IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 84 OF 2022

(Originated from Criminal case No. 256 of 2021 at the District Court of Bunda)

BETWEEN

GEORGE CHOTO ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

26th October & 9th November,2022

M. L. KOMBA. J.:

The appellant George s/o Choto was charged and convicted by the District Court of Bunda at Bunda for an offence of rape contrary to section 130 (1) (2) (b) and 131(3) of the Penal Code, [Cap. 16 R. E 2019]. It was alleged on 15/03/2021 at Hunyari Village within Bunda District in Mara Region, the appellant did unlawfully had carnal knowledge of a girl aged 6 years old. After hearing of the case, the appellant was convicted of the offence of rape and was sentenced by the trial court to serve life imprisonment.

On material date at about 4:00pm the victim (PW1) who was living with her mother, was sent by her mother to fetch some water to the appellant's house. When she reached the place, her uncle (the appellant) called her

inside the house. While she was inside, the appellant asked her to put off her clothes but she refused. The appellant undress her by force and put his penis into the victim vagina, PW 1 felt pain and saw dirty like mucus. The appellant ordered her to stand and then she dressed up, fetch some water and go back home.

The victim reported the matter to PW2 who is her mother, Bahati Sospeter on what happened while limping and crying. PW2 examined PW1 vagina and found it was reddish and discharged some dirty like mucus. PW2 reported the matter to Village Executive Officer, the appellant was arrested and taken to police. PF3 was issued and the victim was taken to Nyamuswa health center where she was attended by PW3 (Fatuma Hamadi). After examination PW3 discovered PW1 lost her hymen, had vagina discharge and slight bruises but she was not infected. Upon proving the offence by the prosecution, the appellant was convicted and sentenced as stated early above.

The appellant was aggrieved by the decision of the District Court and he filed the present appeal to challenge the said decision. In his petition of appeal, the appellant has raised three grounds of appeal to wit: -

1. *That, the trial Magistrate erred in law and in fact to rely upon PW 1 evidence which was recorded contrary to S. 127 (2) of TEA considering the victim did not specify the village where the incidence took place.*
2. *That, no penetration was proved.*
3. *That, prosecution side fail to prove the alleged offence beyond all reasonable doubts.*

The appeal was scheduled for hearing on 26 October, 2022, and the hearing was conducted through teleconference. The appellant was connected from Butimba Prison in Mwanza, unrepresented, whereas the Respondent was represented by Mr. Nimrod Byamungu, State Attorney connected from National Prosecution service office at Musoma.

When given a fortuitous to make his case, the appellant informed the court that he was arrested in the village on 15/03/2021 in the afternoon while at his home and taken to Nyamuswa. Later on he was taken to Bunda and on the same day he was arraigned to the District Court. He lamented that he did not rape the victim and that the trial court relied on circumstantial evidence to convict him as there were only two witnesses.

When he was directed to address the court on his grounds of appeal, appellant said that he did not remember his grounds of appeal and pray the court to accept grounds of appeal as his submission. The Court agreed.

While opposing the appeal, the learned State Attorney opted to argue each ground separately. About compliance of section 127 of Cap 6 Mr. Byamungu said the section was adhered as PW1 promised to speak the truth. He referred this court to page 7 of trial court proceedings and added that the record which reads S. 214 is slip of the pen and therefore he argued that ground non meritorious.

On the ground of failure to prove the offence beyond reasonable doubt, Mr. Byamungu refers section 130(2) of Cap 16 which provides ingredients of offence and further read the narration of PW1 at page 7 of proceedings arguing that her narration shows the use of force by the appellant when she informed the court that the appellant undressed her and put his penis into her vagina. He added that PW1 said she felt pain. Mr. Byamungu went on explaining that previous PW1 refused to put off her clothes when ordered by the appellant, then the appellant did it by himself, he said the action of the appellant to undress PW1 explain he used force as previous there was a denial on the side of PW1. He concluded by saying that during cross examination to PW1 the appellant did not ask anything. Mr Byamungu pressing the court to agree with his position, he cited the decision on **Fundi Omari V. R (1972) HCD** at 98 where the court held that what is required

is prove of accused *genetania* being in contact with *genetania of* the victim. That means when the two organs meet that is sufficient penetration and therefore the second ground has no merit as the penetration was proved.

