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

**IRINGA REGISTRY**

**AT IRINGA**

**CRIMINAL APPEAL NO. 39 OF 2023**

*(Originating from Criminal Case No. 06 of 2022 in the District Court of Iringa at Iringa).*

**JOEL KIDIBULE @ YOWERI KIDIBULE..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

**Date of the Last Order:** **14.08.2023**
**Date of the Judgment:** **01.09.2023**

**A.E. Mwipopo, J.**

Joel S/O Kidibule, the appellant, was charged and convicted by the District Court of Iringa at Iringa for an offence of rape contrary to sections 130(1), (2)(e) and 131 (3) of The Penal Code, Cap 16 R.E 2019. The particulars of the offence in the charge sheet revealed that on the 25th of December 2021, in Mkimbizi area within District and Region of Iringa, the appellant unlawfully had carnal knowledge of one S.M. (the name of the victim is concealed), a girl of seven (7) years old. He was sentenced to serve life imprisonment. The decision of the trial Court aggrieved the appellant, and he preferred this appeal with a total of five grounds of appeal as follows hereunder:-

1. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant with excessive punishment of life imprisonment without considering that a person aged 18 years or less who is the first offender shall undergo the corporal punishment first before being given other punishment (i.e. section 131(2)(a) of the Penal Code).*
2. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant based on contradictory evidence adduced by PW1 and PW2 as to the actual place where the unlawful act occurred, was it in the appellant's room or a" chicken hut (banda la kuku). The contradictions create doubt in the evidence of these witnesses.*
3. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant without considering that the prosecution side failed to bring the husband of PW2 before the Court of law. PW2 testified that her husband told her he heard a person crying. PW2's evidence is hearsay as she testified to what she heard from her husband. PW2's husband was supposed to be brought to Court as a witness to introduce direct evidence.*
4. *That, the trial court wrongly convicted and sentenced the appellant without considering his defense, which was relevant to the charge.*
5. *That, the charge against the appellant was not proved beyond reasonable doubt.*

At the hearing, the appellant appeared in person, and Ms. Winfrida Mpiwa, the learned State Attorney, appeared for the respondent. The hearing proceeded by oral submissions.

Supporting his appeal, the appellant said on the 1st ground of appeal that the Court did not consider his age in sentencing him. He testified that he was under 18 years old during the incident. To prove that he was 18 years old, the prosecution used the evidence of a social welfare officer who said he spoke to his parents. But, his parents were not brought to Court as witnesses. At the time he was charged, the appellant said he was aged 17 years, and the sentence of life imprisonment was contrary to the law.

As to the remaining grounds of appeal, the appellant said the prosecution failed to prove the offence without doubt. They failed to bring a material witness, who is the husband of PW2. PW2 said her husband told her he heard the victim crying. The husband of PW2 was supposed to give his testimony. Without the evidence of her husband, the testimony of PW2 is just hearsay. PW2 claimed that the victim was raped several times. But, PW2 was not a house resident, and she came for vacation.

The appellant further said that there are several contradictions in the prosecution evidence. There is a contradiction in the testimony of PW2 and the doctor who examined the victim. PW2 said the victim's underpants had

sperm, but the doctor said the victim's underpants had blood. This is a contradiction, as PW2 said he washed the victim's parts. The question is, where did that blood that the doctor saw come from? Another contradiction is the place where the incident occurred. The victim said the incident happened in the appellant's room, and PW2 said it occurred in the chicken hut. The Court relied on this contradictory evidence to convict the appellant. The prosecution's evidence is doubtful, and this Court should not believe it.

In her reply, Ms. Mpiwa said she supported the conviction by the trial court, but the sentence imposed by the trial Court on the appellant was excessive. She said in the 1st ground of appeal that the Court already found that the appellant was 18 years old. The evidence of social welfare proved this. As the appellant was aged 18 years, the Penal Code provides in S. 131 (2) that the punishment for the appellant is corporal punishment as he was the first offender. Thus, the sentence of life imprisonment imposed by the trial court on the appellant was excessive.

