IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 70 OF 2023

(Originating from the District of Sumbawanga at Sumbawanga in Criminal Case No. 12 of 2022 before Hon. G. J. William-SRM)

MAJILO JACOB @ VERES.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

06/12/2023 & 05/03/2024

MWENEMPAZI, J.

Before the District Court of Sumbawanga (trial court), the appellant was arraigned for an offence of rape c/ss 130 (1) and (2)(e) and 131(2) of the Penal Code Cap. 16 R.E 2019 (now 2022).

It was alleged by the prosecution that on diverse dates between 27th day of July and 31st day of July, 2022 at Katandala Area within Sumbawanga District in Rukwa Region, the appellant did have sexual intercourse with a girl aged 16 years who in this judgment, shall be referred to as the VICTIM or PW2 interchangeably.

Despite the fact that the appellant had pleaded not guilty to the charge, at the end of the trial he was found guilty and convicted as charged. He was then sentenced to serve thirty (30) years imprisonment. He was also ordered to compensate the victim to the tune of TZS. 500,000/= for the injuries she incurred.

Aggrieved, the appellant appealed to this court with seven (7) grounds of appeal in which i find best to reproduce as hereunder;

1. *That, the prosecution side failed to prove the charge against the appellant as required by the law.*
2. *That, the contradiction on the evidence adduced by PW1 (victim's mother) eroded the credibility of the prosecution evidence at all in the level which cannot be acted upon in a serious offence at hand, and it is prove that the case against the appellant was fabricated and planned.*
3. *That, the birth certificate of the victim was not produced before the court to support the allegation that the victim was sixteen (16) years old.*
4. *That, the testimony that the victim was a student was not proved as the school registration book and student attendance book which were not tendered before the court.*

5. *That, the defense evidence of the appellant was very clear and enough to discharge him from the offence he was charged with.*
6. *That, the failure to report the matter to the police station immediately after the disappearance of the victim is something which brings doubt to the case.*
7. *That, the trial Magistrates' Court relied on the ingredients of the prosecution evidence which failed to make a deep examination and evaluation of the substance, nature and quality if the adduced evidence as a result an arbitrary conclusion was drawn.*

As the grounds rephrased above suggests, the appellant prays for this court to allow his appeal and enter judgment in his favour and order his release from custody.

On the hearing date, the appellant fended off for himself as he had no legal representation while the respondent, Republic was represented by Mr. Ladislaus Michael and Ms. Neema Nyagawa, both being learned State Attorneys.

When the appellant was invited to argue his appeal, he merely adopted all the grounds of appeal as contained in his Petition of Appeal.

Mr. Michael commenced his submissions by supporting the trial court's decision. He then submitted further that they pray to start with ground 2 to 7 at the trot and that they will conclude with the 1st ground of appeal alone.

He then submitted on the 2nd ground of appeal that; the appellant is faulting the evidence of PW1 (victim's mother) that it was not credible.

He added that, in various decisions of the court of appeal, credible evidence is ganged by assessment of the evidence by the witness when testifying and assessing the testimony against the evidence of another witness. The learned State Attorney referred the case of **Shani Chamwela Suleiman vs Republic,** Criminal Appeal No. 481 of 2021, Court of Appeal of Tanzania at Dar es Salaam page 10.

He submitted further that, the testimony of PW1 at page 10 – 11 testified that on 27/07/2022 when returning home from the hospital, the victim was absent. That, she then looked for her in futile until on 31/07/2022 at 7:00 pm, when the victim phoned her and said that she has been married. That, PW1 testified to have reported the event at the police station – Gender desk.

The learned counsel proceeded that, the victim testified at page 24 – 25 of the proceedings that she was at the house of the appellant and that she told her mother using the appellant's phone and when she was calling the appellant was taking a bath. And that, she had sexual intercourse with the appellant more than three times. Therefore, Mr. Michael insisted that, since the evidence has no contradictions, it is our argument the evidence is clear and the ground has no merit.

