IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO 91 OF 2021

(Arising from Criminal Case No. 05 of 2021, the District Court of Kwimba at Ngudu)

MICHAEL S/O BONIPHAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 03.08.2021
Date of Judgement: 17.08.2021

M. MNYUKWA, J.

The appellant was charged with the offence of rape contrary to sections 130(2)(e) and section 131(1) of the Penal Code, [Cap. 16 R. E. 2019) in the District Court of Kwimba at Ngudu. The prosecution side alleged that on 21st day of January, 2021 at about 5.00 hours at Shigumulo Village within Kwimba District in Mwanza Region, the appellant had carnal knowledge with a girl aged nine (9) years without her consent. The appellant pleaded not guilty to the charge. Hence, the prosecution

side brought four witnesses to prove its case. The said witnesses tendered two exhibits. On the other hand, the appellant fended himself without any exhibit.

After a full trial the appellant was found guilty as charged and sentenced to thirty years imprisonment. Being aggrieved, the appellant lodged this appeal with four grounds of appeal as follows:

1. *That the learned trial Magistrate erred in law by convicting and sentencing an appellant while the case against him was not proved by the prosecution side at the required standard of proof in criminal cases (i.e., beyond reasonable doubts)*
2. *That the learned trial Magistrate extremely erred both in law and in fact by convicting and sentencing the appellant by relying on the victim's evidence in absence of any strong corroborating evidence from eye witness (direct evidence)*
3. *That the prosecution side fail to submit the hospital discharge certificate to prove whether PW2 was admitted with her young child at dispensary for four (4) days where this period is when the victim was raped*
4. *That the offence of statutory rape has no legs to stand against the appellant. Also, in the interest of justice the whole judgement*

of the trial court deserves to suffer one fate of being reversed/overturned by the first Appellate Court.

During the hearing, the appellant Mr. Michael s/o Boniphace, appeared in person, unrepresented while Ms. Sabina Chaghaghwe, learned State Attorney appeared for the Republic, the respondent.

The appellant was the first to kick the ball rolling. He first prayed this court to adopt his grounds of appeal filed in this Court on 15th July, 2021.

Submitting on both grounds of appeal, the appellant prayed this court to set him free because it was not true that he had committed an offence of rape. He averred that, there was a family misunderstanding between him and his wife as a result his wife made a false accusation against him and ultimately he got charged and convicted with the offence of rape.

He went on to submit that the allegation that his wife was admitted at the hospital when the victim was raped is not true. Therefore, he prayed this honorable court to set him free because the prosecution side failed to prove its case beyond reasonable doubt.

Responding on the first ground of appeal, Ms. Sabina submitted that, the Republic supports the conviction and the sentence passed by the trial court. She averred that, the prosecution side proved the offence charged beyond reasonable doubt based on the evidence tendered before the court by PWI, PW2, PW3 and PW4.

She went on to state that, the evidence of PW1 explains how the offence of rape was committed. Her evidence was very heavier and proved the offence as it is seen in the trial's court proceedings. She referred this court to the decision of the Court of Appeal in the case of **Selemani Makumba vs R, [**2006] TLR 379 where the Court of Appeal of Tanzania stated that the best evidence in offence of rape comes from the victim of rape.

She further submitted that, when PW1 tendered her evidence in the trial court, the appellant did not cross examine her. Again, she referred this court to the case of **Nyerere Nyague vs R, Criminal Appeal No 67 of 2010** (unreported) in which the Court of Appeal of Tanzania stated that failure of the other party to cross examine indicates that the other party accepted the evidence tendered before the court. She insisted that, the appellant cannot claim that a victim is a liar because when he was

given a right to cross examine her, he did not do so. Therefore, his appeal is an afterthought.

As to the second ground of appeal, Ms. Sabina submitted that she reiterated what she has submitted in the first ground of appeal. She added that in the offence of rape, the best evidence comes from the victim of rape and it is very rare to have an eye witness in rape cases because the offences are committed in private. She insisted that, since the evidence of PW1 was corroborated with the evidence of PW2, PW3, and PW4, it was sufficient enough to convict the appellant. She stated that page 19 of the trial court proceedings shows that the evidence of PW1 was corroborated with the evidence of PW4.

In the third ground of appeal, Ms. Sabina submitted that what is important in the offence of rape is the proof that the appellant raped the victim. Therefore, it was not an issue for the PW2 to submit the medical report showing that she was admitted at the hospital with her young child when the incidence of rape happened.

As to the fourth ground of appeal, Ms. Sabina submitted that, as it is reflected on page 6 of the trial's court proceedings, the victim was 9 years of age, this was supported by the evidence of PW2 as shown at page 10 of the proceedings. Also, when looking at page 11 of the

proceedings, the birth certificate of the victim was tendered to prove her age and the appellant did not object. She concluded by stating that the evidence of PW1 and PW2 proved the offence of statutory rape beyond reasonable doubt.

In rejoinder, the appellant reiterated what he had submitted in chief and insisted this court to set him free.

