IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TABORA SUB-REGISTRY)
AT TABORA
DC CRIMINAL APPEAL NO. 78 OF 2023
(From the District Court of Uyui in Criminal Case No. 32 of 2022)

LUKAS S/O KINYANTWE ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 19/02/2024
Date of Judgment: 01/04/2024 & 08/04/2024

KADILU, J.

In the District Court of Uyui, the appellant herein was convicted of rape contrary to Sections 130 (1) (2) (e) and 131 (3) of the Penal Code [Cap. 16 R.E. 2019]. The prosecution alleged that at unknown dates and times between December 2021 and May 2022 at Izugawima Village within Uyui District in Tabora Region, the appellant had unlawful carnal knowledge of a 14-years girl whom I will refer to as 'the victim' or PW2 to preserve her identity. The facts leading to this case are that the appellant was married to the victim's mother so, he was the victim's stepfather. It appeared that within four years of marriage, the appellant and the victim's mother could not get a child.

The victim's mother advised the appellant to have sexual relations with the victim to get a child. The mother assured the appellant that they would all keep their lips sealed about it. Then, the appellant and the victim started to have sexual intercourse on different occasions to impregnate her and have

a child. The victim's mother directed the appellant and the victim to travel together to Kahama so they could cohabit there. From that time, the appellant started living with the victim and her mother as his wives until the victim got pregnant. Thereafter, a conflict emerged between the appellant and the victim's mother concerning cattle and goats. The misunderstanding led to the arrest of the appellant and charged with having raped the victim.

The record reveals further that on 01/06/2022 the victim was medically examined by PW3 and discovered to be pregnant (13 weeks pregnancy) but she later had a miscarriage. The appellant was arraigned to Uyui District Court where he pleaded not guilty, something that prompted the prosecution to call four (4) witnesses and tendered two (2) exhibits. After the trial, the appellant was convicted as charged and sentenced to serve thirty (30) years imprisonment. Aggrieved with both the conviction and sentence, he preferred the present appeal armed with the following grounds of appeal:

1. *That, the case for the prosecution was not proved against him beyond reasonable doubt as required by the law.*
2. *That, the learned trial Magistrate erred in law and fact for convicting the appellant while the ingredients of rape were not established.*
3. *That, the extrajudicial statement (exhibit P2) was not recorded in compliance with Chief Justice's Guideline.*
4. *That, the victim did not name the appellant at the earliest time after the incident.*

On the strength of the above grounds, the appellant implored the court to allow his appeal by quashing the conviction and setting aside the sentence

meted upon him. When the appeal was called on for hearing, the appellant appeared in person, without legal representation whereas the respondent was represented by Ms. Tunosye Luketa, the learned State Attorney. Being a layperson, the appellant had nothing substantial to submit in support of his grounds of the appeal. He just claimed that the prosecution witnesses testified that the victim was pregnant but they did not tender a PF3. I wish to state at the outset that perusal of the record shows the PF3 was tendered and admitted as exhibit P1.

On her part, the learned State Attorney submitted that the case was proved beyond reasonable doubt because the prosecution called four witnesses including the victim. She referred to the case of ***Loy Lesila@ Mbaapa v DPP***, Criminal Appeal No. 64 of 2022, High Court of Tanzania at Arusha to support her stance. Ms. Tunosye submitted in addition that all ingredients of rape were proved sufficiently because evidence showed that the appellant had carnal knowledge of a girl of 14 years where consent was irrelevant. To support her argument, Ms. Tunosye cited the case of ***Shani Chamwela Suleiman v R.,*** Criminal Appeal No. 481 of 2021, Court of Appeal of Tanzania at Dar es Salaam.

