

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 10 OF 2020

NDOKO RYوبا MARWA_____ **APPELLANT**

VERSUS

THE REPUBLIC _____ **RESPONDENT**

*(Arising from the decision and orders of the district court of Tarime at Tarime, Hon. Mugendi RM,
in criminal case no 77 of 2018 dated 02.01.2019)*

JUDGEMENT

Date of last order; 14.07.2020

Date of Judgment; 03.08.2020

GALEBA, J.

In this appeal, **MR. NDKO RYوبا MARWA**, is challenging his conviction and a sentence of 30 years imprisonment imposed upon him by the district court of Tarime following a charge of rape contrary to **sections 130(1) (2)(e) and 131 (1) of the Penal Code [Cap 16 RE 2002] (the Penal Code)**. According to the prosecution, the offence was committed during the daytime on 08.02.2018 at Songambe street with the district of Tarime in Mara Region where the appellant raped **ABC**, a girl aged 10.

The Appellant pleaded not guilty to the charge and the prosecution had to prove the case against him. Four prosecution witnesses were called namely, **PW1, JOHNSON ELIPHACE**, the Mkuyuni street

secretary, **PW2, ABC**, the victim, **PW3 PLACIDIA RWEYEMAMU**, a medical doctor and **PW4 WP 7393** detective constable **ANAEL**, a police officer. The brief evidence of each witness is as follows;

PW1, JOHNSON ELIPHACE, a Mkuyuni street secretary, testified that on 08.02.2018, while in office a person called **RANGE** came complaining that his bananas had been stolen. This witness together with **RANGE** left the office to pursue the issue of theft of the bananas. They followed footsteps which led to the appellant's home. When they reached there they knocked at the door, but no one opened it. This witness opened the door and found the appellant raping the victim, he raised alarm and neighbors came. He arrested the accused, and he took both the victim and the appellant to the police.

PW2, ABC was the victim of the abuse. She testified that the appellant was living in her grandmother's house and on 08.02.2018 when she came from school she asked for drinking water from the appellant. The appellant told her that she should wait as he would cook food so that she could eat instead, but he took hold of her by force to his house where, with a machete he threaten her, lied her down undressed her. He put off his own clothes and started raping her. According to this witness, raping took place by the appellant inserting his manhood into her female organ. Suddenly, she testified,

PW1 pushed the door and found the appellant raping her. **PW1** raised alarm people came and took her and the appellant to the police.

PW3 PLACIDIA RWEYEMAMU was a medical doctor at Tarime hospital. According to her on 08.02.2018 **ABC** was brought to hospital with allegations of rape. She conducted medical examination of the child and he found that **ABC** had no hymen and she had bruises in her private parts which had been caused by a blunt object. This witness concluded that the victim had been raped and filled in a **PF3** form which she tendered as **EXHIBIT P1**.

WP 7393 detective constable **ANAEL** was **PW4**. She testified that she went to the scene of crime and she is the one who went with the accused person to Tarime hospital.

On 08.11.2018, the appellant was found with a case to answer. The substance of his evidence was that he was tenant of **ABC's** grandmother but the house he was renting was also needed by **ABC's** mother that is why she told **ABC** to complaint that he raped **ABC**. He stated that the victim is like his grand child and she used to eat food at his place.

The trial court considered the evidence of both parties and made a finding of fact that the prosecution had proved the case beyond

reasonable doubt and it found the appellant guilty, convicted him and consequently sentenced him to thirty (30) years imprisonment as already indicated. In this appeal, the appellant is appealing against both conviction and sentence based on 4 grounds of appeal. The complaints in the four grounds of appeal are that, **firstly**, the trial court erred in law and in fact for relying on the evidence of witnesses who were not credible, **secondly**, the evidence of **PW2**, a child of tender age was improperly taken as that child did not promise to tell the truth and also the court did not assess her level of intelligence, **thirdly**, **EXHIBIT P1, (PF3)** had no evidential value in the absence of a **DNA** test report and **fourthly**, the prosecution failed to prove their case beyond reasonable doubt.

When this appeal came up for hearing on video conference platform on 02.06.2020, Mr. Erick Bwire, a prisons officer from Musoma prison submitted to me that the appellant does not understand or speak Kiswahili. He however promised that there is a fellow officer who is speaks Kuria who could assist next time, as he was not around at that time. With concurrence of Mr. Frank Nchanila the learned state attorney for the respondent, the appeal was adjourned to 14.07.2020 for hearing, pending procurement of a suitable interpreter.

Luckily, on 14.07.2020, Assistant Inspector Louis Mwita stationed at Musoma prison, offered to act as the medium of interpretation between the court and the appellant and vice versa. So on this latter date we were able to proceed to hear the appeal.

Before we could start Mr. Mwita informed the court the appellant requested that this court adopts his grounds of appeal as his submissions and then the state attorney be allowed to answer so that if possible the appellant would rejoin.

