IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA SUB-REGISTRY

AT SUMBAWANGA

(DC) CRIMINAL APPEAL No. 74 OF 2023

(Originating from the decision of Hon. G.J. William, SRM, Sumbawanga District Court in Criminal Case No. 85 of 2022)

BETWEEN

JOFREY s/o EMILY SILUNGU

VERSUS

THE REPUBLIC

Last order: February 13, 2024
Judgement: March 13th, 2024

JUDGMENT

NANGELA, J.:

The law, and in particular criminal law, operates within a socio-cultural context and, for that matter, words which may be used to euphemistically convey certain meanings must be interpreted based their socio-cultural-linguistic context in deciphering what they mean in their real meaning. This is an appeal against conviction and sentence regarding the offence of rape.

On the 04th of November 2022, Jofrey Emily Silungu, the appellant herein, was arraigned before the District Court of Sumbawanga facing a Criminal Case No.85 of 2022. In

that case he was charged with the offence of rape contrary to Section 130 (1) and (2)(e) and Section 131 (1) of the Penal Code, Cap.16 R.E 2022. The victim of the offence was a girl aged 14years old.

The prosecution case was to the effect that, on the 25th of August 2022, while at Kalumbeleza Village within Sumbawanga District, Rukwa Region, the appellant unlawfully had sexual intercourse with the victim. Upon hearing the evidence laid before the Court by the learned prosecutor and that of the accused (the appellant herein), the trial court found him guilty of the offence charged and sentenced him to imprisonment for a term of thirty (30) years.

On top of that sentence, the appellant was also to suffer 12 trokes of a cane as corporal punishment, (six (6) strokes at the beginning of his imprisonment term and six (6) at the end of his imprisonment term). Further still, he was ordered to pay compensation to the victim amounting to TZS 500,000/= for the injuries (pain) caused to the victim.

Aggrieved by both the conviction and the sentence meted out on him by the trial court, the appellant has

appealed to this court raising five (5) grounds of appeal. The appellant's grounds of appeal are as follows:

1. That, the prosecution side failed to prove the charge against the appellant as required by the law's standard.
2. That, the trial court was totally wrong in law and fact by convicting and sentencing the appellant without taking into consideration that the prosecution side failed to produce birth certificate or affidavit to prove the age of the victim.
3. That, the trial court erred in law and fact by convicting and sentencing the appellant based on the evidence adduced by Pw-1 (the Victim) that she was raped by the appellant while it failed to note out that the victim failed to raise alarm in need of help.
4. That, the trial magistrate misdirected himself by convicting and sentencing the appellant relying on the testimony of the victim while there was no proper identification for the appellant as no identification parade was conducted at the police station.

5. That, the trial court without calling one Daud, Sai and Thedy for the court to satisfy itself that the appellant knocked the door at the house of the victim, a fact which shows that the case against the appellant was "planted" by the prosecution.

Based on those five grounds of appeal, the appellant prayed for orders that his appeal be allowed, his conviction and sentence be quashed and set aside, he be discharge from the offence he was charged with and be released from prison where he is currently being held. On February 13th, 2024, this appeal was set for hearing.

On the material date the appellant appeared before this court unrepresented. He chose to argue his appeal case himself. As for the respondent (the Republic), it was Ms. Godliva Shio and Mr. Jackson Komba, learned State Attorneys who appeared in court.

When the appellant was given the opportunity to address this court, he told this court to consider his five grounds of appeal already filed and he be freed because he did not commit the offence which he was convicted of. He told this court that he was only arrested while at home and

the case against him was a frameup case because his family had a land dispute with the victim's family. He, therefore, urged this court to consider and uphold his grounds of appeal and set him free.

In opposition to the prayer to allow the appellant's ground, Mr. Jackson Komba, learned State Attorney urged this court to decline granting the prayers sought by the appellant. He submitted the charge against the appellant was duly proved beyond reasonable doubt confirming that it was the appellant who committed the offence of raping the victim aged 14 years old. Mr. Komba submitted that, since the offence constitute statutory rape, proof of the following two element was essential and they were indeed proved. According to him, the elements proved were (a) the age of the victim and (b) the aspect of penetration.

As regards the age of the victim, it was Mr. Komba's submission that the victim herself, who testified as Pw-2 did testify that she was 14 years old. Relying on the Court of Appeal decision in the case of **Issaya Renatus vs. The Republic**, Criminal Appeal No.542 of 2015 (CAT) (unreported), it was Mr. Komba's submission that the age of

the victim can be proved by the victim, any of her relatives or parents or where there is produced a birth certificate.

