

The appellant pleaded not guilty to the charge. The prosecution invited three (3) witnesses namely Lilian Chelesi (PW1), Ainess Uhakula (PW2) and Jesca Joseph (PW3). After a full trial the appellant was found guilty, convicted and sentenced to life imprisonment.

Aggrieved with both conviction and sentence he has come to this court with a petition of appeal of six grounds of appeal.

At the hearing of this appeal the appellant appeared in person (unrepresented) while Ms. Kassana Maziku Senior State Attorney appeared for the respondent Republic.

The appellant adopted his grounds of appeal and submitted that on the date he was arrested, he was arrested by the Civilian and not by the police officer. That he was arrested by the victim's young brother while coming from his farm.

In reply Ms. Kassana Maziku submitted that in the first ground the appellant complains that the trial court erred to rely on the two prosecution witnesses PW2 and PW3. PW2 testified that she travelled and left their children with her sister who was cooking for them. Ms. Kassana submitted further that after the victim has disappeared she traced her and found her not walking properly, she inspected her and found bruises on her private parts.

Ms. Kassana submitted further that the evidence of PW2 was corroborated by the medical doctor who found bruises and semen in the victims vagina. PW1 testified to the effect that the appellant went to her

during the night time and he knocked the door. Before opening the door the victim put on the light which enabled her to see, after she has opened the door she saw the appellant armed with a knife, he took off his clothes and removed victims clothes and raped her. He threatened her not to tell anyone. It is the argument by the learned State Attorney that the evidence of the victim is acceptable and she referred this court to the case of ***John Nziku vs. The Republic***, Criminal Appeal No.181 of 2011 CAT at Iringa. Ms. Kassana argued that this ground lack merit.

Regarding ground No. 2, Ms. Kassana submitted that the appellant complains that the trial court erred to rely on evidence of PW2 and PW2 and he was not examined to see if is the one who raped the victim. It is the argument by the learned Senior State Attorney that there is ample evidence that PW3 examined the victim and found bruises on her vagina and semen. PW1 named the appellant to have raped her although the appellant was not also examined but the available evidence proves that is the one who raped the victim. It is the argument by the learned Senior State Attorney that in sexual offences case the best evidence is that of the victim, to cement his argument she referred the case of ***Seleman Makumba Vs. Republic [2006] TLR 329***. In this case the victim named the appellant to have raped her. For that reason it was the argument by Ms. Kassana that this ground lacks merit.

In ground No.3 it was submitted by Ms. Kassana Maziku that the appellant complaint that the case was just framed to him because at his arrest he was not told of the offence committed and he was just arrested

while coming from the farm. The Learned Senior State Attorney submitted that the act of the police not to tell the reason for the arrest is not a good reason that he did not commit the offence and even civilian have right to arrest suspects.

On the ground No 4, the appellant complaint is that the trial court erred for failure to analyze his evidence as he said is HIV positive and using drugs so the trial court was required to know if the victim was affected. Ms. Kassana argued that it is not necessary that when a person is raped by a man with HIV she can be tested positive after been raped. It may take some time.

Regarding ground No. 5, the appellant complaint is that the trial court erred to receive the evidence of the victim that she is a school girl aged 10 years old while there is no document to prove the same. Ms. Kassana submitted that the charge was read over the appellant and the age of the victim was mentioned, also during the testimony the victim mentioned her age, but the appellant failed to cross-examine her, the Learned State Attorney submitted that this ground is baseless.

As to ground No. 6, the appellant complains that the trial court erred to believe the evidence of PW1, PW2 and PW3 who did not say that they saw him while raping the victim. It is the argument by Ms. Kassana that although PW2 and PW3 did not witness while the appellant raping the victim but PW1 named the appellant to have raped her, as she knew him before is a co-villager and PW3 confirmed that PW1 was raped. It was the submission

by Ms. Kasana that this appeal lacks merit she prayed the same be dismissed.

In rejoinder the appellant submitted that all witnesses are relatives he doubted them except the medical doctor, and at the police the Medical Doctor did not mentioned his name. The appellant complained that the Medical Doctor who examined the victim although he was attending in court but did not give evidence. Different Doctor came to testify.

After reviewing the evidence on record and the submissions by the appellant and the Learned Senior State Attorney, the issue for determination is whether the appellant is the one who raped the victim. I will deal with one ground after another.