In the light of what has been submitted by both parties, and having carefully gone through the available record, I noted that the appellant's grounds of appeal centered on one issue as to whether the prosecution side proved the case beyond reasonable doubt. For the purpose of the convenience, I wish to start by disposing altogether the first and the fourth grounds of appeal which is all about the proof of the statutory rape. Later on, I will dispose of the two remaining grounds.

It is a settled principle of law that every witness is entitled to credence and must be believed. This principle of law has been stated in the case of **Goodluck Kyando v Republic,** Criminal Appeal No 118 of 2003 as cited in the case of **Patrick s/o Sanga v Republic,** Criminal Appeal No 13 of 2008, CAT at Iringa in which the Court of Appeal of Tanzania stated 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."

Again, it is a settled principle of law that the best evidence in rape cases come from the victim of rape as it was rightly submitted by the learned state attorney who referred the case of **Selemani Makumba** (supra).

Furthermore, it is a trite law that in a statutory rape, age is an important ingredient of the offence which must be proved. This has been observed in the case of **Robert Andondile Komba vs DPP**, Criminal Appeal No 465 of 2017, CAT AT Mbeya.

Thus, for the offence of statutory rape to stand under section 130(1) and (2)(e) of the Penal Code, [Cap. 16 R. E. 2019], the prosecution side must prove two ingredients, that is, there was penetration and the age of the victim was below eighteen years.

The age of the victim of rape can be proved by either the victim, a parent, a close relative, a close friend, a teacher of school where the victim was schooling or any person who knows well the victim. This has been observed in the case of **Rutoyo Richard v Republic,** Criminal Appeal No 114 of 2017, CAT at Mwanza.

Moreover, in the celebrated decision of the Court of Appeal, in the case of **Haruna Mtasiwa v Republic,** Criminal Appeal No 206 of 2018, CAT at Arusha, it was held that, the age of the victim can be proved by the birth certificate and in its absence, when the mother has testified on the age of the victim, a birth certificate is not required to prove the age of the victim.

The above cited case laws will guide me to dispose of the first and fourth grounds of appeal as to whether the offence of statutory rape was proved beyond the reasonable doubt.

In our case at hand, the appellant was convicted with the offence of rape contrary to sections 130(2)(e) and 131(1) of the Penal Code, [Cap. 16 R. E. 2019]. The appellant alleged that the prosecution side failed to prove the offence of rape to the required standard.

It is a settled principle of law that in criminal cases, the standard of proof is beyond reasonable doubt. See the case of **Said Hemed v Republic** [1987] TLR 117.

Thus, it is the duty of the prosecution side to prove the offence in which the accused was charged and convicted with at the required standard of proof in the criminal cases. That is to say in the first and fourth grounds of appeal the prosecution was required to prove whether

there was penetration of the male organ into a female vagina and whether the age of the victim was below eighteen years old.

Starting with the issue of penetration as one among the ingredient to prove the offence of rape, the evidence of PWI as reflected at page 6 of the typed trial court proceedings explains how the offence of rape was committed. The evidence reveals that the appellant was not a stranger to the victim as she identified him as a person who is well familiar with. The evidence revealsr that the appellant and the victim knew each other as they were stayed together as family members. In her testimony before the trial court PWI averred that she knows the appellant as his step farther and on the day of the incidence around 5.00 hours when she was asleep, the appellant came and undressed her clothes which were the skirt, the blouse and the underwear and thereafter inserted his penis into her vagina and threatened her not to tell anyone or to cry.

As it was rightly submitted by the learned state attorney, the evidence of the victim shows how the appellant committed the offence of rape. As it was stated in the case of **Selemani Makumba** (supra) the best evidence in the offence of rape comes from the victim of rape. Also, based on the fact that every witness is entitled to credence and must be believed as it was stated in the case of **Goodluck Kyando** (supra), there

is no any hesitation in the circumstances of this case to disbelieve the evidence of PWI. There is no any suspicious which shows that the victim is a liar. This Court believes the evidence of PW1 as a credible witness since even the appellant did not discredit her testimony in the trial court. This can be reflected on page 6 of the trial court proceedings when her evidence was not cross examined by the appellant. It is my view that, failure by the appellant to cross examine the victim may draw an inference to any reasonable man that he did not rebut the testimony of the victim. As it was rightly submitted by the State Attorney that in the celebrated case of **Nyerere Nyague vs Republic**, (supra) the Court of Appeal of Tanzania stated that failure of the other party to cross examine indicates that he accepted the evidence adduced by the other party. The same position was also taken in the case of **Martin Misara v Republic,** Criminal Appeal No 128 of 2016 CAT at Mbeya, among others the court pointed out that

> *"It is the law in this jurisdiction founded upon prudence that failure to cross examine on a vital point, ordinarily, implies the acceptance of the truth of the witness evidence, and any alarm to the contrary is taken as an afterthought if raised thereafter."*

Guided by the above case law, it is clear that the appellant accepted what has been stated by the victim in the trial court as he failed to cross examine her. Therefore, the first and fourth grounds of appeal is an afterthought. Again, the evidence of PW1 was corroborated by the evidence of her mother, PW2 as shown on page 10 of the trial court proceedings that she used to know the victim and that she noticed some changes to her and when examined her, she noticed some bruises in her vagina and that the victim named the appellant being the one who raped her. Likewise, the evidence of PW4, the clinical officer revealed that the victim had experience of having the sexual intercourse as shown in exhibit P2 which was tendered without objection from the appellant.

