**IN THE HIGH COURT OF TANZANIA**

**DODOMA SUB-REGISTRY**

**AT DODOMA**

**DC CRIMINAL APPEAL NO. 85 OF 2022**

***(Appeal from the Judgment of Kongwa District Court Dated the 30th of September, 2022 in* Criminal Case No.157 of 2021)**

**RAMADHANI ZUBERI..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

***11th May & 22nd June, 2023***

**HASSAN, J.:**

Ramadhani Zuberi, the Appellant herein, was charged, convicted and sentenced to thirty (30) years prison term, fine of Tshs. 100,000/= and a compensation of Tshs. 100,000/= to the victim for the offence of rape contrary to the provisions of section 130 (1) & (2) (e) and section 131 (1) of the Penal Code, Cap. 16 R. E 2019. It is in the particulars of offence that, on the day between 13th day of December and 16th December, 2021 at Majengo Kibaigwa within Kongwa District in Dodoma Region the appellant did have canal knowledge of the one **GRADNESS D/O HURMFREY KWEKA**, a girl of 13 years old.

Aggrieved, the Appellant preferred an appeal to this court on the following grounds:

1. *That, the honourable trial District Court erred in law and in facts for reaching those decisions without considering that the prosecution side didn't prove the case beyond any reasonable doubt as required by law.*
2. *That, the honourable trial District Court erred in law and in facts for deciding the case on favour of the respondent while the respondent witnesses adduced weak, nugatory and contradictory evidences.*
3. *That, the honourable District Court Magistrate erred in law and in facts for making its decisions on the respondent's favour by rejecting (ignoring) the strong evidences adduce by the appellant and his witnesses.*
4. *That, the honourable District Court Magistrate erred in law and in facts for reaching those decisions relying on Expert Evidence adduced by a medical doctor who examined the victim while the same witness lacks qualifications in the eyes of law.*

5. *That, the honourable District Court Magistrate erred in law and in facts for reaching those decisions without fair hearing. Hence reached on biased decisions.*

In this appeal the appellant fended for himself, whereas the Respondent Republic had the service of Mr. Mlagala and Mr. Francis, both Learned State Attorneys. In support of his appeal, the appellant adopted his grounds of appeal as his submission, save for his right of rejoinder just in case.

In reply, the Learned State Attorneys opposed the appeal. Piloting the mission, Mr. Francis opted to argue the 1st and 2nd grounds together. He submitted that the trial Magistrate has abled to analyse the evidence adduced by the parties. On that, he was convinced that the evidence adduced by prosecution side was watertight and hence convicted the appellant. To him, all the elements of the offence of rape were proved as follows:

To start with penetration, looking at page 15 and 16 of the trial proceedings, the victim averred that the appellant had taken off her phone and he then commanded her to follow him to his house where he raped her.

He adds that, the evidence of the victim was corroborated by the evidence of the Doctor (PW5) as in page 42 of proceedings who had observed bruises and hymen in the victim's vagina on 17/12/2021 the same day that victim had ran away from the culprit and that she had the intercourse with him. Also exhibit PF3 which was admitted by the court as in page 43 is strengthening the same. Thus, that evidence shows that the ingredient of penetration was well proved by prosecution's witnesses.

Coming to the issue of identification of accused. The learned State Attorney went on to submit that, at page 15 and 16 of the proceedings, the victim testified that the appellant is the one who had repeatedly raped her. The appellant committed that offence when he was living with the victim from 13/12/2021 to 17/12/2021 under locked room, which was from Monday to Wednesday. Again, this piece of evidence was even corroborated by the evidence of the appellant himself (DW1). Looking at page 49 of the proceedings, the appellant admitted to have been living with the victim (GRADNESS). To the State Attorney's view, based on that evidence, it is clear that the appellant is the one who took the victim and he had committed the alleged offence of rape with her.

