IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 68 OF 2023

(Arising from Criminal Case No. 02 of 2023 in the District Court of Singida at Singida)

DAUDI ARON MUSTAPHA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

4th & 25th April, 2024

MUSOKWA, J.

This is an appeal against the conviction and sentence issued by the District Court of Singida (trial court) against the appellant herein upon being charged with the offence of rape contrary to sections 130 (1) & (2) (e); and 131 (1) of the Penal Code, Cap. 16 R. E 2019 (Penal Code). The sentence imposed was thirty (30) years imprisonment and payment of compensation of TZS. 2,000,000/= to the victim. The particulars of the charge provide that the incident occurred on 2nd day of April, 2022 at Relini area, Kindai Ward within the Municipal, District and Region of Singida. It is alleged that the victim was a girl aged fifteen (15) years and in order to protect her identity, I will refer to her as "the victim". Aggrieved by the decision of the trial court, the following substantive grounds of appeal were preferred: -

1. *That, in rape offences the age of the victim is of paramount importance, while the prosecution side alleged that the victim of crime...at the material time she was 15 years PW1 Hadija Labia, the mother victim told the trial court that the victim was 17 years now which was the actual age of the victim.*
2. *That the affidavit produced before the trial court by PW1 as a proof of victims age is not acceptable and cannot take the place of Birth Certificate as it was made to suit the purpose, and the age of the girl was more than 18 years, under such circumstance the trial didn't take its place as a referee.*
3. *That, it is well known that, during admission of any school in Tanzania either in Primary or Secondary school, a parent is demanded to produce a birth certificate of a child, thus the victim has her birth certificate, and its copy could be found in those school, thus in order to hide the truth about the victims age, no any Kindai secondary school teacher was called to prove the victims age and also to prove that she was their student, thus this is prove that this was a cooked case against accused(appellant).*
4. *That, the issue of identification was not resolved properly by the trial court, as the alleged incident took place during evening hours (19:00hrs) as it was alleged that the rapist came from victims behind and caught her neck, closed her mouth and threw her in a near bush, thus the condition for identification was not favourable, thus the possibility of mistaken identity was higher and this was what has taken to implicate innocent person (accused) or appellant.*
5. *That, PW2 (Victim) Mohamed allegation (sic) that she managed to identify the alleged accused through light is questionable as she was thrown in the bush during the act of rape and even the intensity of the alleged light together with its source*

was not said she didn't mention the name of the accused for his description in the early opportunity when she reported the matter to the police station and such description could be corroborated by the police who received her on the material day, her testimony that she knows him well and that he is at the marked and she has been seeing him when she being sent there is after through story made to suit the purpose, as no identification parade was carried out, and she gave this testimony after seeing accused in the court corridors and in the door, something which is injustice.

6. *That, PW4 one Amina Salum Selemani gave hearsay testimony before the trial court, and her testimony before the trial court is not acceptable.*
7. *That, PW3 one Safari Mohamed Ndege who was a doctor told the trial court that on his examination on the vagina, he found that the victim had no hymen, whitish discharge from vagina, bruises and lacertian on the vagina, and once he took high vagina swab to the laboratory, then was no sperm seen, he did VALR test and was non-reactive, but the doctor didn't say which part of the vagina had the alleged bruises, whether inner or outside the vagina. And since the doctor detected the whitish discharge from vagina, which was none sperm probably was caused by the unidentified decease that led the victim to scratch the unspecified area of the vagina identified by the doctor, the doctor's testimony didn't prove that the victim was raped on the material day.*
8. *That, PW5 one A/insp. Damas didn't say who interrogated the accused person, in order to ascertain that the accused right was restored during the alleged interrogation, also such person didn't appear before the trial court, thus PW5 brought a mere story before the trial court.*

9. *That, I was convicted and sentenced not due to the strength of the prosecution case, but due to the weakness of my defence.*

This appeal came for hearing on 4th day of April, 2024 whereas the appellant fended for himself, while the respondent was represented by Ms. Tlegray, learned state attorney. The appellant prayed the respondent to submit first, save for his right of rejoinder.