She contended that the age of the victim was well-established by the victim's mother. Concerning the 3rd ground of appeal, Ms. Tunosye argued that the appellant did not specify any violation of the CJ's Guide relating to the extrajudicial statement (exhibit P2). She, however, submitted that exhibit P2 complied fully with the Guideline and the appellant did not raise any

objection when exhibit P2 was tendered. Regarding the 4th ground of appeal, the learned State Attorney submitted that the victim failed to mention the appellant at the earliest time because the appellant threatened to kill her as shown in the trial court's proceedings. She thus urged the court to dismiss the appeal for being baseless.

I have gone through the grounds of appeal, the parties' submissions, and the records of the trial court. I find the point for determination is whether the appeal is meritorious or not. It is well settled that, the first appellate court is duty-bound to re-evaluate the evidence of the trial court and where possible, come out with its own findings. In answering the issue as to whether the case against the appellant was proved beyond reasonable doubt, I find it pertinent to start with the second ground of appeal in which the appellant complains that the ingredients of rape were not established.

The charge sheet reveals that the appellant was charged under Sections 130 (1) (2) (e) and 131 (3) of the Penal Code. Section 130 (1) (2) (e) provides:

> *"A male person commits the offence of rape if he has sexual intercourse with a girl ... 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."*

It is clear from the quoted provision that in proving the offence of rape, there should be sexual intercourse. Case law is to the effect that penetration however slight is sufficient to constitute sexual intercourse. Therefore, the

prosecution is required to prove two ingredients; that there was penetration, and where the victim was below 18 years in which case consent becomes irrelevant, the other requirement is to prove the age of the victim. In the instant matter, I have perused the record of the trial court and found that the appellant was said to have had sexual intercourse with the victim (PW2) on several occasions which ended in impregnating her. PW1 and PW2 elaborated in detail on how the appellant used to have sexual intercourse with PW2 from the year 2021 to 2022. PW3 was a Medical Doctor who conducted a urine test of PW2 and established that she was 13 weeks pregnant. He tendered a PF3 which was admitted as exhibit P1. In the circumstances, it is obvious that PW2 was penetrated although exhibit P1 could not go further to link the appellant with the victim's pregnancy.

Regarding the age of the victim (PW2), she told the court before testifying that she was 14 years old. It was also stated by her mother (PW1) that she was born in 2008 hence, in 2022 when the incident occurred, she was 14 years old. I am aware that the age of the victim in rape cases can be proved by a parent, relative, medical practitioner, or birth certificate, if available. However, PW1 and PW2's statements regarding the age of the victim were too general to be relied upon by the court as proof of the age. Given the fact that the appellant was charged with statutory rape, the age of the victim needed to be established cogently as a vital ingredient of the offence.

The victim's mother stated just generally that PW2 was born in 2008. She did not give a detailed account of the date, month, year, and place in

which the victim was born. Being a mother, PW1 was expected to know and explain these particulars without any hardship. Unexpectedly, she failed to provide reliable information by, for instance, producing a birth certificate, clinic card (if any), school registration, and any other acceptable document proving the victim's age. In the absence of strict proof of the victim's age, it was unsafe for the trial court to convict the appellant of statutory rape for which the victim's age was an important ingredient.

PW2, the victim narrated to the trial court how she was being raped by the appellant at different times and places without making noise or informing anybody about it on the ground that the appellant threatened to kill her. She went further telling the trial court about how she shared with her mother the plan to get married to the appellant. She expounded in her testimony that she traveled with the appellant from Tabora to Kahama where they lived as husband and wife in the appellant's grandmother's house. She confidently dared to do all these against the will of her mother and the mother did not report anywhere that her daughter was missing.

