IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 146 OF 2018

(Appeal from the decision of the Resident Magistrate Court of Mbeya at Mbeya, Hon. Mlingi, V. J. RM in Criminal Case No. 223 of 2017)

RAPHAEL S/O IDEJE @ MWANAHADA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date: 06/05/2019
Judgement date: 28/05/2019

MONGELLA, J.

Raphael son of Ideje @ Mwanahada, the appellant herein, was charged and convicted of the offence of rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code, Cap 16, R. E. 2002. The facts of this case are as follows:

On 28th September 2017 at Ntangano Village in the District and Region of Mbeya, the Appellant had carnal knowledge of one Martha daughter of Waziri, a girl aged twelve years. The accused pleaded not guilty to the charge and the prosecution had to bring seven witnesses to prove the case. PW1 who was the victim told the trial court that on that fateful date when she was coming from school, the Appellant whom she met on the way grabbed her and raped her. The Appellant threatened to stab her with a knife if she told anyone about the incident. She thus decided to keep quiet until 7th October 2017 when her sister saw her not walking properly and inquired from her as to what happened. That is when she told her sister about being raped by the Appellant. Then they reported the incident to their elders who went and report to the matter to the Village Chairman. The Appellant was arrested thereafter and taken to Inyala Police post. PW1 was also taken to Inyala Health Centre for medical examination. In the end the trial court found the Appellant guilty of the offence and convicted and sentenced him to thirty years imprisonment. Aggrieved by this decision, he has appealed to this Court.

In hearing the appeal, the Appellant represented himself while the respondent was represented by Ms. Xaveria Makombe, learned State

Attorney. In his petition of appeal, the Appellant raised nine grounds for consideration by this Court. The grounds are as follows:

1. *That the trial court erred in law and fact in convicting the Appellant relying on the evidence of PW1 who was thirteen years old without conducting voire dire.*
2. *That the trial court erred in law and fact in convicting the Appellant believing on the testimony of PW1 that she was thirteen years old without proof of birth certificate or testimony from her teachers.*
3. *That the trial magistrate erred in law and fact in convicting the Appellant relying on the testimony of PW4, the Village Chairman and PW5, the Hamlet Secretary at Igalama Hamlet.*
4. *That the trial magistrate erred in law and fact in convicting the Appellant relying on the testimony of PW1 who reported the incident after ten days from the date the incident was alleged to have occurred.*
5. *That the trial magistrate erred in law and fact in convicting the Appellant relying on the PF3 tendered by PW7 which did not prove the offence of rape.*

6. *That the trial magistrate erred in law and fact in convicting the Appellant relying on the evidence of PW7, AMO and Exhibit P1, PF3 while PW7 was not the one who examined PW1.*
7. *That the trial magistrate erred in law and fact in convicting the Appellant relying on the evidence of PW1 while there was no any other person who saw the offence being committed.*
8. *That the trial magistrate did not consider the defence evidence*
9. *That the trail magistrate erred in law and fact in convicting and sentencing the Appellant on the offence of rape while the prosecution failed to prove the offence beyond reasonable doubt.*

During the hearing, the Appellant did not give any submissions but prayed for the Court to adopt his grounds of appeal as part of his submissions.

On the first ground the Appellant argued that PW1 was alleged to be thirteen years at the time the hearing took place but her evidence was recorded without first conducting *voire dire* test. Responding to this argument, Ms. Makombe argued that the ground has no merits because the cited section 127 of the Evidence Act was amended in 2016 by section 26 of the Miscellaneous Amendment Act No. 2/2016. That section

26 specifically repealed section 127(2) of the Evidence Act and inserted another provision which allows a child of tender age to give evidence without taking oath, but should only promise that she will tell the truth and not lies. She further argued that the requirement of this new provision was fulfilled by the trial court where at page 9 of the typed proceedings of the court, PW1 promised to tell the truth.

