IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 131 OF 2022

(Originated from Criminal Case No. 132 of 2022 of the District Court of Tarime at Tarime)

WILLIAM S/O RAPHAEL ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

24th & 30th May, 2023

M. L. KOMBA, J.:

The Appellant William Raphael was charged and convicted by the District Court of Tarime at Tarime for an offence of rape contrary to section 130 (1) (2) (e) and 131(3) of the Penal Code, [Cap. 16 R. E. 2019]. It was alleged that on 18/06/2022 at Nyarongi Village within Rorya District in Mara Region appellant did unlawfully have carnal knowledge of a girl aged 10 years old. After hearing of the case, the Appellant was convicted for the rape offence and was sentenced by the trial Court to serve thirty years (30) imprisonment.

It was alleged that on material date which is 18/06/2022 the victim/PW1 (names will be used interchangeably) went to their shamba to irrigate vegetables. While there he appeared appellant who asked her to accompany

him to tall grasses and see how tall they are. She agreed. Upon reaching on tall grasses the appellant holds the victim tight, undressed her, put her down and put his dudu into the victim's vagina. He then told the victim not to tell any person or else she will be killed. After the said crime, the victim was breeding confusingly but remembering the threat she kept quiet; instead she decided to take bath. Bleeding continues and when then situation became worse is when she informed her mother who then informed her father (PW2) and the victim was taken to hospital.

At the hospital, victim was attended by PW4, A doctor of medicine who informed the court that she received the victim in the same day accompanied by her father, tired and bleeding from her vagina. Victim was taken to emergency room and before examination she fainted. After the first aid she recover and upon examination she was found with bruises in her vagina, the vagina was raptured and bleeding fresh blood with severe pains. Due to that condition, she was referred to another hospital, KOAK hospital where she was discovered to sustain injury and was stitched. Upon proving the offence, appellant was convicted and sentenced as narrated earlier.

The appellant was aggrieved by the decision of the District Court and he filed the present appeal against the said decision. In his petition of appeal, the appellant has raised nine (9) grounds of appeal to wit: -

1. **That,** the trial Magistrate erred in law and fact to convict and sentence the appellant on serious Procedural irregularities as the Magistrate failed to deliver the ruling whether the Prosecution side after closing their evidence established a Prima Facie case against the appellant which could be the basis for appellant to defend himself.
2. **That,** the trial Magistrate erred in law and fact to convict and sentence the appellant by failing to comply with the requirement of the law of informing the appellant his right before the court which include the right to give his evidence on oath or affirmation and even the rights to bring his witness who the appellant confirmed before the court that he will come to testify in favor of him but that opportunity was denied as the appellant was not addressed by the trial court.
3. **That,** the learned Magistrate erred in law by allowing prosecution witness (PW1) to tender exhibit PE1(PF3) report while she was not the maker of the report and the appellant was not given an opportunity to cross examine the maker of the report so it was illegally tendered and admitted in prosecution evidence.
4. **That,** the medical findings found on PF 3 had no scientific justification so they were unreliable.
5. **That,** the trial Magistrate erred in law and fact to convict and sentence

the appellant on inconsistence, contradictory and insufficient evidence as the charge read 10 years age of the victim (PW1) while the fact read 11 years this situation leaves a lot of doubts to establish the guilty against the appellant.

6. That, since the proof of penetration as required by section 130(4) of the Penal Code was not established by PW1, PW2 and PW3, and PW4 there was no proof of rape.
7. **That,** the unsworn testimony of PW1 was wrongly relied upon as it was not corroborated hence unreliable and incapable to convict the appellant.
8. **That,** the trial court should not have convicted the appellant basing the evidence on record which was not properly constituted because a social welfare Officer was not in the Coram.
9. **That,** the case against the appellant was not proved beyond all reasonable doubts as the appellant was not properly identified by the PW1 as required by the law as the one who committed the alleged offence, also among four (04) prosecution's witnesses only one testified before the court that is PW1, this leave no doubt to believe that was incredible evidence against appellant.

Appeal was scheduled for hearing on 24/05/2023, as the hearing was conducted through teleconference court services of the Judiciary of Tanzania, the appellant's appearance was remote connected from Musoma

prison, unrepresented, whereas the respondent Republic was represented by Mr. Isihaka Ibrahim, learned State Attorney.

When given a fortuitous to make his case, appellant prayed this court to adopt his petition of appeal. Petition adopted.

In protest of the appeal, the learned State Attorney, Mr. Isihaka opted to argue each ground separately. On the 1st ground appellant complain that there was no ruling on case to answer. State Attorney referred this court to page 14 of the proceedings which show that the ruling was delivered. On the 2nd ground that appellant was not given his rights after the ruling, he acknowledge that the records are silent on that but he further said record shows the answers of the appellant that he will give testimony under oath and he will call two witness and he will have no exhibit, this shows he utilized section 231(1) of the CPA. It was his submission that it might be an error of the trial Magistrate to fail to record but the right was given because was utilized. He prayed this court to presume that the right was given under section 122 of CPA and appellant called witness who is DW2.

