THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 02 OF 2022

(Originates from Criminal case No. 106 of 2020 before District Court of Mvomero)

ATHUMAN JUMA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

Hearing on: 01/4/2022

Judgement on: 21/4/2022

NGWEMBE, J:

The appellant Athuman Juma was jailed for the period of thirty (30) years in each count forming a total of sixty (60) years imprisonment running currently for the offence of rape. According to the charge sheet, the appellant was charged for rapping two girls, one aged 9 years and another aged 11 years.

For convenient purposes and according to the charge sheet, the genesis of this appeal, traces back to 17th September, 2020 when the alleged offence was committed by the appellant when was at Madizini area, Mtibwa Ward, Turian Division within Mvomero District in Morogoro Region. It is alleged that the appellant had carnal knowledge with two

girls aged 9 & 11 years old. With a view to conceal their true identity, the two victims are baptised as AB and CD respectively or PW3 & PW4 respectively. At last the appellant was arraigned in court and charged for two counts of rape contrary to section 130 (1) (2) (e) of the Penal Code Cap 16 R.E. 2019.

In prosecuting the appellant/accused, the Republic was blessed with five (5) prosecution witnesses, while the appellant/accused defended himself. At the end the trial court was satisfied with the prosecution case that, it was properly built and proved beyond reasonable doubt, thus convicted him in both counts and pronounced sentences of thirty (30) years in each count, forming an aggregate of sixty (60) years imprisonment running concurrently, meaning he will serve thirty (30) years imprisonment.

Being aggrieved with such conviction and sentence, the appellant found his way to this court armed with five grounds. For convenient purposes, same may be summarized into two namely:-

1. The trial court failed to consider the circumstantial evidence which led into the alleged rape, while the applicant works on public places;
2. The whole case was not properly prosecuted and proved beyond reasonable doubt.

On the hearing date of this appeal, unfortunate the appellant appeared in person, while the Republic/respondent was represented by learned senior State Attorney Evelyne Ndunguru. Being unrepresented, the appellant had very little contribution to his grounds of appeal. He insisted that the mother of AB promised to find any means to ensure the appellant is jailed purely out of family conflict.

Proceeded to argued that, he is marriage with his beautiful wife who is readily available for him, and has children, one of them is older than the alleged victims, thus could not commit rape to those children. Rested by praying the appeal be allowed.

In response therein, the learned senior State Attorney, supported the trial court's conviction and sentence. Rightly, argued grounds 1 & 2 jointly by pointing out on a well-known but challenging legal point that the best evidence on rape cases comes from the victim. Supported her argument by referring this court to the case of **Yuda John Vs. R, Criminal Appeal No. 238 of 2017** (CAT – Arusha). Also referred this court to pages 13 and 14 of the trial court's proceedings, whereby the victim aged 9 years testified on the ordeal she underwent, while at page 16 of the proceedings, the second victim age 11 years testified quite clearly on how they were raped by the appellant.

Again, she referred this court to page 10 of the trial court's judgement whereby, the trial magistrate observed the demeanor of the victims when were testifying in court.

Above all referred this court to page 30 where the medical doctor tendered PF 3 for AB and CD respectively, same were admitted in court marked exhibit P1 & P2. Insisted that the rape case was established and proved beyond reasonable doubt.

Arguing on the third (3) ground, insisted that, in fact there were contradictions on dates on when the event occurred between the two victims, however, insisted that same were minor. Supported her argument by citing the case of **Zheng Zhi Chao Vs. DPP, Criminal Appeal No. 506 of 2019** (CAT – Dodoma).

Arguing on fourth (4) ground, briefly referred to the evidence of PW1 which was supported by PW2 & PW5. The evidence of PW5 proved the two victims had no hymen thus, penetrated.

The last ground on failure to prove rape, she insisted that the evidences left no doubt, the appellant raped them, hence the appeal lacks merits same be dismissed forthwith.

Further, pointed out misdirection of the trial court found in sentencing the appellant. According to law, rape of a girl below the age of 10 years, its punishment is life imprisonment. Therefore, the sentence of 30 years for first count was contrary to law. Finally, invited this court to correct such error by aligning the sentence with the applicable law.

In brief rejoinder, the appellant resisted the allegations of rapping those two girls by printing out the environment of where he is doing his business. That he is doing business of selling used clothes (Mitumba) at Turiani Township closer to the market place. Posed a valid question of how could rape be possible to those young girls in a place of business and within the market place, where many people are passing through. Added that whatever alarm would be heard by many people around the market. As such the allegations are purely cooked stories to humiliate him and his family. Rested by praying the court to allow his appeal.

Having summarized grounds of both parties, I am settled in my mind that the principles constituting the offence of rape is well – settled in our jurisdiction. There are many authoritative pronouncements made by this court and the Court of last instance in our country.

