THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 135 of 2021
(Originated from District Court of Kyela at Kyela in Criminal Case No. 172 of 2020)

JABIR CHAPAKAZI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Dated: 19th September, & 24th October, 2022

KARAYEMAHA, J

Before the District Court of Kyela at Kyela (the trial Court), the appellant was charged with the offence of Rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code, Cap 16 R.E 2002 (now 2022).

It was alleged by the prosecution that the appellant one Jabir Chapakazi on 27th day of September, 2020 at or about 17:00hours at Ndandalo area, within Kyela District in Mbeya Region did have unlawful carnal knowledge of a girl aged 12 years, a standard three pupil at Mbogela Primary School. To disguise her identity, I shall henceforth refer to her as 'BMW' or victim.

The accused pleaded not guilty to the charge. The prosecution called four witnesses and exhibits to prove the charge.

The charge laid against the appellant arose out of the following scenario; on 27/09/2020 when the victim was playing with her friend Lea at Leah`s place, the appellant came riding motorcycle, called the victim and told her that she was needed by her father to take some money to buy vegetables. The appellant took the victim on his motorcycle to a place near Kiteputepu Bridged at river Kiwira, while there, the appellant told the victim that she should escort him to the maize farm. When they got there the appellant ordered the victim to undress her clothes and he undressed his. According to PW1 the appellant then ordered her to lay down. He eventually inserted his penis into her vagina.

When the appellant accomplished his mission, he ordered the victim to go at a place where he parked his motorcycle. He gave her one thousand shillings and told her not to tell anyone about the incident. When the victim got back home, her sister saw her with that money and asked where did she get the money. Their mother heard arguments and asked the same question. It is when the victim disclosed to her mother that the appellant went with her in the maize farm at Kiteputepu and

forced her to have sexual intercourse with him. Her mother reported the matter to the ten cell leader and later they reported the matter to Kyela Police station where they were given PF3 and they went to Kyela District Hospital where the victim was examined and found that her vagina have been penetrated as her hymen has been perforated by blunt object and had bruises.

The appellant was later arrested on those allegations and arraigned before Kyela District court where he was charged with offence of Rape. The appellant denied the charge leveled against him.

Following that denial the prosecution paraded four witnesses, namely, BMW (PW1), Rachel Matayo (PW2), David Anyingisye Mwaipopo (PW3) and G.8589 DC Sunday (PW4). Two exhibits, namely, the PF3 and the school attendance register, exhibits P1 and P2 respectively were tendered.

The appellant distanced himself from the commission of the offence contending that he did not have canal knowledge with the victim.

After a full trial, the trial court convicted the appellant on the offence of rape and sentenced him to serve a life time imprisonment term.

Dissatisfied with trial court decision he appealed to this court having the following twelve (12) grounds;

1. That the trial court erred in law when convicted and sentenced the appellant without taking into account that during the trial PW1 did not promise before the trial court that she will speak the truth and not lies as dictated by the law.
2. That the trial court erred in law when convicted and sentenced the appellant without taking into consideration that the evidence of PW1 was supposed to be corroborated by the evidence of her friend Lea who was not called to testify.
3. That the trial court erred in law when convicted and sentenced the appellant relying on a single witness without any corroboration, see the case of **Moses Charles Deo vs. Republic [1987] TLR 134**.
4. That the trial court erred in law when convicted and sentenced the appellant without taking into account that the said rape occurred on 27/09/2020 and PW1 went to hospital on 29/09/2020 but she failed to explain the said delayment before the trial court which made a high doubtful of her evidence since no one who issued the PF3 to PW1 was called to prove the date it was issued.

5. That the trial court erred in law when convicted and sentenced the appellant relying on the evidence of PW1 and PW2 in the absence of Ten Cell Leader who made the first inquiry with his members in order to avoid case fabrication, see **P. Taray vs. Republic**, Criminal Appeal No. 216 of 1994.
6. That the trial court erred in law when convicted and sentenced the appellant without taking into consideration that the evidence of PW3 failed to trace who raped PW1 because PW1 and PW2 failed to go to hospital in time so that sperms could be easily seen for DNA test.
7. That the trial court erred in law when convicted and sentenced the appellant without taking into account that the said money TZS.1000/= which alleged to have been given to PW1 as a reward was not tendered.
8. That the trial court erred in law when convicted and sentenced the appellant without taking into consideration that the best evidence which the prosecution claimed before the trial court that the appellant admitted before ten cell leader and WP Stela was not recorded to be tendered before the trial court to proof the confession.

