second victim (name withheld), a girl of 10 years old, a Standard III pupil at Mkiromero primary school. On the last count, the prosecution also alleged that on the same date and place, the appellant had carnal knowledge of the third victim (name withheld), a girl of 12 years old Standard IV pupil at Mkiromero primary school.

As the appellant entered a plea of not guilty to all counts, the trial commenced where the prosecution summoned six witnesses, the victims inclusive. It also tendered three documentary evidence (the victim's PF-3). When the prosecution closed its case, the appellant fended his and at the end of the judicial day, the court convicted him for all counts thereby sentencing him to serve a jail term of life imprisonment. He was also ordered to pay monetary compensation to each victim to a tune of Tanzanian Shillings, five hundred thousand (500,000/=).

Aggrieved by the conviction meted against him, the appellant preferred the present appeal with five grounds. The said grounds can be merged into one which reads as follows, that: -

> "That, the trial court erred in law and fact by convicting and sentencing the appellant while the prosecution failed to prove its case beyond reasonable doubt."

At the hearing of this appeal, the appellant was in attendance without any legal representation whilst the respondent (the republic) was represented by Mr. GLORIA RUGEYE and Mr. JAMAL ISSA, learned State Attorneys.

When he was invited to submit in support of the grounds of appeal, the said that it was strange when the victims alleged, they were raped but the Doctor who examined them said they had neither bruises nor sperms in their private

parts. He wondered how was it possible for the victims' hymen to be perforated and their private parts be free from bruises and sperms.

Further to that he stressed that if at all it was true that he raped all the three victims, how was it possible for two of them to be infested with syphilis and U.T.I and the remaining one be free from such deceases? He went further to show his dismay over the prosecution's failure to reveal the doctors' findings who took his blood samples for examination. Further to that he challenged his identity as the victims' assailant on the ground that he is not **Babu**, the name which the victim alleged to be their assailant's. He also submitted that the prosecution's evidence contradicts each other when some of the victims alleged that after being raped, they bled but the doctor said their private parts had neither bruises nor sperms. He concluded while praying this appeal to be allowed and his conviction to be set aside thereby setting aside the sentence pronounced against him.

Responding to the appellant's submission, Mr. JAMAL ISSA learned State Attorney, while opposing this appeal commenced by asserting that, in rape cases such as the present one, three ingredients must be proved. He mentioned them to be the victim's age, penetration, and identity of the assailant. Regarding the victims' age, the learned state attorney submitted that the same is not on issue as there is no dispute that all the victims are underage. He said that from the record, PW1 was 12 years old, PW2, was 7 years old and PW3 WAS 10 years old.

Regarding penetration, the learned state attorney submitted that the victims testified that they were raped, and their evidence is supported by the Doctor (PW6) who testified that their respective hymens were not intact. According to him, the doctor's findings that the victims' private part had neither bruises nor sperm by itself is a minor issue although he did not describe how.

Regarding identity of the assailant, the learned state attorney submitted that the same came from the victims. According to him, the victims testified that the appellant is the one who raped them. He said that the victims testified on how they knew him before as he is their village mate. Further to that he said that the victims identified the assailant as the incident took place on the broad day light. That said he wound up beseeching the court to dismiss this appeal in its entirety. On the other hand, the appellant had no rejoinder.

That being the summary of the submission from both sides, the crucial issue for determination is whether the prosecution proved its case beyond reasonable doubt.

In this matter, the prosecution evidence alleged that the victims were raped by the appellant. As it was correctly submitted by the learned state attorney, three ingredients ought to be proved. These are the victims' age, penetration, and the perpetrator of the crime in question.

Regarding age, there is no dispute that the victims who stood as PW1, PW.2 and PW.3 were underage. Their age was 12, 7 and 10 years old respectively.

Before they stood up to testify, they were all subjected to the test of promising to tell the truth and not lies. That by itself entail they were underage. The backup to this principle is the case of ISSAYA RENATUS V. THE REPUBLIC, CRIMINAL APPEAL NO. 542 OF 2015, CAT where the Court, while emphasizing that it is not always necessary to prove the age of the victim through the evidence of the victim, relative, parent, medical practitioner or, where available by production of birth certificate, held inter alia that:-

> "We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact including the age of the victim on authority of section 122 of TEA which goes thus...."

Further to that, the court went on to hold as follows, that:

> "In the case under our consideration there was evidence to the effect that, at the time of testimony, the victim was a class five pupil at Twabagondozi Primary school. Furthermore, PW1 was introduced into the witness box as a child of tender age, following which the trial court conducted *voire dire* test. Thus, given the circumstances of this case, it is, in the least, deducible that the victim

was within the ambit of a person under the age of eighteen..." [Emphasis added]

Before delving into the second and third ingredients of rape, it is important to point out that true evidence in rape cases comes from the credible victim who is better placed to testify what befell her and the person responsible. In ALLY NGOZI V. REPUBLIC, CRIMINAL APPEAL NO. 216 OF 2018, CAT (Unreported), the Court held inter alia that: -

> "...it is settled law that, in sexual offences, the best evidence is the credible account of the victim who is better positioned to explain how she was raped and the person responsible."

