THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

RM. CRIMINAL APPEAL NO. 55 OF 2021

(Originating from Criminal Case No. 34/2020 in the Katavi Resident Magistrate Court at Mpanda)

ROKI PATRICK @ MIZENGO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Last of Order: 21/09/2022
Date of Judgment: 12/12/2022

JUDGMENT

NDUNGURU, J.

The arraignment and the eventual conviction and sentence against the appellant arose from a charge sheet preferred under section 158 (1) (a) of the Penal Code Cape 16. R. E. 2002 (but now amended). Before the trial court, the appellant was charged with the offence of incest by male contrary to Section 158 (1) (a) of the Penal Code. The facts constituting in the charge sheet alleged that on the 29th February, 2020 at Kapanga Village within Tanganyika District in Katavi Region, the appellant did have prohibited sexual intercourse with the victim (her identity is concealed) a girl of nine years old who is to the appellant's knowledge his daughter.

During full trial, the appellant denied the accusations which made the

prosecution side to parade five (5) witnesses to prove its case. On his part, the appellant had no any witness. At the end of the trial, the appellant was found guilty and convicted for the offence he was charged with and sentenced to serve a term of thirty (30) years imprisonment. Aggrieved by that decision, the appellant filed a petition to this court consisting of two grounds which are as hereunder;

1. *That the trial court erred both at law and fact by convicting the appellant on the offence which was not proved beyond reasonable doubt as the ingredient of the offence of rape was not proved.*
2. *That, the trial court erred at law and fact by convicting the appellant without scientific proof whatsoever that the appellant inserted his penis in the victim's vagina.*

As the matter was fixed for hearing, the appellant represented himself while the respondent was represented by Ms. Safi Kashindi Amani learned State Attorney.

When invited to submit for his grounds of appeal, the appellant submitted that he prays for this court to adopt his grounds of appeal and allow his appeal.

Responding to the appellant's submission, Ms. Kashindi argued that they resist the appeal and that she will reply to the grounds of appeal as set in the memorandum of appeal.

She took off by submitting against the 1st ground that the victim in this case is the daughter of the appellant as stated by PW2, Elias s/o Gelson (appellant's brother in-law). Further, she submitted that the appellant is the biological father of the victim and on the day of the incidence when the victim shouted for help, many people gathered to rescue the victim. She added that, the testimony of the medical officer revealed that the victim sustained bruises. Ms. Kashindi also argued that the key witness in this case is the victim herself as provided in the case of **Seleman Makumba vs Republic (2006) TLR 369**. Thus, she concluded that the 1st ground of appeal is devoid of merit, and that all ingredients were proved.

Coming to the 2nd ground, Ms. Kashindi argued that the law does not demand scientific proof but the proof of penetration is very important. And therefore, to her this ground too lacks merit and that she prayed for this court to dismiss this appeal.

In rejoinder, the appellant reiterated his grounds of appeal to be considered.

After reading the submissions from both sides, the only determinant issue in this appeal is to ***whether the charge against the appellant were proved beyond reasonable doubts.***

In dealing with this appeal, I will deal with the raised grounds jointly

in its disposal, putting in mind that, the aspect by the appellant is that the case against him was not proved to the required standards of the law, of which it made me revisit the precedents on rape and the proof of the same.

Starting with the amendment of the Evidence Act in 2016 done by Act No.4 of 2016, subsections (2) and (3) of section 127 of the Evidence Act were deleted and substituted with subsection (2) and in that it reads;

> *"(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 lies.***"
>
> [Emphasis added]

In my understanding, the above cited provision as amended, provides for two conditions. **One**, it allows the child of a tender age to give evidence without oath or affirmation. **Two**, before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies. In emphasizing this position, the Court of Appeal of Tanzania in the case of **Msiba Leonard Mchere Kumwaga v. Republic, Criminal Appeal No. 550 of 2015** (unreported) observed as follows:

> *"..... Before dealing with the matter before us, we have deemed it crucial to paint out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No.4 of 2016*

(Amendment Act). Currently, ***a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies."***

[Emphasis added]

In this case, before PW1 who was a child of tender age gave her evidence, this is what transpired as shown at page 09 of the typed judgement of the trial court;

Answer: My name is Elizabert Roki.

