IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

CRIMINAL APPEAL NO. 12 OF 2022
(Originating from Criminal Case No. 28 of 2014 of the District Court of Bukoba)

FRANK DOMINIC MJUNI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

06th October & 21st October 2022

Kilekamajenga, J.

The appellant was arraigned in the Resident Magistrates' Court of Bukoba for two counts namely, rape contrary to **sections 130(2)(e) and 131(1) of the Penal Code, Cap. 16 RE 2002** (now RE 2022); and prevention of transmission contrary to **section 21(1)(b)(3) of the HIV and AIDS (Prevention and Control Act, No. 28 of 2008**. It is alleged that, the appellant who was a herdsman in the victim's family at Kataiganiro Igurugati village in Bugandika Ward within Missenyi District in Kagera Region. On unknown divers dates of March 2014, the appellant did have sexual intercourse and transmitted HIV to a child of six years. In proving the case beyond reasonable doubt against the appellant, the prosecution summoned six witnesses whereas the defence relied on the oral testimony of the appellant.

The gist of the prosecution evidence is as follows: PW1 who was the victim's mother informed the court that, they employed the appellant to be a herdsman in their family in 2008. The appellant worked for the victim's family until in 2013 when his father came to fetch him. At that time, the appellant had joined an unregistered SACCOS popularly known as VIKOBA where he used to contribute his monthly salary of Tshs. 10,000/=. In 2014, the appellant returned to the victim's family to collect his money from the SACCOS and got it. On the same day, the appellant went to visit his friend and returned at night and found family members watching television. The appellant went into his room and was followed by the victim. PW1, however, did not suspect anything until when she went to kitchen and peeped through the window into the appellant's room. She saw the appellant and the victim seated on the bed. Few days later, the victim started complaining about the itching of her private parts. PW1 checked the victim's private parts and was shocked to find the victim's vagina penetrated. Upon an interrogation on that day, the victim told PW1 how the appellant was raping her on the way from buying some candy and bans. Thereafter, PW1 called PW2 to witness the victim's private part and hear the victim's story about the rape committed by the appellant. PW2 took the victim to the dispensary for medical examination and the victim was found to be HIV positive and was referred to Mugana Hospital for further examination. PW1 testified further that, there was a time when she went to clean the appellant's room and found a CTC card showing

that, the appellant was HIV positive and was under medication. PW1 kept the CTC card.

PW2, the victim's father, testified that, the victim was among his eleven children. He further confirmed that, they employed the appellant as their herdsman hence, they stayed with him (appellant) from 2008 to 2013. When the appellant left, PW1 while clearing the appellant's room, she picked a card showing that the appellant was HIV positive and attended clinic at Mugana Hospital. PW1 showed the card to PW2 and they kept it. In 2014, the appellant came back to collect his money from the SACCOS and he only spent one night at home before going back. However, PW1 told PW2 that she witnessed the appellant and the victim seated on the bed. On 14th June 2014, in the evening hours while getting dinner, the victim refused to eat and broke into tears alleging to be itching on the buttocks. PW1 went to check the victim and found that she (victim) has been penetrated in her vagina. As they were aware that the appellant was HIV positive, they took the victim for medical examination where she was also found to be HIV positive. PW2 reported the matter to the village authorities and the appellant, who was still in the same village, was arrested.

PW3, who was the victim, even though did not know the nature of an oath, was willing to tell the truth. In her testimony, she knew the appellant as their employee. The appellant was seducing her with some sweets and bans before

raping her. She told the court that, the appellant raped her on divers dates at their home and at the house of Rose though she did not report the matter to her mother. PW4, who was the police officer, recorded the appellant's cautioned statement who confessed to have raped the victim. Also, the appellant admitted to be HIV positive and attended clinic at Mugana. PW4 prayed to tender the cautioned statement which was admitted without objection from the appellant and marked exhibit P1. PW4 also drew the sketch map of the scene which was admitted as exhibit PII. PW5, being a medical Doctor who examined the victim and found a wider opening on the victim's vagina indicating that she was frequently raped. Further examination revealed that the victim was HIV positive. PW5 examined the victim's parents who were found to be HIV negative. PW5 tendered the PF3 that he filled-in which was admitted as exhibit PIII. PW6 was a nurse working at Mugana Hospital who was attending the appellant as a HIV patient. She confirmed that, the appellant was HIV positive and received medication from Mugana hospital.

