IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 95 OF 2023

(Originating from Criminal Case No. 19 of 2018 in the District Court of Makete at Makete)

LAURENT SANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of the Last Order: **08.04.2024**

Date of the Judgment: **03.05.2024**

A.E. Mwipopo, J.

The Makete District Court convicted Laurent Sanga, the appellant, for the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2002. It was alleged in the particulars of the offence that on the 12th day of June, 2018, at about 10:00 hours at Mlengu Village within Makete District in Njombe Region, the appellant unlawfully had carnal knowledge of the victim (the name of the victim is concealed), a girl aged four (4) years old. After conviction, the trial Court sentenced the appellant to serve life imprisonment and ordered the appellant to pay shillings 500,000/= to the victim as compensation.

The appellant was aggrieved with the decision of the trial District Court and filed the present appeal containing six grounds of appeal as follows hereunder:-

1. *That, the learned trial Magistrate erred in law and fact in convicting and sentenceing the appellant based on a weakness of the defence side without considering that the appellant was of unsound mind.*
2. *That, the learned trial Resident Magistrate erred in law and fact to convict and sentence the appellant without first ordering the appellant to be sent to the mental institution for a medical checkup in order to know if the appellant is of sound mind.*
3. *That, the trial Resident Magistrate erred in law and fact in convicting and sentenceing the appellant based on the prosecution's evidence, which was inconsistent and unfair since the appellant was mute throughout the trial.*
4. *That, the learned trial Magistrate erred in law and fact in convicting the appellant by presuming that the appellant was of sound mind without considering that the law binds the accused's mind to be conducted by the vested hospital for mental health examination.*
5. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant without considering that a weakness of the defence side is not a ticket to convict the appellant, while the law needs the prosecution side to prove the case without a doubt.*
6. *That, the prosecution failed to prove the case against the appellant beyond reasonable doubt.*

At the hearing, the appellant was present in person, whereas the respondent was represented by Mr. Barton Mayage, the State Attorney. The court invited the parties to make their submissions. The appellant, being a layperson, prayed for the court to consider all grounds of appeal as found in the petition of appeal and to allow the appeal.

In his reply, Mr. Burton Mayage opposed the appeal. He said the appellant, in the 1st to the 4th grounds of appeal, alleged that the trial court failed to consider that he was insane, whereby the trial Court proceeded to conduct a trial and convicted him for the rape offence. It was his submission that the law is settled and that the issue not raised at the hearing of the case by the trial court could not be raised during the appeal. The appellant never raised the issue of insanity during the trial. The proceedings are silent if the appellant raises the issue of insanity. Bringing the issue at this stage is an afterthought. Therefore, the 1st, 2nd, 3rd, and 4th grounds of appeal have no merits.

The counsel submitted jointly on the 5th and 6th grounds of appeal. He said the prosecution proved their case without doubt. The evidence in the record proved all elements of rape offence. The appellant was charged with statutory rape under sections 130(1), (2), and 131 (1) of the Penal Code, Cap. 16 R.E. 2002. The two elements to be proved in statutory rape are the

age of the victim to be below 18 years and the presence of penetration of man organ into the victim's vagina. The age of the victim could be proved by the evidence of parents, guardians, relatives, the victim, medical practitioner and documentary evidence, as was stated in the case of **Issaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (unreported), at page 8. In this case, the victim's age was proved by PW1, who is the victim's grandmother, as seen on page 9 of the proceedings. PW1 testified that the victim is three years old. This evidence of PW1 proved the age of the victim without doubt.

He said the testimony of PW1 and PW2 proved the penetration of the penis into the victim's vagina. PW1 testified that after she heard the victim crying, she went to where the cry was coming from, and she saw the victim naked crying. The appellant was naked near the victim. PW1 examined the victim and saw she had bruises in her vagina, and blood was coming from the vagina. The evidence is seen on pages 9 and 10 of the typed proceedings. When the appellant saw PW1, he ran away. The evidence of PW2 (doctor), who examined the victim, supports the evidence of PW1. PW2 testified he examined the victim and found the victim with bruises and blood from her vagina. PW2 was of the opinion that the victim penetrated her vagina by a blunt object. The evidence of PW1 and PW2 proved that

the appellant penetrated the victim. The act of PW1 to find the appellant naked with the victim, who was also naked and crying, proved that the appellant raped the victim. The incident occurred in the morning; hence the possibility of mistaken identity was eliminated. The appellant was residing in the same area with PW1. After the incident, PW1 informed her husband and the appellant was arrested. This evidence proved without doubt that it was the appellant who penetrated the victim.

