IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 35 OF 2022

(Originating from Criminal Case No. 57 of 2021 in the District Court of Muleba at Muleba)

ONESMO JUMA---------- APPELLANT

VERSUS

REPUBLIC---------- RESPONDENT

JUDGEMENT

Date of Last Order: 22/09/2022

Date of Judgment: 21/10/2022

A. E. Mwipopo, J.

Onesmo Juma was charged and convicted by Muleba District Court for the offence of rape contrary section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. It was alleged that on 06.04.2021 at Kachunkwa Guest House within Muleba District in Kagera Region the appellant did unlawfully have sexual intercourse with one DEM (the name is concealed) a school girl aged 17 years. The prosecution called 5 witnesses and tendered 2 exhibits to prove their case. The trial Court find the appellant with a case to answer and the appellant testified

on oath and called one more witness in his defense. The trial District Court convicted the appellant and sentenced him to serve 30 years imprisonment. The appellant was upset and filed the present appeal.

The petition of appeal filed by the appellant contains 8 grounds of appeal as follows hereunder:-

1. *That, the case against the appellant was not proved beyond reasonable doubt because PW4 stated that he was instructed to examine the victim as to whether she has been raped and whether she was pregnant. After conducting the physical examination, the report shows she had no hymen and the pregnancy test showed that she had no pregnancy.*
2. *That, the trial Court held that the case against the appellant was proved without considering the requirements of section 62 (1) (c) of the Tanzania Evidence Act, Cap. 06 R.E. 2019.*
3. *That, the appellant was convicted of an offence of Rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019, without penetration being proved.*
4. *That, the trial Court erred in law and facts for convicting the appellant relying on uncorroborated evidence of PW1 (ie. Bus ticket from Katende Village to Muleba and receipt of Kachungwa guest House or a testimony of guest attendant). Corroboration in sexual offence is very essential.*
5. *That, the appellant was convicted on evidence which was based on speculations and conjectures which have no room in criminal trial.*
6. *That, the appellant was convicted on evidence which requires corroboration. The evidence which require corroboration could not corroborate another evidence.*

7. *That, the trial Magistrate erred in law and facts by convicting and sentencing the appellant basing on the fabricated case against the appellant.*
8. *That, the presiding Magistrate failed to regard and evaluate the appellant defense in order to separate the chaff from the grain in analysis as the law requires.*

On 22.09.2022 the appellant submitted two additional grounds of appeal which reads as follows:-

1. *That, an inquiry was not conducted by the trial Court as the appellant raised objection on the tendering of Exhibit PE2, thus Exhibit PE2 was admitted illegally.*
2. *That, the trial Magistrate erred in law and facts to admit Exhibit PE2 as evidence whilst it was not read out in Court.*

The Court invited the appellant to make submission in support of the appeal where he prayed for the Court to consider all his grounds of appeal including the additional grounds of appeal.

In response, Ms. Ngolo Dabuye, State Attorney for the respondent, replied to each of the grounds of appeal in the petition of appeal including the additional grounds of appeal. She submitted jointly on the 1st, 3rd, 4th, 5th, 6th and 7th grounds of appeal that the prosecution proved the offence of rape against the appellant without leaving any doubt. She said that the appellant was charged for the offence of statutory rape contrary to section 130 (1) (2) (e) and section 131 of the Penal

Code, Cap. 16 R.E 2019. The age of the victim was proved through the testimony of the father of the victim - PW2 as it is seen in page 5 of the proceedings. PW2 testified the date of birth of the victim – PW1 which proved that when the offence was committed the victim was below 18 years. The appellant did not cross examined PW2 on the testimony over the age of the victim.

It was her submission that the prosecutions also were able to prove that the appellant penetrated the victim. She said the best evidence in sexual offences comes from the victim as it was held in the case of **Selemani Makumba vs. Republic** [2006] TLR 379. The evidence of the victim of sexual offence does not need corroboration under section 127 (7) of the Evidence Act. What Court need before it convict the accused is to believe what was testified by the victim is the truth. PW1 (victim) testified to have relationship with the appellant since 2020 and on the date of incident the appellant had sexual intercourse where he penetrated her vagina by using his penis. The victim identified the appellant as the person who penetrated her on the date of incident. The appellant did not cross examine the victim on her testimony. This means that the appellant was in agreement with what was testified by the victim.

