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

**IRINGA DISTRICT REGISTRY**

**AT IRINGA**

**CRIMINAL APPEAL NO. 34 OF 2023**

*(Originating from Criminal Case No. 109 of 2022 in the District Court of Iringa at Iringa)*

**JUMA HUSSEIN @ MBUNIFU---------- APPELLANT**

**VERSUS**

**REPUBLIC---------- RESPONDENT**

**JUDGEMENT**

**Date of the Last Order: 14/08/2023**

**Date of the Judgment: 08/09/2023**

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

Juma Hussein @ Mbunifu was charged in the District Court for Iringa at Iringa for the offence of rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2022. It was alleged in particulars of the offence in the charge sheet that the appellant on the 7th day of September 2022, at Isupilo Village within the District and Region of Iringa, had carnal

knowledge of one A.A. (the name of the victim is concealed for her protection), a girl aged four (4) years old. The case was heard where both the prosecution and defense side called their witnesses. The trial Court convicted the appellant for the offence charged, sentenced him to serve life imprisonment, and ordered the appellant to pay shillings 1,000,000/= as compensation to the victim.

The appellant was not satisfied with the decision of the trial District Court and filed the present appeal. The petition of appeal filed by the appellant contains eight grounds of appeal as follows:-

1. *That, the trial Court wrongly invoked the best evidence principle to convict and sentence the appellant for the offence charged without taking into account that the evidence of PW1 contradicted itself and also did not establish the essential element of penetration.*
2. *That, the learned trial Magistrate erred in law and facts to convict and sentenced the appellant relying on contradictory and uncorroborated evidence adduced by PW1, PW2 and PW4.*
3. *That, the trial learned Magistrate erred in law and facts for failure to address her mind properly that a girl of tender age (i.e. four years) can't be penetrated by a male person without feeling pain (see page 7 of the proceeding).*
4. *That, the trial Court grossly erred in law by basing conviction on merely cooked and planted testimonies of prosecution witnesses*

*since all witnesses were relatives. There were no independent witnesses brought to testify. Even civilians who assisted PW2 in finding and arresting the appellant were not called as witnesses.*

5. *That, the learned trial Magistrate erred in law and facts for failure to consider that the evidence of PW5 (medical doctor) and his report on the PF3 were null and void.*
6. *That, the learned trial Magistrate erred in law and facts to convict and sentence the appellant without considering his defense which exonerated him from criminal liability.*
7. *That, the learned trial Magistrate erred in law and facts to convict and sentence the appellant without considering the fact that both the appellant and the victim denied the commission of the offence at the earliest possible opportunity.*
8. *That, the prosecution failed to prove the case beyond reasonable doubt.*

On the hearing date, the appellant appeared in person, and Mr. Sauli Makoli, State Attorney, represented the respondent. The Court invited both sides to make their submissions.

The appellant said on the 1st and 2nd grounds of appeal that the testimony of PW1 does not prove that he penetrated her. In her testimony, the victim did not say that the appellant penetrated her. The evidence available failed to prove penetration. He went on to say that the trial court

relied on the evidence of PW1, PW2 and PW4, which was contradictory. Due to the contradiction that goes to the case's root, the prosecution evidence was doubtful and not credible.

On the 3rd ground of appeal, he said the victim testified that she did not feel pain during the rape incident. But, this is not possible for a child of 4 years not to feel pain if she was raped.

On the 4th ground of appeal, it was the appellant's submission that the testimony of the prosecution side relied on the evidence of relatives without any independent witnesses. He said that the witnesses were the victim, the victim's mother, the victim's grandmother and the victim's grandfather. The people around and who assisted PW2 in arresting the appellant were not called as witnesses.

Regarding the evidence of the doctor who conducted the medical examination of the victim, which is the 5th ground of the appeal, the appellant said that the doctor's testimony is misconceived. The doctor said that he saw in the victim's vagina heavy fluid, vagina was enlarged, reddish and with bruises. However, the heavy fluid was not taken to the Government Chemist

for further examination, and the victim said she did not feel any pain during the incident. This is an apparent contradiction.

The appellant said in respect of the sixth ground of appeal that the case against him was fabricated by PW2, who did not want the appellant to work with the victim's uncle.

In the 7th ground of appeal, the appellant said that while answering cross examination questions, the victim said he beat her. She also said that the appellant was taking her to the shop. The victim did not say that the appellant raped her.

The appellant's 8th ground of appeal is that the prosecution's evidence failed to prove the offence. The appellant said that all incidents occurred at the same time. The victim was raped, the appellant was caught, taken to the police and Court simultaneously. He noted that the same was not possible.