On the last ground he said the prosecution did prove offence beyond reasonable doubt and resulted to the appellant conviction. Starting with one ingredient of penetration as provided under section 130 (2) of Cap 16 he relied to his previous submission while arguing the second ground. It was his further submission that the victim being a child and manage to explain what he was told by the appellant, the process of the appellant to undress the PW1 is where the force was used. After the occurrence PW1 informed her mother (PW2) what happened PW2 upon exploring her daughter she found sperms in her vagina. In the same ground Mr. Byamungu further submitted that PW1 manage to identify the appellant as her uncle and supply to this court with the case of **Marwa Wangiti and Another V. R** (2002) TLR at 39 where Court of Appeal said immediate disclosure of the commission of the offence and mentioning the culprit at the earliest possible time is an assurance that witness is credible. State Attorney further explain to this court that after PW2 was informed she rushed to the village leader then to Police station and to the hospital on the same day. Her sharpness

helped to arrest the appellant. All these events are collaborated by the testimony of PW3 (a clinical officer) who on the same day found semen in the vagina of PW1.

State Attorney contended that the appellant did not give notice that he will rely on the defense of alibi that he went to cut tree on the particular day contrary to section 194 of the Cap 20, he contended further that the defense of ***alibi*** was a surprise and prosecutions did not make enough preparation for conducting fair trial. He said failure to do so is fatal as was held in the case of **Kibale V. Uganda** (1999) Vol 1EA at 48, even during defense case the appellant did not see the importance of calling witness whom he allege they were together in cutting firewood for making charcoal. He referred this court to page 14 of the proceedings. He cemented his argument that if at all he went to cut tree why did not call his witness. In order to bolster his argument Mr. Byamungu cited the case of **Tongeni Naata V. R** (1991) TLR at 54 that his defense of alibi is unbelievable. Mr Byamungu was of the view that this defense is an afterthought and pray the same to be dismissed and the whole appeal be dismissed.

When given time to rejoin his appeal, the appellant informed this court that he was sentenced under circumstantial evidence. The case was filed three

times and was dismissed. He contended that on the last he was convicted but there was only two witnesses and a letter which was read by police alleging it come from hospital but the doctor was not called as a witness. He further said the offence was committed during day time but he wonders why there was no person witness that commission as he was not living in an island. Being submitted so, he rest his case.

I have thoroughly gone through the petition of appeal, the parties' submissions and the appellant's complaint in this appeal. It's the duty of this court to determine whether the appeal is meritorious.

At the outset, let it be known that in criminal cases, it is upon the prosecution to prove its case against an accused person beyond reasonable doubt. Starting with the second ground about penetration, PW1 informed the court that when the appellant put his penis in her vagina she felt pain. It is obvious he inserted his penis inside that's why she complained of pain. Further, the content of exhibit P2 shows there was a discharge from victim vagina and PW3 informed the court that there were minor bruises, abdominal discharge and that PW1 lost her hymen. As decided earlier that the penetration however slightly it can be, is enough to prove sexual intercourse **see Fundi Omari V. R (supra), Kayoka Charles V. R Criminal** Appeal No. 325 of

2007 and **Mathayo Ngalya @ Shabani V. Republic**, Criminal Appeal No. 170 of 2006 (last two cases are unreported). This court is satisfied that there was penetration and therefore the second ground is devoid of merit.

Regarding the appellant first ground that section 127(2) of the Evidence Act was not observed before recording PW1's evidence, I do not think that the same needs to consume much of time. The above cited provision provides that:

> *'(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.'* [Emphasis added].

It can be deduced from the above provision that if a child of tender age testifies before the court of law without taking an oath or making an affirmation, he or she must promise to tell the truth and not to tell lies before giving his evidence. In the current case, PW1 who was a girl aged six (6) years old and therefore a child of tender age promised to tell the truth as reflected at page 7 of trial court proceedings as I quote;-

> *'**Court;** PAP was a child of tender age she is asked whether she promise to tell the truth and not lies and replied.*
>
> ***PW1(PAP);** I promise the truth and not lie.*
>
> ***Court;** PW1 has promised to tell the truth and not lies, section 214 of EA Cap 11 R.E complied with.*

With this clear account of what had transpired in the trial court, before PW1s evidence was recorded, I find there was adherence to the provision of law save that the recoding of Section 214 of EA was slip of the pen. Therefore, appellant's complaint in this aspect is unfounded with a consequential effect of it being dismissed, as I accordingly, hereby do.