In reply, Ms. Tlegray opposed the appeal and prayed to the court to address the 1st, 2nd and 3rd grounds of appeal collectively as they are all related to the age of the victim. The 4th and 5th grounds of appeal were addressed collectively as they are connected, focusing on the identification of the accused. Finally, the 6th, 7th, 8th and 9th grounds of appeal, were addressed separately.

Ms. Tlegray commenced with the 1st, 2nd and 3rd grounds of appeal concerning the age of the victim. The learned state attorney submitted that, the mother of the victim, PW1, testified before the trial court at page 4 of the typed trial proceedings that the victim was of the age of 17 when the alleged offence was committed against her. However, the victim, PW2, informed the trial court at page 6 of the typed trial proceedings that her age was 17 years. Ms. Tlegray averred that the affidavit of the mother of the victim, which was tendered in court in lieu of the birth certificate, was

admitted thereof and marked as Exhibit P1, sufficed as proof of the age of the victim. Citing the case of **Isaya Renatus vs. Republic**, Cr. Appeal No. 542 of 2015, at page 8, in support of her submission, Ms. Tlegray asserted that persons who can testify in court as to the age of a child include a relative or the parent of the child.

Proceeding further, the learned state attorney emphasized that the appellant waived his right to cross examine PW1. In this regard, Ms. Tlegray preferred the principle that failure to cross examine a witness implies concurring with their testimony. Furthermore, the state attorney for the respondent stated that when PW1 was tendering the affidavit regarding the birth of the victim, the appellant raised no objection. Ms. Tlegray prayed the court to refer to section 143 of the Evidence Act, Cap. 6 R.E. 2022, which provides that the prosecution is at liberty to procure any number of witnesses provided that such witnesses are deemed necessary to prove the case of the prosecution. It is on this basis, she argued, that the prosecution did not seek the attendance in court of the Kindai Secondary School teacher, to testify as to the age of the child. The prosecution, she reiterated, was satisfied that the testimonies of the witnesses they had procured sufficed to establish a case against the appellant. Further, Ms. Tlegray argued that the age of the victim was not

in dispute at the trial court and it is for that reason that no objection was raised when leave was sought to tender exhibit P1 during the trial.

In responding to the 4th and 5th grounds of appeal, regarding the identification of the appellant, Ms. Tlegray referred the court to page 7 of the typed trial proceedings. The learned state attorney submitted that the testimony of PW2, the victim, adequately established the identification of the appellant. The victim testified that there was electricity light at the scene of the crime, further, that she was able to recognize the appellant from the mark on his face, which is close to the mouth. PW2 in her testimony also claimed that the appellant is not a stranger to her, but that she sees him often when performing her errands at the market place. The case of **Mbaga Julius vs Republic**, Cr. Appeal No. 131 of 2015 at page 13, was preferred to cement her assertion.

The learned state attorney conceded with the 6th ground of appeal that indeed the testimony of PW4 was hearsay evidence. Despite this fact, Ms. Tlegray opined that the said testimony did not adversely affect the prosecution case as the best evidence in a rape case is the evidence of the victim. The case of **Selemani Makumba vs Republic,** [2006] TLR 149 was preferred in this regard.

Addressing the 7th ground of appeal, Ms. Tlegray submitted that the testimony of the medical doctor, PW3, confirmed that the victim was raped. PW3, under oath, testified that the victim portrayed all signs of a rape victim. The learned state attorney prayed the court to refer to pages 11 and 12 of the typed trial proceedings of the trial court. The doctor tendered a PF3, which was admitted by the court as Exhibit P2 and notably, the appellant did not object to the admission thereof. The appellant also opted not to cross-examine the medical doctor.