The counsel believed that the victim's failure to testify during the trial did not affect the prosecution's case. The law is settled that the absence of victim's evidence in a rape offence does not bar the court from convicting the accused person where there is other sufficient evidence. In **Christopher Marwa Mturu vs. Republic**, Criminal Appeal No. 561 of 2019, Court of Appeal of Tanzania at Shinyanga (unreported), it was held on page 12 of the judgment that the law recognizes circumstances where charges may be proved without the victim of crimes testifying in court. In the presence case, the rape charge was proved against the appellant without the evidence of the victim, who was the child of 3 years.

He said that he is aware that the evidence of PW1 does not show the act of the appellant inserting his penis into the victim's vagina. For that reason, in case the court found that the rape offence was not proved, still

the court could convict the appellant for the minor and lessor offence of grave sexual abuse as provided under section 138 C (1) of the Penal Code, Cap. 16 R.E. 2022.

The appellant had nothing to say in his rejoinder apart from insisting that his appeal be allowed.

Having heard the parties' submissions and reading the available record, the court is called upon to determine whether the appeal has merits. I wish to start with the issue of the failure of the trial Court to order the appellant to be examined by the mental institution, as he was not sane during the trial. The issue of appellant's insanity covers the 1st, 2nd, 3rd, and 4th grounds of appeal. In his response, the counsel for the respondent said the record does not show at all the issue of insanity being raised during the trial; hence, it is a new issue that was never raised at the trial Court.

Insanity is the defence provided under section 219 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002. The section read as follows:-

> *"219.-(1) Where any act or omission is charged against any person as an offence and it is intended at the trial of that person to raise the defence of insanity, that defence shall be raised at the time when the person is called upon to plead."*

From the above-cited provision, any person charged with an offence intending to raise the defence of insanity shall raise the defence when the person is called upon to plead.

The trial Court may adjourn the proceedings at any stage of the trial and order the accused person to be detained in a mental hospital for medical examination where it appears to the court that such person may have been insane so as not to be responsible for his action at the time when the act was done or omission made. The position is provided under section 220 (1) of the Criminal Procedure Act, which reads as follows:-

> *"220.-(1) Where any act or omission is charged against any person as an offence, and it appears to the court during the trial of such person for that offence that such person may have been insane so as not to be responsible for his action at the time when the act was done or omission made, a court may, notwithstanding that no evidence has been adduced or given of such insanity, adjourn the proceedings and order the accused person to be detained in a mental hospital for medical examination"*

As a general rule provided under section 12 of the Penal Code, Cap. 16 R.E. 2002, every person is presumed to be of sound mind and to have been of sound mind at the time he committed the offence until the contrary is proved. Thus, the appellant must prove that he was not of sound mind when he committed the offence. Under section 13 of the Penal Code, a

person shall not be criminally responsible for an act or omission if, at the time of committing the offence, he was insane. In the case of **Majuto Samsoni vs. Republic**, Criminal Appeal No. 61 of 2002 Court of Appeal at Mwanza (unreported), it was held on pages 10-11 of the judgment that:-

> *"The legal position regarding insanity is also provided under section 12 of The Penal Code. That is, a person is presumed to be of sound mind and to have been of sound mind at any time, which comes into question until the contrary is proved. On the facts presented in this case, we are unable to find that the contrary has been proved. In regard to the insanity, it is settled that the burden of proving is on the accused on a balance of probabilities and not merely to raise a reasonable doubt as to the sanity of the accused. This principle was reiterated by the Court of Appeal for East Africa in* ***Nyinge s/o Suwatu v. Republic*** *(1765) EA 974 and* ***Mbelukie v. R*** *(1971) EA 479. This court also underscored this principle in* ***Agnes Liundi v. Republic*** **(1980) TLR 46**."

The Court of Appeal's decision in the above-cited case is interpreted that, on the issue of insanity, it is the accused person's burden to prove on the balance of probabilities that he was insane and not merely to raise a reasonable doubt about his sanity.

Upon perusal of the trial court proceedings, I'm satisfied the issue of insanity did not feature at all during the trial. The appellant was supposed to raise the issue of insanity when his plea was taken as per section 219 (1)

of the Criminal Procedure Act. When the charge was read to the appellant, he pleaded not guilty to the offence, and the defence of insanity was never raised. Further, there is no indication in the proceedings of the trial Court that the appellant was not sane during the trial or when he committed the offence so as not to be responsible for the offence. Thus, the trial Court had no reason to order the appellant to be sent to Mental Hospital for mental examination. The 1st, 2nd, 3rd, and 4th grounds of appeal are without merits.