In the present matter, the victims testified that on the date in question at around 16.00 hrs, while in the forest where they went to fetch firewood, accused appeared and ordered them to follow him and having complied, he raped them one after another and later, allowed them to go home. The victims testified that their assailant was familiar to them as he was their village mates and mentioned him by a single name of *Babu.* During submission in this court, the appellant challenged the purported identification in that he is not called **Babu.**

This court went through the records only to find doubts with the victims' identification of the assailant by the name *Babu.* Firstly, During the preliminary

hearing stage, one of the matters which was not in dispute was the appellants names and address. However, the said name of *Babu* is not appearing at the bottom of the matter in question. The names which the appellants agreed to be his which the court went to put on record are VYAMUNGU JUSTINE only. Even when he stood to defend his case, the appellant's name appears to be VYAMUNGU JUSTINE and not otherwise. On that basis, since there is no evidence that VYAMUNGU JUSTINE is also known as Babu, the victims' evidence regarding the name of their assailant is doubtful. Interestingly, even during the trial, the victim witnesses were not guided by the public prosecutor to make dock identification. The law is thus clear that when there is doubt with the prosecution's evidence, the same should be resolved in favour of the accused. In the case of ABUHI OMARY ABDALLAH & 3 OTHERS VS. REPUBLIC, CRIMINAL APPEAL NO. 28 OF 2010, CAT, the Court held inter alia that:

> "Where there is any doubt, the settled law is to the effect that in such a situation an accused is entitled as a matter of right to the benefit of doubts."

Another factor which creates doubt over the appellant's identity is the medical findings by the PW6. From the record, Pw. 6 examined the victim and his findings are to the effect that the victims had neither bruises nor sperms. As it was correctly submitted by the appellant, If the victims were raped and they felt pain and bled, how was it possible for them on the following date, to be found with nothing of such nature. This court is mindful that medical report

does not prove rape, however, if the same was tendered in evidence, it cannot be left unattended simply because its contents is likely to dent the prosecution's case. The same should be analysed together with other pieces of evidence as the court hereby do.

Further to that, the evidence on record reveal that after a medical examination, two victims were found to be infested with sexual transmitted deceased and one had none, i.e. Syphilis and UTI. With the said findings this court asked if at all the appellant raped all the victims, how was it possible for some of the victims to be infested with the said deceases and one was not. In the said circumstances it was expected the victims to bear the same medical results. Interestingly the prosecution did not bother to call the witness to explain why was that possible. Further to that, at the hearing of this appeal and during defence hearing at trial level, the appellant testified that his blood samples was also collected from him and after examination, his PF 3 was handled to a police officer called DEO. He however complained as to why his PF-3 was not produced by then prosecution. This court have put his concern under scrutiny and noted that his testimony in that regard was not challenged by prosecution through cross examination. That by itself entail what he testified was the truth. This principle was stated in the case of SHOMARI MOHAMED MKWAMA V. THE REPUBLIC, CRIMINAL APPEAL NO. 106 OF 2021, CAT (Unreported) where the court held: -

"It is now settled position of the law that failure to cross examine the adverse party's witness on a particular aspect, the party who ought to cross examine the witness, is deemed to have taken as true, the substance of evidence of the witness that was not cross examined, see Issa Hassan Uki V. R, Criminal Appeal NO. 129 of 2017 and Martin Misara v. Criminal Appeal no. 428 of 2016 (both unreported)."

Based on the said authority, since the appellant's PF-3 was not tendered in evidence by the so called DEO, adverse inference is hereby drawn against them. The backup to this is the decision of the Court of appeal in LAZARO KALONGA V. THE REPUBLIC, CRIMINAL APPEAL NO.348 OF 2008, CAT (Un reported) where the court held: -

"...while the prosecution has discretion to call any witness whom they please for establishing their case, however where they refrain from calling a witness who would advance their case an adverse inference may be drawn. In Aziz Abdallah republic (1991) TLR 71, CA, it was held:

"i) ....

ii).....

iii)the general rule and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witness are within reach but are not called without sufficient reason being shown, the court may an inference adverse to the prosecution."

From the foregoing reasoning, the prosecution case is tainted with serious doubts. The said doubts are, as a matter of principle, resolved in favour of the appellant. I thus find this appeal merited and as such it is hereby allowed in its entirety. The court quash the conviction for rape in all the three counts and set aside the sentence of imprisonment and the compensation order. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

Right of appeal id fully explained.

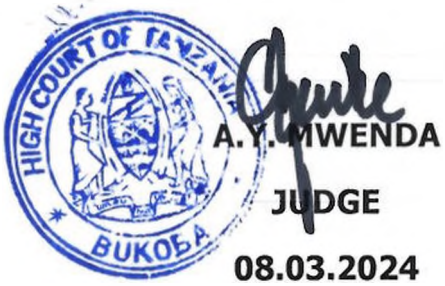
It is so ordered.

A.Y. OWENDA

JUDGE

08.03.2024

Judgment delivered in chamber under the seal of this court in the presence of Mr. Jamal Issa the learned state attorney for the republic (respondent) and in the presence of Mr. Vyamungu Justin @ Babu the Appellant.



A.Y. MWENDA

JUDGE

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