IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 55 OF 2018

(Originating from Monduli District Court)

MATHIAS PATRICK.....APPEALLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MAIGE, J

The appellant MATHIAS PATRICK was charged before the District Court of Monduli with four counts; 1st count- rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2002, 2nd count – rape contrary to sections 130 (1) (2) (e) and 131 (1) of Penal Code (supra), 3rd count – unnatural offence contrary to section 154 (1) of the Penal Code (supra) and 4th count -grievous harm contraryto section 225 of the Penal Code (supra). He was acquitted with the 3rd count and convicted of the 1st, 2ndand 4th counts; and sentenced to serve thirty (30) years imprisonment.

Being aggrieved with both conviction and sentence, the appellant appealed to this court on seven grounds which in may view can be reduced into three grounds. First, the evidence of PW4 was illegally received; Two, the

case against the appellant was not proved beyond reasonable doubt. Three, the trial court was wrong in not satisfying itself on the age of the victim.

The evidence relied upon by the **trial court** to sustain conviction can be summarized as hereinafter. For hardly two years before the instance, the appellant and **PW-1**had been staying under one roof at Mto wa Mbuu within Monduli District. **Mary Samweli** (PW-3) and **Hilda Samweli** (PW4), the victims of the crimes under discussion, were the members of that family as biological daughters of **PW-1**.

On 03/08/2017 at 8:00, while **PW-1** and her two children were at home, there came the appellant who started uttering abusive language against **PW1**. He was threatening to rape **PW-3**. Soon thereafter, the appellant assaulted **PW-1** with a panga before locking her in a room. He then took **PW3** to another room and spent a night with her. On the next day in the morning, **PW2** revealed to her mother that she had been raped by the appellant. On inspection of her body, **PW-1** found the victim with bruises in her private part. The matter was reported to police and **PW3** taken to hospital for medication.

In her testimony,**PW-3** informed the **trial court** that she was a child of 11 years. She supported the evidence of**PW-1** that , on the material date and time, the appellant came at their residence and assaulted her mother with a panga before locking her and Hilda in a room. She testified further that soon afterwards, the appellant took her in another room. He removed her clothes and then inserted his penis into her vagina. He was playing with his finger in her anus. In the process, it further her testimony, the appellant produced his penis into her anus. He continued so until morning, she said further. It was further in her evidence that the appellant had been doing so repeatedly.

On her part, **PW4** represented herself as a young girl of 8 years. It was her evidence that the appellant did rape her on undisclosed day when her mother was on voyage to Karatu. She further confirmed the evidence of **PW-1** and **PW3** that the latter was raped by the appellant on the material date and place herein mentioned.

PW-5 (EMMA AGUSTINO) was a medical doctor at Mto wa Mbu Medical Center. He claims to have medically examined both **PW-3** and **PW**4 on 3/08/2017 and established that both of them were raped. The PF3 were exhibited and marked "P-1" collectively.

In his testimony in defense as **DW-1**, the appellant, denied the charge maintaining that the same has been fabricated due to family dispute between him and **PW1**.

On the date of the disposal of the appeal, the appellant appeared in person and was unrepresented. Mr. Dias Makule learned State Attorney, stood for the respondent/republic.

In his submissions, the appellant adopted the facts in the memorandum of appeal and urged the Court to allow the appeal.

On her part, the learned state attorney defended the conviction and sentence of the **trial court**. On the issue of compliance with section 127 of the **CP**A, it was her contention that the requirement for conducting *voire dire* test is no longer part of our law for the reason of being abrogated by amendment. The counsel dismissed the issue of description of the age of the witnesses to be immaterial.

On whether the case was proved beyond reasonable doubt, the counsel submitted it was. The evidence on the record was water tight, she submitted further. She urged the Court to dismiss the appeal.

I have considered the submission of the parties and gone through the records of the **trial court**. I prefer to start with the issue of *voire dire* test. On this, I subscribe to the learned State Attorney that, section 127 (2) of the Law of Evidence Act (supra) which required the trial magistrate to conduct *voire dire* test before reception of the evidence of a child of tender age, has been abrogated by the Written Laws (Miscellaneous Amendments) (No. 2) Act 2016. With the amendment, a child of tender age may give evidence with or without oath or affirmation; provided that, before giving evidence, the child has to promise that he shall tell the truth and not lies. The proceedings of the **trial court** indicate that before testifying, both **PW3** and **PW4**did promise that they would tell the truth. I will therefore, answer this issue against the appellant.

Let me now consider the appeal in relation with the issue of age. In accordance with the charge sheet, the appellant was charged in the 1st and the 2nd count, with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code (supra). The respective provisions if considered together entail that an offence of rape can be committed either actually or constructively. Constructive rape which is sometime referred as statutory rape, is set out in 130 (2) (e) of the Penal Code. It is said to be committed regardless of absence of consent if the victim is a minor.

It would follow therefore that; since the appellant was charged with the offence of constructive rape, the age of the **victims** was an essential element of the offence. The prosecution was bound to establish by evidence that the **victims** were the children of below 18 years old. This is in line of the decision of the Court of Appeal in**ANDREA FRANCIS VS. REPUBLIC, CRIMINAL APPEAL NO. 173 OF 2014,** CAT at Dodoma (unreported) where it was it was opined that the age of the victim was the determining factor in establishing the offence of statutory rape. The same position was replicated in **RWEKAZA BERNADO VS THE REPUBLIC, CRIMINAL APPEAL NO. 477 OF 2016, CAT-BUKOBA** where it was remarked as follows;

> *""".....we are of the considered opinion that the issue of age of the victim which was alleged in the particulars that described how the offence of rape was committed was a crucial matter to be proved by the witnesses who supported the prosecution case."*