9. That the trial court erred in law when convicted and sentenced the appellant without taking into account that nowhere PW4 interviewed PW1.

10. That the trial court erred in law when convicted and sentenced the appellant without taking into consideration that PW1 did not make an alarm or try to escape when the appellant brought her to a different place from the one promised.

11. That the appellant erred in law when convicted and sentenced the appellant life imprisonment term contrary to the law because the victim`s age was thirteen.

12. That the case of rape was not proved as per the required standard and the appellant`s defense was not considered.

Wherefore the appellant prayed his appeal be allowed, conviction and sentence of the lower court be quashed.

When the appeal came for hearing, the appellant appeared in person (unrepresented) while Mr. Emmanuel Bashome, learned State Attorney represented the respondent (The Republic). The appeal was argued orally argued.

The appellant prayed the State Attorney to start submitting first and reserved his right to rejoin if need arose. This was no problem to Mr. Bashome. He commenced his submission by tackling ground 12. The gist of this ground is that the prosecution failed to prove the case beyond reasonable doubt. The learned Counsel contended stoutly that the prosecution managed to prove the key ingredient of rape, that is penetration. He added that the victim's age was proved to be 13 years at the time of incident and that she was penetrated by the appellant.

With respect to the contradiction of date and month in the evidence of PW2 and PW4, Mr. Bashome's contention was that it did not give an impression that the victim was born in 2007 and was below 18 years. Clearing the doubt, he said even if the charge sheet indicates that she was 12 years that could not flop the prosecution case because age is proved by evidence and cited the case of **Jafari Musa vs. DPP,** Criminal Appeal No. 234 of 2019 (unreported).

On the second element Mr. Bashome submitted that the prosecution proved penetration through the testimony of the victim (PW1) who told the court that the appellant inserted his penis in her vagina. He held the view that the asserted penetration was corroborated by the testimony of PW3, the medical doctor, who examined the victim

and found her hymen perforated and had bruises in her vagina which means she was penetrated by a blunt object. His further contention was that the whole evidence pointed a finger at the appellant to be the only person who penetrated the victim because the victim named the appellant to be the one who inserted his penis in her vagina in a maize farm.

With regard to the allegation that his defense evidence was not considered, Mr. Bashome argued that the complaint was baseless. Citing page 17 of the judgment, the learned counsel submitted that the defence evidence was considered and at the end the trial magistrate found it to have failed to shake the prosecution case. However, the learned State Attorney urged this court to step into the trial court's shoes if it finds that defence evidence was not considered.

Submitting on the second ground whose complaint is that Lea the victim's friend was not produced to testify, Mr. Bashome contended that the law considers quality of evidence and not number of witnesses as per section 143 of the Evidence Act Cap 6 R.E. 2022. He stated further that Lea`s evidence had nothing substantial in proving the offence as she only witnessed the appellant leaving with the victim.

Submitting on the complaint that PW1`s evidence needed corroboration, the learned State Attorney argued that in sexual offences the best evidence comes from the victim and the Court can convict relying on it alone as articulated under section 127 (6) of the evidence Act (supra). However, PW1`s evidence was corroborated by PW3`s evidence, he argued.

With respect to ground number four which complain on the lateness of the victim to be taken to hospital and failure of PW3 to prove the date he issued the PF3. Mr. Bashome submitted that the incident occurred on 27/09/2020 about 17:00hours but the victim was taken to hospital on 29/09/2020 due to steps taken before because they reported the matter first to ten cell leader and later to Police station where they were issued with PF3. In his view that meant the report was made immediately. He further argued that it is not true that the doctor failed to prove the date he returned the PF3 because PW3 said he received the victim on 29/09/2020 and he examined her and filled the PF3 on the same day as reflected at page 26 of the typed proceedings.

Having submitted as such, the learned State Attorney stated that grounds 5, 6, 7, 8, 9 and 10 were covered in the discussion made on ground 12.

However, with respect to ground 11 in which the appellant complained that the sentence imposed was excessive. Mr. Bashome agreed with the appellant`s complaint because the sentencing section, that is Section 131 of the Penal Code R.E. 2022, dictate sentence of thirty years imprisonment and not life imprisonment. The learned counsel, therefore, prayed this court to interfere and reduce the life imprisonment to thirty years and the appeal be dismissed.

In his brief rejoinder, the appellant submitted that the doctor's evidence was that the victim was not penetrated by anything hence the court should consider his grounds of appeal because they are soundful. He prayed to be set free.