She said that the evidence of PW1 was supported by the testimony of PW4 – the Doctor who examined the victim and said that the victim was not virgin as her hymen layer was perforated. PW4 tendered the PF3 which was read to court

after it was admitted. Further, the Cautioned Statement of the appellant was tendered and it was admitted as Exhibit PE2. However, the exhibit PE2 was not read over to the court as result the appellant did not hear its content. This has prejudiced the appellant and the Court has to expunge it from the record. The identification of the appellant by the victim has no doubt as she testified to know the appellant since 2020.

On the second ground of appeal the counsel said that the prosecution and the trial Court considered section 62 of Evidence Act. The prosecution evidence was direct evidence and not secondary evidence. The victim of the rape testified on what transpired to her and her evidence is direct evidence. The court should not consider this ground. In support of the position, she cited the case of **Frank Kinambo vs. DPP, Criminal Appeal No. 47 of 2019,** Court of Appeal of Tanzania at Mbeya, (unreported) at page 11.

The counsel said on the 8th ground of appeal that the court considered the defense evidence in its judgment as it is seen in page 9 of the judgment of the trial District Court. The appellant raised the defense of alibi and the court held that the said defense was raised late but still the court find that the appellant's defense of alibi did not shake the prosecution's case.

The State Attorney said in regard to the additional grounds of appeal that the PF3 and Cautioned Statement were both admitted as Exhibit PE2. The

Cautioned Statement has to be expunged from the proceedings as it was not read over to the appellant. But, PF3 was admitted according to the law and it was read over to the appellant after its admission. Thus, both additional grounds of the appeal have no merits.

In his rejoinder, the appellant said there is no proof that the PW1 was found at the alleged guest house as the register book of the guest house alleged they sleep together was not tendered as evidence. He added that there is contradiction on the age of the victim as the charge and PW2 said that the victim age is 17 years, but the victim – PW1 testified that she was 16 years old at the time she was testifying. PW1 never said as to when the alleged love relationship started. PW2 said appellant was arrested at Katende in Chato District, while PW1 said appellant was found at Muleba District. The prosecution evidence is full of doubts.

After hearing the submissions for both sides, the main issue for determination is whether or not the prosecution evidence proved without doubt the offence of rape against the appellant.

The evidence available in the record reveal that the appellant was charged for the offence of rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. The particulars of the offence in the charge sheet states that the offence was committed on 06.04.2021 at Kachunkwa Guest House within

Muleba District in Kagera Region where the appellant did unlawfully have sexual intercourse with one DEM (the name is concealed) a school girl aged 17 years.

In the case where the appellant was charged for the offence of statutory rape under section 130 (1) and (2) (e) of the Penal Code, Cap. 16, R.E. 2019, as it is in the present case, the prosecution evidence is supposed to prove the presence of penetration and the age of the victim was below 18 years old. Section 130 (2) (e) of the Penal Code, Cap. 16, R.E. 2019 reads as follows:-

> *"130. - (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> > *(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

The victim's age is proved by her or his testimony, the testimony of her/his parents, relatives, medical practitioner or documentary evidence. In the case of **Issaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (Unreported), were it held at page 8 – 9 of the judgment that, I quote:-

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the victim must be*

under the age of eighteen. That being so, 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 a birth certificate. We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact including the age of a victim on the authority of section 122 of TEA....."

From above cited case, the age of the victim of statutory rape could be proved by testimony of witnesses or documentary evidence or the Court may make inferences to the existing facts. In the present case, the PW2, who is the father of the victim, proved that she was below 18 years when the offence was committed. He said that she was born on 25.05.2005 which means by 06.04.2021 when the offence was committed she was aged 16 years and 10 months. The same is supported by testimony of the victim – PW1 and the Doctor who examined the victim – PW4.

The appellant alleged that there is contradiction on the age of the victim in the testimony of PW2 and the victim, but I find no such contradiction in their testimonies. PW2 testified that the victim was 16 years old when the offence was committed and the victim – PW1 said during cross examination by the appellant that she is aged 16 years. On the contradiction between particulars of the offence

and testimony of witnesses on the age of the victim, I admit that particulars of the offence in the charge sheet shows that the age of the victim was 17 years. However, the said contradiction is minor and does not go to the gist of the case since the victim is still below 18 years which means the victim still could not consent to sexual intercourse.