I have taken time to study the proceedings of the **trial court** and I find no concrete evidence establishing the age of the **victims** or either of them. **PW-1**, the mother of the **victims** who was expected to be conversant with their ages, did not make any comment therefor. Neither is the doctor who testified as **PW5**. The age of the victims was just pleaded in the charge sheet. In my understanding of the law, the mere fact that the age of the victim is disclosed in the charge sheet does not *ipso facto* establishes the age of the victim for the purpose of statutory rape. Therefore, the Court of Appeal in**ANDREA FRANCIS** (*supra)* stated as follows;-

"With respect, it is trite law that ***the citation in a charge sheet relating to the age of an accused is not evidence. Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age,*** *as it were. In other words, in a case such as this one where the victims age is the determining factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim. Under normal circumstances evidence relating to the victim's age would be expected to come from any or either of the following: - the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc....."(emphasis supplied)*

In my opinion therefore, in the absence of the proof of the age of the victims, it cannot be said that statutory rape was established beyond reasonable doubts as against the appellant.

Assuming, without deciding that; the age of the victims was proved, there was, in my view, no sufficient evidence to establish the charge. The prosecution evidence in totality sound to be improbable and is guilty of material contradictions. Much as it is the law that; the evidence of the victim is the best evidence in rape cases, the rule does not apply unless the said evidence is credible and probable.(see for instance, **SELEMANI MAKUMBA VS REPUBLIC, CRIMINAL APPEAL NO. 94 OF 1999** (unreported))

I understand that credibility of witnesses is ordinarily within the domain of the **trial court**. The reason being that the same had an advantage of a face to face observation of the witnesses. That aside, the first appellate court has a duty to reappraise the evidence. In so doing, it may asses the credibility but not the demeanor of the witnesses. Addressing a similar issue, the Court of Appeal had this to say in **DERFOMAS MISUNGWI @ BUMBUGU VS, THE REPUBLIC, CRIMINAL APPEAL NO. 21 OF 2010, CAT AT MWANZA** (unreported) where it was stated that;

> *"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

Though in the charge sheet the appellant was accused of raping both **PW-3** and **PW-4**, the evidence of **PW-1** suggests that she was not aware of the rape of **PW4**. Her testimony was only confined with the rape of **PW3** and does not touch howsoever the rape of **PW-4**. Equally so for the testimony of **PW3**. **PW-1** being a biological mother of **PW4** and in consideration of the age of the latter, her silence on the rape of **PW4** was reasonably unexpected.

PW3 claims in evidence to have been raped by the appellant on the night of 03/08/2017. It was after**PW1**had been locked in the room. She was taken into another room and raped until morning. It was further in her evidence that, the appellant had been doing so repeatedly. She claimed to have be promised TZS 500 so that she could not disclose the secrecy. The prosecution evidence however suggest that **PW1** was aware that the appellant was going to sleep with **PW-3**. It was improbable for **PW-1** to await until on the next day to report the incidence. She would have raised an alarm to draw an attention to the neighbor for assistance.

Again, **PW3** said the appellant has been repeatedly raping her whenever he found her alone. If that is the case, why didn't she report the previous incidences. Why didn't her mother testify therefor?

In the charge sheet, it is factually alleged that PW4 was raped on 28.07.2017. In her evidence, she did not say when was she raped. Neither of the prosecution witnesses testified on that. In ANANIA TURIANI VS. R, CRIMINAL APPEAL NO. 195 OF 2009 (UNREPORTED), it was held that *"when a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offense was committed by the accused by giving evidence and proof to that effect".* The same position was stated in RYOBA MARIBA @MUNGARE VS. R, CRIMINAL APPEAL NO. 74 OF 2003 (UNREPORTED)where the appellant was charged with

committing rape on 20th October, 2000 and the prosecution gave evidence that it was committed in October and November, the Court of Appeal quashed the conviction. This was also replicated in RAJAB SHABAN @SANUKA VS. R, CRIMINAL APPEAL NO. 461 OF 2015.

It is from the foregoing discussions I find that the offences of rape according the appellant was not proved beyond reasonable doubts.

The offenceof grievous harm was in the same token not prove. PW1 is portrayed in the charge sheet and evidence to be the victim of the crime. Unlike PW-3 and PW-4, the prosecution evidence does not suggest if he ever went to hospital for treatment. The extent of her injury is not in evidence. She claims to have beaten by a panga but does not disclose the part of her body unto which she was injured. The judgment of the trial court suggests that the appellant was convicted on the weakness of the defense case. This is evident in page 16 of the judgment where it is stated as follows:-

> *"With regard to the 1st, 2nd and 4th counts, I proceed to convict an accused person contrary to the provisions of section 130 (1) (2) (e) and 131 (1) and 225 of the Penal Code (supra).*
>
> *Time without number, it has been repeated so oftenly that where the evidence has been given in examination in chief and during which*

such evidence is not challenged during cross examination, then the cardinal principal of law provides that failure to challenge the evidence is to admit it;"

This was not proper in law. It is an established principle of the law that, the accused can only be convicted of the offence on based on the strength of the prosecution case and not the weakness of the defense case. See the case of **Republic vs. Kerstin Cameron** [2003] TLR 84. I find also that this offence was not established beyond reasonable doubts.

In the final results and for the foregoing reasons, the appeal is allowed. cumulative of the above, I consequentlyquash the conviction and set aside the sentence of the trial court. I further order for immediate release of the appellant from prison unless otherwise lawful held.

Order accordingly.

I.MAIGE
JUDGE
21/11/2018

Date: 21/11/2018
Coram: Hon. Maige, J
Appellant: Present in person
Respondent: Absent
B/C: Mariam--
Court: Judgment delivered, appeal allowed.

HIGH COURT OF TANZANIA

I.MAIGE
JUDGE
21/11/2018