**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO 113 OF 2020**

**(Originating from criminal case No. 74 of 2020 in the district court of Babati at Babati)**

**BAYO PASCHAL @ BANGA @ BAYO SAMBIYE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

22/9/2021 & 03/11/2021

**D.C. KAMUZORA. J**

Bayo Paschal @ Banga @ Bayo Sambiye the appellant herein, is challenging the conviction and sentence of 30 years imprisonment imposed on him by the District Court of Babati (the trial court). He stood charged with the offence of rape contrary to section 130(1) (2)(e) and 131(1) of the Penal code Cap 16 (R.E 2002). It was alleged that, on 23rd day of March 2020 at Gedewari village within Babati District in Manyara region the appellant did have sexual intercourse with a 13 years old girl.

In protecting the child's dignity, the name of the child victim was masked by the trial court and she was referred to as Kadadaa.

The gist of the matter which appeared before the trial court was to the effect that, on the material date of incident Kadadaa was sent by her aunt to the shop at around 17:00hrs. On her way back she passed near the appellant's house and the appellant called her. She responded and followed the appellant. The appellant dragged Kadadaa's hand and forced her into a room. He undressed her skirt, skin-tight and underpants and undressed his trousers and short pant. The appellant took Kadadaa on the bed and inserted his penis on her vagina and when she tried to raise the alarm, he kicked her and threatened to kill her. After he had finished the torment act, the appellant left and Kadadaa went out of the room crying for pain. She met Colister (PW6) outside the room and she narrated the story to Colister who then escorted her to go home. The matter was reported to hamlet chairperson and then to the police station. The victim was issued PF3 to go to hospital and the next day the appellant was arrested, sent to the police station and he was charged for the offence of rape.

In his defence, the appellant categorically denied to have committed the offence. He told the trial court that he had a conflict with

PW6 thus this case was fabricated against him as no any eye witness who appeared to testify in court.

In this appeal, the appellant appeared in person without being represented, whereas the respondent/Republic was represented by Ms. Lilian Mmasi the learned Senior State Attorney. Three grounds of appeal were preferred by the appellant in his memorandum of appeal: -

1) That, the learned trial Magistrate erred in law and fact in convicting the appellant basing on the evidence of PW2 who was incompetent witness.

2) That, the learned trial magistrate erred in law and in fact for convicting the appellant basing on the uncollaborated evidence of PW2, PW4 and PW6 respectively.

3) That, the trial court decision was bad and unfair in favour of the justice.

The appellant also filed four additional grounds of appeal as follows: -

4) That, the honourable trial magistrate grossly erred in law and fact in finding the appellant guilty and convicted him of rape without making proper evaluation on the question of

penetration which was not established beyond reasonable doubt.

5) That, the learned magistrate grossly erred in law and in fact as a result wrongly convicted the appellant of the offence charged by basing on uncorroborated evidence from PW1 which was also taken contrary to the requirement of Section 127 of TEA (Cap 16 R.E 2002) as amended by miscellaneous No. 4 of 2016 and did not promise from her own words to speak the truth.

6) That, the learned trial magistrate misdirected himself for failure to properly examine the evidence adduced by the prosecution whereas there are serious material contradiction and inconsistences in the evidence given by the prosecution witnesses which casts doubt on the credibility or truthiness of the story put forward against the appellant and exposes the case as fabrication.

7) That, the learned trial magistrate grossly misdirected himself for failure to properly consider the appellant defence and see that it casts doubt on the prosecution case.

Hearing of this appeal was conducted orally and the appellant had no any valuable argument to make in support of his grounds of appeal. He only prayed for this court to consider that he did not rape the victim as even the Doctor testified that she saw nothing to prove rape. The learned State Attorney on the other hand supported the conviction and sentence and urged this court to uphold the decision of the trial court. Reading the grounds of appeal, three issues can be drafted there from as follows: -

1. Whether the trial court based its decision on the evidence of PW2 who was incompetent witness.
2. Whether the appellant was convicted based on uncorroborated evidence from PW1 which was also taken contrary to the requirement of Section 127 of TEA (Cap 16 R.E 2002) as amended by miscellaneous No. 4 of 2016
3. Whether the trial court wrongly convicted the appellant without making proper evaluation of evidence and failed to properly consider the appellant defence.