As to the 2nd, 3rd and 5th grounds of appeal, she said that the case was proved against the appellant without doubt. The appellant was sued for statutory rape. The prosecution evidence proved that the victim was penetrated and she was aged below 18 years. The victim (PW1) confirmed that the appellant penetrated her vagina. PW1 said that the appellant

inserted his penis into her vagina and told her not to tell anyone. This evidence is supported by a doctor who examined the victim. The doctor found that the victim was penetrated, and he tendered PF3, which proved that a blunt object penetrated the victim. She said in the case of **Frank Kinambo vs. Republic**, Criminal Appeal No. 47 of 2019, Court of Appeal of Tanzania at Mbeya (unreported), it was held that the best evidence in a rape case is that of the victim. The victim's evidence proved the offence without doubt.

On the victim's age, the counsel said that the victim proved her age in her testimony. Regarding the complaint about where the crime was committed (scene of the crime), the victim said that the incident occurred inside the room of the appellant. PW2 did not state as to where the incident occurred. What PW2 testified is that the appellant had a tendency to lock the children inside the chicken hut, and they warned him about that behaviour.

Regarding the claim that PW2 saw sperm in the victim's underpants, the counsel said PW2 testified that she saw some dirt in the victim's underpants, and PW3 said nothing about the victim's clothes. PW3 examined the private parts of the victim and not her clothes.

Turning to the issue of failure to call PW2's husband, she argued that the husband of PW2 was not a material witness in the case. What is required to prove the case is the credibility and quality of the evidence brought. In the case of **Christopher Marwa Mturu vs. Republic**, Criminal Appeal No. 561 of 2019, Court of Appeal of Tanzania at Shinyanga (unreported) at page 10, and in **Furaha Alick Edwin vs. Republic**, Criminal Appeal No. 410 of 2020, Court of Appeal of Tanzania at Mbeya, (unreported) at page 18, it was held that there is no specific number of witnesses required to prove some facts in a case. The victim was a key witness in this case, and she testified that there were no other people at home during the incident. PW2's husband could not have any material evidence in this case.

In the 4th ground of appeal, Ms. Mpiwa admitted that the trial court did not consider the appellant's defense. She said the omission is curable under S. 388(1) of the CPA, Cap. 20 R.E. 2022, as this Court has the power to re-evaluate the whole evidence and reach its conclusion. The position was stated in the case of **Wambula Kiginga vs. Republic**, Criminal Appeal No. 301 of 2018, Court of Appeal of Tanzania at Mwanza (unreported).

In a rejoinder, the appellant had nothing to add.

Having heard the rival submissions by the parties, the issue for determination in this appeal is whether the appeal has merits.

I will start with determining the 2nd, 3rd, 4th and 5th grounds of appeal that the prosecution failed to prove the offence against the appellant without doubt. The appellant said that the prosecution's evidence is contradictory, hearsay as there is one witness not brought to testify, and the defense evidence was not considered by the trial Court in the judgment. In contention, the counsel for the respondent said that the prosecution evidence proved without doubt that the appellant committed the offence of statutory rape to the victim, a girl aged seven years old.

In this case, the appellant was charged and convicted for the statutory rape; he had sexual intercourse with a girl aged below 18 years. When a person is charged with a rape offence under section 130 (1) and (2) (e) of the Penal Code, Cap. 16 R.E. 2019, the prosecution evidence is supposed to prove the presence of penetration and the victim's age to be below 18 years old. There is no need to prove the presence of consent, as girls under 18 years cannot consent to sexual intercourse. The victim's age is proved by her testimony, the testimony of her/his parents, relatives, medical practitioner or documentary evidence as stated by the Court of Appeal in the case of **Issaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (Unreported). The presence of penetration of the penis into a vagina is proved by the testimony of the victim

and other evidence available, depending on the circumstances of the case. The best evidence in rape cases comes from the victim. See. **Selemani Makumba vs. Republic [2006] TLR 379**. In **Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2018, the Court of Appeal of Tanzania at Iringa (unreported) held that:-

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

Section 130 (4) (a) of the Penal Code provides evidence that penetration of the male's manhood into the female organ is necessary, and such slight penetration is sufficient to constitute sexual intercourse. 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 that penetration is a crucial aspect, and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ. The penetration in sexual offences must be proved beyond a reasonable doubt.

In this case, the prosecution evidence from PW1 (victim), who testified after she promised to tell the truth, shows that she was eight years old on the 25th of May, 2022, when she testified in Court. The incident occurred on the 25th of December, 2021. PW1 said that the appellant called her inside

her room when she entered, the appellant undressed her and inserted his penis into her vagina. After the incident, the appellant told her not to tell anybody. PW1 said it was not the first time the appellant had known her carnally, as he had done so several times. This evidence of the PW1 proved that there was penetration of the appellant's penis into the victim's vagina, and at the time of the incident, the victim was aged below 18 years.