Having carefully considered the grounds of appeal, the submission of the parties and the records, I have a mind to state that the appellant's appeal has two sections. The first section concerns the substance of the evidence and the second section revolves around technicalities. Therefore, this Court is invited to resolve the issue whether the appeal has merits. On determining this issue, I shall be constrained to answer two questions. First, whether BMW was raped and secondly whether it was the appellant who raped her. The answer to these two sub issues will, I trust, give answers to the major question

whether the prosecution case was proved beyond reasonable doubt. In view of the petition of appeal the complaint is the subject of ground 5, 6, 7, 8, 9, 10 and 12.

It is the principle that in criminal cases the prosecution side must prove the case beyond reasonable doubt, see the case of **Mohamed Said Matula vs. Republic**, [1995] T.L.R. 3. The appellant was charged with the offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E. 2022. On this area the cardinal principal is that the prosecution is duty bound to prove two important elements in discharging its duty of proving the case beyond reasonable doubt as was observed by the Court of Appeal in the case of **Maliki George Ngendakumana vs. Republic**, Criminal Appeal No. 353 of 2014 (Bukoba) (Unreported) that;

> *"... it is the principle of law that in criminal cases the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it was the accused who committed it".*

In view of the cited case above, the prosecution is to prove whether BMW was raped and who raped her.

Let me start with this issue whether MBW was raped. PW1's testimony is clear that the appellant took her on his motorcycle on the reason that she was being called by her father. When they got at Kiwira River, the appellant parked his motorcycle and took her to the maize farm. While there she was forced to undress. The appellant also undressed too. Eventually the appellant inserted his penis in her vagina. According to PW1 she felt pains and cried. After finishing, he gave her TSZ. 1,000/= to solicit her silence and further warned her not to tell anyone. The issue of penetration was also verified by PW3 who informed the trial Court that after examining the victim he found out that she was penetrated because she was not a virgin and had bruises. To some extent, his testimony corresponds to the PF3 (exhibit P1) on areas of penetration and absence of hymen but contradicts the fact of seeing bruises. However, it is my considered view that this is a minor variance which cannot cause the gist of the case to collapse. In the light of the foregoing, therefore, I hold with comfort that BMW was, in legal perspective, raped.

The second sub issue is who raped BMW. In this case the evidence on record gives me limited options. It unerringly points to one individual, the appellant. BMW's evidence is categorical that she started it was the appellant who told her that she was needed by her father. He then took

her on the motorcycle but midway, they stopped at Kiwira river. They then went to the maize farm whereby the appellant forced her to undress her clothes. According to PW1, the appellant also undressed his clothes and eventually inserted his penis in her vagina. Her evidence is clear all along that she was with the appellant on that day and it was him who raped her.

It is this evidence that made the trial Magistrate convict the appellant. Indeed, it is incumbent in rape cases that the victim's evidence must be clear, incapable of double interpretation and should be cleared from any doubts. Going through her evidence, these three mandatory requirements were met. Further to that the appellant had an occasion to cross-examine her. She remained on her ground and recalled well what she stated in examination in chief without any scintilla of contradicting herself.

From the discussion above, I find and hold that the prosecution proved that BMW was raped and the rapist is the appellant.

Let me now turn to technical issues raised by the appellant. The first one is a complaint that his defence evidence was not considered. I have closely examined the judgment of the trial court and I respectfully agree with Mr. Bashome. The trial Court's judgment indicates at page

20, 21 and 22 that the appellant's defence evidence was substantially considered and evaluated. At the tail, the trial Magistrate found out that it had failed to shake the strong prosecution evidence. This complaint fails.

The other complaint is with regard corroboration of PW1's evidence. This complaint is a subject of grounds 2 and 3 of the appeal. As rightly submitted by the learned state Attorney, section 143 of the Evidence Act, Cap. 6 R.E. 2022 does not dictate on a number of witnesses to be called to testify. The law only needs quality of evidence to support the charge. The evidence of Leah had nothing to corroborate on the offence of rape because what Leah saw was the appellant leaving with the victim. It is the settled law that in sexual offences the best evidence must come from the victim as was underscored in **Seleman Makumba vs. Republic** [2006] TLR 379. I am mindful of the principle that the proof of rape comes from the prosecutrix herself. Other witnesses if they never witnessed the incident, such as doctors, may give corroborating evidence. See the case of **Godi Kasenega vs. Republic**, Criminal Appeal No. 10 of 2008 and **Said Majaliwa vs. Republic**, Criminal Appeal No. 2 of 2020 (both unreported). I am equally mindful that in terms of section 127(6) of the Evidence Act, (supra), the court can base a conviction on the evidence of the victim of

rape without corroboration, as long as the court is satisfied that the witness is telling the truth. Basing on the facts of this case PW1 is entitled to credence because there is no reason whatsoever to doubt her. It is 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. See the case of **Goodluck Kyando vs. Republic**, [2006] T.L.R 363 and **Vuyo Jack vs. The DPP**, Criminal Appeal No. 334 of 2016 (unreported). I therefore, observe with the trial Magistrate that Leah could add no value in the prosecution case.