Regarding to the issue of consent, Mr. Francis argued that, the evidence adduced shows that a victim's phone was taken compellingly by the appellant, who then commanded the victim to follow him in his house as it seems at page 15 of the proceedings. He added that, the fact that the appellant locked the door of the room of which he committed the offence shows that, the victim had not consented to the commission of the offences.

As to the age of the victim, learned State Attorney submitted that, it is on record that the victim was only 13 years old by the time this offence was committed. PW2 shows that she was born on 25/12/2008. And that evidence of age of the victim was verified by PW1 that the victim age was 13 years old as she was born on 25/12/2008. To cement his argument, Mr. Francis directed the court to section 130 (2) (e) of the Penal Code, Cap. 16 R. E 2022, of which it provides that there will be no consent for a child of the age below 18 years, and the fact that the victim has consented or not is immaterial. Hence, to his view, those are that circumstance and evidence which the trial court has considered to convict the appellant after being satisfied that prosecution had proved their case beyond reasonable doubt.

With respect to the 3rd ground of appeal to Mr. Francis opinion the same is baseless because the appellant has failed to adduce strong evidence

to defend his case, instead he had a weak evidence. He adds that even though, the trial court had considered his defence as it has commented that "that the appellant had only narrated a story on how he was arrested and prosecuted" as in page 19 of the judgment.

On the 4th ground of appeal, learned State Attorney submitted that, the appellant failed to show how the doctor was unqualified. In the State Attorney's believe, PW5 (the Doctor) was qualified and what he has was examined was correct. To bolster his argument, he cited to me the case of **Seleman Makumba v. Republic, Criminal Appeal No. 94 of 1999, CAT (Unreported)** to support his point that:

> *"A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape, that is unconsented sex, even if bruises are observed in the female sexual organ. The true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman their consent is irrelevant, that there was penetration."*

Arguing on the 5th ground, he submitted that it is also baseless. By perusing the proceedings, the appellant was afforded an opportunity to cross examined every prosecution witness. The appellant was also given opportunity to defend his case and call upon his witnesses as in page 46 of the proceedings. The appellant was similarly presented a chance to advance his mitigation after being convicted.

In conclusion, Mr. Francis prayed that, the grounds of appeal to be considered baseless and be disregarded. Consequently, the appeal should be rejected, and conviction and sentence imposed by the trial court to be sustained.

In rejoinder, as he submitted before, the appellant had nothing to say. As usually, for a layman, he decided to leave the matter to the court for determination of his fate.

In the light of what submitted by parties, and having carefully gone through the available record, I noted that the appellants grounds of appeal cantered on one issue, as to whether the prosecution side had proved their case beyond reasonable doubt.

Going from the above, it is apparent that the appellant was charged with the offence of rape contrary to section 130 (1) (2) (e) and section 131 (1) of the Penal Code. Section 130 (1) (2) (e) states that:

> *"130 (2) A male person commits he offence of rape if he has sexual Intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(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."*

Consequently, he was convicted under section 235 (1) and 312 (2) of the CPA, Cap. 20 R. E 2022 and ordered to serve a prison sentence of 30 years, 100,000/= fine, 100,000 compensation to the victim and 6 strokes.

Gathered from the above cited provisions, the age of the victim is one of the crucial elements to establish the offence of rape under the category of statutory rape. Furthermore, apart from proving that the victim had carnally known by the appellant, prosecution ought to prove that the victim

age was under 18 years. It is a trite law that, in a statutory rape, age is an important ingredient of the offence which must be proved. This was held in the case of **Robert Andondile Komba v. DPP, Criminal Appeal No. 465 of 2017 (CAT)**, see also **Isaya Renatus v. Republic, Criminal Appeal No. 242 of 2015, (CAT)** (all unreported), where in **Isaya Renatus**'s case the court of appeal stated that:

> *"Age of the victim can be proved by a victim, relative, parent, medical practitioner and when available production of birth certificate."*

Moreover, in the case of **Haruna Mtasiwa v. Republic, Criminal Appeal No. 206 of 2018, CAT** (unreported) at Arusha it was held that:

