IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 175 OF 2021

(Arising from Criminal Case No. 172 of 2020 in the District Court at Nyamagana dated 28th August, 2021)

HUSSEIN SALIM KASIMU.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

9th May, & 30h June, 2022

DYANSOBERA, J.:

The appellant herein was convicted by the District Court of Nyamagana in Criminal Case No. 172 of 2020 of the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2019] and was sentenced to thirty (30) years imprisonment. Aggrieved by the trial court's decision, the appellant has appealed to this Court protesting his innocence. According to the petition of appeal filed on 29th day of December, 2021, ten grounds of appeal have been preferred as follows: One, that the case was a frame up and planted on him and the prosecution evidence was not trustworthy. Two, that the demeanour of PW 1 was not properly tested to ascertain the truth. Three, that PW 1's evidence was uncorroborated by people who eye

witnessed the incident. Four, that there was no cogent prosecution evidence to establish the appellant's intention to rape the victim. Five, that the conviction was based on the evidence of PW 3 and the PF 3 while the prosecution failed to conduct DNA. Six, that the learned Resident Magistrate failed to analyse and consider his defence. Seven, that the prosecution side failed to call the militia man and street chairman who witnessed the appellant being arrested. The eighth complaint was the failure by the prosecution to tender a search warrant to prove that the appellant was arrested with the victim. In the ninth ground of appeal, the appellant is faulting the trial court for basing the conviction on the evidence of PW 1 who was a victim of tender age arguing that her evidence was not properly admitted under section 127 (2) of the Evidence Act and in the last ground of appeal, the appellant is arguing that the case against him was not proved beyond reasonable doubt.

The facts which led to the appellant's conviction and incarceration can, as far as this appeal is concerned, be summarized. The victim was, at the material time, a STD III pupil at Makuyuni Primary School and was residing with Paskazia (PW 2), her grandmother, her aunt and Makala. By February, 2021 she was 10 years old.

On 22nd day of September, 2020 around noon, the victim left home and went to Pili, her friend after Makala had calumniated her of having stolen a flash disc and she feared that her grandmother would chastise her. She went to Pili's salon to watch TV. Her slippers went missing and she decided to go to her other friend one Scola. She then missed the way and Scola asked her to wait for her and would take her back home. The appellant arrived there and, in the absence of Scola who had gone to the shop, the appellant asked the victim her name and residence. He then asked the victim to accompany him so that he took her to court the following day. Thinking that the appellant was married and had children, the victim accompanied the appellant to his mud house and found that he was living alone. The appellant lit a candle and spread sacks as mattress. The victim sat down. The appellant locked the victim from inside and bade her that he was going to collect some food from his sister. Later, the appellant was back with ugali, sweet cassava leaves and sardines. They ate. The appellant then collected cushions from his sister but would not let her inside. He put the cushions on the ground and put on top of them a *kikoi* and asked the victim to sleep. The victim went to sleep but the appellant undressed her clothes including her underpants. The victim woke up and tried to raise an alarm but the

appellant warned her not to shout lest she be killed. The appellant then took his penis and inserted it into the victim's vagina. They then slept.

The following morning, the appellant fetched some water and went back with some samosas and asked the victim to eat. He then took the clothes, washed them and asked the victim to take bath. They then sat outside whereby the appellant started cutting the victim's nails. In the afternoon, the appellant took the victim to town and bought watermelon, chips and bhagia. They then went back home where the appellant had sexual intercourse with her for the second time.

The following morning, they went to the appellant's sister and the appellant asked the victim to change her name and be known as Mariam and identify the appellant as her father. At Rock City, they managed to come across the appellant's sister and he introduced the victim to his sister as his daughter claiming that the victim's mother was in Dar es Salaam. He again warned her not to divulge the truth lest her be killed. The appellant gave her Tshs. 500/= so as to buy cassava and at 2000 hrs the appellant collected her. At home, the appellant had carnal knowledge of her for the third time.

Next morning, the appellant took the victim to his sister at Rock City Mall and gave her Tshs. 500/=. In the evening, the appellant

collected her and, armed with a photograph of a rotten leg of a human being, the appellant started showing it to people begging some money claiming that the rotten leg belonged to the victim's father who was in need of money. He managed to secure Tshs. 5,000/= and bought her two dresses.