I now turn to determine the appellant's main complaint that the charge against him was not proved beyond reasonable doubt and thus the trial court erred in upholding his conviction without pointing exactly what he was challenging. The appellant was charged and convicted of an offence of rape and consequently sentenced to life imprisonment. He was charged contrary to section 130 and 131 and for clarity and quick reference, I wish to reproduce the sections thus:

> *'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:*
>
> *(a) .....*
>
> *(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;*

(c) .....

(3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment.'

From the above quotation in order to prove the offence to the required standards the court need to prove that the victim is a girl, the appellant is a male, the consent was obtained by force while in unlawful detention and that the victim is a girl under the age of ten years.

In proving that the victim is a girl, the record from the particulars of charge sheet shows the one who was raped is a girl of six years, testimony of PW2 at page 8 of proceedings shows she has a daughter with a name of PAP (name withheld) who is a victim. On proving that the appellant is a boy the evidence is from the matters agreed at the trial court that the accused is an uncle of the victim.

The story in relation to commission of the offence is that, PW1 went to fetch some water at the appellant house where upon reaching the place, the appellant called PW1 to enter into the house where she entered, upon the time the victim is inside the house, the appellant ordered her to remove her clothes, when she refused, the appellant forcefully undressed PW1. At this

juncture I am joining hands with the State Attorney that the appellant used force to undress PW1 as she already refused to undress willingly. While PW1 is inside the appellant undress her and commit the crime. I am convinced that the consent was obtained by force while PW1 was in the appellant house.

The last ingredients need to be proved is age. The court of appeal in the case of **case of Leonard Sakata V. D.P.P Criminal Application No, 35 OF 2019** Court of Appeal of Tanzania Mbeya (unreported) at page 8 paragraph 3 insisted that age must be proved to the offence of rape. The same court in its resent decision in **Shani Chamwela Suleiman V. Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 (28 September 2022) it was said the age of the victim in court of law can be proved by a parent, victim, relative, medical practitioner or where available by production of birth certificate. During trial, PW2 produce birth certificate of PW1(exhibit P1) which was tendered and accepted in the presence of appellant and he did not object, see the **case of Bayo Paschal @ Banga @ Bayo Sambiye V. Republic** (Criminal Appeal 113 of 2020) [2021] TZHC 7061 (03 November 2021). From the birth certificate the PW1 was six years when the offence was committed.

Prosecution relied on PW1 because her evidence in offences like this one is the best see **Selemani Makumba V. Republic** [2006] T.LR. 379, **Shani Chamwela Suleiman V. Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 (28 September 2022); **Mohamed Said V. The Republic**, Criminal Appeal No, 145 of 2017, CAT at Iringa (unreported).

Looking at the evidence of PW1 at the record I observed that PW1 was coherent and consistent in narrating what had occurred to her, which in essence proved the ingredients of the offence which the appellant was charged. The evidence of PW1 regarding how she was raped by the appellant was corroborated by that of PW3 who examined the victim. Another corroborative evidence came from PW2, the victim's mother who gave a narration of what had befallen PW1 as she was told by PW1 herself which in essence reflects the above excerpts from the victim. With such evidence on record, I am satisfied that the prosecution evidence proved the offence the appellant was charged. I do not find any merit from the appellant's ground that the case was not proved beyond reasonable doubt.

In the upshot, having found that the appellant's grounds are unfounded and having dismissed them, I find and hold that the case against the appellant was proved beyond reasonable doubt and the trial court findings was

justified to convict and sentence the appellant. Consequently, I dismiss this appeal for being unfounded in its entirety.

Dated in Musoma this 9th day of November, 2022

M. L. KOMBA

JUDGE

9th November, 2022

Court: Judgment delivered this 9th day of November 2022 in the presence of both parties who were remotely connected via teleconference. The appellant was present connected from Butimba Prison while Mr. Byamungu was connected from his NPS office at Musoma.

Right of appeal explained.

THE HIGH COURT OF TANZANIA
MUSOMA

M. L. KOMBA

JUDGE

9th November, 2022