> *"The age of the victim can be proved by the birth certificate and in 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."*

Going by the facts in the present appeal, it is on record of proceedings that PW1 (the victim's father) testified that, the victim was 13 years old at a

time she was raped. Additionally, PW1 in her testimony at page 10 of the typed proceedings testified that:

> *"...My daughter Gradness Humphrey Kweka is 13 years now. She was born in 2008."*

More so, PW2 (victim) herself at page 15 of the typed proceedings lucidly testified that, I quote:

> *"I am thirteen years old. Born on 25/12/2008."*

With all this evidence, and by applying the renowned principle in the case of **Isaya Renatus** (supra), this court is left without the grain of doubt that, the victim (PW2) was a child of tender age at the time of commission of this offence. As per the evidence she was only 13 years old.

Furthermore, since it was statutory rape, prosecution was only required to prove age of the victim, penetration and causer of that penetration.

On the proof of age, I need not to repeat what have been shown above. With regard to the penetration, it is a trite law that, true evidence of rape comes from the victim and that, in case of an adult proof of penetration

and consent must be established **Selemani Makumba v. Republic** (supra).

On the evidence adduced in court, Mr. Francis referred the court to pages 15 and 16 of the typed proceedings, where the victim (PW2) testified to court on how rape was perpetrated to her by the appellant whom they were living in the same house. With exactitude, PW2 has explained on how she entered to the appellant room, and how the appellant closed the door and removed her clothes and raped her. Looking at page 15 of the typed proceedings, PW2 testified as follows:

> *"... on my way I met two young men. One of them is this one (torching the accused person) forcibly took my phone. He told me you will come to take your phone into my house. I told him to give back my phone but he kept on hearing with it and I followed him while demanding my phone. We went to his room. While there, he closed the door of his room. He removed my clothes and he removed his. He then raped me ..... He inserted his kondo in English called penis. He inserted in my anus. He also inserted his penis into a front underpart where*

*menstruation bleeding pass through but I don't know its name in swahili but it is a place where menstruation period blood possess through. I tried to make some noise but he asked me to keep quite because he might do something harmful to me."*

As it was rightly submitted by the Learned State Attorney, and as it is in the evidence of the victim on record, it stands without saying that, the appellant had committed the alleged offence of rape. In view of the principle propounded in the case of **Selemani Makumba v. Republic (2006) TLR. 384**, that the best evidence in sexual offences come from the victim. Hence, it is apparent to me, and I am satisfied that the testimony of PW2 reflects her truthfulness on what the appellant has done to her as there in no invited defence by the appellant to hold otherwise. Upon this standing, I find the 1st, 2nd and 3rd grounds of appeal raised with not merit. It is obvious that the trial Magistrate reached the final determination of the case based on quality evidence from prosecution.

That said, PW2's stable and unshaken evidence which was also corroborated by the evidence of a medical doctor which confirmed that, there

were bruises in the victim's vagina and absence hymen. For me, the case at trial court was proved beyond reasonable doubt.

With respect to the 5th ground of appeal, I share the same view with learned State Attorney that the trial Magistrate has not been biased during trial. The appellant was unveiled with all available opportunity to defend his case. That is, he was afforded an opportunity to cross examined every prosecution witness. He was given opportunity to adduced his defence evidence and also call upon his witnesses as in page 46 of the proceedings. The appellant was similarly presented with a chance to advance his mitigation after being convicted. In my view, these are the basic rights that the appellant owed to the trial court to acquire a fair trial. Again, this ground has no legs to stand.

Based on the above discussion, I have no hesitation to rule out that, the prosecutions have proved the offence of statutory rape to the required standard, that is, beyond reasonable doubts. I thus find no merit in this appeal and dismiss it in the wholeness.

It is so ordered.

**DATED** at **DODOMA** this 22nd day of June, 2023

**S. H. HASSAN**
**JUDGE**

Right of appeal is explained to the parties.

**S. H. HASSAN**
**JUDGE**