On complaint about Exh P1 which is ground 3 he submitted that record shows the victim tendered no exhibit but the Exh P1 was tendered by PW4

and according to Republic that witness was credible as he was the maker and had knowledge of it. He referred this court to the case of **DPP vs. Mirzai Pirbakhsh and 3 Other** Criminal Appeal No. 493 of 2016 where the witness who know the content can tender document. Further he submitted that at page 13 record shows that the appellant cross examined the witness.

While responding the 4th ground it was the submission of the State Attorney that the exhibit had scientific justification because was filed by a profession as was tendered by a qualified person and the Exh P1 had results of examination the witness. On 5th ground which was the complaint of the appellant over contradiction of the age of the victim to be 10 years or 11 years. He submitted that charge sheet shows the age of the victim to be 10 years although during the preliminary there is nowhere the age was mentioned. He went further and explain that during trial, PW1 said she is 11 years but the facts are silent on whether the eleventh years was attained by the time of the hearing or otherwise. Regardless of the age State Attorney submitted that the punishment is the same which is 30 years imprisonment and he prays this court not to consider this contradiction as is minor and does not go to root of the case. To bolster his argument Mr. Isihaka prayed this court to use the content of S. 388 (1) of the CPA in handling this ground.

On the 6th ground about lack of evidence of penetration, State Attorney submitted that the penetration was proved by the PW1 who is the victim at page 6 and 8 of the proceedings and the best evidence is the one come from the victim as was in the case of **Ally Mpalagana vs. Republic** Criminal Appeal No. 213 of 2016 CAT at Mtwara. He further submitted that PW1 informed the court that appellant entered his penis to her vagina and this proves penetration. In order to bolster his argument Mr Isihaka refer this court to the case of **Nkanga Daudi Nkanga vs. Republic Criminal,** Appeal No. 316 of 2013 CAT at Mtwara where the wordings of the victim was taken to be enough. He said victim testimony was collaborated by PW2 (mother) who informed the court that victim told her she was raped.

On ground no 7 about unsworn testimony of PW1. State Attorney refer the law under S. 198 (1) of the CPA that he is aware that all witnesses should take an oath but children (persons of tender age) not necessary to take an oath rather they are supposed to promise the court to tell truth.

It was his further submission that PW1 was a girl of tender age, according to S. 127 (2) of the Evidence Act she is required to promise to tell the truth and it is featured in the proceedings as at page 6 she promised to tell the truth and there was no need for the trial court not to believe the testimony

of the victim. Her evidence was not necessary to be collaborated although in the case at hand it was collaborated by the evidence of PW2 and Exh P1 and PW4.

On the 8th ground he submitted that presence of social welfare officer under section 99 (1) (d) of Child Act was not necessary because the law require to have social welfare when the child is in conflict with the law but in the case at hand the child was witness and boost his argument with case of **Medson Manga vs. Republic**, Criminal Appeal No. 259 of 2019 CAT at Iringa.

On the last, 9th ground it was his position that prosecution managed to prove the case to the required standard. In the offence of rape they were supposed to prove the age which is proved by the victim herself, penetration was proved by PW1 who is the best witness and the testimony was collaborated by PW2 and PW4 and that the victim testimony was straight without any contradiction. He further submitted that the offence was proved to the required standard and the questions put forward by the appellant did not shaken the evidence as he (the appellant) did no create doubt. Basing on his submission he prays this court to find the appeal has no merit and uphold decision of the trial court.

When given time to rejoin his appeal, the appellant had nothing and it was the end of submission.

I have thoroughly gone through the petition of appeal and Republic submission in this appeal. It's the duty of this court now 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. See **John Makolebela vs. Kulwa Makolobela and Eric Juma @ Tanganyika** [2002] T.L.R. 296.

Starting with the 1st and 2nd grounds about ruling and the rights of the accused, records are clear that ruling of case to answer was delivered on 16 October 2022 and it appeared in page 14 of the proceedings. There after accused informed the court that he will make his defence under oath and he will call one witness but he will have no exhibit. All these words were signed by the accused. This court assumes that the right was given that's why the appellant explained his position and signed. Furthermore, the record shows that appellant informed the court he was ready to give his evidence on the same day and he signed that information. It is the position of this court that failure to record trial court addressing the appellant about his rights does not

prejudice the appellant as he utilized all his rights under the law. Therefore, I find these two grounds lacks merit.

Addressing ground number 3 and 4, I can say that the appellant confused himself on who tendered Exh P1. I wish to make it clear that this case had only one exhibit which is PF3. The said exh P1 was tendered by PW4 who is the medical Doctor having degree of Doctor of Medicine. He was the correct person to tender and elaborate its contents. Not only that she is the one who prepares it but also, she is a professional. CAT once said in the case of **DPP vs. Mirzai Pirbakhsh and 3 Other** (supra) that;

> *A person who at one in time possesses anything, a subject matter of trial, as we said in Kristina case is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law must always be tendered by a custodian as initially contended by Mr. Johson. The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question.* See also **Christian Ugbechi vs. The Republic**, Criminal Appeal No. 274 of 2019.