Yet, the victim claims that she did not disclose her tragedy to anybody for fear of being killed by the appellant. Though, when her mother quarreled with the appellant, the victim's fear went off and she decided to tell the mother that she was being raped by the appellant for a couple of months. Although the law is settled that in sexual offences the best evidence comes from the victim, it is not always the case that such evidence is taken as biblical or Quranic verses that are believed and acted upon unreservedly. It

was held in the case of ***Mohamed Said v R.,*** Criminal Appeal No. 145 of 2017 that:

> *"... it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general and Section 127 (7) of Cap. 6 in particular, and such compliance will lead to punishing the offenders only in deserving cases."*

Circumstances of this case needed to be considered particularly as the victim was said to be a child of 14 years but she behaved like an adult and there was nothing to show that she was attending school. Before convicting the accused of statutory rape, the trial court was expected to consider all these factors along with the appellant's defence that there was a dispute between him and the victim's mother regarding some cattle. Having stated so, I find the appellant's complaint that the ingredients of the charged offence were not proved has merit, and I allow it.

As to who impregnated the victim, her evidence and that of her mother linked the appellant with rape offence whereas a Medical Doctor (PW3) who examined PW2 was categorical that he only tested the victim's urine and found that she was pregnant. PW3 told the trial court that he did not know the person who impregnated the victim. He tendered exhibit P1 (PF3) which indicates nothing relating to rape, the offence which the appellant stood charged with. It does not also show that the appellant was the one who

impregnated the victim. He said although PW1 was pregnant, he (PW3) was not sure that the appellant was responsible for the pregnancy.

PW4 was the Justice of the Peace who told the trial court that the appellant was taken to her by a police officer, G.7846 D/C Matiku so that she could record the appellant's confession. Surprisingly, the record is silent if the appellant admitted the offence at the police station. Moreover, the appellant has complained on the 3rd ground of appeal that the alleged extrajudicial statement was recorded in contravention of the CJ's Guide. As expected, during the hearing of the appeal, the appellant failed to elaborate on the complained violation.

In ***Jackson Protaz v R.***, Criminal Appeal No. 385 of 2020, Court of Appeal of Tanzania at Bukoba, it was stated that when Justices of Peace are recording confessions of persons in the custody of the police, they should observe the CJ's Guide which provides the following steps:

> *"(i) The time and date of his arrest; (ii) The place he was arrested; (iii) The place he slept before the date he was brought to him. (iv) Whether any person by threat or promise or violence has persuaded him to give the statement (v) Whether he really wishes to make the statement on his own free will. (vi) That if he makes a statement, the same may be used as evidence against him."*

I have examined exhibit P2 carefully. It shows that after the Justice of the Peace had asked the appellant about the place where he was arrested, she did not inquire about where he was taken by the police and where he

had slept until he was brought before her. The record is clear that the appellant was arrested on 01/06/2022 and taken to the Justice of the Peace on 07/06/2022. I am conscious that the law does not set a time limit within which extrajudicial statements should be recorded, but they have to be recorded within a reasonable time.

In the case of ***Mashimba Dotto@lukubanija v R.***, Criminal Appeal No. 317 of 2013, the Court of Appeal distinguished cautioned statements from extrajudicial statements. It held that there is no statutory time limit set within which extrajudicial statements should be recorded. The Court added that extrajudicial statements can be taken at any time but within a reasonable time after the accused has expressed his willingness to make such a confession. As shown above, it took the appellant seven (7) days to be taken to the Justice of the Peace and there is no explanation for such delay. In that situation, it cannot be said that the extrajudicial statement was recorded within a reasonable time.

More so where we have Section 32 of the Criminal Procedure Act (CPA) which provides that a person under restraint of the police should be taken to court within 24 hours. In ***Martin Makungu v R.,*** Criminal Appeal No. 194 of 2004 it was held that:

> *"It does not need extraordinary thinking to know that the appellant must have been under very stressful condition. It was quite possible that during the stated period, the appellant could have been stressed so much that it cannot be safely said without utmost certainty that when he eventually gave his statement before the justice of the peace, he was a free agent."*

It follows that when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter, and non-compliance renders the statement not to have been taken voluntarily. *See* the case of ***Japhet Thadei Msigwa v R.***, Criminal Appeal No. 337 of 2008, Court of Appeal of Tanzania at Iringa. For the foregoing analysis, I find the appellant's concern that exhibit P2 was not recorded in compliance with the CJ's guide is meritorious. I allow the 3rd ground of appeal and proceed to expunge exhibit P2 from the record.

