IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 103 OF 2022

(Arising from the decision of the District court of Musoma at Musoma in Criminal Case No 46 of 2022)

RICHARD LAURENCE MAFURU @ BABA MRUGA .....APPELLANT

VERSUS

THE D. P. P..... RESPONDENT

JUDGMENT

07 & 14th June, 2023

M. L. KOMBA, J.

This is the decision against an appeal by **RICHARD LAURENCE MAFURU @ BABA MRUGA** who convicted and sentenced to life imprisonment by the District Court of Musoma at Musoma (the Trial Court) where he was arraigned for offence of rape contrary to section 130(1) (2)(e) and 131(1) both of the Penal Code, [Cap 16 R. E. 2019].

It was alleged by the prosecution that on 25/02/2022, the victim (PW1) who was a girl of six years, while on her way home, was taken by the appellant and went together to appellant home and was directed to enter the appellant's room to take shoes. Appellant followed the victim while in room

he removed the victim's dress and underwear and the appellant removed his trouser, remained with boxer and put in and rub his penis to the victim's vagina and ejaculated in the mouth of the victim. After washing her mouth, the victim was given sweet.

PW2, who is the victim's brother, Evarist asked her where she got that sweet and the victim replied that she was raped by the appellant and was given that sweet 'big boom'. PW2 then informed their grandmother by name of Victoria (PW4) that victim was raped. PW4 then went to the appellant home and asked what was wrong and he denied the allegation. PW4 took the accused to Village Executive Officer (VEO), it was the VEO who called police and took PW4, victim and the appellant to police and then the victim was taken to Hospital where she was attended by PW5 and filled PF3 which was admitted as exhibit P 2.

It was the testimony of PW5 that the hymen of the victim was intact but she had fresh bleeding and had some blood into her vagina hence he concluded there was penetration.

The trial court was satisfied that prosecution managed to prove the offence as charged and sentenced the appellate to life imprisonment. He was not

satisfied hence this appeal protesting the conviction and sentence with four grounds;

1. *That, the trial Magistrate erred in law and fact for convicting while no penetration was proved that is why even the PW1 hymen was not perforated and mild bruises might be caused by fungal infection whatever.*

2. *That, the trial court erred in law and fact to convict by relying upon inconsistence and contradictive evidence, there is some records indicates urine and others shows ejaculation means sperm. And her grandmother did not found mild bruises as was asserted by the doctor.*

3. *That, the trial Magistrate erred in law and fact for convicting I after failing to disclose as to why did not believe my defence.*

4. *That, I do not say bye without saying that, the prosecution side failed to prove the offence beyond all reasonable doubt.*

When the matter was up for hearing the appellant was remotely connected from Musoma Prison, unrepresented while Republic was represented by Ms. Natujwa Bakari, State Attorney.

The appellant prayed this court to adopt his petition of appeal and waiting for State Attorney to reply on his grounds while he complained that he did not commit any offence.

In response to petition of appeal, starting with the first ground Ms. Natujwa submitted that there was a penetration which was proved during trial when PW1 informed the court that appellant took his penis and rub to victim's vagina and then he put his penis in the mouth and cited section 130 (4) (a) of cap 16 narrating that the section explaining how penetration amount to rape that however slight it may be it amount to rape and further submitted that at pages 22 and 23 of the trial proceedings PW5 testified that the victim was penetrated.

Submitting for the second ground about inconsistance and contradicting evidence Ms. Natujwa conceded that it is true PW1 said appellant urinate while PW4 informed the court that the appellant ejaculated. She explained that due to the victims age she could not know liquid put into her mouth that she did not differentiate urine and sperms but PW4 know the difference that's why she said appellant ejaculated. In this ground State Attorney cited the case of **Francis Eliud vs. Republic**, Criminal Appeal No. 82 of 2021

that evidence of a child to prove penetration need not to be graphic and pray this ground to be found non meritorious.

