IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 64 OF 2021

(Originating from Criminal Case No.50 of 2020 of the District Court of Nyamagana at Mwanza)

HASSANI AMINI NGORORO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 07.06.2021

Date of Judgment: 10.06.2021

A Z. MGEYEKWA, J

The appellant, Hassan S/O Amini @ Ngororo appeared before the District Court of Nyamagana on 26th February, 2020 whereby the appellant faced a charge of Rape contrary to sections 130 (1),(2) (b), and 131 (1) of the Penal Code Cap. 16. [R.E 2019].

It was alleged in the particulars of the offence by the prosecution that, the appellant on 14th December, 2019, 15th December, 2019 and 16th December, 2019 at Buhongwa area within Nyamagana District in the City Mwanza Region, did have sexual intercourse with one Wilhelemina D/O Makanya a girl aged sixteen (16) years old without her consent.

As a result, the prosecution summoned four witnesses to prove the case against the accused person, I find it apt to briefly narrate the relevant factual background of the instant appeal. It goes thus: Makanye Lusato, the victim's father testified as PW1, was living with her daughter who was 16 years old. On 14th December, 2019, PW1 realized that her daughter disappeared and he went to the school where PW2 was schooling and was informed that PW2 did not attend classes since 14th December, 2019. On 17th December, 2019 PW1 found PW2 at a grocery, he took her back home. On the following day, 18th December, 2019 PW1 he took her daughter to the hospital where he obtained a PF3 and reported the matter to the Police station.

According to the victim who testified as (PW2), at the material date, she was 17 years old. From 14th December, 2019 to 17th December, 2019 the victim was staying with the appellant. However, she did not disclose the truth to his father until 18th December, 2019. At first, PW2 told PW1 she was living

with a friend without mentioning that it was a male friend. On 17th December, 2019 the victim was accompanied by her father they went to the defendant's house but the door was closed. PW2 complained that the defendant was her boyfriend and they made love. Raymond Nsigaye a Clinical Officer performed a medical examination on PW2 and established that she was in her menstruation period and her private part was open revealing that she used to vaginal sex. PW3 tendered a PF3, it was admitted as exhibit P1. Last witness, WP 2762 Sgt. Ester (PW4), investigated the case and PW2 told her that the defendant raped her.

In defence, the accused relied on the sworn testimony, with no exhibit. He had one witness. DW1 denied the charge. He lamented that PW2 was accompanied by DW2, they arrived in his office at 23:00 hrs. DW2 requested him to allow them to spend the night in his room. He admitted and left them in his room. DW2 had a similar story.

At the conclusion of the trial, the learned trial magistrate composed his judgment in which she found the appellant guilty of the offence he was alleged to have committed. The appellant was convicted and sentenced to serve thirty years imprisonment.

The appellant now seeks to impugn the decision of Nyamagana District Court upon a Petition of Appeal comprised of five grounds of appeal as follows:-

1. *That the trial court erred in law by not complying with the High Court Order dated 1st day of April, 2021.*

2. *That the trial court erred in law and fact by convicting the appellants without proof to the required standard.*

3. *That, the trial erred in law and fact in holding that, the prosecution has proved their case beyond reasonable doubt.*

4. *That the trial court erred in law and fact by convicting the appellants based on the contradicted evidence.*

5. *That the trail court erred in law and fact basing its conviction and sentence on hearsay evidence which is not admissible and abuse to court process.*

When the matter was called for hearing on 10th May, 2021, the appellant enjoyed the legal service of Mr. Bitwale, learned counsel whereas Ms. Sabina Choghogwa represented the respondent Republic.

Mr. Bitwale was the first one to kick the ball rolling. In determining the grounds of appeal, he opted to consolidate the second and third grounds

because they are intertwined. Equally related are the fourth and fifth grounds and opted to argue the first ground separately. Submitting on the first ground, Mr. Bitwale avers that the trial court did not comply with the High Court order. He argued that this court noted that the trial court did not afford the appellant's room to mitigate his sentence thus, it remitted back the file to the trial court to rectify the said errors within 14 days. He complained that the corrections were effected after 20 days. He contended that this court order was violated. He urged this court to set the appellant free. Fortifying, his submission he cited the case of **Tanzania Breweries Ltd v Ston Sobe and 8 Others**, Misc. Civil Application No.96 of 2000 (unreported).

