IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 80 OF 2019

(Original from Tabora District Court in Criminal Case No. 36/2019)

YAHAYA S/O MASHINE.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

19/10/2020-4/12/2020

BAHATI, J.:

This appeal originates from Tabora District Court in Criminal Case No. 36/2019 **YAHAYA S/O MASHINE** hereinafter referred to as the appellant was convicted and sentenced to serve thirty (30) years in jail for an offence of Rape contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 [R. E 2019].

A brief background of this matter is that the victim XY, a standard VII pupil at Imalampaka Primary School, a girl of 15 years, a resident of Kikungu Village Magiri Ward within Uyui District in Tabora region, who

will be referred to as the victim on 5th March, 2019 during day time went to cut maize at the farm. In the course of going back home, she met the appellant who asked her to stop. PWI could not stop, she continued walking, whereby the appellant grabbed her hand and he threw her down where he covered her mouth by using a left hand. Then the appellant undressed the victim's skin tight and pant and proceeded to rape her. Suddenly, the appellant heard the mother of the victim coming as she was talking alone, then the appellant left victim and ran away. The victim went back home and her mother (PW2) asked her who ran away as she was coming. The victim told her mother that it was the appellant who ran away after raping her and her mother asked her why she did not raise an alarm. She informed her mother that, it was because the appellant covered her mouth. Then the victim's mother (PW2) checked the victim's vagina and found that she was bleeding.

It is on record that the appellant ran away and left his bicycle at the scene, therefore the victim's mother took that bicycle and sent it to the elders. The appellant went back requesting for his bicycle but the victim's mother deprived of giving him that bicycle and she went to report to elders where the matter was reported to the Village Executive Officer who directed the matter to be reported to the police. On arriving at Isikizya in Uyui District they were given PF3 where they went

to the dispensary at Magiri Ward. PW5 a clinical officer examined the victim and found that there was no discharge or bruises, the hymen was not intact, there was no blood and she was not pregnant. The PW5 concluded that according to his examination it was not her first time for PW1 to have sex. He tendered the PF3 as exhibit P1.

PW4, Meshack Minde Mangale a school teacher at Imalampaka primary school who tendered a register as an exhibit and the same were admitted by the court as P2. PW3, the VEO of Imalampka village who was informed on the incident and found the appellant under arrest when he questioned the appellant, he said that he agreed with the victim to have sex. The prosecution sent him to police where when being asked by the Police (PW6) who wrote the statement of the appellant together with the statements of the witnesses concerning rape.

In his defence the appellant told the court that on 5th March, 2019 he was going to the wedding ceremony which was there at their village. On his way he met the victim where he greeted her and in the course of greeting her, the mother (PW2) saw them and started raising an alarm where he could not run. Other people came to that place including the VEO and questioned the appellant who explained what happened. Then

VEO ordered the appellant to be tied with ropes before he was taken to the police. He believed that this case was planted against him.

The trial court was satisfied that the offence of rape was established against the appellant beyond doubt. He was convicted and sentenced to thirty years imprisonment.

Being aggrieved with the decision of the said court, the appellant appealed to this court against the conviction and sentence on grounds namely;

1. *That, the penetration (sexual intercourse) was not established by the testimonies of both PW1 and PW2, neither the contents of exhibit P1 (The F3).*
2. *That, the alleged sexual intercourse between PW1 and the appellant was aborted by PW2; no doubt the medical examination of PW1 did not yield positive results as regard matters penetration.*
3. *That, the presiding magistrate did not properly address her mind to the issue of people's hate as aptly put by the appellant in his defence case.*
4. *That, the case for the prosecution was not established to the required standard.*

When this appeal was called on for hearing, the appellant appeared in person while the respondent was enjoying the services of Mr.Deusdedit Rwegira, learned State Attorney.

In his submission, the learned State Attorney supported the appeal. On the 1st ground, he submitted that the evidence of PW1 does not explain clearly how he met with the accused person. The statement does not state clearly what happened without elaborating on what took place. Failure of the victim to state exactly what happened in the event of rape presumes the ingredient of rape was not well established.