Turning to the 5th and 6th grounds of appeal about the failure of the prosecution to prove the offence, the charge shows the appellant was charged with statutory rape under sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002. In proving the offence, the prosecution must prove the victim's age to be below 18 years, the presence of penetration of the penis into the victim's vagina, and it was the appellant who penetrated the victim. The victim's age was proved by the evidence of PW1 and PF3 (exhibit P1). PW1, who is the grandmother and guardian of the victim, testified that the victim was aged three years. Exhibit P1 shows the victim is four years old. The evidence of PW1 and exhibit P1 proved that the victim was below 18 years old.

The second element of statutory rape is the presence of penetration. Penetration may be proved by the victim, eyewitnesses or other

circumstantial evidence. In a sexual offence, the best evidence comes from the victim, as was held in the case of **Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2018, Court of Appeal of Tanzania at Iringa, (unreported). The penetration in sexual crimes must be proved by the prosecution beyond a reasonable doubt, as stated in the case of **Kayoka Charles vs. Republic,** Criminal Appeal No. 325 of 2007, Court of Appeal of Tanzania at Tabora (Unreported). In the present case, the victim did not testify due to tender age, as shown on page 9 of the typed proceedings. It is the evidence of PW1 which suggests that the appellant penetrated the victim. However, as the state attorney observed it, the evidence of PW1 does not show at all the act of the appellant penetrating his the penis into the victim's vagina. PW1 said that she heard the victim cry, and when she went to where the cry was coming from, she found the appellant naked near the victim, who was also naked. She inspected the victim and saw bruises in her vagina, and blood was coming from her vagina.

The evidence of PW1 that she found both the appellant and victim naked and the victim bleeding from her vagina raises strong suspicion that the appellant has penetrated his penis into the victim's vagina. However, there is no evidence to prove the penetration of the appellant male organ into the victim's vagina. The evidence of PW2 and exhibit P1 prove the

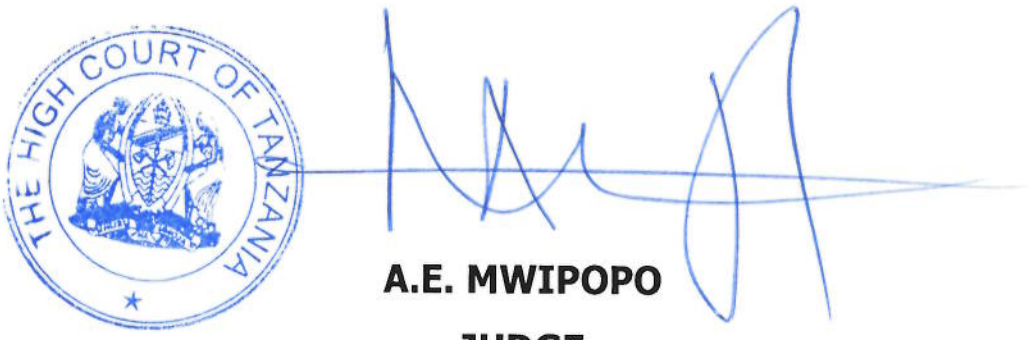
presence of bruises and blood coming from the victim's vagina, which is proof of penetration of a blunt object into the victim's vagina. But, still, there is no evidence proving that it was a penis which penetrated the victim's vagina. In exhibit P1, it was recorded that there is proof of attempted rape, suggesting that the victim was not raped.

Despite finding that there is no evidence proving penetration of penis into the victim's vagina, which is a key ingredient of a rape offence, I agree with the counsel for the respondent that the evidence proved the offence of grave sexual abuse contrary to section 138 C (1) (a) of the Penal Code, Cap, 16 R.E. 2002, which is cognate and minor to the offence of rape. The evidence of PW1, PW2, and exhibit P1 proved the appellant, for sexual gratification, used part of his body or any instrument on any orifice or part of the body of the victim which is vagina. The victim was penetrated, but it was not known by what kind of blunt object. The evidence is sufficient to prove the offence of grave sexual abuse.

Consequently, I quash the conviction for rape offence and set aside the life imprisonment to the appellant imposed by the trial Court. I convict the appellant for the minor and lessor offence of grave sexual abuse contrary to section 138 C (1) (a) and (2) (b) of the Penal Code, Cap, 16 R.E. 2002. As the victim was below the age of 18 years, I sentence the appellant,

namely Laurent Sanga, to serve 20 years imprisonment from the date of conviction by the trial Court (31st day of December, 2018). The order for the appellant to pay compensation of shillings 500,000/= to the victim imposed by the trial Court is upheld. It is so ordered accordingly.

Dated at Iringa, this is the 03rd day of May, 2024.



A.E. MWIPOPO

JUDGE