I in fact agree with the submission of Ms. Makombe on this ground. The requirement for conducting *voire dire* has been repealed by section 26 of the Miscellaneous Amendment Act of 2016. Specifically, the amended provision reads:

> *"26. Section 127 of the Principle Act is amended by*
>
> *(a) Deleting sub sections (2) and (3) and substituting for them the following:*
>
> *(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

The provision thus requires the child of tender age to promise to tell the truth and not to tell lies to the court. However, the promise given by that child must be recorded in the proceedings. In the case at hand, at page 9 of the typed proceedings, the trial court categorically recorded what

PW1 stated. It recorded that "*I promise to tell this court only the truth.*" The requirement of the law was thus complied with. I find no merit in this ground and therefore dismiss it.

On ground two, the Appellant argued that the court recorded that PW1's age is thirteen years without having it proved through birth certificate or without getting her school teachers to testify as to her age. Responding to this ground, Ms. Makombe submitted that the age of PW1 was proved by PW1 herself whereby she stated to be thirteen years old, that she was born on 11th January 2005 and that she was a form one student at Mtozo Secondary School. She further argued that the Appellant had a chance to cross examine PW1 regarding the birth certificate but he did not. He never asked PW1 anything about the birth certificate, her age or her being a student. By not cross examining on these issues it means that the Appellant agreed with the evidence issued by PW1and bringing it at this stage becomes an afterthought. She cited the case of ***Paul Anthony v. The Republic, criminal appeal no. 189 of 2014*** (unreported) whereby the CAT at page 6 stated that failure to cross examine a witness on a certain matter shows that the accused has agreed to the evidence adduced.

Ms. Makombe also cited the case of ***Tumaini Mtayomba v. The Republic, criminal appeal no. 217 of 2012*** whereby the age of the victim was not disputed and the CAT at page 12 ruled that it was condoned. She further argued that the circumstances in this case resemble the one in the case at hand whereby the victim stated her age, but the same was not disputed by the Appellant. She cited as well section 114(2) of the Law of the Child Act, no. 21 of 2009, which provides that where the age cannot be established, then the age stated by the victim, his parents, guardian or social welfare officer shall be taken to be the correct age. Thus since the victim stated that she was thirteen years that should be taken to be the correct age in terms of section 114(2) of the Law of the Child Act even though no birth certificate was tendered.

In my view, I agree with Ms. Makombe that the proof of age of the victim of statutory rape can come from the victim herself or her parents. (See: ***Ally Rashidi v. The Republic***, Criminal Appeal no. 540 of 2016, at page 8. See also ***Charles Makapi v. Republic***, Criminal Appeal no. 85 of 2012(unreported). At page 9 of the typed proceedings PW1 clearly stated her age to be thirteen years old and clearly stated her date of birth to be 11/01/2005 which further proved her age to be thirteen years at the time

the trial was being conducted. The Appellant never disputed this and at the same time there was no any other contradicting testimony regarding the age of the victim. If there happened to be a query regarding the age or any contradicting testimony thereof then further proof of the age would have been necessary. Under such circumstances I find this ground of appeal devoid of merits and dismiss it.

On ground three the Appellant argued that the trial magistrate erred in believing the evidence of PW4 and PW5 who were the Village Chairman and Hamlet Secretary of Igalama Hamlet who testified that the Appellant had admitted to committing the offence before them while no document to that effect was tendered in court. Responding to this ground Ms. Makombe submitted that the trial court was correct in relying on this piece of evidence. That both PW4 and PW5 testified to have heard the Appellant confess and pray for forgiveness before the Village Authority and the victim's parents. She further argued that this piece of evidence is admissible under section 62(1b) of the Evidence Act, Cap 16, R.E. 2002 which is oral evidence directly from the person who heard. I have gone through the records of the trial court and found that PW4 and PW5 did not record an extra judicial statement from the Appellant. Therefore there was

no necessity of producing any document to that effect. PW4 and PW5 testified like other witnesses who heard what the Appellant said in front of the village authority members and the victim's parents. This ground is dismissed as well.

On ground four the Appellant argued that PW1 was not a credible witness. That the incident was alleged to have occurred on 28th September 2017 but was reported on 7th October 2017, that is, after expiry of ten days. That if PW1 was really raped she could have immediately informed people at the milling machine who could have helped her to arrest the Appellant. Responding to this argument, Ms. Makombe submitted that the Appellant threated to stab PW1 if she told anyone about the incident and that is the reason she kept quiet until when she was discovered by her sister after seeing her walking improperly. That PW1 was a credible witness because she maintained her story throughout that it was the Appellant who raped her. That even the trial magistrate considered the delay but in the end believed the testimony of PW1. I agree with Ms. Makombe that there was a reason for the delay to get a medical examination on time. Taking into consideration the age of PW1, it was easy to be intimidated by the Appellant's threats. The fact that PW1

never contradicted herself when she got the courage to speak the truth makes her a credible witness.