In the defence, the appellant alleged that the case was framed against him by the victim's parents who did not want to pay his money. He also alleged to have been arrested by the militiamen while grazing cows four months after the commission of the crime.

The appellant was finally convicted and sentenced to life imprisonment. Being aggrieved with the decision of the trial court, he appealed to this court with seven grounds as follows:

1. *That the trial court erred in law and fact to convict the appellant without efficient (sic) evidence of the DNA forensic profiling test as recommended by section 395A of the CPA Cap. 20 RE 2019.*
2. *That the trial court magistrate erred in law and fact to disregard the defence evidence of the appellant.*
3. *That, the Age of the victim was not proved to the required law standard by adducing the evidence when failing to adduce the evidential documents to proving so.*
4. *That, the Hon. Trial court erred in law and fact to convict the appellant relying on his cautioned statement extracted from him in contravention of section 50 and 51 of the Criminal Procedure Act, Cap. 20 RE 2019 and neither taken to the justice of the peace as required by section 28 of the Tanzania Evidence Act, Cap. 6 RE 2019.*
5. *That the evidence adduced by the victim (PW3) is contradictive the evidence (sic) of her mother (PW1), where the victim (PW3) told the court that she was raped when they went to center with accused (sic) while her mother (PW1) told the court that her daughter was raped when she was visited to the room of the accused that's bad in law (sic).*
6. *That the Hon. Trial court erred in law to convict the appellant without eye witness to prove the alleged offence if (sic) the accused is the one who raped the girl of six years who was raped without rise the alarm compared the age of victim (PW3) (sic).*
7. *That here is no special evidence (sic) of be living that accused HIV/AIDS infections are that of the victim when the prosecution side relying on CTC 1 cerd (sic) of the accused to prove the alleged offence of rape.*

Before this court, the appellant appeared in person to defend the appeal. Being a lay person and unrepresented, he simply urged the court to adopt the grounds and allow the appeal. On the other hand, the learned Senior State Attorney, Mr. Emmanuel Luvinga, who appeared for the respondent, objected the appeal and supported the conviction and sentence against the appellant. On the first ground, the counsel argued that, there is no mandatory requirement to conduct DNA test in proving the offence of rape and the provision of the law cited by the appellant is irrelevant. On the second ground, though the trial magistrate might have failed to properly consider the adduced evidence, this court has an obligation to step into the shoes of the trial court and consider the appellant's evidence. On the fourth ground, Mr. Luvinga argued that, the age of the victim may be proved by oral evidence from the parent, guardian or a medical doctor. In this case, the Medical Doctor testified on the age of the victim. He further submitted that, it is true that the appellant's cautioned statement was read before being admitted and this is an error which may lead to an expunge of the caution statement. On the fifth ground, Mr. Luvinga objected the allegation that there was contradiction between the victim's evidence and that of PW1 on the place where the rape was committed. He insisted that, the appellant raped the victim on several occasions. On the sixth ground, the counsel was of the view that, in rape cases, the best evidence normally comes from the victim. In this case, the victim's evidence was further supported with the testimony of PW1, PW2 and PW5. On the seventh ground, Mr. Luving argued that, PW6 informed the court that the appellant was

HIV positive and the appellant did not challenge nor object such evidence. Finally, the counsel urged the court to dismiss the appeal as there was sufficient evidence to sustain a conviction.

When rejoining, the appellant argued that, during the trial, the Medical Doctor failed to identify the victim.

In this appeal, I wish to address the grounds of appeal as raised by the appellant. On the first ground, the appellant complained on the conviction which was meted against him without being coupled with DNA test. In response to this ground, the learned senior State Attorney argued that the proof of rape cases does not necessarily depend on the evidence of DNA test. In consideration of this ground of appeal, I also find it pertinent to state on the essence of subjecting an accused to DNA test in rape cases. I entirely agree with the argument advanced by the learned State Attorney that, not every rape case will require DNA results to prove the case to the required standard. Every case must be treated according to its surrounding circumstances. In this case, the victim was discovered to have been raped on several occasions. She further informed the court on how the appellant was luring her for some candies and raped her. Furthermore, the appellant who was HIV positive had also transmitted such a perilous disease to the victim. As the act of rape was committed to the victim in secret until discovery, the DNA test could not be conducted because there could

be no sperms to collect from the victim's vagina. Also, there was no need to require an eye witness as argued by the appellant. In proving this case, the prosecution only relied on the victim's testimony, the appellant's cautioned statement and other relevant evidence.

