IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA SUB – REGISTRY)

AT KIGOMA

DC CRIMINAL APPEAL NO. 14 OF 2023

FRANK MABUGA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Arising from the District Court of Kigoma at Kigoma)

(Mushi, SRM)

dated 20th day of March 2023

in

DC Criminal case No. 43 of 2022

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JUDGEMENT

09th November & 14th December 2023

Rwizile J

The appellant was charged before the District Court of Kigoma with statutory rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code. He was alleged to rape a girl 13 years old. The prosecution side tendered six witnesses to prove the charge, while the defence had 3 witnesses.

On the evening of the 19th of December 2021, her stepmother (Pw1) directed the victim to look for the chicken that had not returned home. To her dismay, like the chicken, the victim did not as well return home.

Pw1 mounted as a search for her, unsuccessful. She met two children, who told her, the victim was seen with a tall man with white skin. Pw1 then reported the matter to the police. Women told her that they saw the victim with the appellant entering Ishimwe guest house. Pw1 informed the police and the appellant was arrested and prosecuted.

In his defence, he agreed to meet the child. Being a social welfare officer, he said, he gave her a place to sleep at the Ishimwe guest house where he hired a room for his relative. He thought she was a street girl. He denied having sexual intercourse with her.

After a full trial, he was found guilty, convicted as charged, and sentenced to 30 years imprisonment. Aggrieved by the verdict, he decided to appeal to this court on the following grounds:

1. *That, the Hon. trial Magistrate erred in law and facts by holding that the charge against the appellant was proved beyond all reasonable doubt while the Court did not take the evidence of Pw2 in adherence to the mandatory requirements of the law.*

2. *That, the Hon. trial Magistrate erred in law and facts by failing to scrutinize the evidence on records thereby arriving at the verdict that the appellant was found guilty of the offence despite the doubtful evidence and discrepancies in the evidence by prosecution witnesses on material points.*
3. *That, the Hon. trial Magistrate erred in law and facts by holding that the appellant was found guilty of the offence charged despite the material breaches of mandatory dictates of the law thereby resulting in incurable irregularities in the trial Court's proceedings including but not limited to taking of evidence and affording fair hearing to the appellant as an accused person.*

The appellant appeared under the legal representation of Mr. Sadiki Aliki, learned advocate. For the Republic was Ms. Antia Julius, a learned State Attorney. This appeal was argued orally. The appellant argued the 1st and 2nd grounds together. It was argued that the age of the victim was not proven. Mr. Aliki added that as long as it is statutory rape, age must be proved. The learned advocate cited the case of **Ruteyo Richard vs. R**, Criminal Appeal No. 114 of 2017. The learned counsel insisted that the victim's stepmother had no card to prove her age, she was just guessing. He added that even the victim did not know her age. Her parents are living in Tabora but were not called to testify.

The learned counsel was of the submission that there was no proof of penetration. He referred to the PF-3 exhibit P1, which reported that there were bruises and no virginity due to penetration of a blunt object. Mr. Aliki doubted that evidence. The victim, according to him, alleged to be raped on 19th December 2021 at night. Then, he added, she left on 20th December and there was no evidence to show where she spent that other time. He was clear that some important witnesses like the so-called good Samaritan and the street leader who hosted the victim, and who called Pw1 didn't testify.

His last submission was on the change of trial magistrate without assigning the reasons for the change. He argued that the case was before Mwakitalu-SRM, then assigned to Mushi-SRM, who recused herself because she had another matter before her against the appellant. She returned the matter to the in charge who re-assigned it to himself.

To support his submission on the necessity of giving the reason for the change of the trial magistrate, he cited the case of **Abdi Mandi and 3 others vs. R**, Criminal Appeal No. 116 of 2015 that the reason for re-assignment must be stated in the record. Further reference was in the case of **Saada Nyambibo vs Debora J. Nyambibo**, Civil Appeal No.

140 of 2020, and insisted that the reasons put forward for changes of the trial magistrate did not sound.

Opposing the appeal, MS Antia learned State Attorney, submitted that age was proved. The learned Attorney's view was that age can be proved by parents, doctors, relatives, or the victim, as held in the case of **Ruteyo Richard** (Supra) and **Makende Simon v R**, Criminal appeal No. 412 of 2017. She also said that Pw1 a relative of the victim proved the victim's age as informed by the victim's mother. The doctor, it was further argued in that connection was just told about her age and was not an issue before him. As for the issue of penetration, she submitted that it was proved by Pw4, and the victim

The learned attorney argued further that, the charge was proved, that it was the appellant who took her to the guest house and raped her. To support her submission, she cited the case of **Selemani Makumba vs. The Republic**, [2006] TLR 379 which supports the fact that the best evidence comes from the victim. According to her, all key witnesses were called, and those who were not called were not at the scene of the event. In conclusion, the learned state attorney said, the change of magistrate was done with reasons recorded in the proceedings.