At home, the appellant had sexual intercourse with her for the fourth time. That was on 25 9.2020. On 30.9.2020 in the morning, the appellant took her to his sister at Rock City, left her there and gave her Tshs. 500/=. In the evening the appellant picked her but some people surrounded the house and the victim saw her grandmother. She ran towards her and hugged her. The appellant claimed that the victim had been beaten and he, the appellant, had taken her to hospital. The appellant was thereby arrested and taken to Igogo Police Station. The victim was interrogated and recounted that she was raped by the appellant. The following morning the victim was taken to Butimba hospital and medically examined on HIV and pregnancy.

As to why she could not escape, the victim told the trial court that the appellant used to holding her hand while walking and she could not tell any body as she had been threatened to be killed.

On cross-examination, the victim maintained that the appellant used to penetrating her vagina with his penis. She argued that the appellant refused to take her back home inspite several incessant demands. She further argued that the appellant gave her his track suit to disguise her face and appearance.

The evidence of the victim was supported by Paskazia Rwigina (PW 2), the victim's grandmother who testified that she found the victim with the appellant in the latter's house. She identified the appellant who was one-eyed and the victim told her that she was having sexual intercourse with the appellant. The fact that the victim was under 18 years was supported by her mother one Rehema Athuman Ayubu (Pw3) who lives at Katoro. According to her, the victim was born on 16th day of January, 2010 and by 2021, she was 10 years old.

It was the evidence of Abigail Mhingo (PW 5), a clinical officer cum Social Welfare that on 1st October, 2020 she medically examined the victim whereby by the HIV and STD test showed negative but that she was not a virgin and her private part was smelling bad. PW 5 filled in the PF 3 (exhibit P 1). It was her further evidence that heavy duties and riding bicycles could not cause loss of virginity. She argued that the incident had happened a long time ago and as such, she could not tell

whether or not the victim was penetrated. PW 5 was, however, insistent that the victim had lost virginity. She was emphatic that the victim did not tell her that she was injured with anything or that she was riding a bicycle but that she was living with the appellant.

The evidence of the victim was corroborated in material particular by PW 4 one F. 2474 DC Pius who investigated the case. It was his evidence that in his investigation, he interrogated the witnesses including the victim and interviewed the appellant who told him that on 22. 9.2020 he met the victim crying and claiming to have been beaten at home. The appellant then took her at home and stayed with her from 22nd to 30th September, 2020 when he was apprehended.

In his defence, the appellant told the trial court that he was resident of Bugarika and a plumber. As to how he came to stay with the victim, he explained that he picked the victim on the road and she was crying. The victim's friends that is Scola and Pili told the appellant that the victim had been beaten by her grandmother and uncle on the theft of a flash. The victim told him that the *mjumbe* was Charles Mkumbi. When the appellant touched the victim, he found her with fever. The victim refused to be taken to her grandmother and asked to be taken to her mother. The appellant argued that he could not take her to the police

station because on that day it was raining heavily and it was at 2100 hrs. Denying to have slept with the victim, the appellant told the trial court that he took the victim to an old woman who is his neighbour. In the subsequent days, the appellant was taking the victim to Kirumba at the house of his brother's friend where she was sleeping. The appellant argued that he was impotent as such he could not carnally know the victim. The appellant admitted that he was staying with the victim from 22nd to 30th September, 2020 and that at the time of his apprehension he was with her.

In his judgment delivered on 26th day of August, 2021, the learned Resident Magistrate was satisfied that the case against the appellant was proved to the hilt. He convicted the appellant and sentenced him accordingly.

On my part, I have considered the ten grounds of appeal, the submissions from either side. Besides, I have taken into account the record of the trial court. I think the whole appeal hinges on whether or not the charge against the appellant was proved beyond reasonable doubt. That is the gist of the appellant's last (10th) ground of appeal which seems to be the summary of the first nine grounds of appeal.

There is no dispute that this is a statutory rape and some of the elements to prove its commission include age of the victim and penetration of the male organ into the female private parts. The fact that the victim was carnally known was clearly stated by all prosecution witnesses. The victim detailed how the appellant carnally knew her four times for the period she was staying with him. The victim detailed how the appellant was inserting his penis into her vagina, how he was buying some foods for her, how the appellant had instructed the victim to feign as his daughter and how they were caught by people at the appellant's house. The fact that she was carnally known was supported by PW 5 who medically examined the victim and established that the victim was not virgin as her vagina was open and had lost hymen and had a foul smelling vagina. The appellant, in his cautioned statement recorded before PW 4, admitted not only that he had stayed with the victim from 22nd to 30th September, 2020 but also, that he was carnally knowing her.