Starting with the first issue, it was contended that the appellant was convicted based on evidence of PW2 who was an incompetent

witness. There is no explanation from the appellant as to why he considered PW2 as incompetent witness. From the records, PW2 is a clinical officer and she was the one who examined the victim on the first day she was sent to hospital on allegation of rape. Now the question is whether PW2 is an incompetent witness. Ms. Mmasi while arguing on this point submitted that, PW2 is a competent witness. She explained that, the law is clear that a person can become incompetent witness by reason of age (too young or too old) or mental problem. That, since PW2 is aged 30 and a doctor by profession, she was a competent witness to testify and her evidence was considered by the court on page 3 to 4 of the judgment.

There is no any sound argument to regard PW2 as incompetent witness. She was a clinical officer who first attended the victim of rape. This issue is already settled in our jurisprudence. The Court of Appeal in **Criminal Appeal No. 412 Of 2017 Makende Simon Versus The Republic**, (unreported) while referring its decision in **Charles Bode v. Republic, Criminal Appeal No. 46 of 2016** [unreported] made a finding that, a clinical officer is qualified and authorized to practice medicine and that he can observe, interview and examine sick and healthy individuals in all specialities to document their health status and

can apply pathological, radiological, psychiatric and community health techniques. That being the case, this argument is baseless and the evidence of PW2 was properly recorded and relied upon by the trial court.

On the second issue it was contended that the appellant was convicted based on uncorroborated evidence from PW1 which was also taken contrary to the requirement of Section 127 of TEA (Cap 16 R.E 2002) as amended by miscellaneous No. 4 of 2016. The Senior State Attorney Ms. Lilian submitted that, in this case the victim PW1 stated from the very earliest stage that she was raped by the appellant. That, such evidence was collaborated by PW2 who is a medical expert who attended the victim on 24/3/2020. That, PW2 examined the victims' private parts and her findings can be found in her evidence before the trial court and the PF3 (exhibit PE1). On the issue of violation of Section 127 of the TEA Ms. Lilian submitted that, the record of the trial court at page 15 reveal that the court complied to the requirement of section 127 of the TEA as the victim promised to tell the truth and the court noted that fact.

The issue on whether the trial court based its decision on uncollaborated evidence of PW1 will be discussed together with the third

issue. Here I will only discuss the contention that the evidence of PW1 was procured in contravention of section 127 of TEA (Cap 16 R.E 2002) as amended by miscellaneous No. 4 of 2016. Section 127(2) of the Act reads;

> *"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 any lies."*

A child of tender age is defined under subsection 4 of section 127 as a child whose apparent age is not more than fourteen years. There is no dispute over age of the victim (PW1) who was mentioned as a girl aged 13 years thus fall within the meaning of a child of tender age. Section 127(2) requires a child of tender age to promise to tell the truth to the court before giving evidence. In this matter the appellant claim that the requirement under the above section was not met. I have revisited the trial records and at page 15 of the typed proceedings part of the response from PW1 reads, "*I know what is sin. I came here in court to give the truth evidence*". The court then recorded as follows, "*the victim by the name of Kadadaa promise this Honourable court that she will give the truth evidence*".

With the above observation it suffices to say that the trial court complied with the requirement of the law. The contention by the appellant that the evidence of PW1 was recorded contrary to the requirement of Section 127 of TEA is unfounded.

