

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 35 OF 2020

(Arising from the Judgment of the District Court of Ilemela at Ilemela in DC. Criminal
Case No. 43 of 2019)

ABUBAKARY S/O SADICK @ MANGI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

23/04 & 06/05/2020

RUMANYIKA, J.:

The appeal is against conviction and a custodial sentence of 30 (thirty) years and order of compensation imposed on Abubakary Sadick @ Mangi (the appellant) on 07/11/2019 for the offence of statutory rape Contrary to Sections 130 (1) and (2) and 131(1) of the Penal Code Cap 16 R. E. 2002.

The five (5) grounds of appeal revolve around points as under:

- (1) That the appellant wasn't properly identified.
- (2) That the prosecution having failed to call the arresting or police investigations officer the trial court should have drawn adverse inference.
- (3) That the prosecution did not connect the appellant scientifically.

(4) That an unexplained delay of the victim to report and name the appellant vitiated the prosecution case.

Ms. Lilian Meli learned state attorney appeared for the Respondent Republic. The appellant wished not to appear (vide his letter of no Reference number dated 08/04/2020).

When the appeal was called on 23/04/2020 for hearing, but following the global outbreak of the coronavirus pandemic and pursuant to my order of 14/03/2020 the parties were present online (except for the above stated reason the appellant), through Mobile No. 0717418929, and by way of Audio Teleconferencing I heard the learned state attorney.

Ms. Lilian Meli learned state attorney submitted that the victim (Pw2) properly identified the appellant because she knew him before also the two having spent a sufficient time together watching a TV in the sitting room **(2)** appearance in court of the arresting or police investigations officer it was immaterial under the circumstances. **(3)** Pw4 proved it all (Exhibit P1) therefore a DNA analysis and report was uncalled for **(4)** Pw2 gave reasons also for having not raised alarms that customarily they had no corporative neighbors. Leave alone the appellant's threats to the victim.

Pw1 Elizabeth Urrio a clinical nurse of Bugando hospital stated that as she stayed with the victim and now travelled to Dar es Salaam, on 05/04/2019 she asked the appellant (whom she knew before as her mason) in her absence always well wish the victim, only in the morning of 07/04/2020 the victim to report that the appellant had raped her. That having assigned him, Shaban a neighbor reported the case to police and Buzuruga Health Centre.

Pw2 Maua (name not real) stated that as she was at home the appellant whom she knew before at times as mason and built them a house he arrived alleged feeling not well. That as the appellant had spent long time together with Pw2 watching a TV and she slept, suddenly the appellant raped while threatening to kill her therefore she was scared and helpless. That as he was now done and she took a hide in her sister's room, she attempted to call her sister but the latter was not reachable until next morning. That she reported the case to Shan and Mama Amina whom she met around and they rushed her to Buzuruga Health Centre where accordingly the doctor attended her. That they had two students as co-tenants say 10-15 paces in the vicinity. That the appellant left the scene say at 6.00 am.

Pw3 Justina Mwalimu a local auxiliary soldier stated that he knew Pw1 appellant and Pw2 before. That the appellant was Pw1's mason and therefore the two were familiar to each other and used to see him at the scene only to learn about the incident on 07/04/2019.

Pw4 Dr. Yombo Boniphace of Buzuruga Health Centre with 26 years work experience he stated that as he was at work place busy on 08/04/2019 at 12.00 pm. the victim reported the case to him, he examined her and from vaginal cavity he noticed some bruises, it was abnormally red and hymen ruptured.

Pw5 Petro Doto the local 10/10 stated that he knew Mangi (the appellant) before as the latter was a mason who had partly built Pw1 a house in neighborhood and, at times the mason kept some work tools at his home. That's all.

The appellant is on record having denied the charges that if anything, he was arrested by police only for betting and Mangi was not his name. That is it.


Laying down the foundation for conviction, the learned trial resident magistrate in a nutshell she found and held that no doubts the victim was raped (Exhibit "P1"), that victim knew the appellant before and therefore properly identified him. The magistrate therefore she considered the victim (Pw2's) as the true and best evidence.

The central issue is whether the prosecution case was proved beyond reasonable doubts. The answer is yes! The reasons are:- **one;** there may have been no evidence to show that Mangi was also the appellant's name yes, however not only that one was immaterial under the circumstances, but also when he was arraigned in court and in the name charged for the 1st time on 21/05/2019, without more words he simply replied: "**It is not true**", **I did not rape** "Maua". He did not readily deny the name just like he denied the charges. The name-related complaint at a later stage therefore it was after thought. On this one, appearance of the arresting officer was uncalled for much as the appellant's arrest had not been at issue. **Two;** equally so, appearance of the respective police investigations officer it was irrelevant under the circumstances. After all in order the prosecution case to be proved it is not quantity of witnesses that counts but quality of the evidence. **Three;** as said, in the beginning the appellant may have pretended not feeling well perhaps until later in the night, the two having remained together in the sitting room watching a TV but then the more or less family friend appellant took advantage of it and he raped

her. **Four;** the appellant and victim may have been lovers only that this time around the victim turned hostile yes, but for the victim's under age (Pw1's evidence). It's trite law that in cases of statutory rape only age of the victim counts and her consent is immaterial. The issue why she did not raise alarms even to the stone through two neighbors also would be irrelevant under the circumstances. It therefore follows that the issue of visual identification at night shouldn't have been raised (given all the narrated circumstances). **Five;** At times due to complex nature of human psychology ill will complaints may lie on courts than accused, not only the appellant who, in the first place had no duty to prove his innocence, he did not in his evidence tell why Pw1 and Pw2 testified against him, but also the two public witnesses did not even remotely in their evidence show such demeanors. **Six;** It is a settled law that true and best evidence of rape comes from the victim, in this case the 16 years old "Maua" (See the case of **Seleman Makumba V. Republic** (2006) TLR 379 (CA). For all the reasons that I have endeavored to discuss, I shall have no basis upon which to fault the learned trial resident magistrate.


The conviction and sentence are upheld, except the order of compensation which is hereby reduced to Shs. 500,000/= (five hundred thousand) only. The appeal is devoid of merits and it is dismissed. It is ordered accordingly.

Right of appeal explained.


S. M. RUMANYIKA
JUDGE
02/05/2020

It is delivered under my hand and seal of the court this 06/05/2020 in the absence of the parties with notice. Copies to be supplied immediately.




S. M. RUMANYIKA
JUDGE
06/05/2020