Now, turning to the second element of the rape offence which is the presence of penetration, the law on penetration is clear that penetration of the penis into the vagina, however slight, is sufficient to constitute penetration. This was stated by the Court of Appeal in the case of **Masomi Kibusi vs. Republic,** Criminal Appeal No. 75 of 2005 (unreported). The penetration in sexual offences must be proved beyond reasonable doubt. In the case of **Kayoka Charles vs. Republic,** Criminal Appeal No. 325 of 2007, Court of Appeal of Tanzania at Tabora, (Unreported), it was held by the Court of Appeal that penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ. Thus, it is the victim who has to say in her testimony that there was penetration of male sexual organ into her sexual organ.

The learned counsel for the respondent said that the best evidence in rape offence is that of the victim herself. I agree with her that the principle is settled that the best evidence in the sexual offences comes from the victim. The position

was stated by Court of Appeal in number of cases including the case of **Selemani Makumba vs. Republic [2006] TLR, 379,** where it held 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."*

The Court of Appeal had similar position in the case of **Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2018, Court of Appeal of Tanzania at Iringa, (unreported), where it held that:-

> *"It is now settled law that the proof of rape comes from the prosecutrix herself."*

As a general principle, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness. This position was stated by Court of appeal in **Goodluck Kyando vs Republic [2006] TLR 363**. In the case at hand, the victim – PW1 testified that she know the appellant as he was her boyfriend since 2020. That on 05.04.2021 the appellant gave her money to go to Muleba where they planned to meet on the following day. PW1 said on 05.04.2021 she went to Muleba and took a rum at Kachunkwa Guest House. On the following day the appellant went there and they had sexual intercourse. She said that the appellant placed his penis into her vagina and they slept the whole night. This is the evidence of the victim on

how the offence of rape was committed and how she was able to identify the appellant as the person responsible who committed the offence.

The identification of the appellant by the victim have a lot to be desired. The victim named the appellant in her testimony as the person who raped her and he was her boyfriend since 2020. I was asking myself if this evidence was sufficient identification of the appellant. Despite the fact the victim – PW1 said in her testimony that appellant was her lover for almost a year, I expected the victim or other witnesses to provide further explanation on how the appellant was well known to the victim. Saying that the appellant was her boyfriend without further explanation as to how she know him is not sufficient to prove that the victim knew the appellant prior to the incident.

Further, PW2 said in his testimony that after his daughter – PW1 went missing on 05.04.2021, he reported the incident to Katende Village Executive Officer (V.E.O) on 06.04.2021. He said they suspected that appellant is involved. Then, they went to arrest the appellant and took him to Muleba Police station. Later they followed the victim to Muleba and arrested her. It was in cross examination where PW2 said that appellant agreed that he took the victim. From this evidence, it is clear that the appellant was arrested following suspicion that he was involves with disappearance of the victim on 05.04.2021. Thereafter, victim was found. Unfortunately, there is no reason given by PW2 why they suspected

that appellant was involved. Also, there is no evidence on how PW2 knew the appellant. It is suspicion of the PW2 which caused the appellant to be arrested. In absence of the reason for the suspicion, there are some doubts casted in the prosecution evidence.

Further, the evidence from PW1 and PW5 shows that the victim had sexual intercourse with the appellant at Kachunkwa Guest House on 06.04.2021 at room No. 113 which she rented and he slept there. However, there is no evidence brought by the prosecution to prove that the victim did rent a room or she was seen at the Guest House from 05 – 08.04.2021 when she was arrested. These witnesses (PW1 and PW5) said that there was communication through mobile phone between the victim and the appellant during all this time. Unfortunately, there is no evidence of the phone numbers which appellant and victim were using in their communication to prove the presence of communication between them during this time. Failure to bring exhibit or to call witness from Kachunkwa Guest House raises doubts to the prosecution case and this benefits the appellant. In **Aziz Abdalla vs. Republic, [1991] TLR 71**, the Court of Appeal held:

> *"The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question; are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown the court may draw an inference adverse to the prosecution."*