On the third ground, the appellant argued that the age of the victim was not proved. I understand, in rape cases, proof of the victim's age may be necessary. It has already become an established principle of the law that, the victim's age may be proved by the evidence of the victim, parents, guardian, relative, medical practitioner or production of a birth certificate, baptism certificate or a clinic card. See, the case of **Shani Chamwela Suleiman v. The Republic,** Criminal Appeal No. 481 of 2021, CAT at Dar es salaam (unreported); **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015, CAT (unreported). The rationale behind proving the victim's age may be obvious; being a statutory rape, the age of the victim may be at the margin between seventeen and eighteen years old. See, **section 130(2)(e) of the Penal Code, Cap. 16 RE 2019.** Also, the victim's body makeup or morphology may not be sufficient to tell whether the victim is below the age of eighteen years so as to fall under statutory rape.

In this case, the age of the victim was stated in the evidence of the medical doctor who testified in court that, he received a patient who was six years old on 18th June 2014 and conducted an examination on her. Also, when the trial

magistrate was receiving the testimony of the victim, she recorded that, the victim was a pupil aged six years old. These facts do not leave any doubt that the victim was six years old. In my view, the victim's age, not being at the marginal line towards eighteen years old does not present any complexity on its proof. I find the age of the victim to have been proved in compliance to the law.

On the fourth ground, the appellant alleged that, his cautioned statement was recorded in contravention of sections 50 and 51 of the Criminal Procedure Act, Cap. 20 RE 2019. Though the appellant did not specify the nature of the complaint on this ground, but he seems to challenge his cautioned statement on the allegation that it was recorded after the expiry of four hours after his restraint or arrest. This point allowed my perusal on the available record and discovered that, the appellant was arrested on 17th June 2014 at 18:00 hours and he was immediately taken to the police where his statement was recorded on the same date at 21:40 hours. Therefore, the allegation that the caution statement was recorded after the expiry of four hours has no merit.

The appellant further argued that, despite confessing before the police, he was not taken to the justice of the peace for an extra judicial statement. On this point, I understand that, after confessing before the police, as a matter of practice, he was supposed to be availed to the justice of the peace for recording an extra judicial statement. However, a caution statement and extra judicial

statement are two separate pieces of evidence albeit the same evidence may support each other. In understand, in absence of an extra judicial statement, the court must exercise an extra care on relying on the caution statement. In essence, an extra judicial statement is a vital piece of evidence that corroborate the caution statement. In the case of **Ndorosi Kudekei v. R, Criminal Appeal No. 318 of 2016**, CAT at Arusha (unreported) the Court stated that:

> *With the absence of the extra-judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant had confessed to having killed the deceased or not."*

However, in absence of extra judicial statement, the caution statement does not become invalid. It is always safe to apply the caution statement in corroboration with other pieces of evidence. In this case, the appellant cautioned statement only supported the other relevant prosecution evidence adduced during the trial.

In this case, the best evidence came from the victim. Though she was of the age of six years (during the trial), she was able to tell the court that she was frequently raped by the appellant after being promised some sweets and bans. Even in absence of other prosecution evidence, if the trial court finds the victim's evidence credible, it may be sufficient to sustain a conviction. This position of the law is clearly expressed under **section 127(6) of the Evidence Act, Cap. 6 RE 2019** thus:

(6) Notwithstanding the preceding provisions of this section, where in 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 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.

In this case, the victim's evidence squarely fits the appellant's cautioned statement and the court had no reason to doubt her testimony. In fact, even if her testimony could not be corroborated, it was sufficient to ground a conviction. The contradiction of her evidence with that of PW1 and the appellant's caution statement on where the incidences of rape were being committed, in my view, does not go into the root of the case. What seems to be evident is, the victim suffered several acts of rape from the appellant and it was not easy, at her age, to recall. The prosecution evidence, left no doubt that, the victim was raped and worse enough she contracted HIV. I have no hesitation, whatsoever, to support the conviction and sentence against the appellant as the two counts were proved beyond reasonable doubt. The appellant's defence did not shade any doubt on the prosecution case. I hereby dismiss the appeal and uphold the decision of the trial court.

DATED at **BUKOBA** this 21st day of October, 2022.

Ntemi N. Kilekamajenga.
JUDGE
21/10/2022

Court:

Judgment delivered this 21st October 2022 in the presence of the appellant and the learned State Attorney, Miss Evarista Kimaro. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga.
JUDGE
21/10/2022