

**IN THE HIGH COURT OF TANZANIA**  
**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 49 OF 2020**

(Original Masasi District Court Criminal Case No. 4 of 2019)

Before: Hon. H.C.Kando, Esq. RM)

**AKIDA <sup>S</sup>/<sub>O</sub> MOHAMED @KATEMA.....APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

15 March & 12 April, 2021

**DYANSOBERA, J.:**

Akida Mohamed Katema, the appellant, was charged in the District Court of Masasi with the offence of rape contrary to Sections 130 (1) (2) and 131(1) of the Penal Code [Cap 16 R.E. 2002]. The particulars of the offence alleged that the appellant, on 29<sup>th</sup> day of December, 2018 at or about 2000 hrs at Mikangaula village within the District of Masasi in Mtwara Region, unlawfully did have carnal knowledge of one SA (not her real name), a primary School girl aged 7 years. He was convicted and was sentenced to thirty (30) years' prison term. Aggrieved, he has appealed to this court seeking to challenge both conviction and sentence. He is armed

with a total of six grounds of appeal which boil down to one complaint that the offence against the appellant was not proved beyond reasonable doubt.

Briefly, the facts of the case are the following. Stella Barnaba of Mtakuja village was a STD II pupil at Mtakuja Primary School. Beforehand, she was living at Mikangaula village with her biological mother and foster father. That father is the present appellant. In 2018, the victim's mother one Marcelina Bernard asked Blandina Anthony Kassian to take the victim from Mtakuja to Mikangaula for girl initiation rituals commonly known as unyago. PW 2 found that the victim was wetting the bed. She examined her and found her private parts with bruises. On further inquiry, PW 3 was told that the victim used to have sexual intercourse with the appellant several times. PW 3 relayed the information to PW 2 who then took the victim to the police station where they were issued with a PF 3. PW 3 swore that she was not aware of any complaint in respect of the victim. Oscar Raphael Achila, is the Village Executive Officer at Kivukoni. He was informed that the victim was discharging urine uncontrollably as she had been raped by the appellant. He arrested the appellant and took him to the police station. He also took the victim to the hospital. The victim told him that she used to asking her mother to sleep, go to the farm or anywhere

and in the absence of the victim's mother, the appellant was carnally knowing her. WP 8209 DC Subira who investigated the case by collecting evidence and discovered that the victim had been raped by the appellant.

On 4.1.2019, Mwanaidi Khalid Kachenje, a Doctor, was told by Stella Alexander that she had been carnally known by her step father but her mother said that she was not aware of that incident. She medically examined the girl who was not in a good mood as she seemed to be distressed. She recalled that the victim's vaginal parts were normal but her thighs had bruises/scratches. The hymen skin was missing signifying that she was not a virgin. A further examination revealed that the anus was intact, there was no bruises in the vagina but the girl smelt urine. She came to the finding that the girl had been penetrated. She advised the victim to undergo counselling. She then filled in the PF 3 (Exhibit P. 1).

In his sworn evidence, the appellant stated that his daughter was taken to unyago and was bedwetting. He contended that he could not tell what they had done to her at unyago celebrations. He told the trial court that he had up brought her since she was two years old. He denied to have raped her.

At the hearing of this appeal, the appellant appeared in person whereas the respondent was represented by Ms Caroline Matemu, learned State Attorney. The appellant who had also filed additional grounds of appeal added that the victim went to unyago and the incident took place at jandoni. He denied the victim to have been with him. On her part, learned State Attorney supported the appeal. She contended that after going through the record and the grounds of appeal, she realized that the charge which had to be proved, shows that Akida Mohamed Katema on 29.12.2018 at 2200 hrs at Mikangaula in Masasi, the appellant carnally knew Stella Alexander, aged 7 years. Learned State Attorney argued that during her giving testimony, the victim introduced herself to be Stella Barnaba which indicates that the evidence of who exactly the victim was was lacking.

Ms Caroline Matemu also noted that the date of incident was at variance. She insisted that where specific date and name is mentioned in the charge, there has to be led evidence to prove the same. Reliance was placed on the case of **Salum Rashid Chitende v. R.**, Criminal Appeal No. 204 of 2015. Learned State Attorney, on these anomalies, invited this court to quash and set aside the conviction and sentence.

The appellant had nothing to rejoin.

I think the case against the appellant was not proved beyond reasonable doubt.

First, the charge in the charge sheet shows that the victim was Stella d/o Alexander. The same applied to the facts of the case during the preliminary hearing stage. However, in the evidence, it is shown that the victim was Stella Barnaba. This is clear at p. 6 of the typed proceedings of the trial court when the victim was testifying and introducing herself. The victim's close relatives did not mention the exact name. While her biological mother (PW 3) spoke of the victim being her 'daughter', PW 3 was referring her as the 'victim'.

The Court of Appeal in the case of **Salum Rashid Chitende v. R**, Criminal Appeal No. 204 of 2015 referring to its previous decision in the case of **Mathias s/ o Samwel v. R.** , Criminal Appeal No. 271 of 2009 observed at page 7 thus:-:

"When specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place. We think, it is also important that when specific name of the victim is stated in the charge sheet there should be no variance of the name of the victim which has appeared in the charge sheet with that which has appeared in the evidence in the proceedings, otherwise, that will create doubts as to who was the actual victim"

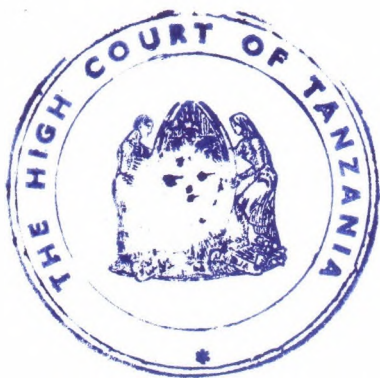
This means that the identity of the victim was not established, that is whether she was Stella d/o Alexander or Stella Barnaba.


Two, the victim's mother (PW 3) who all the time was with the appellant and sleeping in the same room and on the same bed testified that she was not aware of her husband carnally knowing the victim.

Three, the record shows that what prompted PW 2 to believe that the victim had been raped was that she was bed wetting. Apart from the fact that the appellant had explained that the victim was bedwetting even before she was taken to female initiation rituals. There was no evidence be it clinically or biologically establishing that bedwetting is always the result of rape.

For those reasons, I align myself with the observation of the learned State Attorney that the appeal has merit.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order the appellant to be released from custody forthwith unless lawfully held for other causes.



  
**W.P. Dyansobera**  
**JUDGE**  
**12.4.2021**

This judgment is delivered under my hand and the seal of this Court on this 12<sup>th</sup> day of April, 2021 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent and in the presence of the appellant.



  
**W.P. Dyansobera**

**JUDGE**