The testimony of PW1 is corroborated with the testimony of PW2 and PW3. PW2, the victim's grandmother, testified that the victim was born on the 7th of December, 2003. On the 27th of December, 2021, while washing the victim's underpants, she noticed a dirty in the middle of the underpants. As the victim was still a child, PW2 asked her what had happened, and the victim told PW2 that the appellant was responsible. PW2 took the victim to the hospital after obtaining PF3 from the police. The gynaecologist examined the victim and informed PW2 that the victim was penetrated. PW3, a doctor who examined the victim, testified that he examined the victim on the 27th of December, 2021. During the examination, he was assisted by a female nurse as the victim was a female child. In the examination, PW3 observed that the victim's vagina was open, proving she was penetrated. PW3 tendered a PF3 of the victim containing the report of his examination, which the trial Court admitted as exhibit PE3. Exhibit PE3 reveals that the victim

had no hymen and had bruises and redness in the labia minora, upper fold of the vagina and clitoris. The PF3 also shows that the victim's underpants were wet with a discharge of old clotted blood. The object that caused the injury was a blunt object. This evidence proved that the victim was penetrated.

The appellant asserted there is a contradiction in the testimony of PW1 and PW2 regarding the place where the offence was committed and the evidence of PW2 and PW3 about the sperm or blood found in the victim's underpants. The counsel for the respondent said in contention there is no contradiction between the evidence of PW1 and PW2 regarding the place where the offence was committed. I have read the evidence in the record. PW1 (victim) informed the Court that the offence was committed inside the appellant's room. PW2, in her testimony, did not state where the incident occurred. Regarding the incident of locking children in the chicken hut, PW2 testified that the appellant tended to lock the children inside the chicken hut, and they warned him about that behaviour. Thus, I agree with the counsel for the respondent that there is no contradiction regarding the place where the offence was committed.

On the claim that the PW2 and PW3 evidence contradicted what was found in the victim's underpants, the evidence from PW2 reveals that she

found the victim's underpants with yellow dirt (sperm) while washing the victim's underpants. The victim was still a child, so she reported the incident to police. On his part, PW3 said while answering cross examination questions that the victim's underpants had a blood clot. The Court is satisfied that there is no contradiction in the testimony of PW2 and PW3 since there is no evidence showing that PW3 examined the same victim's underpants washed by PW2. Exhibit PE3 shows that PW3 recorded that the underpants worn by the victim were wetted with the blood discharge. This evidence indicates that the victim wore the underpants during the medical examination and not the ones washed by PW2. Thus, the alleged contradictions in the testimony of PW2 and PW3 have no basis.

On the appellant's claim that the prosecution failed to bring the husband of PW2 as a witness since PW2 said her husband told her that he heard children crying, the counsel for the respondent said in the contention that PW2's husband is not a material witness in rape cases. The material witness is the victim of the offence.

The Court is aware of the settled law that failure of the prosecution to bring a key witness in the criminal case leads to adverse inference to the prosecution case. The position is found in the provision of section 122 of the Evidence Act, Cap. 6 R.E. 2019, where the Court may infer the existence of

any fact which it thinks likely to have happened, regard being had to the ordinary course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. In **Aziz Abdallah vs. Republic [1991] TLR 71,** it was held on page 72 that:

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

Further, under section 143 of the Evidence Act, Cap 6, R.E. 2019, no particular number of witnesses is required to prove a fact. What matters is the credibility of the witnesses. See. **Yohana Msigwa vs. Republic, [1990] TLR 148**. In the case of **Republic vs. Rumisha Kashinde and Another [1991] TLR 175**, it was stated that:-

> *"The prosecution had the discretion to call or not to call someone as a witness, where it did not call a vital reliable person without a satisfactory explanation the court could presume that the person's evidence would have been unfavourable to the prosecution."*

Thus, the prosecution has the discretion to call or not to call any witness. But, where the witness with material evidence is not called without

sufficient explanation, the Court could presume that an uncalled witness's evidence would have been unfavourable to the prosecution.