In reply to the 8th ground of appeal, the learned state attorney submitted that failure to procure the testimony of the police officer who recorded the cautioned statement is immaterial. Ms. Tlegray reiterated that according to section 143 of the Evidence Act, (supra), no specific number of witnesses is required in proving the prosecution case.

Contending the 9th ground of appeal, the learned state attorney argued that the conviction of the appellant was the result of the prosecution proving their case beyond reasonable doubt. It follows therefore that such conviction was not due to the weakness of the evidence of the defense as alleged by the appellant. Proceeding further, the state attorney for the respondent averred that in proving the offence of statutory rape, the evidence of the prosecution was centered on proving the elements of the

offence, which were penetration, consent, and the age of the victim. Referring to page 11 of the typed proceedings, the learned state attorney submitted that the testimony of PW3, the medical doctor, proved that there was penetration. Further that, the testimony of PW2, the victim established that there was no consent as recorded at page 6 of the typed trial proceedings. In addition, the testimony of PW1, the mother, established the age of the victim at page 4 of the typed trial proceedings. For those reasons, she prayed the court to dismiss this appeal and uphold the decision of the trial court.

In his rejoinder, the appellant prayed the court to adopt his grounds of appeal. The appellant emphasized that he did not commit the alleged offence because he was not at the scene of the crime at the time the offence was allegedly committed. The appellant vehemently countered the testimony of the victim that there was electricity light at the scene of the crime which facilitated the identification of the appellant by the victim. The scene of the crime, was allegedly in the bushes, therefore, he asserted, it is impossible that there was electricity light in the bushes. Arguing further, the appellant averred that there were many people in their community with marks on their faces hence, claims by the victim

that she was able to identify him due to the mark on his face, were unfounded.

The appellant rebutted the testimony of the medical doctor. The appellant compared the testimony of the victim, that the unlawful act was committed for nearly an hour, with the testimony of the medical doctor that the findings of the medical report revealed that there was no semen. It was his submission that evidently the testimony of the victim contradicts the testimony of the doctor as the findings do not correlate with the manner in which the offence was allegedly committed. Furthermore, the medical doctor stated that bruises were observed in the private parts of the victim, but he failed to provide further explanation as to the cause of the bruises because bruises can be caused by numerous things including self-inflicted bruises during personal grooming.

Submitting further, the appellant asserted that the police officer who was arraigned before the court to testify is not the same one who arrested him. In explaining this, the appellant argued that the police officer who testified in court, already found him arrested and in the custody of the police. In concluding his rejoinder, the appellant argued that the testimony that was relied upon by the prosecution was hearsay evidence;

therefore, he prayed this court to consider favorably his grounds of appeal and accordingly determine this matter in the interests of justice.

Upon submission by the parties and careful scrutiny of the records, the issue for determination before this court is whether the prosecution successfully proved the offence of statutory rape beyond reasonable doubt.

In the case at hand, it is clear that the appellant was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code. In particular, section 130 (1) (2) (e) states that: -

> *"130 (1) It is an offence for a male person to rape a girl or a woman.*
>
> *(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."*

From the above cited provisions of the law, in establishing the offence of statutory rape, the age of the victim is among the essential ingredients that must be proved. Thus, sufficient proof that the victim was below the age of 18 years must be advanced by the prosecution for that purpose.

The Court of Appeal of Tanzania (CAT) cases of **Robert Andondile Komba vs. DPP,** Criminal Appeal No. 465 of 2017 and **Isaya Renatus vs. Republic,** Criminal Appeal No. 542 of 2015, (all unreported), are relevant in this respect. For instance, the CAT case of **Isaya Renatus** (supra) partly held at page 8 that: -

> *"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."*

Additionally, in the case of **Haruna Mtasiwa vs. Republic,** Criminal Appeal No. 206 of 2018 (unreported), the CAT sitting at Iringa held that:

> *"As we held in Bashiri John v. Republic (supra) in which, relying on our previous decision in Isaya Renatus v. Republic, (supra), we observed that* ***proof of age may be by parents, medical practitioner or by a birth certificate". [emphasis added]***