Moreover, I may from the beginning insist that the offence of rape in our jurisdiction is among the most serious offences, which upon conviction

attract heavy punishment up to life imprisonment, having a minimum of thirty (30) years imprisonment. Therefore, according to its seriousness, its proof must be watertight leaving only remote possibilities or doubt which may be ignored. Likewise, the prosecution must note that, offences attracting long imprisonment, like statutory rape, its proof must carefully be done to avoid mistakes, only the culprits should be netted and punished accordingly.

Rape is established upon proof of penetration however slight may be constitutes the offence of rape. Section 130 (4) (a) of the Penal Code clearly provide as quoted hereunder:-

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*

The court of Appeal in the case of **Godi Kasenegala Vs. R, Criminal Appeal No. 271 of 2006 (CAT)** raised a valid question on what constitutes an offence of rape? They proceeded to answer as follows:-

> *"under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of 18 years without her consent. Two, having sexual intercourse with a girl of the age of 18 and below with or without her consent (Statutory rape). In either case,* ***one essential ingredient of the offence must be proved beyond reasonable doubt.*** *This is the* ***element of penetration*** *i.e.* ***the penetration, even to the slightest degree, of the penis into the vagina"***

In similar vein the Court in the case of **Mbwana Hassan Vs. R, Criminal Appeal No. 98 of 2009 (CAT – Arusha)**, held:-

"It is trite law also that, for the offence of rape .... There must be unshakeable evidence of penetration"

In the absence of unshakeable evidence on penetration even to the slightest degree, rape cannot be constituted. Penetration being a core element of rape, undoubtedly, must be unshakably established and proved beyond reasonable doubt.

In respect of this appeal, apart from the evidences of the two victims, none of the prosecution witnesses testified clearly that the victims were penetrated. PW1 who was the first person to be informed on rape, she testified clearly that the vagina of AB was normal but observed reddish at the center. She inquired on what happened, but refused, later disclosed that she had sexual intercourse with the appellant when was together with the second victim.

The two girls in their testimonies, pointed fingers to the appellant to have had sexual intercourse. However, mere allegations of sexual intercourse are not enough, there must be unshakable evidence on the occurrence of rape. To prove rape to girls of 9 years and 11 years, several signs are expected, first, girls of that age have no experience, therefore such act is a stranger to them. Second their sexual organs are not developed to accept such act. Therefore, such act will cause rapture of their female organs causing over bleeding and may even cause difficult to walk, bearing in mind the appellant is matured person of 39 years old expected to have fully grown and matured male organ. Understandably the two girls could not tolerate such act, repeatedly as they boldly testified in court.

Considering more deeply on the whole prosecution evidences especially the testimonies of PW5, who was a medical doctor, may help to shade

some light on the reliabilities of the allegations of rape. Of course, I am aware that, medical doctors testify in court not as witnesses of facts, rather provide expert opinion in their field. The expert opinion is admissible to furnish the court with scientific information, which is likely to be outside the experience and knowledge of a trial judge or magistrate. The court is not bound to follow such expert opinion, when there is enough and cogent evidence to arrive into conclusion without help of their expert opinion. But when there is a serious doubt, the expert opinion would help the court to arrive into clear position of the alleged offence. This position was also articulated by the Court of Appeal in the case of **Edward Nzabuga Vs. R, Criminal Appeal No. 136 of 2008.**

In respect to this appeal, PW5 had this to say at 30 of the proceedings: -

> *"...two parents each having her child came to my office at the hospital with PF 3 alleging that their children have been carnally known by their neighbor. I started to conduct medical examination one after another in respect to their problem. I conducted physical examination and laboratory test. Physical examination by eyes did not show directly that the girls have been penetrated recently but all of them had no virginity. Lack of virginity at their age showed that they are likely to have been penetrated sexually or by other means including accidents. Also conducted HIV test and Syphilis (Kaswende) the results were negative"*

The same testimony was recorded in PF3 of both victims as quoted hereunder:-

> *"No any injury on genital organ, absence of hymen. Investigation show negative on venereal disease. No spermatozoa"*

The question is whether these expert reports help this court to confirm that there was penetration in the victims' female organs? It is difficult to answer in affirmative.

Analyzing the evidences on record, likewise do not indicate if the two girls were penetrated. For instance, PW1 does not say exactly why she became nervous over her daughter. Said she observed at the center of her vagina, there were unusual reddish. But that testimony is contrary to the observation made by a medical doctor on the same date. More so, PW2 had no evidence at all for what she testified was purely hearsay from PW1.

The stories provided for by PW3 & PW4 are attractive closure to the truth, first PW3 said her mother discovered that she has been sexually abused when she found him walking improperly. PW4 also said the place where rape was committed had pornography pictures. After showing them, he did the same to them. This piece of evidences attracts serious question of whether Police conducted the required investigation to unearth if at all the appellant had such special room and does show pornography pictures? Failure of which and bearing in mind the available evidences, raise serious doubt. I reserve this issue for further consideration.