The counsel for the respondent said that the evidence of PW1 was supported by the testimony of PW4 – the Doctor who examined the victim and said that the victim was not virgin as her hymen layer was perforated. She said the PF3 tendered by PW4 was read to court after it was admitted and it supported the PW4 testimony. The counsel said further that the Cautioned Statement of the appellant was tendered and was admitted as Exhibit PE2, however, the exhibit PE2 was not read over to the court as result the appellant did not hear its content. The omission of the trial Court to read the cautioned statement after it was admitted is not the only irregularity in this trial. The record of proceedings shows in page 13 of the typed proceedings that the appellant retracted the confession. He said that he did not sign it freely which means he was denying to make the statement voluntarily. It is settled that a trial within a trial should be held to determine not only the voluntariness or otherwise of an alleged confessional statement but also whether or not it was made at all. This position was stated by the Court of Appeal for Eastern Africa in the case of **Mwangi Nyange vs. Reg**. [1954] 21 EACA 377, **Mohamedi All and Another vs. Reg.** [1956] 29 EACA166, and in **Annes Allen vs. DPP**, Criminal Appeal No. 173 of 2007, Court of Appeal of Tanzania at Arusha, (unreported). In the **Mohamedi All and Another vs. Reg,** (supra), it was held that:-

> *"where the accused at his trial repudiates or retracts his confession or maintains that it was not voluntary, then before it may be admitted, the*

court must conduct a trial within trial and decide upon the evidence on both sides whether it should be admitted."

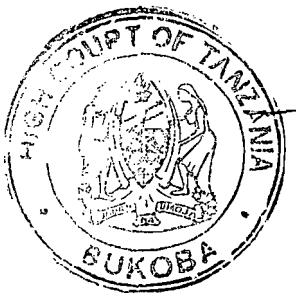
Since the appellant retracted the cautioned statement, the trial Court was supposed to conduct a trial within a trial (inquiry) to ascertain the voluntariness of the recording of the statement. Failure to conduct a trial within a trial and failure to read cautioned statement after its admission has rendered the admission of the exhibit to be null and void and I proceed to expunge it from record.

Turning to the submission by the counsel for the respondent that the victim's evidence was sufficient to convict the appellant and there is corroboration from other evidence, I have different view. I have said earlier herein that there are some doubts in the victim's evidence. The evidence needs corroboration from another independent evidence before the Court could rely on it to convict the appellant. The evidence from PW4, a doctor who examined the victim, is not sufficient to corroborate since he examined the victim on 12.04.2021. As the incident was alleged to be committed on 06.04.2021, it is obvious that he examined the victim after 6 days. This evidence is not sufficient to support anything on the rape incident. Anything can happen between those six days to the victim. The PW4 testimony that the victim was not virgin as her hymen layer was not found is not the proof that she was raped. The other evidence from PW2 is based on suspicion and that of PW5 is based on the hearsay.

The appellant said in his 8th ground of appeal that the trial Court failed to consider and evaluate his defense. The trial Court in its judgment decided to disregard the defense evidence for the reason that he failed to give notice of the defense of alibi in accordance with section 194 (6) of the Criminal Procedure Act, Cap. 20 R.E. 2019. However, the trial Court was supposed to consider the evidence and to give it the desirable weight and not to disregard it. The appellant duty is to raise doubt that he did not commit the offence and his defense that on 06.04.2021 he slept at his house with his wife – DW1 contradict the prosecution case. The said defense was supported by testimony of DW1 who said on 06.04.2021 the appellant slept at home.

In the circumstances, the conviction of the appellant by the trial Court was not proper. The appellant was not properly identified by the victim and the same could not be assumed. It was wrong for the trial court to act on weak evidence of identification which did not eliminate possibilities of mistaken identity or fabrication. Also, defense evidence cast some doubts in prosecution case. Thus, I find the prosecution case was not proved beyond reasonable doubts.

Therefore, the appeal is allowed. The conviction of the appellant for the offence of rape by the trial District Court is quashed and the sentence of thirty (30) years imprisonment is hereby set aside. Forthwith, I order for the release of the appellant from prison otherwise held for another lawful cause. It is so ordered.



A.E. MWIPOPO

JUDGE

21/10/2022

Court: Judgment was delivered in the presence of the appellant and the counsel for the respondent.

A.E. MWIPOPO

JUDGE

21/10/2022