In the case at hand, the husband of PW2 is not a material witness. PW2 said in her testimony that the appellant tended to lock children in the chicken hut, and her husband noticed after he heard the children crying. Locking the children into a chicken hut has nothing to do with the rape offence the appellant faces. Thus, the PW2's husband was not a material witness.

Regarding the failure of the trial Court to consider the appellant's defense in the judgment, the counsel for the respondent admitted that the trial Court failed to consider the appellant's defense. She said the omission is curable under section 388(1) of the Criminal Procedure Act, Cap 20 R.E. 2022, and prayed for this Court to be the first appellate Court to re-evaluate the whole evidence and reach its conclusion. It is correct that this being the first appellate Court, the Court has to re-evaluate the entire evidence of the trial Court and reach its decision. The Court of Appeal stated the position in the case of **DPP vs. Jaffari Mfaume Kawawa, [1981] TLR 149**.

The appellant's defence was that the case against him was fabricated after he claimed for the payment of salary arrears. He said that his employer was not giving his salary on the agreement that he would be given all his

salaries after he attained 18 years. After reaching 18 years, the appellant claimed his salary and was given this case. The appellant denied raping the victim and said that after he was taken to the police station, he was told to admit the offence and would be forgiven. He said the prosecution evidence was contradictory and doubtful and did not prove the offence against him.

The defense evidence does not raise any doubt in the prosecution's case. The appellant's claims for salary arrears were raised for the first time during the defense case. The appellant did not say his claims for salary arrears were for how long. On the claims that he was promised to be forgiven if he agreed to commit the offence, there is no evidence in the record showing that the appellant agreed to commit the offence. On the claims for contradictions in the prosecution's case, the Court has already found out while discussing the 2nd, 3rd, 4th, and 5th grounds of appeal that there is no contradiction whatsoever in the testimony of PW1, PW2, and PW3 as to the place where the incident occurred and if the victim's pants were found with sperm or blood. The evidence of the victim (PW1) proved that the appellant inserted his penis into the victim's vagina, and he ejaculated, and it was not the first time to do so. The testimony of PW2, PW3, and Exhibit P3 supports the victim's evidence. Thus, I agree with the trial Court and the respondent

that the prosecutions proved the offence of rape against the appellant without leaving any doubt.

Concerning the first grounds of appeal, the appellant said the sentence of life imprisonment was excessive to him since, at the time of the incident, he was 18 years old. As the first offender, he was supposed to be sentenced to corporal punishment only and not life imprisonment as the trial Court did. Ms. Mpiwa submitted that as the trial court already did find that the appellant was 18 years old in its ruling, his punishment under section 131(2) of the Penal Code is corporal punishment. The sentence of life imprisonment imposed by the trial court on the appellant was excessive.

I agree with the learned state attorney that the trial Court conducted an inquiry as to the age of the appellant after he objected to the age stated in the charge sheet that he was 18 years old at the time of the incident and claimed that he was 17 years old. The trial District Court found that the appellant was 18 years old at the time of the incident as he was born on the 3rd of May, 2003. By the time the incident was committed on the 25th of December, 2021, the appellant was 18 years and seven months. The judgment of the trial Court shows the appellant was a first offender. The law is clear in rape offences that when the accused is 18 years or less and is a first offender, the Court shall only sentence him to corporal punishment. The

position is stated under section 131(2)(a) of the Penal Code, Cap 16 R.E 2019, that:-

> *"(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall-*
>
> *(a) if is a first offender, be sentenced to corporal punishment only;"*

In this case, the appellant was 18 years old at the commission of the offence, and he was a first offender. The punishment provided by the law for the first offender aged 18 years is corporal punishment. But the trial Court sentenced the appellant to life imprisonment. The sentence imposed by the trial Court on the appellant was excessive and contrary to the law. This ground has merits.

Therefore, the appeal is partly allowed. The conviction of the appellant of the trial Court is upheld. The sentence of life imprisonment imposed by the trial Court to the appellant was excessive and contrary to the law as the appellant was 18 years old at the time of committing the offence. Since the appellant has already spent two years in prison, the punishment is more than enough. There is no need to impose corporal punishment on the appellant. I order for the immediate release of the appellant from the prison otherwise held for lawful cause. It is so ordered accordingly.


**A.E. MWIPOPO**

**JUDGE**

**01/09/2023**