

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

DC. CRIMINAL APPEAL NO. 163 OF 2023

(originating from criminal case no 21 of 2023 of the District court of Mbozi at Vwawa)

GIFT S/O EDWARD MUYOMBE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

Date of hearing: 13/052024

Date of judgment: 09/07/2024

NONGWA, J.

Before the District court of Momba at Chapwa, 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]. The prosecution alleged that, on diverse dated of May and September, 2022 at Ilembo area within the District of Mbozi in Songwe Region the appellant had carnal knowledge of one 'FS' (name withheld to disguise her identity) a girl aged sixteen years. In this appeal she will be referred as the victim or PW1. The

appellant denied the charge but at the end of the trial, he was convicted and sentenced to thirty years imprisonment.

Dissatisfied with that decision, has appeal to this court fronting six grounds of appeal, namely **one**, that the trial court erred in law to convict and sentence the appellant on charged offence of statutory rape as the prosecution side failed to prove the age of the victim; **two**, that the trial court erred in law and fact to convict and sentence the appellant as the prosecution failed to prove their case beyond all reasonable doubt; **three**, that the trial court erred in law and facts by deciding the case in favour of the republic who failed to call key witnesses; **four**, that the trial magistrate erred in law and facts to ground conviction on weakness of the appellant's evidence rather than the strength of the prosecution evidence; **five**, that the trial court erred in law and facts as decided the case basing on hearsay evidence; and **six**, that the trial magistrate erred in law and facts to rely on PF3 which failed to prove the offence of rape.

When the matter came on for hearing the appellant was represented by Mr. Issack Chingilile, learned counsel whereas for the respondent Republic Ms. Prosista Paul, State Attorney. Hearing was in the form of written submission.

Mr. Chingilile on first ground, submitted that age of the victim was not proved, he argued proof of age must come from birth certificate, clinic

card, school registration or affidavit, that neither of the document above was produced by the victim and there was no evidence of parents let alone that of the victim. To substantiate the argument the case of **Festo Lucas @ Baba Faraja @ Baba Kulwa vs Republic**, Criminal Appeal No. 27 of 2022) [2022] TZHC 14677 (16 September 2022; TanzLII) was cited. Counsel argued that failure to prove age of the victim, it was wrong for the trial court to convict him with statutory rape.

In ground two that prosecution failed to prove the case, the learned counsel submitted that burden of proof in criminal trial under section 3(2) and 110 of the Evidence Act is upon the prosecution and the standard is beyond reasonable doubt. He stated penetration was not proved because the victim did not state exact date when she was raped. That although PW1 said it was May, 2022 and September, 2022 she did not make noise and tell anybody that she was raped by the appellant. The counsel added that the victim said had sexual intercourse before meeting with the appellant. The case of **Festo Lucas @Baba Faraja**(supra) was referred.

It was further submission that words of the victim must not be taken as gospel but pass the test of credibility. That had the trial court analysed properly evidence could have found PW1 was not credible.

On failure to call key witness in ground three, it was submission of counsel for the appellant that parent, guardian or welfare officer were not

called. That two brother who PW1 said found her with the appellant were not called. To bolster the point the case of **Manento Matibwa Francis@Babio vs Republic**, Criminal Appeal No. 35 of 2021 and **Aziz Abdallah vs Republic** [1991] TLR 71.

In ground four that the appellant was convicted based on weakness of his defence, Mr. Chingile submitted that the conviction was not based on strong prosecution evidence, again the case of **Festo Lucas @ Baba Faraja** (supra).

Arguing ground five that conviction was based on hearsay, Mr. Chingilile submitted date of birth stated by PW1 was based on what she was told by her mother but the said mother was not called as witness. he referred to the case of **Vumi Liapenda Mushi vs R**, Criminal Appeal No. 327 of 2016 (Unreported).

Submitting in ground six that PF3 did not prove rape, counsel for the appellant argued that PF3 did not prove that it was the appellant who committed rape and PW2 said there was no bruises or hymen and that the victim was used to sexual intercourse.

Replying to the above State Attorney submitted that age of the victim was proved as the victim stated the date month and year she was born and the same was supported by evidence of medical practitioner. The case of **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of

2015) [2016] TZCA 218 (29 April 2016; TanzLII) to support the argument. State Attorney implored the court to disregard the case of **Festo Lucas @Baba Faraja** (supra) relied by the appellant for being of the high court and facts being different.

On submission that the prosecution failed to prove the case, it was submitted that PW1 stated the time she was raped by the appellant but due to lapse of time was not able to remember the date.

On victim not reporting or raising noise, the State Attorney submitted that was because she was worried, the case of **Selemani Hassani vs Republic**, Criminal Appeal No. 203 of 2021 [2022] TZCA 127 (22 March 2022; TanzLII) in which the court held delay to report an incident of sexual offense due to fear of reprisal or shame does not affect credibility of the victim. Further submission was that the fact that the victim has sexual intercourse with another person did not bail of the appellant that he raped the victim.