He went on to submit that there are contradiction between PW2 (mother) evidence and the exhibit PF3 which was admitted in court. PW2, the mother of the victim testified that when she inspected the victim's vagina she witnessed that she was bleeding while the clinical officer PW5 testified that in his findings there was no discharge on bruises, the hymen was not intact.

Also, the evidence of PW2 contradicted with that of PW1 (the victim) who did not tell the court that there was blood. The evidence of blood is testified by her mother. To bolster his argument he cited the case of **Seleman Makumba v R (2006) TLR 374** where the court of Appeal held thus:-*"The good evidence of rape has to come from the victim if an adult that there was penetration but no consent and in case*

of any woman consent is irrelevant that there was penetration." Therefore it is not safe to rely on the evidence of PW2 on which her evidence adduced does not suffice. Therefore he prayed to this court to allow the appeal.

In reply, the appellant had no much to say, he prayed to this court to be set free.

The crucial issue to be determined in this appeal is whether the appellant raped the victim and whether the prosecution has proved the case against the appellant beyond reasonable doubt.

It is not in dispute that the appellant was charged with statutory rape whereby consent is immaterial rather the age of the victim is of essence and has to be categorically stated in the testimonies.

The law provides that for the accused person to be convicted of the offence of rape penetration must be proved. Section 130 (4) of the Penal Code provides that;

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence."*

The appellant in his ground of appeal submitted that the penetration (sexual intercourse) was not established by the testimonies of both PW1 and PW2, neither the contents of exhibits PF3.

Having perused through the court record, the issue before this court is on whether the prosecution proved the case without any reasonable doubt.

I agree with the appellant that PW5 evidence and PW1 and PW2 does not establish the fact that she was raped. As rightly submitted, the victim in her testimony gave a general statement that she was raped without explaining further how she was raped and what transpired at the scene of the crime. In the case of **Ryoba Mariba @Mungare V R , Criminal Appeal No. 74 of 2003 (unreported),** the Court of Appeal held that it was essential for the Republic to lead evidence showing that the complainant was raped.

I join hands with both the learned State Attorney and the appellant that the victim who was PW1 gave a general statement that she was raped by the appellant without much explanation as to what took place and how the sexual intercourse was conducted.

Also, this court has noted that on the evidence by PW2, (mother's of the victim) stated that when she inspected the victim, she found that she was bleeding however, the PF3 did not establish that even the victim did not tell the court. Thus this evidence raises doubts as to why the victim did not testify to that effect.

In cases like this, the evidence of the victim is very important in proving the offence since sexual offences are normally committed in privacy. It is therefore, hard to get precise information of what transpired from other people than the victim. That is why it is said that the best evidence in rape cases comes from the victim herself as clearly established in the case of **Seleman Makumba V R, [2006] TLR 379 at pg 384** the court of appeal observed that ;

> *"The good evidence of rape has to come from the victim, if an adult that there was penetration but no consent and in case of any woman consent is irrelevant that there was penetration."*

The Court has also noted that there were contradictions in the testimonies of the prosecution witnesses PW2 evidence and that of PW1 which goes to the root of the case.

With those pointed weaknesses, I agree with both parties without hesitation and convinced that the prosecution has failed to discharge the said duty. Having in mind that this offence depends on penetration which the court found that has not been proved, thus the appeal is with merit.

I hereby quash the trial court's conviction entered and set aside the sentence resulting therefrom. I consequently order immediate release of the appellant unless he is lawfully held.

Order accordingly.

A.A BAHATI

JUDGE

4/12/2020

Judgment delivered under my hand and seal of the court in the chamber, this 4th day December, 2020 in the presence of Appellant only.

A. A. BAHATI

JUDGE

4/12/2020

Right of appeal is explained.

A. A. BAHATI

JUDGE

4/12/2020