Mr. Komba told this court, as regards the case in which the appellant was involved, that the victim herself proved that she was 14 years at the time of the rape incident. He also added that, the victim's relative who testified in court as Pw-2 did establish that the victim was 14 years old.

Concerning the issue of penetration, Mr. Komba submitted that the same was also well established not only by the victim as page 24 of the proceedings of the trial court would show, but also the medical doctor who examined her after the fact. Relying on the decision of the Court of Appeal in the case of **Mawazo Anyandwile Mwaikaja vs. The Director of Public Prosecutions**, Criminal Appeal No. 455 of 2015, it was Mr. Komba's submission that the true evidence of rape of a child is that of the victim herself.

He surmised, therefore, that, since the victim testified to the trial court that she was raped as the appellant penetrated his penis to her vagina, her testimony must be believed, and the offence of rape took place. He further cemented his submission by reference the case of **Mawazo**

Anyandwile Mwaikaja vs. The Director of Public Prosecutions, (supra).

Mr. Komba submitted further that, the proceedings of the trial court do show that, while Pw-4 was testifying to the court, a caution statement of the appellant was received which showed that the appellant confessed to have committed the offence. He told this court that the appellant did not object to the admissibility of the caution statement which was admitted in court as **Exh.PH-2**.

He argued that since the appellant did not object to the admissibility of **Exh.PH-2**, it was clear that he did commit the offence. To bolster his submission, he placed reliance on what section 27 (1) of the Evidence Act, Cap.6 R.E 2022 provides stating that a confession made before a police officer may be admitted as against the accused person. Based on such submissions, Mr. Komba contended that the first to the fourth grounds of appeal raised by the appellant have no substance and this court should dismiss the uphold the trial court's decision.

As regards the fifth ground and the issue of identification parade, it was Mr. Komba's submission that the

evidence of the victim was to the effect that the appellant slept with her the whole night till morning as they were found together in the appellant's home. He contended, therefore, that, there was no reason for identification parade since the victim knew the appellant very well.

In his brief rejoinder, the appellant told this court that he neither raped nor did anything wrong to the victim. He was concerned that if he did rape the victim why she did not raise any alarm to seek for rescue? The appellant maintained his innocence. As regard the confession which was alleged that he made by way of his own cautioned statement (**Exh.PH-2**), the appellant told this court that when he was arrested and placed under police custody he was beaten up. He prayed to be set free.

I have carefully considered the rival submissions of both the appellant and those of the learned State Attorney appearing for the respondent. The issue to address in this appeal is whether, by looking at the evidence laid before the trial court, it was proper to convict the appellant of the offence of rape and sentence him to a 30years imprisonment term with 12 strokes of a cane. Put differently, the issue is

whether the appellants grounds of appeal have any merit in them.

The offence for which the appellant was convicted of and sentenced to serve a 30-year's jail term, suffer 12 strokes of a case as corporal punishment and pay TZS 500 as compensation to the victim on top of such jail term and corporal punishment, was an offence of rape. This being a first appeal, this court is duty bound and thus, entitled, to thoroughly examine the record of appeal and the pleadings and re-appraise the evidence on record, subjecting it to fresh and exhaustive scrutiny, before arriving at own independent conclusions on, not only the issues of fact, but also those of the law.

The cases of **Deemay Daat, Hawa Burbai & Nada Daati vs. The Republic**, Criminal Appeal No. 80 of 1994, (CA) (Arusha) (unreported) and that of **Abdallah Makayule vs. Dunia Moshi**, Land Appeal No.175 0f 2018 (unreported) support that view. In the **Deemay Daat's Case** (supra) the Court of Appeal made it clear, while referring to the case of **Peters vs. Sunday Post Ltd** [1958] E.A 424, that the first appellate court:

"is entitled to look at the evidence and make its own finding of fact.

In this appeal, the record shows that before the trial court the prosecution had four witnesses who included the victim who testified as Pw-1. In her testimony, while being led by Mr. Mathias Joseph, learned State Attorney, Pw-1 told the trial court that she was aged 14 years old.

In her testimony she also narrated what happened on the eventful day stating that, the appellant had creeped into the room at the mid of night where she was sleeping and took her to a school and inserted his penis ("**dudu**") into her vagina, continuing with that act for several minutes before later taking her to his house while threatening to kill her if she makes any noise.

The question to ask from such narratives, however, is whether one could rely on her testimony to establish that she was raped and, thereby support his conviction and sentence. I think there was cogent evidence of rape. As correctly argued by Mr. Komba, the learned State Attorney, the victim's testimony was clear in two ways: **one** she did state that she was 14 years, meaning that she was a person of underage.