Another important element of statutory rape, is proof of age. In this appeal, PW1 mentioned the date when her daughter was born, that is on 2012 and PW2 proved that her daughter was born in year 2010. Of course parents may prove the age of their victims as was rightly decided by the Court of Appeal in the case of **Salu Sosoma Vs. R, Criminal Appeal No. 32 of 2006,** held:

"We are mindful of the fact that a parent is better positioned to know the age of his child"

Therefore, the question of age was proved. This fact supports my previous observation that if there was penetration into their private parts/vagina obvious the medical doctor would have observed and proved same. In the contrary, PW5 proved that there was neither injuries nor pain and physically looked normal. Even by using laboratory test, both had no signs of any sexual transmitted diseases like HIV or Syphilis. The question is, which piece of evidence attracted or enticed the trial magistrate to convict the accused?

I think, every witness is entitled to be trusted and believed on what he testifies in court. Likewise, the evidence of PW1, PW2 & PW5 should be trusted as credible witnesses. This position was categorically stated in the case of **Goodluck Kyando Vs. R, Criminal Appeal No. 118 of 2003** where the Court of Appeal held:-

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness"

If that is the position of law, then judges and magistrates must always be rational when conducting trials. They must not be easily moved from findings of truth in every allegation. Cries of the victim does not mean she is telling the truth. Courts must go beyond demeanor especially on cases attracting long imprisonment like sexual related offences. I am certain, sexual related offences are easily alleged, but very difficult to defend against those allegations. I have seen in court; even important persons have been accused of rape. But when the court orders for additional evidences from medical doctors on the ability of the accused to commit

rape or defilement, proved negative. Even insane persons have been accused of rape.

Since we are living in a diverse society, especially on the era of telling lies is an order of a day, courts must be more careful. Otherwise, innocent persons will be jailed. I agree with the old jurists who said, it is better one hundred guilty persons should escape jail than to jail one innocent person.

Having so said, now it is time to answer the issue of investigation. Expectedly, police upon being informed from the parents of the two girls, would conduct thorough investigations to unearth the truth of that allegations. Unfortunate may be, there is no indication if at all that case was investigated. For instance, an investigation would reveal if the appellant had a special room in his place of business where he was sexually abusing those school girls. If at all he had bicycle and the alleged pornography as per the testimonies of the two victims.

It is so clear, I think, the offence was not investigated at all, thus neither police investigator nor police officer was involved in investigating the allegation of rape. Otherwise, he would have called in court to testify on his investigative facts of the alleged offence.

This court and the Court of Appeal have repeatedly, lamented on increasing poor investigation by police. Rape cases are serious offences in our country, which attract long sentence imprisonment up to life imprisonment. Therefore, each person involved therein must perform his duties seriously. The victim must tell only truth on what exactly happened to her; Police likewise must be serious to investigate the matter immediately upon receipt of the allegations; Doctors as experts who are expected to reveal only truth based on their expertise examination on the victim's private parts (Vagina); more so, the learned State Attorneys are

bound to ascertain on the evidences they are about to build their case in court. They should not take any allegation to court without being sure on availability of enough evidences to establish a prima facie case against the accused; and finally, the trial Magistrate must have critical minds on every relevant piece of evidence before arriving to the conclusion of either conviction or acquittal.

In this point of lack of seriousness of police to investigate the offence, the Court of Appeal lamented in the case of **Hosea Francis @ Ngala & Maria Hosea @ Ulanga Vs. R, Criminal Appeal No. 408 of 2015 (CAT at Dodoma)** by holding as follows:-

> *"We are obviously concerned about the failing standards of professionalism in the collection of evidence at scene of crimes. We are as surprised why, after visiting the alleged scenes where the deceased met her unlawful death, PW1 and other police officers who were in his entourage, failed to collect physical evidences which the police according to PW3 were shown"*

The same sentiments were repeated in this court in the case of **R, Vs. Issa Mohamed @ Chiwele & 3 others, Criminal session No. 39 of 2016 (HCT at Lindi).** The result of poor investigation affects the prosecution from building the case based on crucial pieces of evidences, that are expected in a well-handled case. Lack of seriousness on the part of police investigators result into poor prosecution and failure to net the true culprits.

Repeatedly, this court and the Court of Appeal have pronounced that due to intrinsic nature of the offences of morality, like rape and unnatural offences, where only two persons (the victim and the accused) are involved, the testimony of the victim must be scrutinized with extreme

care, otherwise, I have seen many times, even family conflicts are reported as rape or unnatural offences which attract long sentence imprisonment. Usually offences like this, the prosecution evidences must either stand or fall depending on the above facts.

In totality and for the reasons so stated, I am certain that this appeal was not properly investigated thus, lacked proper prosecution and prove beyond reasonable doubt. I therefore, proceed to allow this appeal, quash the conviction and set aside the sentence meted by the trial court, consequently order an immediate release of the appellant from prison, unless otherwise lawfully held.

I, accordingly order.

Dated at Morogoro in Chambers this 21st day of April, 2022.

P.J. NGWEMBE

JUDGE

21/04/2022

Court: Judgement delivered at Morogoro in chambers this 21st day of April, 2022 in the presence of the Appellant in person and Ms. Evelyne Ndunguru State Attorney for the Republic/respondent.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE

JUDGE

21/04/2022