Now turning to the third issue which is centred in the evaluation of evidence, it was contended by the appellant that the trial court failed to properly evaluate the evidence before it and convicted the appellant based on uncollaborated prosecution evidence and without considering the defence evidence. In responding to this issue, Ms. Lilian submitted that, the evidence of PW2, PW4 and PW6 was well collaborated and understood by the trial magistrate and it was properly applied in conviction. Referring the case of **Kuboja Boniface V Republic** Ms. Lilian submitted that, the court has power to assess the credibility of a witness and in assessing the credibility of a witness the court will consider the coherence of the evidence that will also be collaborated with other evidence. She insisted that, the trial court properly applied that principle in convicting the appellant after it properly evaluated the evidence which proved that there was penetration. She added that, based on the decision in the case of **Daudi Shila**, the evidence of rape comes from the victim that there was penetration of a woman without consent where the victim is adult and where the victim is a child, consent is irrelevant. Ms. Lilian insisted that the proceedings of the trial court at page 16 reveal that the appellant penetrated the victim and her evidence was not shaken by the appellant during cross examination. Ms.

Lilian also submitted that the trial court considered the evidence of the appellant which was only based on the claim of conflict with PW6.

I had ample time to go through the evidence in records. There is no doubt that the appellant was known to the victim before the date of incident. The victim claimed that the appellant called her name and when she respondent the appellant grabbed her hand and forced her into the room where he undressed her clothed and raped her. Her evidence was supported by PW6 who assisted the victim to her home. PW6 and PW3 who is the victim's aunt examined the victim's private parts and discovered sperms. The incident took place on 23/03/2020 and the victim was sent to the police station and then to Hospital on 24/03/2020. PW2 who is a clinical officer examined the victim and discovered bruises and redness on the victim's labia majora and labia manora. She made a conclusion that the same may be caused by a blunt object and penis is among the blunt object. PW2 presented in court the PF3 revealing the same fact that there were bruises and redness on the victim's labia majora and labia manora but no discharge from genitalia or blood and no evidence of penetration. The PF3 was signed by a Medical Doctor by the name of Joseph Lori as PW2 claimed that she had no legal capacity to fill in the PF3. Now the question is

whether what was discovered on the victim's private part prove penetration.

I do agree with the contention by the appellant that there were inconsistencies in the prosecution evidence which were not addressed by the trial court. It is a settled principle that where there is inconsistencies, the court is duty bound to address them and make a finding upon the same. That was also the finding in the case of **Mohamed Said Matula Vs. R [1995] TLR**. 3 where it was held: -

> *"where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"*

In the present matter there are two inconsistencies not addressed by the trial court which I undertake to address. **First,** while PW3, PW4 and PW6 claimed to examine the victim and discovered sperms, PW2 who is a clinical officer who examined the victim saw nothing. PW2 however claimed that the victim was taken to her when she had already taken a bath. Thus, it was possible for her not to see the discharge from the victim's private parts. I therefore find this contradiction/inconsistency not material. **Two,** while the victim claimed

that the appellant penetrated her vagina and she felt pain, PW2 who examined the victim claimed that she only saw bruises and redness on the victim's labia majora and labia manora but her hymen was intact meaning that she was not penetrated. This inconsistence is material and needed a clear address and deliberation by the court.

I do not intend to challenge the evidence by the expert who examined the victim that no proof of penetration but much as there is proof that there were bruises and redness on the victim's labia majora and labia manora, that demonstrates that something caused those bruises and redness. The victim claimed that the appellant inserted his kidude which the court interpreted as penis to her vagina. It may be that there was no full penetration but the accused conduct while trying to penetrate the victim resulted into the bruises and redness to the victim's labia majora and labia manora. In that regard I find that even in the absence of proof for full penetration resulting into rupturing of the hymen, there was a proof that the appellant inserted his penis to the victim's vagina resulting to bruises and redness. I am made to believe that the bruises and redness in the PW1's female organ suggested that it was tempered with.