Where a victim of an alleged rape is a person of underage, any proven act of intercourse with her would be illegal regardless of whether there was consent to it or otherwise forced on her. That makes no difference for, if established, it will amount to a statutory rape. Now, was the victim a person of underage and, could her own testimony of being of the age of 14 be credible or was there any need for further proof?

Proof of age of the victim of rape claimed to be a person of underage is essential. This was emphasized by the Court of Appeal in the case of **Masanyiwa Masolwa vs. The Republic,** Crim. Appeal No. 280 of 2018 (unreported). In that case, the Court of Appeal stated authoritatively that:

> "... in case of persons aged below 8years, ... [a]ge must be proved. See **Alex Ndendya vs. R.** Criminal Appeal No.340 of 2017."

In this instant appeal, the issue as to whether the victim was indeed of the age of 14 and whether such was proved need not detain me longer and no wheel need be invented in determining whether a particular victim was of

underage or not. In the case of **Issaya Renatus vs. The Republic**, (supra), the Court of Appeal made it clear that:

> "...it is most desirable that the evidence as to proof of age **be given by the victim, relative, parent,** medical practitioner or, where available, by the production of birth certificate. "(**Emphasis added**).

In this present appeal, not only did the victim state categorically that she was aged 14 years old, but her testimony was also corroborated by Pw-2 to the effect that Pw-1 was indeed a child aged 14 years old. Consequently, the issue of non-production of birth certificate to establish the age of the victim is a non-starter. It cannot be raised as a valid ground in this appeal since that is not the only way to prove the age of a victim of rape alleged to be a person of underage. It follows, therefore, that, the second ground of appeal has no merits.

Two, is the issue of penetration. Essentially, for the offence of rape to exist, proving that there was penetration of a male sexual organ into a female sexual organ is quite essential on the part of the prosecution. That requirement

has been authoritatively emphasized in several cases. One is the case of **Selemani Makumba vs Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006) which pointed out who in the first place should prove that there was penetration.

For clarity, the Court of Appeal made it clear that:

> "True evidence of rape has to come **from the victim**, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration." (Emphasis added).

The above position finds support even in a more recent case of **Masanyiwa Masolwa vs. The Republic, (supra).** In that case, the Court of Appeal stated authoritatively as well how penetration should be established. The Court had the following to say, and I quote:

> "for the offence of rape of any kind to be established, the prosecution or whoever is seeking the trial court to believe his or her version of the facts on trial, must positively prove that a sexual organ of a male human penetrated that of a female victim of the sexual offence...."

In this present appeal the victim was able to narrate what happened on the eventful night. In her testimony, she told the trial court that, having been taken out to a school by the appellant at the mid of the night, he forced her to undress and penetrated his "**dudu**" into her vagina. Now, one question that needs to be clarified is whether the word "**dudu**", as used by the victim (Pw-1), meant the appellant's male organ (penis) or something else.

In my view, what Pw-1 meant was that the appellant inserted his penis into her vagina and the word "**dudu**" was used by her euphemistically. I will explain why I hold it that way. Essentially, one of the socio-linguistic aspect common in many cultures is the presence of what has been referred to as 'taboo' or 'taboo words.'

Those experts in socio-linguistic studies (see, for instance, Allan & Burridge, (2006) ***Forbidden Words: Taboo and the Censoring of Language,*** Cambridge: Cambridge University Press) do confirm such a fact and do argue that such words are mostly rooted in social constraints. And the famous Psychoanalyst Freud Sigmund (1913 [2001]) in his treatise: ***Totem and Taboo***, (translated by Strachey),

London: Routledge., refers to the word "taboo" in relation to something esteemed as "sacred", "consecrated" and "forbidden" and "unclean".

In an African socio-cultural context like ours, therefore, and from such a socio-linguistic viewpoint, certain parts of the human body, such as the private parts, are not spelt out in their real name among interlocutors because such real names of theirs are regarded as "tabooed words". Instead, interlocutors will tend to use euphemistic terms and expressions. Moreover, studies, do suggest, even in other cultures, that use of such euphemistic terms or expressions is also influenced by, among other things, the age of the interlocutor as well as his or her gender.

From the above context, which the law must also take cognizance thereof given that sociology and law are two interwoven topical issued wherein the latter cannot be applied outside the contextual basis of the former, it follows that, in interpreting the word "**dudu**", as used by Pw-1, the victim of the offence of rape, one should not lose sight of the context into which such a word was used. Lucky enough, the Court of Appeal of Tanzania has as well laid a solid and

authoritative foundation regarding the use of euphemistic jargons in sexual offences incidents.