In the present appeal, it is on the records of the trial court that PW1 (the victim's mother) testified at page 4 of the typed proceedings that the victim was 17 years. PW1 testified that: -

> *"...(the victim) is my fourth child, she was born in 30/01/2007 at Singida Regional Hospital. She is 17 years of age and a form II (sic) at Kindai Secondary School. I haven't taken any birth certificate but I did take an affidavit to prove her age."*

In addition, PW2 (the victim) at page 6 of the typed proceedings testified that *"I am seventeen (17) years now, I was born on 30/01/2007.* Moreover, the charge sheet reads as hereunder: -

CHARGE

STATEMENT OF OFFENCE

RAPE; *contrary to sections 130(1) (2) and 131(1) of the Penal Code Cap.16 R.E 2019.*

PARTICULARS OF OFFENCE

DAUDI S/O ARON MUSTAPHA *on 2nd day of April, 2022 at Relini area, Kindai Ward within the Municipal, District and Region of Singida did have sexual intercourse with (victim) a girl of Fifteen (15) years old and a Form II student at Kindai Secondary School.*

The testimonies of PW1, the mother of the victim and PW2, the victim establish that the victim was in fact below the age of 18 at the time of the incident. The variance that is noted between the evidence adduced by the prosecution, that the child was aged 17 years, and the charge sheet which provides the age of the victim to be 15 years is explainable. The reason is that the offence was allegedly committed on 2nd April 2022, whereas PW1 and PW2 gave their testimonies in court on 22nd February, 2023 when the victim had already turned 17 years old.

Needless to say, whether the victim was 15 years old or 17 years old at the commission of the crime, it is immaterial as the statutory rape relates

to the girl under eighteen years of age. The CAT in the case of **Alphonce Bisege Mwasandube vs The Republic, Criminal Appeal No. 630 of 2020** was faced with a similar issue regarding variation of the age of victim indicated in the charge sheet and the age testified by the witness. The CAT held that: -

> *"At first, we would agree with Ms. Masai that whether the victim was **aged six years or seven years** at the commission of the crime, **it was immaterial as the penalty for raping a girl aged under ten years is life imprisonment** in terms of section 131(3) of the Evidence Act". [emphasis added]*

The testimony of PW1, the mother of the victim was supported by the affidavit she deponed regarding the age of her daughter. The said affidavit was admitted in court as Exhibit P1. As correctly observed by Ms. Tlegray, state attorney, the appellant did not contend to the admission of the exhibit P1. On this basis, the 1st, 2nd and 3rd grounds of appeal which relate to the age of the victim are hereby declared to be devoid of merits.

I will proceed to the 4th and 5th grounds of appeal which challenge the evidence adduced by the prosecution on the identification of the appellant. The learned state attorney submitted that the testimony of the victim, PW2, was precise and sufficiently established the identification of the appellant as the culprit. The appellant, in rejoining, vehemently

disputed the testimony of the victim. I will refer to the testimony of the victim, specifically in her description of the appellant as recorded at pages 6 to 7 of the typed trial proceedings. The victim, being under oath, testified at page 6 as follows: -

> *"..it was around 19:00 hours, I met the accused who is a meat seller at the local market there...."*

Further, PW2, at page 7 of the typed proceedings stated as herein below:

> *"He was (sic) a mark on his face near his mouth. I know him well, he is at the market and I have been seeing him when I am being sent there."*

The case of **Mbaga Julius vs Republic**, Cr. Appeal No. 131 of 2015 at page 13, was preferred by the state attorney to cement her assertion with regard to the victim's identification of the appellant. For ease of reference, the holding of the CAT will be reproduced herein under: -

> *"We on our part are of the considered opinion that the evidence adduced by PW4, PW5 and PW7, despite their tender age, sufficiently proved that the appellant committed the offence charged with. Firstly,* ***they gave a coherent narration of the sad and shameful incident****. Secondly, the record clearly shows that* ***they knew the appellant who they regularly met at school....****in this regard, the appellant's complaint that he was identified in the dock is farfetched because he was identified by the victims before stepping in the dock." [emphasis added]*

On the basis of the above cited case, and the testimony of the victim in which she gave a coherent narration of the incident and further made a

thorough attempt in identifying the appellant, the 4th and 5th grounds of appeal lacks merit too.

