IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

KIGOMA SUB-REGISTRY

AT KIGOMA

DC. CRIMINAL APPEAL NO. 31 OF 2023

FANUEL RAMECK .....1st APPELLANT

SAMWEL NOA.....2nd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Arising from the decision of the District Court of Kasulu)

(Batenzi, SRM)

dated 18th November 2022
in

Criminal Case No. 394 of 2021

JUDGEMENT

23rd October & 8th November 2023

Rwizile, J

The appellants were charged with gang rape contrary to section 131A (1) and (2) of the Penal. After a full trial, the District Court found them guilty, convicted them as charged, and sentenced them to life imprisonment. They were aggrieved with both conviction and sentence, hence this appeal. The memorandum of appeal advanced five grounds, styled as hereunder;

1. *That the trial court erred in law and fat for convicting and sentencing the appellant while the case was not proved beyond reasonable doubt.*
2. *That the trial court erred in law and in fact for sentencing the appellants without taking into account that the appellant was the child at the time commission of the offence.*
3. *That the trial court erred in law and in facts for failure to address to the appellants the right to appeal as prescribed by law.*
4. *That the trial court erred in law and facts by removing for failure to take into consideration of defense testimony and that the appellants were not told the offence charged at the time of the arrest.*
5. *That trial court erred in law and in facts for holding that the appellants were properly identified with no evidence in support from the prosecution.*

Mr. Msasa learned counsel advocated for the appellants, while for the respondent stood Ms. Antia Julius learned State Attorney.

Advancing appellants' arguments in respect of grounds of appeal, it was stated that the conviction was mounted without proving the case beyond reasonable doubt. To substantiate this point, it was said, that the evidence relied upon was from Pw1 and Pw7. According to him, there was no evidence of Pw7 in the record despite being referred to in the judgment on page 7. It was the evidence of the prosecution, the learned counsel added, that the offence was committed when the appellants held the knife but the said knife was not tendered in evidence.

Further, he argued, contrary to the evidence, the victim-Pw1 said, the 1st appellant was drunk and that he was apprehended at the crime scene, but the trial court in its judgment held the view that the conviction was due to failure to cooperate. This court was therefore asked to consider evidence of Pw1 as unreliable.

According to the learned counsel, the evidence for the prosecution left many gaps and contradictions such as the number of persons at the crime scene, by Pw1 that they were five and upon cross-examination she said they were four, that there were no bruises in her sexual organs but still she was penetrated, that there were sperms but Pw4 did not say how long could such sperms last in her body. Further, it was on whether the underpants were blue as stated by Pw1, or cream as stated by Pw2. It was therefore clear to the learned counsel that such contradictions were material to the extent that conviction could not be based.

Arguing the second ground, it was said that the sentence imposed on the 2nd appellant is illegal because the same was 18 years old when the offence was committed. He said it was contrary to the charging provisions which directed a different sentence.

Lastly, when arguing ground 5, the learned counsel was clear that the offence in terms of the evidence of the victim, was committed at 5 a.m. in darkness. He said that in terms of the case of **Waziri Amani v R** [1980] TLR 250, the appellants were not identified. I was asked to allow this appeal.

On the party of the respondent, Ms. Antia learned State Attorney argued that evidence of rape is penetration, absence of consent if rape is committed to an adult, and identification of the culprit. She asked this court to be guided by the case of **Wambura Kiginja vs. R**, Criminal Appeal No. 301 of 2018, and **Seleman M vs R**, [2006] TLR 379.

She argued that Pw1 and Pw4 proved penetration and that the 2nd appellant was holding a knife when assisting others to rape Pw1 is not an issue. Apart from proving penetration, she added, the appellants were identified and that absence of bruises is not the necessary evidence of rape. She further said Pw1 testified that the 2nd appellant was arrested at the crime scene. There was no need for the identification parade as submitted by the appellants' counsel that there was darkness when the offence was committed, and so, an identification parade was necessary. She further said that since the 1st appellant was not a strange person to Pw1 and that he was mentioned by the 2nd appellant, there was no need for the parade. Dealing with the

absence of evidence of Pw7 on the record, it was her submission that it was a slip of the pen on the party of the trial court.

