

TANZANIA / JUDGMENT

Sheka

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (TABORA SUB-REGISTRY) AT
TABORA DC. CRIMINAL APPEAL No. 71 OF 2023 (From the decision of the District Court of Uyui,
Original Criminal Case No. 17 of 2023) SHEKA MAYENGA @
SHLJA APPELLANT VERSUS THE
REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 13/05/2024 Date of Judgment: 10/06/2024 KADI LU, J, In the District Court of Uyui, the appellant was charged with rape contrary to Sections 130 (1) (2) (e) and 131 (3) of the Penal Code [Cap. 16, R.E. 2022], Though the victim's name is on record, I shall refer to her as "the victim." The prosecution alleged that on 23/10/2022, at or about 11:00hrs at Muhalule - Lutona Village within Uyui District in Tabora Region, the appellant had carnal knowledge of the victim, a child aged 09 years. The charge was read to the appellant and he pleaded not guilty. The prosecution paraded five witnesses and tendered one exhibit whereas the appellant fended himself. He did not tender any exhibit, After a full trial, the court convicted the appellant and sentenced him to life imprisonment. He was dissatisfied with the conviction and sentence. He filed the instant appeal consisting of the following: grounds:

1. That, the case was not proved beyond reasonable doubt as required by the law.
2. That, the learned trial Magistrate erred in law to convict the appellant on hearsay evidence. i
3. That, the penetration was not proved as no PF3 was tendered and no medical report was tendered before the trial court. During the hearing of this appeal, the appellant appeared in person without legal representation. The respondent was represented by Ms. Suzan Barnabas and Ms. Aziza Mfinanga, the learned State Attorneys. The appellant requested the State Attorney to submit first. Starting with the 3rd ground, Ms. Suzan submitted that the prosecution proved penetration as shown in the proceedings of the trial court. She added that the victim's testimony cogently showed how the appellant raped her. According to the learned State Attorney, the victim's evidence was corroborated by evidence of her brother who was an eye-witness of the incident. Concerning PF3, Suzan argued that it is unnecessary to tender it in sexual offences. She cited the case of Lazaro Katonga k, R, Criminal Appeal No. 348 of 2018. On the 2nd ground of appeal, she submitted that the evidence presented

against the appellant was not hear-say as alleged. She explained that the victim testified clearly on how the offence was committed. PW4 stated that he saw the appellant committing the charged offence and prayed to be canned instead of being sued. Ms. Suzan argued that the appellant did not cross-examine these witnesses on the points he has raised in this appeal. She referred to the case of Issa Hassan Uki v, R,, Criminal Appeal No. 129 of 2017. Ms. Suzan submitted that the case against the appellant was proved beyond reasonable doubt because in rape cases, evidence of the victim is sufficient to convict the accused. She elaborated that in the instant case, apart from the victim, the prosecution called PW4, and PW5 and tendered a 2 cautioned statement of the appellant in which he admitted having raped the victim. The State Attorney explained that the testimony of PW2 showed that the appellant was named at the earliest possible time. To support her argument, she cited the case of Marwa Wangiti Mwita & Another v. R,,

[2002] TLR 39 and prayed the appeal be dismissed for lack of merit. When the appellant was allowed to submit on his grounds of appeal, he insisted that evidence presented in the trial court was hearsay as no neighbour was called to testify if he/she heard or saw him committing the alleged offence. He expounded that it was the victim's brother alone who said he saw the incident while there were Very close neighbours but none of them was called to testify. He questioned why the neighbours did not see the incident or hear the victim if it is true that she shouted. He narrated that the victim's brother stole his phone and sold it. In following up on his right, it was when the rape case was implanted in him. Concerning the 3rd ground of appeal, the appellant submitted that as there was no PF3 tendered, the trial court could not ascertain rape in the absence of any medical report. Regarding the cautioned statement, he told the court that he was beaten by the police and forced to admit that he raped the victim. He prayed for the court to allow the appeal and set him free. Having gone through the evidence on record, the grounds of appeal, and submissions by the parties, the issue for determination is whether the appeal is meritorious. Being the first appellate court, I will step into the shoes Of the trial court and evaluate the evidence on record to ascertain whether the case against the appellant was proved beyond reasonable doubt. In addressing the grounds of appeal, I wish to start with the complaint that the 3 learned trial Magistrate erred in convicting the appellant based on hearsay evidence. The charge sheet reveals that the appellant was charged under Sections 130 (1) (2) (e) and 131 (3) of the Penal Code. Section 130 (1) (2)

