

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 142 OF 2020

(Original Criminal Case No. 183 of 2019 of the District Court of Chato District at Chato)

GODFREY S/O MKENGE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

15th & 26th February, 2021

RUMANYIKA, J.:

Godfrey Mkenge (the appellant) appeals against the 20/04/2020 conviction and custodial sentence of thirty (30) years for the offence of rape Contrary to Section 130(1) (2) (e) and 131(1) of the Penal Code Cap 16 R.E. 2019.

Rephrased, five (5) grounds of the appeal may revolve around 4 points essentially:-

- (1) That essential ingredient of penetration was not proved.
- (2) That the evidence wasn't evaluated property.
- (3) That the purported victim wasn't proved under age.

(4) That the prosecution case wasn't beyond reasonable doubts proved.

The appellant appeared in person and had nothing to add to his memorandum of appeal.

Ms. Lilian Meli learned state attorney appeared for the respondent Republic. Having chosen to, she argued all the grounds together; **(a)** that the prosecution case actually it was proved beyond reasonable doubts by the victim (pw2) that although she had been lover of the appellant due to her being in menstrual period this time around she resisted but in vain **(b)** that he confessed and there was appellant's cautioned statement (Exhibit-"P2") leave alone the local VEO who told the court that the victim and appellant were almost red handed arrested and they confessed much as the last three pieces of evidence sufficiently corroborated the credible and consistent victim's evidence.

A brief account of the evidence on record reads thus:-

Pw1 SF (synonymous name) stated that amongst six of them the victim (15) was the second daughter that as from late in the evening of 03/09/2019 till next morning the girl was missing, and case was reported to the local chair one Moni straight away to Bwongera cluster, in a certain

took them to Mganza police post much as the girl admitted now the two having had cohabited for four (4) days previously.

Pw4 G. 2068 D/C Daniel of Mganza police post stated that with regard to the incident and he was duly assigned by the OCS, he accordingly recorded cautioned statement of the confessing appellant (Exhibit "P1").

Pw5 Japhet Yohana Jacob, a 6 years' experienced clinical officer of Katete Health center he stated that as he was on 05/09/2019 morning hours on duty, among others he attended pw2 who was accompanied by a policeman and mother and found the girl no longer virgin, no bruises or something but it suggested that habitually she had sexual intercourse (copy of the PF3- Exhibit "P2"). That is all.

Dw1 Godfrey Mkenge stated that he was at home on 03/09/2019 at about 21.00 hours arrested by a member of militia and local chair and shortly produced to Mganza police post where surprisingly he was charged for ape therefore arraigned in court. That he was just fixed and the purported victim was a liar much as also, name of the school it wasn't established therefore she wasn't proven a school pupil. That is it.

house and room around at about 10:00 am they found the lovers appellant and victim seated then were arrested where shortly thereafter from Mganza police post they picked a PF3 for the victim and the latter was accordingly examined in hospital.

Pw2 AB (not the real name) a peasant and daughter of pw1 she stated that for quite some times she was the appellant's lover and they had sexual intercourse on 27/08/2019. That as she had been sent by mother to buy fish at Mganza and she met the appellant, she could not go back home instead the two cohabited each other at the appellant's home this time for the second round but forcefully because she resisted as she was a school pupil and on menstrual period that he prepared food but she simply refused it. That he raped her three times for three days of her stay and whenever he went out the appellant locked her in until such time they were arrested. Then she was examined at Katete health centre (copy of PF3 duly recognized).

Pw3 Mashamba Kongoki the local chair stated that pw2 having had been reported by pw1 missing on 03/09/2019 at about 19.00 hours, now accompanied by some other local leaders they stormed in a room where they found the appellant and the girl seated in the bed room then they

The central issue is whether the prosecution case was proved beyond reasonable doubts. The answer is no for **four** main reasons:-

One; very seldom than not, rape was witnessed by anybody other than the victim and the accused. I think it is from this understanding that it was trite law and there was unbroken chain of authorities that true evidence of rape comes from the victim (case of **Seleman Makumba V.R;**) provided that however slight actual penetration was proved and in cases of ordinary rape the woman did not consent to the sexual intercourse unlike like it was the case here, in statutory rape cases the young girl's consent it was immaterial.

Two; It appears in this case that mainly the learned trial resident magistrate believed her and he considered pw2 being true and credible. I don't think that the former could be more incorrect because whereas in her testimonies pw1 told the trial court that the two lovers were arrested after they had cohabited for one day, in their testimonies the "victim" and pw3 talked about three and four days cohabitation respectively much as I understand that the duration, frequency or extent of rape it was immaterial but in the absence of better and further explanation the possibilities were there that by so cohabiting each other the two lovers had it in mind that

they stayed as wife and husband which situation strictly it constituted no rape of any kind whether or not she stayed there forcefully it was afterthought much as according to her even when the appellant left her back, if at all locked in, the girl did not scream or raise any alarms for co-tenants to rescue her.

Three; The 2nd point takes me to the issue of the victim's age which also the appellant questioned bitterly. If anything, the mother (pw1) only stated the victim's age being 15 years the former did not actually prove the age whether or not pw1 was the biological mother it was irrelevant because for the purpose of computation, age of a person needed be proved by way of evidence it could be through birth date or something. If production of a birth certificate/card in court it was impossible, whenever applicable suffices the baptismal certificate. Whether or not the girl was proved a school pupil it was immaterial under the circumstances.

Four; But without prejudice to the foregoing the appellant may have confessed, and the cautioned statement was duly taken and recorded by pw4 (Exhibit "P1") fine, but nowhere, be it expressly or quietly the appellant was on recorded having admitted the essential ingredient that indeed the victim was 15 or even younger at the time with greatest respect

therefore like any such other pieces of evidence Exhibit "P1" had no any kind of evidential corroborative value.


In the upshot, the appeal is allowed entirely. The conviction, sentence and orders are hereby quashed and set aside respectively. Unless he was held for some other lawful cause, the appellant be released from prison immediately. It is so ordered.

Right of appeal explained.


S. M. RUMANYIKA
JUDGE
20/02/2021

Judgment is delivered under my hand and seal of the court in chambers this 26/02/2021 in the absence of the parties.




S. M. RUMANYIKA
JUDGE
26/02/2021