Having resolved the 3rd ground, that takes me to the 4th ground of appeal in which the appellant contends that the victim did not mention him at the earliest possible time. The learned State Attorney responded that the appellant threatened to kill the victim if she disclosed their affairs to anybody which was why she did not mention him early. I have already resolved this point partly when I was dealing with the 2nd ground of the appeal. In the case of ***Marwa Wangiti Mwita & Another v R.,*** [2002] TLR 39, it was held that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability. In the same way, delay or complete failure to do so should put a prudent court to inquiry.

In the case at hand, the victim of rape did not only mention the appellant at the later stage but also, she was inconsistent about when she started having sexual intercourse with the appellant. Whereas her mother (PW1), testified that PW2 started being raped by the appellant in April 2021, PW2 stated that the appellant started raping her in January 2022. PW2

informed the trial court that after the first sexual intercourse in January 2022, the appellant took her to Kahama where they continued having sex. On the same point, PW2's mother stated that it was in December 2021 when her daughter told her that she was being raped by the appellant. The mother added that PW2 went to Kahama with the appellant in April 2021 and returned to Tabora in May 2022.

The ability of the witness to name the offender at the earliest possible moment is reassuring though not a decisive factor that the witness is credible. As hinted, a credible witness is expected to name a suspect at the earliest possible opportunity. On the contrary, it took the victim in this case seven (7) months (from April to December 2021) to mention to her mother that she was raped regularly by the appellant. She stayed for all that long without letting anyone know of her ordeal. Additionally, in December 2021 the victim's mother knew that her daughter was undergoing rape but she did not seek medical examination until 01/06/2022 when the victim was found pregnant.

It is undisputed that the act of being raped is unacceptable, shameful, painful, and unforgettable but being of tender age as the victim was, it is incomprehensible how she managed to remain peaceful and shtum until when she was 13 weeks pregnant. It is thus inconceivable for the victim to have hidden the truth for such an unexplainable delay. I find the 4th ground of appeal meritorious too and I allow it. The State Attorney was of the firm view that the offence was proved beyond a reasonable doubt because the

testimony of PW2, the victim of the offence proved that she was raped and the rape was done by the appellant who also made her pregnant.

With due respect, the learned Counsel's assertion is not supported with evidence on record. There is nowhere that the prosecution proved that it was the appellant and nobody else who made PW2 pregnant. In the case of ***Peter Silvester v R.***, Criminal Appeal No. 131 of 2020, High Court of Tanzania at Mwanza, it was stated:

> *"What the prosecution was able to prove was that the victim was impregnated. It did not bring concrete evidence to prove that it was the accused, now the appellant, who caused such a pregnancy. That would have best been proved by scientific evidence, and in the circumstances of the case, the DNA test evidence was much more appropriate to ascertain the fatherhood of the baby, which evidence, in turn, would have proved a person liable for impregnating the victim."*

It is alleged in this case that the victim had a miscarriage. In my view, the miscarriage obstructed the possibility of ascertaining the person who impregnated the victim through scientific tests. Considering the evidence carefully, I find no evidence that proves that the appellant was the one who made PW2 pregnant in the exclusion of all other men around Izugawima Village. The prosecution ought to have gone further to prove scientifically that the appellant was the one who impregnated PW2. I thus, agree with the appellant that the prosecution case was tainted with numerous doubts which deserve to be resolved in his favour.

Consequently, I allow the appeal, quash the conviction, and set aside the sentence meted upon the appellant. I order his immediate release from prison custody unless lawfully held for some other cause.

Order accordingly.

KADILU, M.J.,
JUDGE
08/04/2024

Judgment delivered in Chamber on the 08th Day of April 2024 in the presence of the Appellant and Ms. Tunosye Luketa, State Attorney, for the Respondent.

KADILU, M. J.
JUDGE
08/04/2024