I will jointly address the 6th, 7th, 8th and 9th grounds of appeal which collectively challenge the testimonies of PW3, PW4, PW5; being the medical doctor, the sister of the victim, and the police officer respectively. The 9th ground of appeal is based on the claim by the appellant that the conviction and sentence was not based on the strength of the prosecution case but on the weakness of his defence.

It is worth noting that the learned state attorney for the respondent conceded to the 6th ground of appeal; that the testimony of PW4, the victim's sister, is hearsay evidence and is therefore unreliable. However, the state attorney submitted further that the position of the law in rape cases is clear in that the best evidence in cases of this nature is the testimony of the victim. The case of **Selemani Makumba vs. Republic,** [2006] TLR 149 was preferred in this regard.

I concur with the submission of the state attorney that the best evidence in rape cases is the testimony of the victim. In the circumstances, the testimonies of PW3, PW4, PW5; including Exhibits P1 and P2, the affidavit regarding the birth of the victim and the PF3, were, indeed, corroborative evidence. The medical doctor, PW3, testified that the medical findings

confirmed that the victim portrayed all signs of a rape incident. PW4, the sister of the victim was the first person who met the victim after the incident had occurred and accompanied her to the police station and to the hospital within a few hours of the disgraceful incident. The testimony of PW4 further corroborates the testimony of the victim on the identification of the appellant whereby she is recorded at page 17 of the typed trial proceedings and testified that *"I know the accused we live in the same street".* The coherent narration of the incident by the victim is recorded at page 6-7 of the typed trial proceedings as reproduced hereinafter: -

> *" I remember on 2/04/2022 at evening time...my sister sent me to the shop to buy oil for cooking I reached the shop and I bought the oil and on my way back, it was around 19:00 hours, I met the accused who is a meat seller at the local market there...she (sic) was behind me and I was in front walking back home and I was suddenly caught by accused on my neck and closed my mouth which made me not to make any sound, he beat me on my head and throw me in a near bush...and did make sexual forcely...he did to me about more than a half an hour and he wake from my body and kicked my left leg, I did scream and he ran away..."*

Further, section 127 (6) of the Evidence Act (supra) provides that: -

> *"Notwithstanding the preceding 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 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.*** *" [emphasis added]*

In view of the evidence on record and the cited authorities, it is the finding of this court that the elements of the offence of statutory of rape, namely, penetration, and the age of the victim, were proven beyond reasonable doubt. In the case of **Alphonce Bisege Mwasandube** (supra) the CAT partly held that: -

> *"Apparently, the appellant was charged with* ***statutory rape,*** *thus the prosecution* ***only had the duty to prove penetration*** *and* ***the victim's age*** *as stated in the case of Alex Ndendya (supra)". [emphasis added]*

Further, the conviction and sentence of the appellant were not a result of the weakness of the defence of the appellant. To the contrary, the evidence adduced by the prosecution including the testimony of the victim of the rape incident were credible.

In my view, the offence levelled against the appellant was proved beyond reasonable doubt in terms of section 3(2) (a) of the Evidence Act, (supra).

For the foregoing reasons, the appeal is devoid of merits and the same is dismissed in its entirely.

I order accordingly.

DATED at **DODOMA** this 25th day of April, 2024.

Right of appeal is explained.

I.D. MUSOKWA
JUDGE

Ruling delivered in the presence of the appellant and in the presence of Ms. Tlegray, learned state attorney for the respondent.

I.D. MUSOKWA
JUDGE