Having considered the submission for and against this appeal, I propose to start determining the third ground first which is on change of trial magistrate. It is now settled that when a trial magistrate is assigned a matter, the duty imposed on him is that he should try it to the finality. Any shift from this normal trial process must be stated in the proceedings. In **Priscus Kimaro vs. R**, Criminal Appeal No. 301 of 2013 (CAT-unreported) the Court observed:

> " . . . *where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded..."*

Going by the proceedings, the record has it that, the case was assigned to Mwakitalu-SRM on 22.2.2022 who before he left, heard five witnesses for the prosecution out of six who testified. When he was transferred to another station, the case was re-assigned to another magistrate (Mushi-SRM) on 8.11.2022. The assigning magistrate stated the reasons for re-assignment as transfer of the trial Magistrate to some other station. When the same was placed before Mushi-SRM, she recused herself for the reason that she had another case against the appellant pending before her. On 14.11.2022, Momba PRM re-assigned it to himself. But on 20.12.2022, it seems the trial Magistrate (Momba-PRM) who previously

had re-assigned the case to himself was indisposed. It was then placed before Mushi-SRM for adjournment. The Public Prosecutor asked the presiding Magistrate that the matter was ready and everyone was present. He pleaded that since the trial magistrate was assigned other duties, the case be heard by her. In response, Mushi-SRM noted as follows;

> *"...as the trial magistrate was assigned to other official duties this matter was re-assigned to Hon. E.B. Mushi* -Ag. DRMi/c..."

Under section 214 of the Criminal Procedure Act, the magistrate proceeded to address the parties. The appellant, when asked to comment, did not mince words, he told the magistrate that he was ready to proceed with the case where it ended.

From the foregoing, the reasons for the change of the trial magistrate were recorded in the proceedings, the appellant was very much aware and so informed. I find no merit in this ground of appeal. It is dismissed.

In terms of arguments, Mr. Aliki submitted generally on the other grounds. He argued and rightly so that, in statutory rape cases like this one, the age of the victim must be proved. The view of the learned State Attorney was that age was proved. In the record, it is plain that the victim said, she was 13 years old. Her relative Pw1 was of similar evidence, that she

was 13 years old. As said, she added that the victim was born in Tabora in the Urambo District on 12.9.2008.

It is now settled that the age of the victim in court can be proved by either the victim, relative, parents, or a doctor. In **Leonard Sakata vs The Director of Public Prosecutions,** Criminal Appeal No. 235 of 2019 on pages 13-14

> "*With respect; whilst there may be other ways of proving age such as by evidence given by the victim, relative, parent, medical practitioner or where available by production of a birth certificate, like any other fact age may be deduced from the evidence availed to the court...*"

I do not think, that what was testified by the prosecution witnesses fell short of proof of age. I know, it is not true that all facts in a case must be proved by documentary evidence.

With or without documentary evidence if the court is satisfied that oral evidence is nothing but the truth as testified by the witnesses, a fact may be taken as proved. For the foregoing reasons, I find no reason to believe that age as a necessary ingredient of statutory rape was not proven. The victim and her stepmother were clear on the same issue. I find no merit in this point.

Penetration as another element of rape was contested. Mr. Aliki submitted that it was not proven. He argued that the PF-3 said there were bruises without virginity. Pw4, who examined the victim testified that there were bruises in the private parties of the victim. It should be noted here that bruises are not the requirement of proving penetration. It is because bruises may depend on how sexual parties came into contact and perhaps the size of both parts. There is no doubt in my mind that based on the evidence, all elements of rape have been proven. The only question that remains is who raped the victim.

The position of the law is clear that in criminal cases, the burden of proof lies on the prosecution. In **Tobias Michael Kitavi vs. R,** Criminal Appeal No. 31 of 2017 on pages 14-15 Court of Appeal held;

> *"It is settled law that the prosecution is under the duty to prove its case beyond a reasonable doubt, and the accused is only required in his defence to raise reasonable doubt on the prosecution's case."*

As submitted by the counsel for the appellant the victim's whereabouts from the 19th of December to the 22nd of December 2022 were not clearly shown. According to Mr. Aliki, the victim is alleged to have left the appellant after rape on the 20th of December but reached home on the

22nd of December She was hosted by two people one woman and a village leader.

In his view, they were important witnesses to come to testify which was not the case. It can be stated from above that failure to account for that period does not show, that the appellant did not commit the offence. It sounds to me that it creates some gaps which need support from other evidence.

Further, apart from the evidence of the victim, there is evidence of Keila Visent (Pw3). She testified that she saw the appellant with the victim entering the guest on the 19th of December during night hours. Again, she saw them when leaving from the same guest the next day. It is this evidence according to Pw1 that shed some light on where the victim was. On page 30 of the proceedings, she testified as follows, when she saw them come out of the guest house;

> *"... I followed them, I saw that girl heading to Ujenzi then the accused continued to follow her with his car slowly then I became tied to follow, then and I returned to my home..."*

When cross-examined on a similar issue, on page 32, she had this to say,

"I followed them for a few moments, the girl was ahead and the accused was following her with his car. I wanted to reach her and ask her where she lived and why she slept at the Ishimwe guest house when I reached her, I greeted her, I wanted to ask her if the accused was her relative but that girl was too shy to reply and she was delaying to reply to me, it was then I left her because I did not want the accused to see me talking to that girl..."

But in another incident, the evidence of Pw1 is in connection with that of Pw3. Pw1 on page 12 of the proceedings;

...went to those women, they were two "walikuwa wanafuma shuka", we told them, we were looking for a girl... those women said, if you could have come yesterday, we could have taken you and could have arrested the suspect they did see the child entering into Ishimwe guest house with a person named Frank. They said, that when it was around 8:00 in the morning they saw Frank getting the said child from the guest house..."

But Pw3 on page 30 stated that;

"... I asked them to describe the girl they were looking for, was the same girl whom I saw entering into Ishimwe guest house the previous night with the accused, so I told that woman her child slept

For the foregoing, I find merit in this appeal. I therefore allow the appeal and set aside the conviction and sentence. The appellant is to be released from prison save if held for some other lawful cause.

ACK.Rwizile

JUDGE

14.12.2023