On ground five, combined with ground number nine, the Appellant argued that the trial magistrate erred in relying on exhibit P1, the PF3 tendered by PW7, an Assistant Medical Officer without taking into consideration that the said PF3 indicated that there were found no bruises or sperm into PW1's vagina, hence failure in proving the major ingredient of the offence of rape. Ms. Makombe responded to this argument by citing the case of ***Edward Nzabuga v. Republic, Criminal Appeal no. 136 of 2008*** in which the CAT stated that in rape cases the important thing to prove is penetration. She also cited section 130(4) of the Penal Code, Cap 16, which also provides that what is to be proved in rape cases, is penetration however slight. She argued that penetration was proved by the victim as seen at page 10 of the typed proceedings of the trial court, whereby PW1, the victim, explained to be raped by the Appellant.

She further argued that the act of not being found with sperm or bruises in her vagina does not negate the fact that she was raped. Also PW7, as seen at page 29 of the typed proceedings, explained clearly why sperm

and bruises were not found in PW1's vagina. PW1 explained it was so because the victim reported after the elapse of several days from the event. She recited the case of ***Edward Nzabuga*** (Supra) whereby she argued that the circumstances were the same to the effect that the victim was examined after elapse of some days. That the CAT took note of that and ruled that it was obvious that sperm could not be found as two days had elapsed before the victim could be examined by the medical doctor.

Still relying on the case of ***Edward Nzabuga*** (supra), Ms. Makombe submitted that the PF3 and the evidence of the medical doctor are expert opinion and the court is not bound by it. That if there is another evidence to prove the offence and where the court can reach its decision without support from expert opinion, then such opinion becomes unnecessary. She concluded on this ground by arguing that even with the exception of the evidence of PW7, the evidence on record is overwhelming to uphold the conviction against the Appellant.

I agree with the position presented by Ms. Makombe on this ground. The law is very clear that in rape cases, penetration is the element to be

proved, however slight it may be. The CAT has also set the position in a number of cases that in proving rape cases, the true evidence of the occurrence of rape comes from the victim. (See: ***Selemani Makumba v. Republic***, (2006) TLR 386; ***Alfeo Valentino v. Republic***, Criminal Appeal, No. 92 of 2006 (unreported) and ***Shimirimana Isaya and Another v. Republic***, Criminal Appeal, No. 459 of 2002 (unreported)). Therefore in the case at hand, PW1 clearly mentioned the appellant as the one who raped her and maintained that throughout. The fact that she was medically examined after seven days explains why there was no sperm or bruises in her vagina. PW1 also explained, as seen at page 10 and 11 of the trial court typed proceedings, the reasons as to why she did not report the incident immediately. She specifically stated to have been threatened to be stabbed by the Appellant in the event she told anyone about the incident. Taking into account her age at the time the incident occurred, I am convinced that she might have really been frightened by the Appellant's threat and decided to keep quiet. Therefore this ground stands dismissed as well.

On ground number six, the Appellant argued that PW7, the medical doctor who testified and tendered the PF3 was not the one who

examined PW1, the victim. That PW7 himself told the trial court that PW1 was examined by his colleague one Beatrice Mrenga who was not summoned in court and with no explanation from prosecution as to why they failed to bring her to court to prove the said exhibit. Responding to this argument, Ms. Makombe argued that the ground has no merits because it was clearly explained by PW7, as seen at page 29 of the typed proceedings that the doctor who examined PW1 was no longer working at Inyala Health Centre and her whereabouts are unknown and that is why PW7 was called to testify on her behalf. She further argued that since PW7 was also a medical doctor, he was in good position to explain about the exhibit. And that the act of calling another doctor to testify has not prejudiced the right of the Appellant as he got the chance to cross examine PW7 who answered all his questions.