Submitting against the third ground, the learned counsel stated that they object the particular ground because PW1 at page 10 testified that the victim was 16 years old. In addition to that, he said the victim's testimony at page 24 on the last paragraph, the 1st sentence, she too testified to have 16 years old. That, it is their belief that these two witnesses were sufficient to prove the age of the victim. He then referred this court to the case of **Isaya Renatus vs. Republic,** Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora. In this case at hand, he insisted that the mother (PW1) and the victim (PW2) did prove the age of the victim and that there was no need of tendering a birth certificate. He therefore prayed for this ground of appeal to be dismissed.

Coming to the 4th ground of appeal, Mr. Michael was of the view that the said ground is meritless. He submitted that, **one**, PW1 testified that the

victim is a student, a Standard Seven (Std. VII) pupil at Msua Primary School. **Two,** at page 24 at the last paragraph the victim herself testified that she is a student at Msua Primary School. He nevertheless added that, when in cross examination, the appellant did not cross examine on the point of tendering a birth certificate, and that, since the appellant did not cross examine on that point it is open that he agrees/admits to the facts to be true. In insisting his point, Mr. Michael referred this court to the case of **Donad Mwanawima vs Director of Public Prosecution,** Criminal Appeal No. 352 of 2019, Court of Appeal of Tanzania at Sumbwanga at page 19 where it was stated that: -

> *"It is settled that a party who fails to cross examine a witness while testifying is deemed to have accepted that piece of evidence and will be estopped from asking the trial court to disbelieve what the witness said".*

As a result, Mr. Michael prays for this 4th ground of appeal to be dismissed for lacking merits.

Mr. Michael then submitted against the 5th ground of appeal that, his side opposes it because the duty of the appellant was to create doubt against the prosecution case, in which his evidence did not create any doubt against the prosecution case. In addition, Mr. Michael cited the case of

Hassan Rashid Gomela vs Republic, Criminal Appeal No. 271 of 2018 Court of Appeal of Tanzania at Mtwara page 9 paragraph 2: where the Court held that: -

> *"The appellant's defence did not raise any doubt against the prosecution's case."*

Therefore, he insisted that this ground too deserves to be dismissed.

On the 6th ground of appeal, the learned counsel submitted that, PW1 at page 11 of the proceedings testified that the victim had disappeared and she was looking for her up to 31/07/2022 and, on 01/08/2022 she reported the matter at the police after receiving a phone call from the victim. That, PW1 had reported to the police station after knowing the whereabouts of the victim. However, he added that, the delay of reporting the matter to the police was due to the efforts of searching for the victim, and that it is baseless for the appellant to claim that the delay of reporting the incidence to the police creates doubts to the prosecution case, and therefore they pray for this ground also to be dismissed.

Lastly, Mr. Michael prayed to argue the 7th ground together with the 1st ground of appeal. That, they object these two grounds because the charge was proved. He added that, in sexual offences, only points which

are to be proved are: **One,** age of the victim, and **two,** whether there was penetration. He submitted that, the prosecution tendered two kinds of evidence to prove the offence, that is oral evidence and documentary evidence.

He submitted that, the victim testified that she is 16 years old, and her testimony on age was supported by PW1 who also testified on age at page 10. That, PW4 also testified on the victim's age in the PF3 which showed that she is 16 years, therefore age was proved without any doubt.

As to whether the appellant had sexual intercourse with the victim, Mr. Michael submitted that, the victim's evidence at page 24 and Doctor's evidence at page 31 proved that there was penetration. That, the doctor concluded that the victim had no hymen, in which it was supported by the victim as she testified that she had sexual intercourse three times with the appellant as seen on page 25.

Mr. Michael added that, PW3 also testified to have recorded the statement of the appellant, in which he had admitted to have sexual intercourse with the victim as the two are lovers. The said statement was tendered as evidence and this court admitted it as Exhibit P1, whereas, the appellant did not object its tendering. Therefore, the learned counsel insists that the evidence was enough to prove the offence against the appellant.

In concluding, he added that in the case that involves sexual offences the best evidence is that of the victim. And in this matter at hand, he said, the evidence of the victim was able to prove the offence against the appellant. And that, the trial magistrate analyzed the evidence and gave reasons at page 8 of the judgment. Therefore, he prays for this appeal to be dismissed and the decision of the trial court to be upheld.

In rejoinder, the appellant submitted that all what has been said and submitted is not true. That, he was the one who was wronged. That the prosecution evidence is contradicting. Whereas, everyone is leaning on the age of the victim, in which it is not everything, and it is only attempts of covering up his case. Therefore, he prayed for this appeal to be allowed.