With regard to the age of the victim, apart from her own evidence, Rehema Athman Ayubu (PW 3) testified that the victim who is her daughter was born on 16th day of January, 2010 and that by 2021, she was 10 years old.

Now on the appellant's complaints. In his petition of appeal, the appellant questioned the credibility and demeanour of the prosecution witnesses arguing that the witnesses were not properly tested to ascertain the truth. I have analysed the prosecution evidence and I am satisfied that the prosecution witnesses were telling the truth. The trial court which heard and saw them testifying believed them. There was nothing from the appellant that the witnesses had any interest to serve when testifying rather than vindicating the law.

Besides, the finding by the lower court on credibility binds the higher court. It is trite law that credibility of a witness basing on his demeanour is the domain of the trial court. However, the appellate court can be called upon to assess the credibility of a witness if there is reason to do so. In the instant case, I find no reason to do the assessment.

In his fifth ground of appeal, it is the appellant's complaint that the conviction was based on the evidence of PW 5 and the PF 3 while the prosecution failed to conduct DNA. As rightly submitted by learned Senior State Attorney, there is no requirement under the law for DNA test to be conducted in order to prove rape cases. For instance, the Court of Appeal in the cases of **Aman Ally @ Joka v. R**, Criminal Appeal No. 353 of 2019 (CAT Iringa) and **Christopher Kandidius @ Albino**

v. R, Criminal Appeal No. 394 of 2015 (CAT-Dar es Salaam), to mention but a few, took that position.

The appellant also complained of the prosecution's failure to call the militia man and the street chairman to prove that the appellant was arrested. I think the appellant is catching at straws. The fact that the appellant was apprehended was not disputed. The necessity of calling these two people did not arise.

Lastly, the appellant is faulting the trial court for failure to observe the provisions of section 127 (2) of the Evidence Act in that the evidence of the victim was not properly admitted. There is no dispute that before the amendment of sub-sections (1) and (2) of section 127 of the Evidence Act, a court had to be assured of the witnesses' competence to testify that is, understanding the nature of an oath and the duty of speaking the truth but in 2016 section 127 (2) of the Act was amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016 which now requires a child witness to promise to tell the truth and not to tell lies.

The trial court's record shows that the trial court complied with the law as it currently stands.

The appellant also insisted that he was impotent to be able to commit rape. With respect, that fact was not proved albeit on balance of probabilities. Even if the appellant had managed to prove that he was impotent, the law on penetration is clear that penetration, even the slightest degree of the penis into the vagina is sufficient to constitute penetration. A case in point is **Masomi Kibusi v. R**, Criminal Appeal No. 75 of 2005 (unreported).

In the instant case, the prosecution, through the evidence of the witnesses, sufficiently proved that the appellant carnally knew the victim four times. The appellant's claim that the victim was sleeping elsewhere, which claim was unsupported, did not tilt the strong and compelling evidence of the prosecution but rather, it rendered support of the case for the prosecution.

As was the trial court, I also find the case against the appellant having been proved beyond reasonable doubt. The conviction is unassailable.

Lastly, I turn to the sentence. As rightly submitted by Ms Margareth Mwaseba, learned Senior State Attorney, the sentence meted out was in accordance with the law save that the trial Court overlooked the question of corporal punishment. The Sexual Offences Special

Provisions, Act No. 4 of 1998 amended section 131 of the Penal Code by repealing it and replacing it with a new section 131. The new section 131 (1) provides:

> *"131. – (1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life,* ***and in any case for imprisonment of not less than thirty years with corporal punishment,*** and with fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person."
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> **(Emphasis is mine)**.

In the instant case, the full sentence as provided by the law was not meted out by the District Court. Under the above quoted provision, apart from 30 years imprisonment, the Court mandatorily had to impose corporal punishment and compensation as well. However, since the extent of injuries the victim sustained was not clearly stated, the order of compensation is not, in the circumstances, proper.

In view of the omission committed by the trial court for failing to impose a sentence of corporal punishment in addition to a custodial sentence of

thirty years term of imprisonment, I step in to the shoes of the trial court and order that the appellant be sentenced to 12 strokes of corporal punishment in addition to 30 years custodial term of imprisonment.

For reasons stated, I dismiss the appeal and vary the sentence accordingly.

W.P. Dyansobera
Judge
30.6.2022

This judgment is delivered under my hand and the seal of this Court this 30th day of June, 2022 in the presence of the appellant and Mr. Morice Mtoi, learned State Attorney for the respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera
Judge