On failure to call key witnesses the State Attorney submitted that under section 143 of the Evidence Act, it is not number of witnesses which is required to prove certain fact. It was submitted that as PW1 said in September when the appellant was arrested did not do sexual intercourse on that day, therefore those witnesses were not necessary. He added that the appellant did not cross examine the victim, to support the stance the

case of **Godson Dan Kimaro vs Republic**, Criminal Appeal No. 54 of 2019 [2022] TZCA 621 (7 October 2022; TanzLII) was referred.

The State Attorney stated further that every witness is entitled to credence unless there is good reason of not believing that witness and this case the appellant did not raise any doubt in the prosecution case.

On submission that conviction was based on weakness of defence, the State Attorney submitted that they succeed to prove the case to the required standard and defence evidence was considered as seen at page 8 and 9 of the judgment. In ground five that proof of age was based on hearsay evidence, it was argued that the victim had knowledge of her age as it came from her parents thus it met the condition under section 62 of the Evidence Act. Counsel cited the case of **Isaya Renatus** (supra) to the effect that proof of age may come from the victim, relative, parents, medical practitioner or birth certificate.

In ground six that PF3 did not prove rape, State Attorney submitted that evidence of medical doctor was just an expert opinion and in this case the victim proved that had sexual intercourse with the appellant. thus prayed the appeal to be dismissed.

I have considered record of appeal and rival submissions of the parties, I addressing grounds of appeal, I will start with the first and five

conjointly as they intertwine, then third, six and last will be ground two and four together as they both touches on evaluation of evidence.

The appellant complains in ground one and five that age of the victim was not proved, thus it was wrong to charge him with statutory rape. The State Attorney had a different view. In this case the appellant was charged by statutory rape under section 131(1)(2)(e) of the Penal Code, in the sense that the victim was below eighteen. The law is that in sexual offences in which the victim's age is the determining factor in establishing the offence evidence must be positively laid out to disclose the age of the victim. In the case of **Amani Yusuph vs Republic**, Criminal Appeal No. 124 of 2019 [2023] TZCA 48 (23 February 2023; TanzLII) the court agreed with what **Ngwembe, J.** said in **Omary Hashimu vs R.** [2022] TZHC TANZLII, that;

'In statutory rape, proof of age is fundamental. In fact, the age of a woman is a determining factor which differentiates between normal rape and statutory rape. Even punishment depends on the age of a woman.'

The law is clear and settled that proof of the age of the victim of sexual offences may come from a birth certificate or the victim herself or parents. See, **Isaya Renatus** (supra). In the instance case proof of age came from the victim herself who testified that she was born on 05/03/2005, making in 2022 when had sexual intercourse aged

seventeen, below eighteen years. I therefore find the appellant was properly charged. On complaint that evidence of age from the victim was hearsay, dies naturally as the victim is capable of proving her age. Thus, ground one and five fails.

Ground three is failure to call key witnesses, Mr. Chingilile has submitted that victim's brothers who arrested the appellant and arresting police officer were not called. In reply it was argued that the prosecution was under no obligation to call every witness who were not part to the alleged rape.

As rightly submitted by the State Attorney under section 143 of the Evidence Act, it is not number of witnesses but weight of evidence which count, however, when a witness who is so connected and can provide good link to the alleged offence and is not called to testify, the court is entitled to draw adverse inference. See **Azizi Abdallah vs Republic** [1991] TLR 71.

After considering evidence in record, the arresting police officer was not important, it was clear from evidence of PW1 that the appellant and victim were arrested by her brothers, there was no involvement of police in arresting the appellant. In addition, PW3 a police officer testified for the prosecution. Regarding victim's brothers were instrumental in arrest of the appellant together with the victim and connect him with rape were

important witnesses. They would have provided a clear picture on how they got tips of PW1 going to the appellant and provide a link in some evidence which might be lacking. In the circumstances of this case, victim's brothers, although they did not see PW1 being raped were necessary witness to link how the appellant was found with the victim but none was called, I thus draw adverse inference to the prosecution for its failure to call those persons. Ground three succeeds to that extent.

In ground six to the effect that PF3 failed to prove offence of rape, it is true that PW2 said the victim's vagina had no bruises and that the victim was used to sexual intercourse. In rape cases it is not bruises that proves penetration the reason under section 130(4) of the Penal Code even slight penetration is sufficient to prove penetration, otherwise all rape to adult female will go unproved. In rape offences what matters is whether there is sufficient evidence to prove that the victim was raped on the material day. As to whether in this case it was proved is the next ground for consideration. Ground six fails.