In reply, the counsel for the respondent said on the 1st and 7th grounds of appeal that the victim was examined before she gave her testimony. The Court was satisfied that the victim promised to tell the truth. The victim identified and named the appellant as Mbunifu. She said that the appellant raped her. The victim did show where the appellant inserted his penis into

her vagina. This evidence is sufficient to prove that the appellant raped the victim. The testimony of PW5 (the doctor who examined the victim) supports the victim's evidence. PW5 said he observed in his examination that the victim had bruises and her vagina was enlarged. The counsel for the respondent is of the view that since the act of rape was done in the secrecy, it was only the victim who could provide the evidence about the rape incident. He said the best proof of rape offence is that of the victim as it was held in the case **Frank Kinambo vs. D.P.P.**, Criminal Appeal No. 47 of 2019, Court of Appeal at Mbeya (unreported), and in **Selemani Makumba vs. Republic [2006] TLR 379**. The victim identified and named the appellant as the person who committed the offence. The doctor did not say the victim was in pain. There is no requirement that the victim has to feel pain for the rape offence to be proved. Penetration of male organs into the vagina, however slight, is sufficient to prove the offence.

The counsel said on the 2nd ground of appeal that the evidence of the victim, PW5 and PW2, proved the offence without doubt. PW2 was not present during the incident. After the incident, she went to the crime scene and took the victim to hospital for examination. PW4's testimony is how he saw the appellant apprehended by the villagers. The evidence of PW2 and

PW4 support the victim's evidence. These witnesses are credible, and there is no evidence not to believe them as it was held in the case of **Goodluck Kyando vs. Republic [1996] TLR 363.** The counsel said this answer also covers the 3rd ground of appeal.

Regarding the 4th ground of appeal, the State Attorney said witnesses with material evidence testified in this case. PW1 is the victim, PW2 is the victim's mother, PW3 is the victim's grandmother, and PW4 is the chairman of Makanyagio Street. PW4 did not come to testify as the victim's grandfather. PW5 and PW6 were not the victim's relatives. It was impossible to teach a child of 4 years to give false evidence. The incident occurred in the circumstances where most witnesses were relatives. The reporting of the incident and the way the accused was arrested immediately after the incident proved that the information about the incident was correct. The victim immediately named the appellant as the one who raped her. In the case of **Hassan Hussein vs. Republic**, Criminal Appeal No. 41 of 2022, Court of Appeal of Tanzania at Kigoma, (unreported), it was held that naming the culprit immediately after the incident is assurance that the victim identified the culprit. After PW2 found the appellant with the victim, she inspected the victim and found the victim was penetrated. PW2 went to report to the police

station and later on took the victim to the hospital. This evidence is not fabricated. The appellant said the people who arrested him were not brought to testify. However, there is no number of witnesses required to prove the case, but what is needed is the credibility of their evidence, as was held in the case of **Yohanis Msigwa vs. Republic [1996] TLR 148.** The evidence of prosecution witnesses was sufficient and proved the offence.

In his reply to the 5th ground of appeal, the respondent said PW5 examined the victim. What he saw during the examination was recorded in the PF3, which was tendered as an exhibit. The testimony of PW5 is credible. His evidence corroborated the testimony of PW1. Regarding the failure of the trial Magistrate to consider the defense case in the judgment, which is the 6th ground of appeal, the respondent said that the trial court considered the appellant's defense in the decision. He said that the trial court's judgment considered the accused defense and found that the prosecution evidence proved the offence without a doubt.

The respondent's contention on the last ground of appeal was that the prosecution proved its case without doubt. He said there is no doubt in the prosecution's case that the appellant committed the offence. He prayed for the appeal to be dismissed for want of merits.

In his rejoinder, the appellant said it is not possible for a child of 4 years not to feel pain when she was penetrated. This prove that there was no penetration and the whole evidence is fabricated.

From the submissions, the grounds of appeal and the evidence in the record, the main issue for determining whether the appeal has merits.

The charge sheet shows that the appellant was charged with the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2022. It is settled law that where the appellant is charged for the offence of statutory rape under section 130 (1) and (2) (e) of the Penal Code, Cap. 16, R.E. 2022, as it is in the present case, the prosecution duty is to prove the presence of penetration and the victim's age to be below 18 years old. Section 130 (2) (e) of the Penal Code provides that a male person commits the offence of rape if he has sexual intercourse with a girl with or without her consent when she is under eighteen years of age. The only exception is if the woman is his wife aged 15 years or older, and they are not separated.

The proof of the victim's age is done by the victim's testimony, the testimony of the victim's parents, relatives, medical practitioners or

documentary evidence. The Court of Appeal stated this in the case of **Issaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora (Unreported), at pages 8 and 9 of the judgment.