I now turn to the first ground which raises a complaint that PW1 as a child of tender age did not promise to tell the truth before giving her evidence in court. Under section 127 (2) of the Evidence Act (supra), the Court is duty bound to make sure that a witness of tender age must promise to tell the truth and not lies before he/she testifies in court. This was also the position in **Godfrey Wilson vs. Republic** Criminal Appeal No. 168 of 2018. I have gone through typed trial court proceedings and found that from page 14 to 15 the trial Magistrate put some questions to a child and lastly she promised to tell the truth. For that reason, it is my opinion that the child promised to tell the truth before testifying. This complaint dies a natural death.

With regard to the fourth ground in which the appellant complains on the lateness of the victim to be taken to hospital and failure of PW3 to prove the date he issued the PF3, I hurriedly agree with Mr. Bashome that the incident occurred on 27/09/2020 in the evening and the victim was taken to hospital on 29/09/2020 at 12:00 hrs. PW2 explained the steps she took before going to police station and later to hospital. She told the court that she reported the matter first to ten cell leader who with his members made inquiry on the matter against the appellant before reporting to the police and later took the victim to the hospital where PW3 examined her. Having this clear picture, it is my firm view that the delay was not ordinate and could not prejudice the appellant in any way. However, the law does not require that the victim should be immediately taken to hospital but what I think is important is that she should be quickly taken to hospital in order to have proper evidence and avoid any possibility of losing it or lessening it hence making investigation complicated. However, in this case apart from taking some days exhausting all procedures be it knowingly or ignorantly, still the doctor digest some signs of penetration. In a nut shell, the delay in this case can neither be said that it creates doubts in the prosecution case by neutralizing the credibility of the victim nor can it be said to have been caused by the victim or PW2.

Lastly is the complaint in ground eleven that the sentence imposed to the appellant was excessive. It is quite clear that, upon conviction, the appellant was sentenced to life imprisonment. This was in conformity to the sentencing section, that is 131 (1) of the Penal Code, which provides that:

> *"131-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2),* ***liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years*** *with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person."* [Emphasis added]

In order to interfere with the sentence, I must meet some legal principles. These were lucidly set forth in **Masanja Charles vs. Republic**, Criminal Appeal No. 219 of 2011 (unreported), the Court of Appeal restated principles that the trial court ought to be mindful of, when passing a sentence. These principles are emphasized the fact that a sentence would be considered irregular and unlawful:

- *Where the sentence is manifestly excessive or is so excessive as to shock,*

- *Where the sentence is manifestly inadequate,*
- *Where the sentence is based upon a wrong principle of sentencing,*
- *Where the trial court overlooked a material factor,*
- *The period the appellant had been in custody pending trial.*

The superior Court was quite categorical that sentencing is a sole discretion of the trial court and the appellate court can only interfere with these principles where they are not conformed to. It held:

> *"We have cautioned ourselves and be mindful of the well settled principle that we should not interfere with the discretion exercised by a trial court while imposing a sentence except where it is apparent that the circumstances show that the trial court acted upon a wrong principle or erred both in law and factual analysis leading to the imposition of a manifestly excessive sentence."*

In this case, the appellant is only 25 years when he committed the offence. I think, the community would feel seeing this young boy change from the worst to better. It is impossible to see these changes and give him a chance of rectifying his wrong path if he remains an inmate for the remaining part of his life. Considering his age and the fact that he still has some useful life ahead of him and productive young man of the

family and society at large, I feel that the sentence of 30 years would do justice and would teach him a lesson. This, in my view, is a material factor which the Court of Appeal in **Masanja Charles** (supra) invited the sentencing Court to consider.

Since the trial Magistrate's sentence did not consider the material factor choosing instead to walk the route of excessiveness, this court is justified, under section 388 of the Criminal Procedure Act [Cap 20 RE 2019] to interfere with his discretion and reduce the sentence to 30 years of imprisonment.

Consequently, I set aside the sentence of life imprisonment and order that the appellant should serve a sentence of 30 years imprisonment. In that regard, his appeal is partly allowed.

It is so ordered.

DATED at **MBEYA** this **24th** day of **October, 2022**

J. M. KARAYEMAHA
JUDGE