In terms of section 130 (4) (a) of the Penal Code Cp 16, penetration however slight, is sufficient to constitute sexual intercourse necessary to the offence. In **Criminal Appeal No. 170 of 2006, Mathayo Ngalya @ Shabani v. R. CAT** (unreported) the Court of Appeal of Tanzania stated as follows

> *"The essence of the offence of rape is penetration. For the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence."*

This court was faced with similar situation in **Criminal Appeal No. 111 of 2018 Joseph Damian Savel Versus the Republic** where the assistant Medical Officer who medically examined the victim found her hymen intact but pointed out that her vaginal parts had bruises and fluid like sperms. Dyansobela J, made a conclusion that the offence of rape was proved as the bruises in the victim's female organ suggested that it was tempered with.

I humbly subscribe to that reasoning. Much as the victim was found with bruises and redness in her labia majora and labia manora it proves that the same was tempered with. In other words, the bruises and redness prove an attempt to full penetration which under the law

will be regarded as slight penetration enough to constitute the offence of rape.

On the argument regarding the proof in this appeal, I will be guided by the case of **Saganda Saganda Kasanzu v Republic,** Criminal Appeal No. 53 of 2019 TZ CA (Unreported) where it was held inter alia that, *" the issue as whether or not the case was proved beyond reasonable doubt depends on the totality of the evidence adduced before the trial court".*

In the matter at hand, in considering the totality of evidence I convinced to believe that the offence of rape was proved beyond reasonable doubt.

On the contention that the evidence was not collaborated, I have already narrated the evidence above and for sure there was a clear collaboration of the victim's evidence and PW6 who escorted her to go nome. PW3 who is the victim's aunt sent the victim to the police station and then to hospital. The evidence of PW4 who is a police officer also reveals the action taken after receiving the victim and the expert evidence shows that the victim was examined and a report recorded. The PF3 is also part of the record although signed by a different person. The reason for that was well explained and I do not see if it was fatal as the clinical officer has mandate to examine the victim. What is contained

in the PF.3 is her first observation on the victim's body. In that regard I find the appellant's contention that the victim's evidence was not collaborated wanting. In this I will be guided by the decision in the case of **Ali Abdallah Rajab v. Saada Abdallah Rajab and others** [1994] TLR 132 where the Court of Appeal of Tanzania observed that:

> "*The decision of this case was wholly based on the credibility of the witnesses. The learned trial magistrate saw and heard the witnesses as they testified. He was therefore in a better position to assess their credibility than this Court which merely reads the transcript of the record.*" (Emphasis added).

Also, the case of **Elias Joakim V Republic** [1991] TLR 221 where it was held that, *"Competency in giving evidence in so far as the child of tender years is concerned is not a matter of age but of understanding"*

The victim in this matter possessed sufficient knowledge of what happened to her and her evidence was supported and collaborated by the evidence of other witnesses who saw bruises and redness in her private parts. Although the appellant raised a defence that he had a conflict with DW6, the prosecution evidence was clear and was not shaken by the accused's defence. The trial court rightly relied on the prosecution evidence and I see no reason to fault the same.

Regarding the contention that the trial court decision was made without considering the defence evidence, I find this contention baseless. It is clear at page 5 of the trial court judgement that the appellant evidence was pointed out and considered weak. The defence was much based on the allegation that the appellant had a conflict with PW6 on account that he reported her to the police station for selling traditional liquor. The trial court did not buy that story on account that PW6 was not the victim in this case. I therefore find that the appellant's evidence was considered and, in my view, it casted no doubt on the prosecution evidence to convince the trial court to rely upon that defence to acquit the appellant. The appellant did not state how his conflict with PW6 was related to the rape and the discovery of bruises and redness in the victim's labia manora and labia majora. Thus, the appellant defence did not weaken or casts doubt on the prosecution case.

In the end, I find that the prosecution side managed to prove the offence of rape. The trial court's failure to address some of the inconsistencies did not prejudice the appellant as the same even though addressed by this court, they were not concluded in favour of the

appellant. I therefore uphold the trial court judgment and sentence and dismiss the appellant's appeal.

**DATED** at **ARUSHA** this 3rd Day of November, 2021


D.C. KAMUZORA

JUDGE