Arguing for the second and third grounds, the learned counsel for the appellant contended that the prosecution did not prove their case beyond reasonable doubt. He lamented that the trial court record is silent about the victim's age. Mr. Bitwale argued that the PW2's age was not proved since the prosecution did not tender any birth certificate. To bolster his submission he cited the case of **DPP v Amani Waziri** [2003] TLR, the court discussed the age of the victim referring to a clinic card.

The learned counsel claimed that the prosecution banked on PW3's evidence, however, PW3 examined the victim and established that the victim was in her menstruation period and she used to vaginal sex. He valiantly argued that there is no any evidence to prove that it was the respondent who raped the victim. He went on to argue that penetration is a key aspect in rape cases, in the instant case, the victim did not prove penetration. Mr. Bitwale fortified his argumentation by referring this court to the case of **Abdurashid Kashindi v Republic**, Criminal Appeal No. 188 of 2019 this court cited the case of **Kayoka Charles v R**, Criminal Appeal No. 325 of 2007.

With respect to the fourth and fifth grounds, the learned counsel for the appellant argued that the appellant was convicted based on contradictory evidence and hearsay evidence. To support his argumentation he referred this court to page 10 of the trial court judgment. He went on to state that the trial court wanted to prove that the victim was sleeping in Adam's place. He spiritedly argued that the burden of proof shifted from the prosecution to the respondent. He added that shifting the burden of proof renders a case nullity. Supporting his position he cited the case of **Hussein Iddy and other v Republic** [1986] TLR 166.

Mr. Bitwale did not end there he went on to state another contradiction is when the victim complained that the appellant restrained him but her mother found her in a grocery drinking beer the same show that the victim was not restrained to go outside as claimed.

On the strength of the above argumentation, Mr. Bitwale beckoned upon this court to allow the appeal and set the appellant free.

Responding, Ms. Sabina expressed her stance at the very outset that she supported the verdicts of the trial court. The learned Senior State Attorney consolidated the second and third grounds, the fourth and fifth grounds, and argued them together. The first ground was argued separately.

The learned Senior State Attorney started his onslaught by attacking the first ground. She was brief and straight to the point. Ms. Sabina stated that the High Court order was in regard to mitigation and to enter a conviction and the trial court on page 7 of its court proceedings reveals that mitigation and conviction were recorded as per this court order. In her view, the shortfall was caused by the court, not the parties. She urged this court to disregard this ground.

As to the second and third grounds, the learned State Attorney argues that the prosecution proved his case as per section 3 (2) of Evidence Act, Cap.6. She argued that the age of the victim was established by PW1, the victim's father. She referred this court to page 8 of trial court typed proceedings and the case of **Salu Sosoma v Republic**, Criminal Appeal No. 31 of 2006. The Court of Appeal held that a parent is in a better position to confirm his/her child's age. Ms. Sabina went on to submit that PW2 evidence is clear, she said that from 14th December 2019, she went to leave with the appellant and had carnal knowledge with her

In response to the fourth and fifth grounds, Ms. Sabina valiantly argued that the prosecution evidence was not hearsay evidence and she added that there was no contradiction that goes to the root of the case. Ms. Sabina stated that the trial Magistrate's judgment was based on the victim's evidence. She went on to state that the defence case was analysed. Ms. Sabina fortified her submission by referring this court to pages 5 and 6 of the trial court typed judgment. The learned State Attorney added that the trial Magistrate found that the defence case could not overshadow the prosecution case.

On the strength of the above submission, Ms. Sabina beckoned upon this court to sustain the sentence, and conviction for the prosecution has proved the case beyond reasonable doubt.

In a short rejoinder, the appellant' Advocate reiterated his submission in chief and stressed that the prosecution has not proved the case to the standard required to the law. Insisting, he argued that the issue of age is proved. He went on to argue that the principle of the best evidence comes from the victim was overruled by the Court of Appeal of Tanzania in the case of **Pascal v Sele Republic**, Criminal Appeal No.23 of 2017.