One is the case of **Hassan Kamunyu vs Republic** (Criminal Appeal 277 of 2016) [2018] TZCA 259 (25 July 2018). In that case, the similar euphemistic word "**dudu**" was used to describe how acts of unnatural offence contrary to section 154 (1) and (2) and the offence of sexual assault under section 135 (2) of the Penal Code, Cap.16 R.E 2002 were committed over twelve madrasa pupils.

In that appeal case, the appellant had earlier been arraigned, convicted, and sentenced to serve a thirty-year sentence in jail. Aggrieved by the conviction and sentence, he appealed all the way to the Court of Appeal.

During his appeal, one of the concerns he raised was in reference to the word "**dudu**" which the victims had used in their testimony which he wondered what indeed it was. In its considered wisdom, however, the Court of Appeal stated as follows, and I quote *in extenso*:

> "The appellant wondered what the "dudu" was. We have considered the appellant's complaint which might seem convincing at first sight.

However, given the recent jurisprudence of the Court we are not convinced by the appellant's arguments. There is a paradigm shift in the recent jurisprudence of the Court from the orthodox position where in offences of this nature; sexual offences, the victims were supposed to be graphic in narrating the ingredients of the offence. Luckily, the Court has had an opportunity to deal with the point in some cases on rape. The current position is that in proving that there was penetration in a rape case, it is not always expected the victim will graphically describe how the penis was inserted into the victim's vagina. There is a string of cases on this point."

The Court of Appeal listed several such cases pointed out that:

"... words like "[he] removed my underwear and started 'intercoursing' me" ... or ... "[he] undressed me and started to have sex with me"...or, "kanifanyia tabia mbaya", ... "alinifanya matusi" or "**he put his dudu** in my vagina" .. were, though not explicitly described, taken by the court to make reference to penetration of the

penis of the accused person into the vagina of the victim."

Of particular importance and in connection to the socio-cultural context in which law, and in this case criminal law, needs to be understood, is the comment which the Court made in relation to how section 130 (4) (a) of the Penal Code, Cap.16, R.E 2022 needs to be interpreted. Citing its earlier case of **Joseph Leko v. Republic**, Criminal appeal No. 124 of 2013 (unreported), the Court was of the view that:

> "The new development of the interpretation of the provisions of section 130 (4) (a) of the Penal Code has been brought into being taking into consideration, inter alia, cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. Thus, in *Joseph Leko* (supra) the Court instructively observed: "Recent decisions of the Court show that what the court has to look at is the circumstances of each case including cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. The reason is obvious. There

> are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters...."

As I stated hereabove, in our cultural context, interaction among various interlocutors has certain speech limitations whereby, within such boundaries, certain words such as those depicting private parts are euphemistically pronounced. Pw-1, therefore, did abide by that cultural norm, and reference to "**dudu**" interring her female private part meant reference to the appellant's male organ entering Pw-1's female organ.

In her testimony, Pw-1 did as well tell the trial court that she cried since she had never done such a thing before but with no regard the appellant went on to satisfy his own lustful libido. The issue of there being penetration, therefore, was well narrated by the victim and, since she is the one who felt what happened to her, there is no reason why anybody else should doubt her testimony.

Such is also a position which the Court of Appeal supported in the case of **Mawazo Anyandwile Mwaikaja vs. The Director of Public Prosecutions**, (supra). In that case, the Court of Appeal, having looked at the evidence including the testimony of the victim, observed as follows (and which kind of observation may also apply in this appeal):

> "It is discernible from the victim's evidence, that she was not only clear and detailed on what befell on her ...but was consistent. That evidence alone tells it all how she was raped. Like both courts below, we see no reason to disbelieve the victim."

But there are other pieces of evidence worth considering in establishing the guilt of the appellant. One is the testimony of Pw-3, the clinical office who examined the victim, was also clear that the victim had been penetrated and she had no hymen and confirmed penetration by a blunt object.

I am very much alive to the fact that a medical report or the evidence of a doctor may help to show that there was sexual intercourse, but it does not prove that there was rape,

that is unconsented sex, even if bruises are observed in the female sexual organ. See the case of **Selemani Makumba vs Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006). In this present appeal, however, the victim – Pw-1 -had said, as already stated hereabove, that the appellant had inserted his penis into her vagina. That was penetration which Pw-3, having examined the victim, also confirmed that such a thing took place.