Submitting in respect of the 1st ground of appeal Mr. Nchanila submitted that all witnesses were credible. He submitted that **PW1**, was an eye witness, he found the appellant raping the victim red handed. On **PW2** he submitted that, this witness was the victim of the crime and she detailed her ordeal. He submitted that the evidence of this witness is the best evidence and he cited the case of **SELEMANI MAKUMBA VERSUS REPUBLIC [2006] TLR 379** to support his point. He also submitted that **PW3**, the medical officer testified that the girl had no hymen and had bruises in her private parts meaning that the child was raped. As for the **PW4**, the police officer, he submitted that her evidence corroborated other pieces of evidence from other prosecution witnesses. He finally concluded that all prosecution witnesses were credible. In rejoinder the only useful point made was that because of age, the appellant had lost capacity to commit the offence of rape because he does not have any sexual

stamina. He submitted that because of the same predicament, he had permitted his wives to have children with any other men who would be sexually competent.

I have gone through the evidence of all witnesses with a critical eye looking to any likely loophole to benefit the appellant, if this court has not managed to get one. For instance **PW1** witnessed the appellant *in flagrante delicto* raping **ABC**, and **ABC** mentioned that it is **PW1** who found the appellant raping her. As for **ABC**, her evidence was properly taken, she promised to tell the truth thereby complying with the law applicable. Her evidence is the best evidence in the law relating to offences against morality see **SELEMANI MAKUMBA VERSUS REPUBLIC** (supra). The evidence of **PW3**, a medical doctor corroborated that of **ABC** on the appellant having penetrated the girl with his manhood, a blunt object. In my opinion the case against the appellant was proved to hilt. In the circumstances, the 1st ground of appeal is dismissed.

The complaint in the 2nd ground is that **PW2** did not promise to tell the truth and his level of intelligence was not assessed. Mr. Nchanila submitted that at page 11 of the typed proceedings, it is recorded that **PW2** promised to tell the truth. He submitted that this ground is misconceived.

I agree with Mr. Nchanila in respect of this ground. Before **PW2** was to testify, at the bottom of page 11 of the typed proceedings she promised to tell the truth and that is what the Evidence Act since July 2016 requires. Assessing intelligence of a person of tender age, is no longer a requirement; that was the case when **voire dire** test was still lawful, but the test has since been outlawed see section **127(2) of the Evidence Act**. In the circumstances, this ground is baseless and the same is dismissed.

The complaint in the 3rd ground of appeal is that **EXHIBIT P1** has no evidential value because there is no **DNA** test report linking the appellant and the victim. In respect of this complaint Mr. Nchanila submitted that the **DNA** is not a legal requirement in rape cases. He referred this court to **CRIMINAL APPEAL NO 465 OF 2017 ROBERT ANDONDILE KOMBA VERSUS THE DPP CA MBY** (unreported) at page 15. He submitted that the necessary legal requirement is proof that the accused penetrated the female organ of the victim in terms of **sections 130(4) (a) of the Penal Code**.

In respect of this ground, I agree with the submission by Mr. Nchanila, and truly, if DNA test was to be made a statutory requirement all criminals of rape would go scot-free. In this case DNA test report was not one the documents that the prosecution had to tender for them to establish the case of rape. Penetration of the child was proved by the child herself which evidence was corroborated by that of the

medical doctor, **PW3** who testified that, the girl had no hymen and she had bruises in her private parts following a forced thrust of a blunt object. Based on those facts, the 3rd ground of appeal is dismissed for want of merit.

The last ground was a general ground, where the appellant was complaining that the prosecution did not establish the case beyond reasonable doubt. In reply to this ground Mr. Nchanila submitted that there could be a likely issue on the age of the victim but the age was proved by **PW3** the medical doctor at page 14 of the typed proceedings. He added that according to **CRIMINAL CASE NO 57 OF 2018 ATHANAS NGOMAI VERSUS THE REPUBLIC** at page 18 the court of appeal held that the age of the victim can be proved by the victim, a parent, a guardian, a medical practitioner or a birth certificate where available.

Based on the manner we have resolved, the 1, 2 and 3rd grounds, in addition to the submissions of Mr. Nchanila above, this court holds that indeed, the prosecution proved the case against the appellant and the complaint in the 4th ground of appeal has no merit. In the circumstances, that ground is dismissed.

Finally, the conviction and the sentence imposed upon the appellant by the trial court is upheld and this appeal is dismissed for want of merit.

DATED at MUSOMA this 3rd August 2020



Z. N. Galeba
JUDGE
03.08.2020

Court; This judgment had been reserved for delivery on Friday 31st July 2020 and it was ready for delivery on that day. However the day turned out to be **Eid al-Adha**, an Islamic Festival of the Sacrifice, and therefore a Public Holiday in Tanzania. This judgment was therefore delivered on Monday, 3rd August 2020, a working day immediate following the Public Holiday. The same was delivered in the absence of parties but the judgment was ready for collection by both parties on the same day of its delivery.



Z. N. Galeba
JUDGE
03.08.2020