On the first ground of appeal the appellant complained that the trial court erred in law when convicted him without evaluating the evidence of PW2 and PW3 as these witnesses are liar, there is evidence by PW.1 who testified that her sister had travelled and left the victim to her she inspected the victim after being raped and she found bruises on her private parts. PW3 is a doctor who examined the victim and found bruises and semen on the victim's vagina. In my considered opinion this evidence connects the appellant with the committed offence thus this ground lacks merit as the records reveals that the evidence of PW2 and PW3 was examined, and if the appellant doubted on their testimony was supposed to cross-examine the witnesses or raise this issue at the trial rather than raising it at this stage of appeal. This appears as an afterthought. An act of the appellant not to cross-examine the witnesses on their testimonies is deemed to have

accepted what they stated in their evidence as was held in the case of ***Edwin Thobias Paul vs. Republic***, Criminal Appeal No.130 of 2017, where it was observed that:-

"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said"

Regarding ground No. 2, the appellant complained that the trial court erred in relying on evidence of PW1 and PW4 that was not clear and also he was not included on medical check up to prove if he was the one who raped the victim, this complaint lacks merit, the Learned Senior State Attorney has correctly said that the victim is the one who named the appellant that he is the one who raped her, the trial court believed on the victim testimony as in sexual offences case true evidence comes from the victim as was also held in the case of ***Seleman Makumba*** (supra). It should be understood that medical examination to the victim is intended to find out if the victim was raped, it is not the duty of the Medical doctor to prove as to who raped the victim, this is the duty of the prosecution side.

In ground No 3, the appellant's complaint is that this case was just planted to him because after being arrested and sent to the police station, he was not informed of the offence he committed. Failure by an arresting police officer to inform the suspect arrested reason of his arrest is not necessarily that the offence which is preferred against him is planted against him. There

is no good reason appellant has advanced to justify his complaint that he was framed up, the complaint therefore lacks merit.

Regarding ground No.4, the appellant complained that the trial court erred to convict him without proof as he is HIV positive and he is using drugs, so he complained that if he is the one who raped the victim the trial court ought to satisfy itself whether the victim was also infected with HIV. It is not necessary as was pointed out by the learned Senior State Attorney that when a person is raped by a man with HIV she cannot be tested positive after been raped, it can take some time if at all she was also infected for her to be tested positive. I view this ground as baseless.

In ground No.5, the appellant complained that the trial court erred in believing that the victim was aged 10 years without proof of birth certificate. There is a legal requirement that age of the victim is to be established in rape cases for purpose of sentencing. In the case at hand there is no birth certificate tendered in court nor did the parents of the victim gave evidence on the victim's age. However in her testimony the victim mentioned her age to be 10 years at the commission of the offence, the appellant did not cross-examine her at the trial while she was testifying if he doubted on her age. Failure by the appellant to cross-examine the victim on such an important matter is taken that he had agreed to what the victim witness told the court. He cannot later on appeal question her age, he is estopped as he had such opportunity at the trial. In the case of ***Ismail Ally vs. Republic***, Criminal Appeal No. 212 of 2016, (Unreported), the appellant in a statutory rape case

complained on appeal on the age of the victim. The Court of Appeal observed:-

"The complainant age was not raised during trial. It is also glaringly clear that the appellant did not cross examine PW1, PW2, and PW3 on that point. Therefore raising it at the level of appeal is an afterthought".

Ground No 5 of appeal also lack merit, the same was raised without good complaint.

Regarding ground No. 6, the appellant complained that his conviction was based on hearsay evidence which could not prove the offence of rape against him. The court record reveals that the trial court relied on evidence of PW1 to establish the guilty of the appellant. The evidence of the victim is not hearsay evidence. It is direct evidence of a witness who saw and heard the appellant. Is the witness who witnessed what the appellant did to her. The other witnesses PW.2 and PW.3 their testimonies just corroborated the evidence of the victim whose evidence alone would suffice to ground the appellant conviction. This ground is also baseless.

Having observed as here in above, and for the reasons advanced above it is my opinion that this appeal lacks merit the same is dismissed.

DATED at IRINGA this 11th day of March, 2020.


F.N. MATOGOLO,
JUDGE

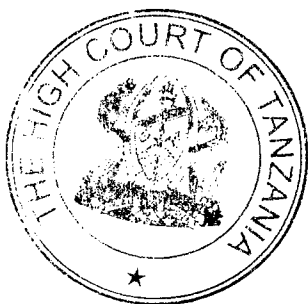
11/3/2020.


Date: 11/03/2020
Coram: Hon. F. N. Matogolo - Judge
Appellant: Present in person
Respondent: Mr. Adolf Maganda Senior State Attorney
C/C: Charles

Mr. Adolf Maganda - Senior State Attorney:

My Lord I appear for the Respondent. The appeal is judgment we are ready.

COURT: Judgment delivered.




F. N. MATOGOLO
JUDGE
11/03/2020