In the present case, the evidence of PW1 (victim), PW2 (victim's grandmother), and PW3 (victim's mother) proved that the victim was aged four years at the time of the incident. PW3 testified that the victim was born on the 14th day of November, 2017. As the incident occurred on the 7th day of September, 2022, the victim was aged four years and ten months. The evidence proved that the victim's age at the time of the incident was below 18 years.

Regarding the presence of penetration, it is a settled law that penetration of the penis into the vagina, however slight, is sufficient to constitute penetration. The Court of Appeal stated the position in the case of **Masomi Kibusi vs. Republic**, Criminal Appeal No. 75 of 2005 (unreported). Penetration is the key element of the offence, and the victim must testify that there was penetration of male sexual organs inside the female sexual organ. The penetration in sexual crimes must be proved by the prosecution beyond reasonable doubt. The Court of Appeal stated the position in the case of **Kayoka Charles vs. Republic,** Criminal Appeal No.

325 of 2007, Court of Appeal of Tanzania at Tabora, (Unreported). The best evidence in rape offence is that of the victim herself, as stated by the Court of Appeal in the case of **Selemani Makumba vs. Republic** (supra), and in **Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2018, Court of Appeal of Tanzania at Iringa, (unreported).

The evidence in the record shows that the victim (PW1) is the child of 4 years. According to section 127 (4) of the Evidence Act, Cap. 6 R.E. 222, she is a child of tender age. The trial Court recorded the testimony of PW1 after she promised to tell the truth. PW1 said in her testimony that she knew the appellant, and when she was going to the shop to buy candies, the appellant took her to the bush, removed her clothes and inserted the organ he used to urinate inside her female organ. The appellant was doing so while beating the victim. After the incident, the appellant told the victim not to tell anybody. This testimony of PW1 was sufficient to prove the presence of penetration. Thus, the appellant's claims that there is no evidence from the victim proving the presence of penetration has no basis.

On the claims that there is a contradiction in the testimony of PW1, PW2, PW4 and PW5, the appellant has not explained the said contradiction. Looking at the evidence of PW1, her testimony was that the appellant

grabbed her while going to the shop and took her to the bush, where he did rape her. After the incident, PW2 came to the area. After seeing them, PW2 called for help from the people.

PW2 said in her testimony that on the 7th day of September, 2022, around evening hours, the victim disappeared, and she started to search for her. Near the appellant's house, PW2 saw the appellant coming from the bush with the victim. The appellant told PW2 he assisted the victim by taking her to the shop. PW2 examined the victim and found she had no underpants. The victim told PW2 that the appellant was assaulting her. PW2 reported the incident to the police, and after getting PF3, she took the victim to the hospital for medical examination. The medical report show that the victim was raped.

Indeed, the evidence in record confirm that the victim did not say to the PW2 that the appellant had known her carnally. But, the victims answer to PW2 depends on the question asked to her. The victim is a child of four years, and it is not possible for her, under normal circumstances, to say she was raped when asked a question. The person asking a question to a child of such age has to know how to ask questions to such a child. I fail to find any contradiction in the testimony of PW1 and PW2. Also, the appellant's

claims that the victim failed to say she was raped immediately to PW2 after the incident has no merits. As a child of four years, it was not easy for the victim to report immediately about what transpired to PW2 without being asked.

PW4, the Makanyagio Street Chairman, testified that he saw civilians arrested the appellant and assaulting him. The civilians informed PW4 that the appellant was found in a bush with a girl of approximately five years in suspicious circumstances. He took the appellant to the police station and reported the matter. There is no contradiction in the testimony PW1, PW2 and PW4.

PW5, the doctor who examined the victim, said he observed during the examination the victim had bruises on the outer lips of her vagina (labia majora), some wet fluid in her vagina, and the victim's vagina was enlarged. He was of the view that blunt objects caused bruises and enlargement. The appellant said that it was not possible for a child who was found with bruises to say she did not feel pain during the rape incident. However, based on the age of the victim, it could not be said that the victim's statement that she did not feel pain during the incident contradicts the PW5 testimony. The victim said while inserting his penis inside her female sexual organ, the

appellant was assaulting her. It depends on what pain she felt most. I agree with the counsel for the respondent that experiencing pain is not proof of rape. The presence of the pain is not the proof that the victim was raped.