On the strength of the above submission, Mr. Bitwale beckoned upon this court to allow the appeal and set the appellant free.

It is now my duty to determine the grounds of appeal by considering the rival arguments made by the learned counsel for the respondent and the learned State Attorney. I should state at the outset that in the course of determining this appeal, I will be guided by the canon of the criminal cases that, the burden of proof in criminal cases rests squarely on the shoulders of the prosecution side unless the law otherwise directs and that the accused has no duty of proving his innocence as it was held in the case of **Armand**

Guehi v Republic, Criminal Appeal No. 242 of 2010, the Court of Appeal of Tanzania (unreported). The main issue for determination is *whether the prosecution case was proved beyond a reasonable doubt*.

In my determination, I will consolidate the second and third grounds because they are intertwined. Equally related are the fourth and fifth grounds which I shall also determine together. Except for the first ground will be argued separately.

With respect to the second and third grounds of appeal, the contention is that the prosecution failed to prove the case beyond reasonable doubt.

Regarding the age of the victim, the learned counsel for the appellant claimed that the victim's age was not proved. I have revisiting section 130 (1), (2), (e) of the Penal Code Cap.20 [R.E 2019] one of the ingredients of rape offense ought to be proved beyond the shadow of doubts is the age of the victim of rape that at the time she was raped, she was under eighteen years of age. See the case of **Solomoni Mazala v Republic**, Criminal Appeal No. 136 of 2012, Court of Appeal of Tanzania Dodoma (unreported). PW1, the victim's father was in a better position to know the age of her child

as observed in the case of **Salu Sosoma v Republic**, Criminal Appeal No.31 of 2006 whereas the Court of Appeal observed that:-

"... a parent is better positioned to know the age of his child."

Based on the above provision of law and the cited authority, I will scrutinize the facts on record to prove if at the material date, she was under eighteen years of age or not. In the instant case, without a speck of doubt, it is evident that the victim's father (PW1) was able to prove the age of the victim the same is reflected on page 8 of the trial court typed proceedings. PW1, who is the victim's father stated that the victim was 16 years old. Therefore, PW1 was in a better place to know the age of her child as observed in the case of **Salu Sosoma v R** (supra) which means the issue of age is not in dispute, the victim's father proved that PW2 was 16 years old. Additionally, the PW1 evidence was collaborated by the victim (PW2).

I now go back to the first ground, the issue for consideration is whether the essential ingredients of penetration were proved. The learned counsel for the appellant alleges that the prosecution did not prove penetration which is a vital ingredient of the offence of rape. It was Ms. Sabina contention that the prosecution discharged the burden of proving that the penetration took

place and she referred this court to the case of **Shija Misalaba v Republic,** Criminal Appeal No. 206 of 2011 that the victim's evidence is the best evidence and PW2 has proved that she was raped.

The Court of Appeal of Tanzania in its numerous decisions held that the proof of rape comes from the victim herself, this was held in the cases of **Godi Kasenegala v Republic**, Criminal Appeal No. 10 of 2008 (unreported), **Shija Misalaba v Republic,** Criminal Appeal No. 26 of 2011 (unreported)); **Kalebi Elisamehet v The DPP,** Criminal Appeal No. 315 of 2009 (unreported); **Selemani Makunge v Republic,** Criminal Appeal No. 94 of 1999 and **Ramadhani Samo v Republic,** Criminal Appeal No. 17 of 2008 (unreported). To mention a few. In **Godi Kasenegala** (supra)**,** it was held that:-

> *"It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors may give corroborative evidence".*

Moreover, in rape cases, the key ingredient is penetration. The same was held in the cases of **Selemani Makumba v R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal of Tanzania observed that: -

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

I am aware that there are recent decisions of the Court of Appeal of Tanzania where the scope of section 130 (4) (a) of the Penal Code Cap. 16 [R.E 2019] is expounded to prove penetration in sexual offence is concerned. Those decisions include; the cases of **Joseph Leko v Republic**, Criminal Appeal No.124 of 2013; J**umanne Shaabani Mrondo v Republic**, Criminal Appeal No. 282 of 2010; **Baha Dagani v Republic**, Criminal Appeal No. 39 of 2014 and **Hassan Bakari @ Mama Jicho v Republic**, Criminal Appeal No. 103 of 2012. To mention a few.