Therefore, it is my considered view that the evidence of the victim which was not disputed by the appellant even if is not corroborated with other evidence is watertight to prove the offence of rape. Her evidence also become more credible when corroborated with the evidence of PW2 and PW4 who narrated that the victim had sexual intercourse.

Coming to the issue of age as one of the ingredients in the statutory rape. In our case at hand the age of the victim as shown in the particulars of the offence shows that the victim was a girl of 9 years old. Guided by the decisions of the Court of Appeal in the cases of **Rutoyo Richard** and

Haruna Mtasiwa (supra) regarding the issue of proof of the age of the victim, it is clear that in our case at hand the age of the victim was proved by the victim herself as shown on page 6 of the proceedings when she stated that she was 9 years old, but also her age was proved by her mother as shown on page 10 of the trial court proceedings when she stated that the victim is her daughter and she was nine years old. To back up her testimony, PW2 tendered birth certificate which was not objected by the appellant and admitted by the court as Exhibit P1.

Upon carefully scrutinize Exhibit P1 which is the birth certificate of the victim, I find the date of birth of the victim is recorded as 04 December, 2014. This means that, according to the birth certificate, the victim is now six (6) years and eight (8) months. Given the above contradiction on the age of the victim between the testimony of PW1, PW2 on one hand and Exhibit P1 on the other hand, I am convinced to rule out that the victim is 9 years old by considering the fact that she was a student of standard two at Shigumulo primary school at the time of commission of the offence as stated by PW2 in her testimony which is reflected at page 10 of the trial court proceedings and that testimony on the age of the victim was not cross examined by the appellant. That is to say, in our case at hand in the absence of the birth certificate, the age of

the victim was proved by the testimony of the victim, and her mother which is reliable and credible. With those findings, I am satisfied that the prosecution proved the age of the victim as below eighteen years.

Based on the above discussion, I have no hesitation to rule out that the prosecution proved the offence of statutory rape to the required standard that is beyond reasonable doubts. I therefore, dismiss the first and fourth ground of appeal.

On the second ground of appeal that the offence of rape was not proved since there is no any strong corroborative evidence from an eye witness, as it was rightly submitted by the learned State Attorney, it is very rare according to the nature of the offence to have eye witnesses in rape cases. As I stated earlier, in such offences, the best evidence comes from the victim of rape. If the evidence of the victim is credible it is enough to convict the appellant.

In our case at hand, PW1 is a credible witness who is very familiar with the appellant. Therefore, I find the second ground of appeal is baseless and I equally dismiss it.

On the third ground of appeal, the appellant submitted that the prosecution witness (PW2) failed to submit the hospital discharge certificate to prove that she was admitted with her young child when the

incidence of rape happened. In this ground, I don't see if it was necessary for the PW2 to prove her absence by tendering the discharge form to show that she was at hospital when the incidence of rape happened. The case which faces the appellant is the commission the offence of rape, therefore what PW2 testified before the court is the proof that the victim was raped after examining her as she noticed some changes to the victim. Thus, it is my considered view that the discharge form even if was not tendered in the trial court, does not disprove the offence of rape against the appellant whose conviction and sentence is mainly based on the evidence of the victim corroborated with the evidence of PW2 and PW4. I am therefore, dismissing the second ground of appeal as well.

On the issue of sentence, even though it was not raised by either of the party, but the record shows that, the trial court sentenced the appellant to 30 years' imprisonment despite section 131(3) of the Penal Code (Cap 16 R.E 2019) provides that if a person commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment. Since I have decided to consider the testimony of PW1 and PW2 to determine the age of the victim, and because it is clear that their testimonies shows that the victim is below the age of ten years,

I hereby revise the sentence passed by the trial court and substitute it with the sentence of life imprisonment.

The foregoing said, I am of the considered view that the charge levelled against the appellant was proved at a required standard in the criminal cases. I thus find no merit in the appeal and dismiss it entirely. Conviction by the trial court is hereby upheld and the appellant is sentenced to life imprisonment.

Dated at Mwanza this 17th day of August, 2021

M. MNYUKWA
JUDGE

COURT: Judgement delivered this 17th day of August, 2021 through Audio Teleconference whereby the appellant was remotely present and in the absence of the learned State Attorney for the respondent, Republic. C/C, Kerenge present.

Right of appeal to the Court of Appeal is fully explained to the appellant.

M. MNYUKWA
JUDGE
17/8/2021