In my view, the Appellant needed to cross examine the doctor who examined the victim in terms of section 240(3) of the Criminal Procedure Act, Cap 20, R.R. 2002 (CPA) and that is why the court had to order for the doctor to be called. Section 234(3) specifically provides:

> *"When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make or make available for cross-examination the person who*

made the report, and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."

Unlike section 291(4) which provides for exception in proceedings taking place in the High Court whereas it empowers the Court to dispense with such requirement where it is satisfied that the person who made the report is dead or his attendance cannot be procured without undue delay or expense; section 240(3) as quoted above does not give such exception. However, an inference can be drawn from section 291(4) of the CPA in arriving at the spirit of the law in enhancing fairness to both the accused and the victim. The Appellant's aim of requiring a medical doctor for cross examination was for him to question the doctor on the contents of the PF3. PW7 explained the contents of the PF3 and the Appellant got the chance to cross examine him on the same, as seen on proceedings taken on 22nd May 2018 in the handwritten proceedings. There was a good reason for not having the examining doctor for cross examination. She could be procured because her whereabouts were unknown. PW7 being a doctor in the same health centre was able to give explanation on the contents of the PF3. I therefore agree with Ms. Makombe's submission on

this ground that no injustice was occasioned on the Appellant as he got the chance to cross examine an expert on the contents of the PF3.

On ground number seven (argued together with ground number nine), the appellant argued that the trial magistrate grossly erred in relying on the evidence given by PW1 while there was no other person who witnessed the event thus the offence not proven beyond reasonable doubt. Responding to this argument, Ms. Makombe was of the view that the offence was proved beyond reasonable doubt. That, the evidence of PW1, which was corroborated by PW2, PW3, PW4 and PW5 was enough to prove the case beyond reasonable doubt. She cited the case of ***Selemani Makumba*** (supra) and argued that the relevant evidence in rape cases comes from the victim. She also cited section 127(6) of the Evidence Act, which provides that in rape cases, where the sole evidence is that of the victim who is a child, the court after being satisfied can take the evidence of that child after assessing it, even if there is no corroborating evidence. The trial court thus considered the evidence of PW1and saw it was credible and went ahead to convict the Appellant.

In my view, the trial court is better placed in assessing the evidence adduced by witnesses. It is better placed in studying the demeanor of the witnesses than an Appellate court which deals only with records before it. An Appellate court can only interfere with the evidence recorded in the trial court where it appears there was a material irregularity in recording such evidence. The trial court assessed the evidence of PW1 and other witnesses and saw it was credible enough to be relied upon and to prove the case beyond reasonable doubt. I have gone through the trial court proceedings and I have not seen any irregularity to warrant interference in the trial court findings on the evidence adduced by PW1 and other witnesses in this case at this appellate level.

On ground number eight the Appellant argued that the trial magistrate did not consider the evidence from the defence side. Ms. Makombe opposed this ground and referred the Court to page 6 to 8 of the trial court judgment. She submitted that in those pages the trial magistrate considered the defence evidence and ruled that no doubts were raised by the defence and that is why he went ahead to convict the Appellant. I will not waste much on this argument because it is vivid from page 6 to 8 of the trial court judgement as referred by Ms. Makombe that the trial

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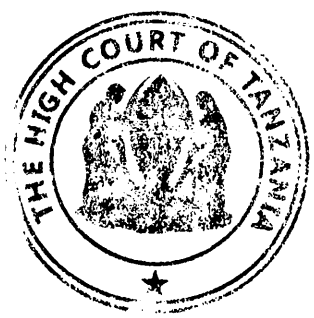
magistrate analysed and considered the defence evidence. He even gave reasons as to why he did not believe in the defence put up by the Appellant. I find this ground devoid of merits and dismiss it accordingly.

Having observed as above, I find no merit in this appeal and thus dismiss it in its entirety. I uphold the conviction and sentence of the trial court.

Appeal dismissed.

L. M. MONGELLA
JUDGE
28/05/2019

Dated at Mbeya this 28th day of May 2019



L. M. MONGELLA
JUDGE
28/05/2019

Court: Judgment delivered at Mbeya in Chambers on this 28th day of May 2019 in the presence of the Appellant appearing in person and Ms. Hannarose Kasambala, learned State Attorney for the Respondent.

L. M. MONGELLA
JUDGE
28/05/2019