On the issue that the prosecution case relied on the evidence of relatives without any independent witnesses, the law is settled that what is needed to prove the offence is the credibility of witnesses and not the number of the witnesses as provided by section 143 of the Evidence Act, Cap. 6 R.E. 2022. No particular number of witnesses is required to prove the case, as it was held in the case of **Yohanis Msigwa vs. Republic (supra).** The law does not forbid relatives from testifying in a case. The circumstances of the case determine if the evidence of relatives could be relied on or not. In **Mustafa Ramadhani Kihiyo vs. Republic [2006] TLR 323,** it was held that there is no law that bars the evidence of relative witnesses from being considered by the Court except where the Court finds that it is necessary to do so.

The evidence available reveals that PW1, PW2 and PW3 were relatives. PW1 was the victim of the case, PW2 was the victim's grandmother, who found the appellant with the victim in suspicious circumstances, and PW3 was the victim's mother, who took the victim to the hospital after the

incident. PW3 also testified about the victim's age. Other persons could not give their evidence. For that reasons prosecution had to call them as witnesses. The appellant said that PW4 is the victim's grandfather. However, the testimony of PW4 does not show that he was the victim's grandfather. PW4 testified that he was Makanyagio Street Chairman and he was the one who took the appellant to the police station after he found the appellant arrested by civilians. The appellant's claims are based on the answer PW4 gave during cross examination that he saw the appellant being beaten by people alleging that he was with PW4's grandchild. Nothing shows the PW4's grandchild is the victim. Also, the remaining witnesses (PW5 and PW6) were not the victim's relatives. Thus, the issue has no merits.

Regarding the appellant's claims that the testimony of the witness shows that all incidents took place at the same time simultaneously in the evening, it is true that PW2 and PW4 said that the incident took place in the evening. They took the victim and the appellant to Ifunda Police Station in the same evening. PW3 testified she found the victim at Ifunda Police Station in the evening and took her to Ifunda Mission Hospital. PW5 testified that he examined the victim at the hospital in the evening. The evidence in the record shows that after the appellant was caught with the victim coming

from the bushes, he was taken to the police station with the victim, who was later taken to hospital. There is nothing to show that the area of the incident, Ifunda Police Station and Ifunda Mission Hospital were far apart. But, the Court is aware in Tanzania, the evening start at 16:00 to 19:00 hours. In three hours, there is a possibility for every event in this case to be done completely. Thus, the claim does not raise doubts about the prosecution's case.

The appellant said in the 6th ground of appeal that his defense was not considered in the judgment of the trial Court. In contention, the counsel for the respondent said that the trial Court considered the defense case. I have read the judgment of the trial Court. As the appellant stated, the trial Court failed to consider the appellant's defense. It is settled law that failure to consider the evidence of the defense is fatal to the trial or proceedings. The position was stated in **James Bulow & Others vs. Republic [1981] T.L.R. 283**, and in **Jonas Bulai vs. Republic**, Criminal Appeal No. 49 of 2006, Court of Appeal of Tanzania at Dar Es Salaam, (unreported). A trial Magistrate's duty was to evaluate the entire evidence before reaching a verdict.

However, as the first appellate Court, this Court has to re-evaluate the trial Court's entire evidence and reach its decision. The position was stated by the Court of Appeal in the case of **D.P.P. vs. Jaffari Mfaume Kawawa, [1981] TLR 149**. The appellant, in his defense, denied to commit the offence. He said he was arrested by three people and taken to the Ifunda Police Post. He was later transferred to Iringa Central Police Station, where he was informed that he had raped a five year old child. He said PW2 fabricated the case for the reason that she hates the appellant because he was not working with the victim's uncle.

The appellant's defense does not raise doubt in the prosecution's case. The appellant has denied generally committing the offence and alleged the case was fabricated because of his conflict with PW2. Despite the allegation, I don't see the reason for PW2 to hate the appellant for his act of stopping to work with the victim's uncle. The hate, if any, was supposed to be between the appellant and the victim's uncle. The appellant did not cross examine PW2 when she was giving her testimony on any conflict or grievance between them. This shows that the issue of presence of the conflict between appellant and PW2 is an afterthought.

The prosecution evidence from PW1 proved that she is aged four years, and the appellant did have carnal knowledge of her. The evidence of PW1 is supported by the testimony of PW2, PW3 and PW4 that the appellant was arrested with the victim in suspicious circumstances. PW5 and PF3 (exhibit PE1) corroborated PW1's testimony that a blunt object penetrated her. PW1, despite her age, appears to be a credible witness, and there is no reason not to believe her. Thus, I'm satisfied that the appellant's defense does not raise any doubt about the prosecution's case.

Therefore, the appeal has no merits, and I dismiss it. It is so ordered accordingly.

**Dated at Iringa this 8th day of September, 2023.**


**A.E. MWIPOPO**

**JUDGE**