Answer: I am nine years of age.

Answer: My father is Roki Patrick.

Answer: I am in Class one at Nsimbo Primary School,

Answer: I don't know the meaning of Oath.

Answer: I promise to tell the truth to court and not a lie

Court: Witness Elizabet d/o Roki appeared to be a child of tender age, upon my keen examination of putting some questions and her answers, she demonstrates understanding, but she didn't understand the nature of an oath, however she promised to tell the truth to court and not a lie. This court finds her not competent witness to testify under oath.

J. S. MUSAROCHE
SRM

I went through the trouble of reproducing the particular part of the victim's making a promise of telling the truth and not a lie before testifying because, in this case the victim is the key witness in proving the charges against the appellant. I am therefore fortified and pleased with the procedure taken by the trial magistrate in making sure that the victim is a credible witness who is capable of testifying.

In addition to that, as rightly submitted by the learned State Attorney as she cited the celebrated case of **Seleman Makumba vs Republic** (supra), indeed, the best evidence comes from the victim herself, and in my considered view such evidence should give clear details of how the alleged rape took place. In the case at hand the victim, PW1 testified before the court that on the fateful day, she was with her father heading to a shop on a path, and on that path, there are bushes, and suddenly her father pulled her into the bush and forcefully undressed her and himself too, he made her lie down on her back and took out his penis, he then slept on her and started inserting his penis in her vagina, she then cried for help and some good Samaritans arrived to rescue her.

From her testimony, it is evident that herself knew what was done to her by the appellant, as she narrated how, when and where the ordeal took place until she was rescued. The Court of Appeal has in a number of

its decisions emphasized that rape is normally conducted in secrecy so the best evidence in rape cases comes from the victim herself. See **Daimu Daimu Rashid @ Double D vs Republic, Criminal Appeal 5 of 2018 CAT** (unreported), **Godi Kasenegala v. Republic, Criminal Appeal No. 10 of 2008 CAT** (unreported) just to mention a few.

With regard to the issue of rape, it is noteworthy that it entails penetration. According to section 130 (4) (a) of the Penal Code penetration, however, slight constitutes the ingredient of the offence of rape. This was also reiterated in the case of **Amir Rashid v. Republic, Criminal Appeal No. 187 of 2018** (unreported) in which the Court of Appeal cited with approval its earlier decision in the case of **Hassan Bakari @ Mamajicho v. Republic, Criminal Appeal No. 103 of 2012** (unreported) and stated as follows: -

> *"The other catchword is penetration. Simply put, it means the penis entering the vagina. Such entering, however slight it may be, is an important ingredient to the offence of rape."*

In the matter at hand, PW3's (James Gelson) evidence was to the effect that when he took PW1 to Katuma Dispensary for examination she was found to be penetrated by a blunt object. This was verified by PW5 (Emmanuel John) a medical officer who conducted the examination on the victim and filled the PF3 an exhibit which was admitted in evidence as

exhibit PE2. PW5 told the court the victim was complaining of pain in her vagina, as he examined her, he found some bruises, no hymen and slight fresh blood stained with secretion and all that he had seen might have been caused by a blunt object such as a penis.

By way of emphasis, I am convinced that the appellant was convicted and sentenced after the prosecution side had proved their case against him beyond reasonable doubts and that whatever inspired him to file an appeal to the court was part and parcel of his regrets of doing the ordeal to his own daughter, as I believe of now obviously there is an element of shame in him.

In conclusion, I find no justification to interfere with the findings of the trial Court which particularly based on the testimony of the victim herself, and the medical officer's evidence. Accordingly, I hold that this appeal lacks merit, and it is hereby dismissed in its entirety.

It is ordered accordingly.

D. B. NDUNGURU

JUDGE

12/12/2022