

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 146 OF 2019

(Original Criminal Case No. 317 of 2016 of the District of Chato District at Chato)

SELEMANI JOSEPH1ST APPELLANT

MAGEUZI JUMA 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

28/05 & 02/06/2020

RUMANYIKA, J.:

The appeal is against conviction and life custodial sentence handed down by Chato district court on 18/11/2016 with respect to the charges of gang rape Contrary to Section 131A (1) and (2) of the Penal Code Cap 16 R.E. 2002.

Rephrased and condensed ten (10) grounds of appeal revolve around seven (7) points essentially;

- (1) That the victim was not proved a secondary school pupil or underage.
- (2) That the trial magistrate wrongly shifted burden of proof onto appellants and he convicted them on their weak defence.

- (3) That with respect to the PF3 (Exhibit PE1) the trial magistrate improperly evaluated the evidence.
- (4) That the ingredients of rape were not proved.
- (5) That unexplained delay in arresting the appellant left much to be desired.
- (6) That the trial court had no jurisdiction except a juvenile court because the 2nd appellant was a child at the time.
- (7) That the prosecution case wasn't beyond reasonable doubts proved.

Seleman Joseph and Mageuzi Juma (the 1st and 2nd appellants) respectively appeared in person. Ms. Lilian Meli learned state attorney appeared for the respondent Republic.

When the appeal was called on 28/05/2020 for hearing, following global outbreak of the Coronavirus pandemic and pursuant to my order of 07/05/2020 the parties were online (mobile numbers 0735 706 035 and 0717 410 929) respectively heard.

The appellants actually made no useful submissions they only relied on their joint memorandum of appeal.

Ms. Lilian Meli learned state attorney supported the conviction and sentence and she submitted: **(1)** that the charges of gang rape were proved beyond reasonable doubts the secondary school girl having fallen in love with the 1st appellant but both cohabited and they consummated her for a week. That proof of the victim's being under age therefore was immaterial because the charges were not statutory but of gang rape **(2)** date of the PF3 may have varied between it and evidence the adduced yes,

but even where the piece of evidence was expunged the remaining evidence sufficiently and reliably proved the case given the victim's evidence and the appellants' admission **(3)** that the 2nd appellant during the time may have been child yes, but his complaint was now afterthought.

There is a point which needs to be put very clearly from the outset. After calling for records of the trial court were issued several times and repeatedly but in vain, the appellants promised to bring copy of the impugned judgment that they had with them. Finally they supplied the court and learned state attorney with certified copy (pursuant to my order of 19/02/2020).

According to the certified copy of judgment the evidence runs thus;

Pw1 Edina Festo a pupil of Wema Secondary School around she stated that having been approached by the appellants in September, 2016 she stayed with the two lovers under the roof and they consummated her for a week until such time her uncle and some local leaders apprehended and took them all to police.

Pw2 and Pw3 testified materially the same that as Pw1 had been reported missing they found her cohabited with the appellants.

Pw4 Dr. Renatus Bunzari of Chato district hospital stated that following the incident he on the even date examined Pw1 where in her vaginal cavity he noticed bruises and some spermatozoa which therefore suggested that the girl had been raped.

Pw5 H.5828 D/C Juma of CID Chato stated that upon interrogating the victim and other witnesses and he gathered all the evidence, the appellants were accordingly arraigned in court and prosecuted.

The issue is longer whether against them the charges of statutory rape were proved beyond reasonable doubts but charges of gang rape much as not only the purported victim was not proved under age but also non one of the prosecution witnesses stated how old was Pw1 leave alone; **(a)** the charging provisions of the law and **(b)** the offence that the appellants were convicted with. Whether or not the victim was a secondary school pupil is immaterial under the circumstances.

The 1st appellant and the purported victim may have been lovers and then the 2nd appellant "joined" them down the road. It means therefore the 1st appellant should not have been charged for rape in the first place. Moreover, now that the 1st appellant had not complained against the 2nd appellant and throughout the week unusually the purported victim having had consented to the cohabitation, the issue of rape or gang rape was neither here nor there the girl was lucky that she was not charged for offence of **polyandry** C/s 152(1) and (2) of the Law of Marriage Act Cap 29 RE 2002.

In the upshot the appeal is allowed. The conviction and sentence are quashed and set aside respectively. Unless they were held for some other lawful cause, appellants be released from prison immediately.

Right of appeal explained.



S. M. RUMANYIKA

JUDGE

31/05/2020

It is delivered under my hand and seal of the court in chambers this
2nd June, 2020 in absence of the parties with notice.




S. M. RUMANYIKA

JUDGE

02/06/2020