On the third ground, she submitted that his evidence was considered but it was not collaborated and was less heavy compared with the evidence of prosecution and refer this court to page 9 – 12 of the trial court judgment. On the last ground she said the duty of prosecution in the offence charged with the appellant was to prove the age of the victim which was done by exh. P1 and the victim herself that she was six (6) years, penetration which was proved by PW1 and PW5 and that the victim knew the appellant before material date as she mentioned the appellant immediately after the crime. That proved that it was the appellant who raped the victim and referred this court to the case of **Selemani Makumba vs. Republic** [2006] T. L. R 379 that the best evidence is of the victim. She prayed this court to uphold the conviction.

In determining this appeal, I will analyse generally to see whether prosecution managed to prove the offence beyond reasonable doubt while addressing ground as raised by the appellant.

The offence which charged the appellant with is rape contrary to section 130(1) (2)(e) of the Penal Code, [Cap 16 R.E 2019, now R. E. 2022]. Under this section the prosecution needed to prove age of the victim, reading Exh. P1 which is the birth certificate of the victim and it is written she was born on 02/12/2016 and the offence occurred on 25/02/2022 that means the victim was six (6) years old.

In proving this offence penetration must be proved. This is also found in the first and second ground of appeal. Reading testimony of PW1 after promising to tell the truth she informed the court that appellant rubbed his penis into her vagina and put it into the mouth where he releases urine. On the issue of urine, I joined hands with State attorney that victim by her age she couldn't differentiate urine and sperm. So far as appellate rub his penis into vagina and put into mouth what followed was ejaculation. By her age, just as decided in **Hassan Kamunyu vs. Republi,** Criminal Appeal no. 277 of 2016 CAT (unreported) that in sexual offence the victim is not expected to be graphic. This court finds the appellant released some liquid. And PW5 testified in court that after examination he concluded there was penetration.

PW5 is an expert in medicine I don't find reason not to believe him on his opinion as addition to what has been narrated by the victim. The purpose of

the evidence of an expert is not to prove the guilty of the accused but to show whether there was penetration. It was not the duty of PW5 to prove if it was the appellant who raped the victim.

After the proof of penetration now, the remaining question is who raped the victim. In my scrutiny in trial court record, I have observed that the victim eloquent account before the court was not controverted. She ably identified the appellant and explained the heinous encounter with him while appointing the appellant and mentioning his name. She did not only explains how appellant undressed her but also explain the size of the appellants 'dudu' and where the 'dudu' resides. Appellant did not shake this testimony. PW1 manage to identify the appellant as she knows him before, she used to buy sardines at appellants home and manage to mention him the moment she met PW2, his brother. That prove it was the appellant who raped the victim.

PW1 is a child of tender age, on fateful date she was 6 years old. The Law of Evidence Act as of now, corroboration is not necessary to support unsworn evidence of a child of tender years provided that there is full compliance with section 127 (2) of the same Act.

Coming back to the case at hand, it is apparent on the record that before taking the evidence of witnesses whose age was tender, the trial court

complied with section 127 (2) to the letter. The record bears it out at page 9, 10, 13 and 14 that the trial Magistrate conducted a *voire dire* of PW1 and PW2 and was satisfied that the witnesses understood the duty to speak the truth and were able to give rational answers. The evidence of the child which is correctly obtained need no collaboration according to section 127 (6) of the Evidence Act, Cap 6. The section reads;

> *127(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.***

Having explain the use of words urine and ejaculation, establishing the penetration which was the finding of the expert and identification done by the victim I find all grounds of appeal were non meritorious. Prosecution managed to prove the offence against the appellant just as the trial

Magistrate decide. Therefore, I don't find the need to alter the findings of the trial court.

In the foregoing, I sustain the conviction and sentence as pronounced by the trial court and dismiss this appeal in its entirety.

DATED in **MUSOMA** this 13 Day of June, 2023.

M. L. KOMBA

Judge

Judgement delivered in chamber while the appellant was connected from Musoma Prison and in the absence of the State Attorney.

M. L. KOMBA

Judge

13 June, 2023