But there is even more evidence to consider when proving that it was the appellant who committed the alleged offence of rape with which he was found guilty and convicted by the trial court. Such proof is discernible from the testimony of Pw-4 which must also be brought to the limelight. Pw-4 was the one who took the caution statement of the appellant and the latter confessed to him what happened. According to Pw-4, the appellant had told Pw-4 that he (the appellant) did go to the victim's house and took the victim to Kalumbeleza Primary School where they had sex. The caution statement was not disputed by the accused and was admitted as **Exh.PH-2**. In my view, such evidence against the appellant was, therefore, watertight.

In his attempt to disentangle himself from the wrongdoing, the appellant has tried to raise the issue of identity in his fourth ground of appeal. In my view, that is also a non-starter because, having raped the victim he took her to his fathers' house and into his own room where the two spent the night till morning. In such a circumstance, there was no way that there could have been a mistaken identity.

Pw-1 therefore recognised the appellant very well and there was no need for identification parade as the appellant seems to claim under his fourth ground of appeal. In essence, where an accused is known to the victim prior, identification parade is of no use. See the case of **Niyonzimana Augustine vs. Republic** (Criminal Appeal 483 of 2015) [2016] TZCA 669 (22 February 2016).

Finally, is the ground number 5 of the appeal which is to the effect that the trial court erred for not calling one Daud, Sai and Thedy as witnesses. This is also a baseless ground since even a single witness may sufficiently lead to proof of an offence and conviction of an offender. In the case of **Mawazo Anyandwile Mwaikaja vs. The Director of**

Public Prosecutions, (supra), the Court of Appeal was categorical that:

> "The law on proof of certain fact is clear... that, truth of certain information is not measured by numbers but by credibility of those relaying the information...In terms of section 143 of the Evidence Act, Cap.6 R.E 2002 (EA), there is no specific number of witnesses is required for the prosecution to prove any fact. (See Yohanes Msigwa vs.R [1990] TLR 148."

From the foregoing discussion, and as I demonstrated earlier from the available evidence of Pw-1, Pw2, Pw-3 and Pw-4, I am satisfied, therefore, that, the age of the victim fully was established and that that there was proof of penetration of the appellant's penis into the victim's vagina. In view of the above and, considering the victim's age, there is no doubts that the offence of statutory rape took place, and the prosecution case was proved beyond reasonable doubt. It is my findings and conclusion, therefore, that, this appeal has no basis, and, for that matter, it should fail.

There is, however, one observation which has been made by this court regarding the sentence of 12 strokes corporal punishment and which calls for attention. While I understand that imposition of such a punishment was done at the discretion of the trial magistrate, (see the case of **Selemani Makumba vs Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006), I do not think that the punishment, though awarded in line with the dictates of the section 12 (3) of the Corporal Punishment Act, Cap.17, R.E. 2019, was necessary.

I hold it to be so, because, since the appellant was found guilty of the offence and sentenced to serve a 30-year jail term such a lengthy sentence was sufficient to ensure that the appellant is reformed in his behaviour and ability to self-control himself in a decent manner required of the law and expected by the members of the society at large.

In my view, therefore, such a lengthy sentence and requirement that he pays compensation to the victim, sufficiently met the five recognised purposes of punishment which are: deterrence, incapacitation, rehabilitation, retribution, and restitution. The 30 years' incarceration, is

presumed, will specifically deter the appellant from committing such a crime or even another crime in future because of fear of facing a similar or worse punishment.

But by putting a convict behind the bars for that long will as well incapacitate and prevent him to commit a crime of the like nature in an immediate future because of his removal from society by way of his imprisonment.

In addition, the 30 years' incarceration period is also meant to alter his future criminal attitude or behaviour as he is expected to undergo reform programmes while in jail. It also serves the retributive desires for personal avengement as the society around feels that justice was meted out to the offender as per the dictates of the law.

Finally, is the fact that the trial court had as well imposed on the appellant a requirement to pay financial compensation to the victim this being an act of restitution for the harm done on her.

It is from those considerations which I find that the lengthy sentence of 30 years imprisonment meted out to the appellant ably serve that I see no reason for any excess

luggage on it in the form of corporal punishment was needed.

In view of that, I hereby set aside that penalty of corporal punishment and uphold the rest of the sentence as awarded by the trial court. The Appellant is to serve his sentence of 30 years jail term and will pay the TZS 500,000 compensation to the victim.

Save what I have stated regarding the sentence of corporal punishment, the appeal stands dismissed.

Order accordingly.

DATED AT SUMBAWANGA ON THIS 13TH DAY OF MARCH 2024

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DEO JOHN NANGELA
JUDGE

Right to appeal fully explained.

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DEO JOHN NANGELA
JUDGE