Last is ground two and four together that the prosecution did not prove the offence beyond reasonable doubt. Mr. Chingilile has submitted that the offence of rape against the appellant was not proved. In this appeal I have already dealt with other ingredients of rape in the preceding grounds. It is the settled position of law that, in sexual offences the

victim's evidence is considered the most reliable, for obvious reason that such offences are usually committed in closet. Despite the rule that the victim's evidence is the best as was held in the case of **Seleman Makumba vs Republic** [2006] TLR 379, yet such evidence should not be taken as a holy version to be believed wholesome rather, credibility of the victim must be tested and approved. See: **Mohamed Said vs Republic**, Criminal Appeal No. 145 of 2017 [2019] TZCA 252 (23 August 2019, TanzLII).

It is noteworthy that the credibility of a witness in rape cases refers to how believable or trustworthy their evidence is in court regarding the alleged offense. Therefore, it is crucial for the court to assess the credibility of witnesses to determine the truth and make a just decision.

In the present appeal counsel for the appellant has argued that no date of commission of rape was mentioned. Also, that the victim did not make noise and tell anyone. In reply the State Attorney submitted that the victim said rape was committed in may and September, on omission not to state a date, it was submitted was due to lapse of time. On failure to raise noise, it was stated that the victim was worried.

I have followed the dialogue, the complaint is three folded, one failure to mention date, two, failure to make noise and three, failure to report the incident of rape. On the victim not mentioning exact date of

commission or rape, I find the omission is not fatal, evidence of the victim was in tandem with the charge sheet which disclosed that the offence was committed in May 2022 and September 2022. The omission would hold water if the prosecution had alleged that the offence was committed on the exact date.

On failure to raise alarm the State Attorney has submitted that the victim was worried. It is now part of law that in sexual offences case if the victim does not raise alarm and is not threatened it diminishes her credibility. In the case of **Damian Manyika @ Babu Tanga vs Republic**, Criminal Appeal No. 306 of 2022 [2024] TZCA 451 (13 June 2024; TanzLII), the court held;

'... the victim never raised alarm before, during or after the rape was committed against her on all occasions. Further, there is no evidence that, the victim was under any threat from the appellant not to report the matter.'

PW1 testified that had sexual intercourse with the appellant on two occasions in May 2022, on the second occasion she found the victim with neighbours, then why did she not raise noise for those neighbours to get to her rescue. Assuming PW1 was worried as State Attorney submitted. In her evidence PW1 said "*I could not give information any place as I was worried.*" The statement I was worried is too general and does not show any existence of threat.

Another limb is delay to report the alleged rape, evidence from the victim herself that she had sexual intercourse twice in May, 2022, if indeed she intended to reveal what the appellant was doing to her why did she not report in May but wait to be caught by her brothers in September, 2022. State Attorney cited the case of **Seleman Hassan** (supra) to convince the court that delay to report due to fear does not affect credibility of victim. I have read the case and found the same is distinguishable with the present one. In that case there was a delay of one day while in this case it is five months.

Similar circumstance to the present were discussed in **Bakari Juma vs Republic**, Criminal Appeal No.38 of 2020 [2023] TZCA 17640 (22 September 2023; TanzLII) the victim was a girl of 13 years old who alleged to have been threatened by the appellant that he would remove her eyes and leave her blind if she disclosed the incident of rape. The Court was not convinced with her explanation on a delay of about a year. In **Martin Jacob @ Mlila vs Republic**, Criminal Appeal No. 434 of 2021 [2024] TZCA 447 (11 June 2024; TanzLII) the victim was 17 years old at the time of the alleged rape and was a form four student, but failed to report the incident of rape for more than six months for a similar reason that she was threatened death by the appellant but the court dismissed existence of threat.

In this appeal, it was evidence of PW1 that in May, 2022 has sexual intercourse with the appellant twice but the incident was discovered in September, 2022 not at the instances of the victim but due to clue her brothers had. I am worried, if I assume that the victim was worried what was she worried of, it does not come out from her evidence the kind of worry she had that existed lasted for about five months. In the case of **Martin Jacob @ Mlila** (supra) the court stated;

'The above piece of evidence raises more questions than answers. We have been asking ourselves, whether the threats existed from June up to December, the kind of threats and if they were made recurrently and if she could remember on which particular occasion on those four alleged encounters.'

In this appeal PW1 testified that she had sexual intercourse with the appellant twice both in May 2022 but PW1 never reported the incidents to anyone. As to existence of threat there is evidence from the victim that she was going to the appellant by herself, these sufficiently proves that there was no any threat. From the evidence of the victim had it not been her brother her sexual intercourse with the appellant would not have been noticed. PW1 conduct to wait to be caught with her brothers indicates that she was not a credible and trustworthy witness.

From the discussion above, there is more questions than answers to what was alleged by the prosecution, it is my finding that the prosecution

case was not proved beyond reasonable doubt and doubts raised should be resolved in favour of the appellant.

In the event, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. I hereby order immediate released of the appellant from prison forthwith unless he is lawfully held.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA
JUDGE
09/07/2024

Right of appeal fully explained.

DATED and DELIVERED at MBEYA this 9th day of July, 2024 in presence of the appellant and Ms. Prosista Paul SA.

A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA
JUDGE