- (e) provides: 'X male person commits the offence of rape if he has sexual intercourse with a giri.... 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.' It is clear from the quoted provision that in proving the offence of rape, there should be sexual intercourse. Case law is to the effect that penetration however slight is sufficient to constitute sexual intercourse. Therefore, the prosecution is required to prove two ingredients; that there was penetration, and where the victim was below 18 years in which case consent becomes irrelevant, the other requirement is to prove the age of the victim. In the instant matter, I have perused the record of the trial court and found that the appellant

was said to have had sexual intercourse with the victim, (PW3). It follows that the prosecution was duty-bound to prove that the appellant penetrated the victim. The evidence on record indicates that the prosecution case mostly hinged on the victim's testimony and that of her brother, PW4. I have reviewed the evidence and observed that the victim and the appellant were neighbours. The incident occurred on 23/10/2022 at 11:00 hrs. The victim's brother (PW4) told the court that he was not at home when the victim was raped. He stated that he was attending a wedding ceremony and, on his way back, he heard the victim crying. He approached and found the appellant 4 and her in the toilet while half-necked. The victim's mother (PW2) was also absent during the incident. When she arrived home, the victim and PW4 informed her about the incident and she reported it to the Hamlet Chairman at 20:00 hrs. On 24/10/2022 morning, the victim was taken to the undisclosed dispensary for medical examination. The record is silent about the outcome of the examination and the nature of treatment offered to the victim after the incident. There was no PF3 issued by the police and no medical examination report was tendered in evidence. What is clear on pages 4, 7, and 10 of the trial court's proceedings is that the incident was reported to police after the victim was taken to the dispensary, a day after the incident. I am mindful that in criminal proceedings involving sexual offences, the court may convict the accused based on the testimony of the victim alone, but I am also aware that the court is obliged to assess the credibility of the said evidence. It was held in the case of Mohamed Said v. R.r Criminal Appeal No. 145 of 2017, that: "It was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. " In the case at hand, the victim (PW3) told the trial court that she tried to shout but the appellant covered her mouth with his hands which is why the neighbours could not hear her. Notwithstanding, when her brother went back from the wedding, he heard her shouting for help and he succeeded in apprehending the appellant. In the circumstances, I am persuaded by the appellant's claim that the evidence against him was hearsay because PW1, 5 PW2, and PW5 did not witness the incident and the credibility of PW3 and PW4's testimony is doubtful as shown above. The medical expert who attended the victim did not testify and the medical report was not tendered. I am conscious that PF3 is not exclusive proof of penetration as oral evidence can equally prove it. It is the law that in rape cases, penetration can be established by a third party such as the doctor through medical examination, a parent, or any other person through physical examination. PW2 informed the trial court that she found the victim's vagina having bruises and was reddish. With respect, that was a seeming statement that could be given by anyone. In the case of Mussa Ally Onyango v. R., Criminal Appeal No. 75 of 2016, the Court of Appeal at Arusha held that rape can be established even if there is no medical evidence provided that there is other evidence pointing to the fact that it was committed. The victim's mother said the appellant and the victim were medically examined but she failed to state the findings of the examination linking the appellant with rape. Regarding the age of the victim, she told the court before testifying that she was 09 years old. It was also stated by her mother (PW2) that the victim was 09 years old. PW2 did not state the year in which the victim was born to enable the court to verify her age at the time of the incident. I am aware that the age of the

victim in rape cases can be proved by a parent, relative, medical practitioner, or birth certificate, if available. However, PW2 and PW3's statements regarding the age of the victim were too general to be relied upon by the court as proof of the age. Given the fact that the 6 appellant was charged with statutory rape, the age of the victim needed to be established cogently as a vital ingredient of the offence. The victim's mother did not give a detailed account of the date, month, year, and place in which the victim was born, Being a mother, PW2 was expected to know and explain these particulars without any hardship. Unexpectedly, she failed to provide reliable information by, for instance, producing a birth certificate, clinic card (if any), school registration, and any other acceptable document proving the victim's age. In the absence of strict proof of the victim's age, it was unsafe for the trial court to convict the appellant of statutory rape for which the victim's age was an important ingredient. PW5 was a police officer from Loya Police Post who recorded the appellant's cautioned statement, Exhibit Pl. The appellant was said to have admitted to the commission of rape. However, during the hearing of the appeal he told the court that he was beaten and forced to sign the statement. The court finds this allegation an afterthought since it was not raised during the trial. When PW5 prayed to tender exhibit Pl, the appellant did not raise the allegation of torture, did not object to the admission of exhibit Pl, and failed to cross-examine PW5 about the cautioned statement. Nonetheless, I observed that there was an unexplained delay in charging the appellant. The incident occurred on 23rd October 2022, and it was reported to police on 24th October 2022, the appellant's cautioned statement was recorded on the same day but he was charged and arraigned in court in May 2023. The record is silent about where the appellant was and what was he doing for nearly seven months between the arrest and 7

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