The absence of a knife as an instrumentality of crime, it was argued that it is not an issue in the case at hand, the learned Attorney added. Likewise, she added that the difference in the color of the underpants does not affect the substance of the evidence.

On the second ground, the learned Attorney did not dispute that the 2nd appellant was 18 years old at the time the crime was committed. Therefore, she said, in terms of the provisions creating the offence charged, the sentence imposed was illegal. Lastly, she argued that section 388 of the Criminal Procedure Act, cures the defect, if any, on the judgment of the trial court which had no sentence as submitted by the appellants' counsel.

When rejoining, Mr. Msasa believed that section 388 of CPA, cures errors in the judgment. He said, in the material particulars of this case, failure of the judgment not to pronounce the sentence is fatal. The proceedings, according to him, must be nullified and a trial denovo be ordered. The learned counsel otherwise, reiterated his submission in chief and asked this court to allow the appeal.

Before going into the merits of this appeal, with respect to the point raised by Mr. Msasa, the failure of the judgment to pronounce the sentence is a fatal irregularity. The record has it that, the trial court after hearing the case on 18th October 2022, reserved the judgment which was pronounced on 25th November 2022. That was delivered in open court in the presence of the appellants and the Public Prosecutor. After its pronouncement, the appellants were afforded a chance to mitigate, they were accordingly sentenced.

In my view, I find nothing that went wrong on the part of the trial court. I am not aware of any law, and Mr. Msasa has not cited any that mandatorily requires that the judgment must be with the sentence imposed. The practice has it that upon pronouncing judgment with conviction, the sentence proceedings follow. If there was an error as Mr. Msasa implies, still, as submitted by Ms Antia learned State Attorney, this error is curable under section 388 of the CPA because no failure of justice has been occasioned.

Going back to the merits of the appeal, the first ground is that the case was not proved beyond reasonable doubt.

It is cardinal that the duty to prove the charge is on the prosecution. As submitted, the law provides that the offence of rape is proved by

penetration, how deep was penetration notwithstanding. Because the victim in this case was of the age of majority another requirement is absence of consent. The prosecution evidence shows the offence was committed early in the dawn. Indeed, there was a need to prove circumstances favouring proper identification to suit the dictates of proper identification stated in the case of **Waziri Aman v R** (supra). The record of appeal has it that, evidence of Pw1 the victim, narrated how the offence was committed on her. She said as follows on pages 13 to 14 of the typed proceedings

> *"... they were a total of four people. They told me that they need no question. They dropped me on the ground. They did tear my underwear... one of them had sexual intercourse with me and he left. Another one held his penis and inserted it into my vagina. Among these four people the one who I remained with started to struggle. He was drunk. I pleased him while taking him out of the ground ascending to people's residences. This person who is this one here (pointing to the accused number 1) was just beating me with a fist. I raised the alarm. As I raised the alarm people responded to my alarm. They arrested the accused number 1. Then we were brought to Kasulu Police Station. I explained how it was. At the police station, we found the second person to have sexual intercourse with me. I just knew him he is called Fanuel. Accused number 1 also mentioned Fanuel to be among the people who had this sexual intercourse with me..."*

It is clear from the extract of the evidence of Pw1 that the first accused was arrested at the crime scene. According to the chargesheet accused number is Samuel Noa, now 2nd appellant. It is further in the record that the same person was taken to the police station where the 1st appellant was found. Further evidence of Pw2 was keen on the same incident. He is the leader of the street and upon the arrest of 2nd appellant, they led him and the victim to his residence. He testified in the following terms on page 18 of the typed proceeding;

> *"I do live in Sido Street in Kasulu district. I am a street chairperson for Sido Street. On 14/12/2021 during morning hours at or about 5:00 am I was at my residence. There happens a rape incident in my street. The citizen came to my residence me. As I awakened, I went outside and found them. They were with two people. One was a girl who was raped. The other one was a man who was the rapist. This man had a small knife and a pair of scissors. I took these two people to Kasulu Police Station..."*

The extract supports what Pw1 told the trial court about the arrest of the 2nd appellant. In his evidence as well Pw2 identified him in the dock. Dock identification was crucial in the material circumstances since it cements what took place days before he came to testify.