This position is now settled that, in proving whether penetration took place it is not expected for the victim of the alleged rape to graphically describe how the male organ was inserted in the female organ. The new development of the interpretation of the provision of section 130(4), (a) of the Penal Code Cap. 16 [R.E 2019] has been brought into being taking into consideration *inter alia*, cultural background upbringing, and the age of the person giving evidence. The inference of the words "sexual intercourse" or

"have sex" and the like were explicated in the case of **Hassan Bakari @ Mamajicho v. Republic**, Criminal Appeal No. 103 of 2012, the Court of Appeal of Tanzania (unreported) in which the Court held that:-

> *"...**It is common knowledge that when people speak of sexual intercourse they mean the penetration of the penis of a male into the vagina of a female. It is now and then read in court records that trial courts just make reference to such words as sexual intercourse or male/female organs or simply to have sex, and the like. Whenever such words are used or a witness in open court simply refers to such words,** in our considered view, they are or should be taken to mean the penis penetrating the vagina ...*"[Emphasis added].

Guided by the above new development as penetration is concerned, PW2 proved that penetration took place. Now, before I reach my final analyses, I will determine the concern raised by the learned counsel for the appellant that the victim's evidence was contradictory and untrue,

I am going to analyse whether the prosecution proved beyond reasonable doubt that the accused took part in an act of sexual penetration with the victim. In the case of **Mohamed Said v Republic**, Criminal

Appeal No. 145 of 2017 at Arusha (unreported) delivered on 3rd August, 2019, the Court of Appeal of Tanzania emphasized the need to subject the evidence of the victim to security, in order the court to satisfy by itself what the victim stated contain nothing but the truth.

Similarly, section 127 (7) of the Evidence Act Cap. 6 [R.E. 2019] provides that:-

> *"Notwithstanding the proceeding provisions of this section, wherein criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of a sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict if, for reasons to be recorded in the proceedings,* ***the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.*** *"*
>
> *[Emphasis added].*

Applying the above authority and position of the law, in the instant appeal, PW2 testified that they had carnal knowledge all days when she

was at the appellant's house. PW2 testified to the effect that the appellant is the one who raped her. The conviction by the trial court is founded solely on the evidence of the PW2 (the victim). The Doctor (PW3) examined PW2 to find out if the alleged victim was raped and stated that on the day when he examined the victim was in her menstruation period, there were any bruises and he said that the victim used to sexual intercourse.

I am doubtful whether PW2 was a truthful witness whose evidence rendered the conviction of the appellant. The appellant had two versions as to how she found her way into the appellant's house. In her testimony; PW2 claimed that she did not tell her father that she was in her female or male friend's house because she was afraid her father could beat her. If she was certain that she was in the appellant's house why did she mentioned the appellant on the same day? She named the appellant on the following day 18th December, 2021.

PW2 testified to the effect that they went to the appellant's house on the same day the house was closed while PW1 testified that they went to the appellant's house on the following day the house was closed. Connecting the evidence of PW2, DW1, and DW2; the keys were handled to DW2, she is the one who kept the keys. The same differs with PW2 evidence that she

was restrained to go out of the house that means she was kept indoors all the time, the same creates doubt. Considering that the appellant was arrested at his workplace, cooking chips, not inside the house where PW2 claimed that she was kept in there. PW2 claimed that she left her school bag inside the appellant's house but PW4 who investigated the matter did not recover any school bag in the appellant's house.

Apart from that, the victim claimed that the appellant restrained her to go out form the house. When PW2 was re-examined she said that she was restrained in the appellant's room for three consecutive days and she managed to go out when the appellant left the door open. However, when testifying further PW2 claimed that his father found her at the grocery. It is doubtful; how she managed to go out after being restrained for three days, then, end ended in the grocery? In my firm view, the fact that the victim had two versions or inconsistent evidence in this regard shows that she was not telling the truth. In the case of **Mohamed Said** (supra), the Court of Appeal of Tanzania held that:-

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth* ***but that her or his testimony should pass the test of truthfulness****. We have no*

doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases." [Emphasis added].