Basing on section 240 of the CPA that a document prepared by a medical/ professional witness is admissible, I find these two grounds devoid of merit.

Last The age of the victim was featured in ground 5. Record shows facts indicated the age of the victim was 10 years on June, 2022. During trial September 2022 victim informed the court that she is eleven years. I agree that there is contradiction over the age of the victim but this is minor one as does not go to the root of the case. The offence charged the appellant associate a girl under eighteen years and the lack of consent. What I believe is whether the age is 10 or 11 years other ingredients of rape has been proved. And therefore, this ground is dismissed.

On ground 6 of the appeal, I join hands with the submission by State Attorney that penetration was proved by the PW1 who is the victim when testified during trial and the best evidence is the one come from the victim as was in the case of **Ally Mpalagana vs. Republic** and **Nkanga Daudi Nkanga vs. Republic Criminal (supra),** see also **Mussa Ernest vs. Republic** (Criminal Appeal No. 463 of 2019) [2022] TZCA 655 (27 October 2022)

About unsworn testimony of PW1, the law is settled that a child of tender age is not compelled to take an oath rather he has to promise to tell the truth. This is in accordance to section 127 of the Law of Evidence;

> *127 (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.*
>
> *(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.*

Reading through the record of the trial court, at page six PW1 promised to tell the truth. The same position was considered by the Court of Appeal in **Selemani Moses Sotel @ White vs. Republic**, Criminal Appeal No. 385 of 2018 CAT at Mtwara. This court rules that so far as PW1 promised in court to tell the truth then she is credible witness and this ground is baseless.

About the presence of social welfare officer section 98 (1) and 99 (1) (d) of Child Act provides that;

98.-(1) A Juvenile Court shall have power to hear and determine-

(a) criminal charges ***against a child****; and*

(b) applications ***relating to a child care****, maintenance and protection.*

99.-(1) The procedure for conducting proceedings by the Juvenile Court in all matters shall be in accordance with rules made by the Chief Justice for that purpose, but shall, in any case, be subject to the following conditions –

(a) the Juvenile Court sit as often as necessary;

(b) proceedings shall be held in camera;

(c) proceedings shall be.....

(d) ***a social welfare officer shall be present;***

(e) a parent, guardian or next of kin shall have a right to be present;

According to above excerpt the social welfare officer is necessary when the child is in conflict with the law, whether he is charged or his maintenance is

at stake. but in the case at hand, just as submitted by State Attorney, the child was a witness and therefore it was not necessary to have a social welfare officer because the trial court was not a juvenile court. See **Medson Manga vs. Republic**, (supra). I find ground 8 devoid of merit.

Appellant was charged and convicted of offence of rape and consequently sentenced to thirty years imprisonment. He was charged contrary to section 130 and 131 and for clarity and quick reference before analysing whether the offence was proved beyond reasonable doubt, 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) , (c), (d) and*
>
> *(e) 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.*

From the above excerpt, what is supposed to be proved in this offence is that the appellant should be a man, the victim must be a girl or woman of less that eighteen years and proof of *actus reus* of sexual intercourse. That is not enough court should assess credibility of witness.

In the case at hand, the appellant is a man, the victim is a girl of 11 years which is less that eighteen years as provided by law, sexual intercourse is proved by Exh P1 which is PF 3 and elaboration of PW4 who informed the court the condition of victim that she had bruises in her vagina and it was raptured. Victim was stitched in her vagina that show there was a use of force during that sexual intercourse. Penetration is proved when PW1 informed the court that appellant undressed her and put his dudu into her vagina. The most and credible witness in the case is PW1 whose evidence was collaborated by PW2 and PW4. 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 with which the appellant was charged.

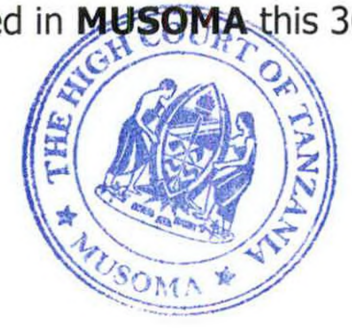
Among other things the court of appeal in the case of **Leonard Sakata vs. D.P.P** Criminal Application No, 35 of 2019 while seated at Mbeya (unreported) at page 8 it was insisted that age must be proved to the offence

of rape. The same court in **Shani Chamwela Suleiman vs. Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 (28 September 2022) 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, PW1 informed the court that she is eleven years. And that confirmation that she was under eighteen when the appellant raped her. I do not find any merit from the appellant's ground that the case was not proved beyond all reasonable doubts.

All in all, I am satisfied that the trial court after considering the evidence on the record, together with the relevant law, had arrived at the correct decision.

All I would say is that, it is upon the above reasons that, I find no merit in this appeal and I dismiss it in its entirety.

Dated in **MUSOMA** this 30th day of May, 2023.



M. L. KOMBA
Judge

Judgment delivered this 30 day of May 2023 in the presence of both parties. Appellant was present connected from Musoma Prison while Mr. Thawabu Issa State Attorney represented the Republic.

Right of appeal explained.

NAK

M. L. KOMBA

Judge

30 May, 2023