As to how the 1st appellant was arrested, it is from the evidence of Pw1 that she knew her before as Fanuel. But she had not named him before. At the police station, when the 2nd appellant was arrested, he mentioned him to have been together at the scene of the crime.

The evidence is clear as per proceedings on page 31 when the first appellant stood as Dw2. He said;

> *"I was surprised as I was mentioned by accused number 1 without me having any information. Accused number 1 stated that this too is involved. As I attempted to plead, I was put under restraint. I was told that I had raped. I did not do this offence. I don't know this Dotto Damiano. I have even not ever seen her..."*

From the above, it is clear to me that evidence of identification in terms of **Waziri Aman's** case(supra) is not applicable since the 2nd appellant was arrested at the crime scene as per evidence of Pw1 and Pw2 which I do not think I have to doubt. The trial court that saw and witnessed them testify believed that the two were telling nothing but the truth. It follows therefore that I have no reason to doubt the said finding. I do not think, I have to find faulty in their evidence.

At law, evidence of the co-accused person cannot, indeed be taken as conclusive unless it is supported by some other independent evidence. The

1st appellant said was mentioned by the 2nd appellant as he was found at the police station. Pw1 told the trial court that he knew him and that was also at the scene of the crime. She also said she was the second person to rape her. She also said, under cross-examination that the same was a person she boarded a motorcycle with. Early in her evidence, Pw1 said, that when she was on the way on that fateful morning, boys on a motorcycle snatched her handbag and a phone. They went away, and then another motorcycle came by and asked her if she identified them.

She was asked to board the motorcycle and be led to the place those who stole from her had gone.

It seems to me that the time taken from the time the first incident happened and the way the rape took place, there is no doubt Pw1 was able to see everything and I think the evidence of the 2nd appellant is corroborated. That being the case, I agree with the learned State Attorney that there was no need for an identification parade.

Further, as to contradictions, the same was stated as the colors of the underwear of the victim, whether blue or cream and the amount of people at the scene. I have visited the evidence and I am convinced that such material does not affect the quality of the evidence of rape. In similar terms

absence of the knife and pair of scissors as used at the crime scene to threaten her, cannot affect the substance of the evidence of Pw1. I am saying so because it is Pw1 who best knew the color of her underpants and the rest may have been effected by the time it took to recover the same.

The evidence by Pw4 that showed she had no bruises but had dusty clothes and swabs taken proved there were sperms. She also had a swollen eye which was difficult to open. This evidence proves she was penetrated and that it happened under a forceful situation. Taking that as a whole, I do not doubt that the prosecution proved its case beyond reasonable doubt. Therefore, the conviction was justified in the circumstances. From the foregoing, I desist the invitation to set aside conviction. It is confirmed.

The second part of this appeal is about the sentence imposed on the 2nd appellant. There is no doubt that both parties agree that the 2nd appellant was 18 years old.

He was charged and convicted under section 131A (1) & (2) of the Penal Code. For the avoidance of doubt, the same law states as hereunder;

> *131A.-(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.*

(2) Subject to the provision of subsection (3), every person who is convicted to gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape.

Basically, from the provisions, the sentence of gang rape which I have no doubt is what was committed has a sentence of life. However, this does not apply to the situation stated under subsection 3 of the same section. That is why, subsection 2 starts with the words "subject to the provisions of subsection 3". The exception stated therefrom appears in the case when the accused is 18 years or below. The provisions are in the following terms;

Where the commission or abetting the commission of a gang rape involves ***a person of or under the age of eighteen years*** *the court shall, instead of sentence of imprisonment, impose a sentence of corporal punishment based on the actual role he played in the rape. (emphasis added)*

As I have shown before, the 2nd appellant was 18 years as at the time of being charged. The sentence that is imposed is over and above the minimum sentence prescribed by the law. It is, therefore, illegal. When I dismiss the appeal, I set aside the sentence against the 2nd appellant and substitute for it with unconditional discharge since she has been unlawfully in prison serving a sentence he ought not to be serving. This is to say, conviction and sentence for the 1st appellant remain as imposed by the trial court.

ACK. RWIZILE

JUDGE

08.11.2023