In determining the appeal before me, I will address the 2nd, 3rd, 4th, 5th, 6th and 7th grounds of appeal together, whereas the 1st ground of appeal will be addressed separately. The trial court's record indicates the testimony of the witnesses summoned were not at any point contradictory. However, if any, the inconsistence has to go to the root of the case in which in the case at hand, there is nowhere that the witnesses have contradicted themselves.

In the case of **Said Ally Ismail vs Republic,** Criminal Appeal No. 241 of 2008 (unreported) it was held that: -

> *"....it is not every discrepancy in the prosecution's witness that will cause the prosecution case to flop.* ***It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled ..."***
>
> ~~(Emphasis added)~~

The appellant complained on the failure by the prosecution side to produce a birth certificate to prove age of the victim. As rightly submitted by the learned State Attorney, it is not necessary that birth certificate should be produced to prove the victim's age. Age can even be proved orally by the victim's parent or guardian or the victim herself. It can as well be proved by inference. **See: Seleman Moses Solel @ White vs Republic,** Criminal Appeal No. 385 of 2018 and **George Claud Kassanda vs DPP,** Criminal Appeal No. 376 of 2017. (Both unreported).

Nevertheless, I do agree with the ground that the victim being a student has not been supported by either a school attendance book or registration book. Only, PW1 and the victim herself testified that she is a student of Msua Primary school in which it is not sufficient to conclude that indeed

the victim is a student of the said school. It is the trite that, the burden of proof is always on the prosecution side, therefore it was expected of them to either summon a witness who will prove the same by tendering the said books which belong to the school the victim is alleged to be attending. I therefore proceed to allow the fourth ground of appeal as it is meritious.

On the other hand, it is of course, for the prosecution to prove the guilt of an accused person beyond reasonable doubt and an accused person does not assume any burden to prove his innocence. It means, therefore, that failure by an accused person to say anything at the trial in his own defence does not imply admission of guilt. See: **Selemani Makumba vs Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006). Therefore, the claim from the appellant that his defence was enough to discharge him from the offence charged against him is unfounded as the same did not shake the prosecution's side evidence that he had raped the victim.

I now turn to address the 1st ground of appeal, the evidence of PW2 (the victim) and Exhibit P1 (cautioned statement), which was not objected to by the appellant, did reveal how the appellant had sexual intercourse with the victim. As it is in sexual offences, as rightly submitted by the learned

State Attorney that the issue to be proved is whether there was penetration. In the record of appeal, the victim's evidence at page 24 and Doctor's evidence at page 31 proved that there was penetration. The doctor's concluded that the victim had no hymen and she had bruises. In the victim's testimony, she testified that she had sexual intercourse three times with the appellant as seen on page 25.

I have also gone through the testimony of PW3 who recorded the statement of the appellant, in which in it, the appellant had admitted to have sexual intercourse with the victim as the two are lovers. The said statement was tendered as evidence and this court admitted it as Exhibit P1, whereas, the appellant did not object its tendering.

In Section 130 (4) (a) of the Penal Code, Cap 16, R. E. 2022, states

"130 (4) For the purposes of proving the offence of rape-

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"

In the circumstances pertaining in this case, the offence was allegedly committed behind closed doors and there were no eyewitnesses. Therefore, the evidence of the victim was crucial as it has been held in various cases that the evidence of rape comes from the victim herself,

See: Seleman Makumba's case. In addition to that, the statement of the appellant himself which he never objected to its tendering also corroborated the testimony of the victim. Similarly, the doctor's testimony and Exhibit P2 (PF3), they all proved that there was penetration of the appellant's penis into the victim's vagina in which consent was irrelevant. Therefore, the charge against the appellant was proved to the required standard of the law.

Apart from ground number four, I proceed to dismiss all the remaining grounds of appeal as I hold them to be meritless before this court. Consequently, I hereby partially allow this appeal by quashing the corporal punishment and upholding the conviction and sentence of thirty years (30) imprisonment and the payment of TZS. 500,000/= for the injuries he caused to the victim.

It is so ordered.

Dated at Sumbawanga this 05th day of March, 2024.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

T. M. MWENEMPAZI

JUDGE