Applying the above authority in the present case, I am doubtful whether the victim's testimony passed the test of truthfulness. PW2 claimed that the appellant had sexual indulgences with her for three days consecutively while PW3 evidence proved that PW2 was in her menstruation period. I am asking myself if the appellant could have sex with PW2 all the days while she was in her period? Nevertheless, the victim was found seated at the grocery without the appellant at the same time she claimed that she was restrained in the appellant's house. Her evidence is contradictory as pointed out by the learned counsel for the appellant. This contradiction goes to the root of the case. In the case of **Sahoba Benjuda v Republic**, Criminal Appeal No.96 of 1989, the Court of Appeal of Tanzania held that:-

" *Contradiction in the evidence of a witness's effects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness*

touching on the particular point unless it is supported by some other evidence."

Applying the above legal authorities, it is my considered view that in the present case; the contradictions go to the root of the case thus the same cannot be believed.

As I have mentioned earlier, I am not disputing that penetration as an essential fact to the offence of rape was proved by PW2. However, in the circumstance of the case at hand where PW2 evidence is doubtful, her evidence is required to be corroborated by other prosecution witnesses' evidence. I am going to analyse the evidence other prosecution witnesses to find out whether PW2 evidence was corroborated. The Doctor's evidence did not establish or corroborate PW2 evidence no penetration was proved. PW1 and PW4 none of them corroborated PW2 testimony because their evidence was hearsay evidence. In my respectful opinion, the victim's uncorroborated evidence should have been held to be untrustworthy, for the reason that she was trying to shift blame from herself to the appellant. PW2's conduct and behavior raise doubt as to whether she had carnal knowledge with the appellant in exclusion of any other person. Such kind of girl behaviour like PW2 should not always subject a boy or man to a conviction

of rape. In the cases of **Margaret v the Republic (**1967) Kenya LR 267 and **Chila v Republic** (1967) EA 722 at page 723, the Court held that:-

> *"The law of East Africa on corroboration in sexual cases is as follows: the* ***judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant,*** *but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice." [Emphasis added].*

Applying the above authority in the instant appeal, PW2's evidence was required to be corroborated since her story raises doubt. In my respectful opinion, that was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless the court satisfies itself that PW2's evidence is true. I understand that in sexual offences, the law aims to protect a female child but the court should be cautious to punish the offender based on the enormity behaviour of the victim like PW2. In the case of Mohamed Said (supra) the Court of Appeal of Tanzania held that:-

" Since PW2 was the star witness for the prosecution on whose evidence the conviction was mounted, it is our conclusion that the conviction rested on weak unreliable evidence and should not be left to stand."

Given the tricky nature of the circumstances of this case, I have deemed it necessary to make some observations pertaining the need to exercise care in handling cases of sexual offences. I have carefully considered the circumstances surrounding this case and found the victim was untrue, therefore, I found that the evidence was not watertight to convict the appellant for an offence of rape and there is no other evidence on record to support the offence of rape. This makes the reception of PW2 evidence improper and in view of this court findings, PW2 was not a credible witness.

A glance at the trial court's judgment reveals that the appellant's defence, advanced in his defence testimony, was duly considered by the trial magistrate. However, the trial court did not analyse DW2 evidence, who was the only witness to support DW1 case, DW2 testified to the effect that the appellant gave her, his room keys and he moved to his friend's house. DW2 evidence proved that DW1 was not staying in the said house until when the victim was found by her father. DW1 evidence is corroborated by DW2 evidence.

Under the circumstances, I find the appellant's contention in the second and third grounds meritorious. I will therefore detain myself in evaluating and analyzing the remaining grounds of appeal doing so will be an academic exercise.

The upshot of all this is that, I allow the appeal, quash, and set aside the decision of the trial court and order thereto. I order the appellant shall be set free forthwith unless he is held under some other lawful warrant.

Order accordingly.

Dated at MWANZA this date 10th June, 2021.

A.Z.MGEYEKWA

JUDGE

10.06.2021

Judgment delivered via audio teleconference on 10th June, 2021 whereas the appellant and Ms. Sabina, learned State Attorney for the respondent Republic were remotely present.

A.Z.MGEYEKWA

JUDGE

10.06.2021

Right to appeal fully explained.