**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**(APPELLATE JURISDICTION)**

**(DC) CRIMINAL APPEAL NO. 1 OF 2021**

(Original Criminal Case No. 239/2020 of the Kibondo District Court, before Hon. F.Y. Mbelwa - RM)

**JULY S/O JOSEPH ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

# J U D G M E N T

8th March & 27th April, 2021

**I.C. MUGETA, J.**

This is an appeal against conviction of a rape charge and sentence to thirty years in prison. The appeal is founded on the following grounds of appeal: -

i. *That, before the court I denied the offence of rape as charged.*
ii. *That, there was no any witness who dored (sic) to mention or testify to obseve (sic) the appellant commiting the alleged offence at the scene of crime other than the weak evidence of the victim herself.*
iii. *That, the trial magistrate erred in law and in fact in accepting that the prosecution side had proved its case beyond all*



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*reasonable doubts while in fact the whole prosecution evidence was weak.*

iv. *That, the trial court erred in law and facts in failing to consider the appellant's defence.*

v. *That, the trial magistrate erred in law and in fact by convicting and sentencing the appellant basing on weak evidence of PW2 and PW4 which is full of hearsay.*

Simply put the complaint in the grounds of appeal is that the charge was not proved beyond reasonable doubts.

The facts of the case are that at the incident time the victim was aged 18 years. The victim and the appellant are familiar with each other. They studied at the same Secondary School but different classes. On 28/8/2020 at around 20:00 hours, they met at Mabondeni area, Kikulazo Village. The area was lighted by a bright moonlight. The victim was on her way to her aunt to deliver a cellphone. Threat, the appellant, allegedly, did have carnal knowledge of her without consent. Her yell for help got no response because the incident place is a bit far from the Villagers' residences and the assailant blocked her mouth. He put on a condom during the sexual act. After the encounter she proceeded to her aunt to whom she recounted her odeal and named the appellant as the perpetrator. Her aunt, Elimina Mlengela (PW2) found the victim's clothes unusually dirty, her underpants torn and the

vagina with clotted blood. The aunt took the victim back to her parents immediately where the victim told her father about the incident. She also named the appellant as perpetrator of the crime. The father, Damas Kipeya (PW4) reported the incident to the Village Executive Officer (VEO) one Egid Fidels (PW5) and named the appellant as the offender. As it was already a night they agreed to pursue the matter the next day. On 29/8/2020 at Morning hours, the VEO directed a militia man, MG.520621 Uchaguzi Simon (PW6) to look for the culprit who he arrested and took him to the VEO's office. Thereat, the VEO testified, the appellant tried to bribe him Tshs. 275,000/= to settle the matter after he admitted to have committed the crime. At evening on 29/8/2020, the victim was treated at Kakonko hospital by Dr. Jackline Avelin (PW7). Physically, she observed bruises on right side of the face, near her right eye and near the mouth. The victim vagina was bruised, no hymen and she had bled excessively. She tendered the PF3 as exhibit P2. The blood stained under garments of the victim was tendered as exhibit P1 by WP.3240 D/CPL Getruda (PW3).

In his defence, the appellant raised a defence of alibi. That on 28/8/2020 from 19:40 – 20:30 hours he was at home with his friend Jackson Bashima. Jackson Bashima (DW2) supported his alibi. The appellant also testified that



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after his arrest, while at VEO's office he was asked to pay bribe of Tshs. 275,000/=. On this he is supported by his elder brother Jonas Jacob who testified that the VEO had demanded Tshs. 275,000/= as bribe.

The trial court framed three issue for determination. These are: -

i. *Whether there is evidence sufficient to prove penetration to (sic) the victim.*
ii. *Whether accused was properly identified as the one penetrate (sic) by the victim.*
iii. *Whether there was absence of consent during rape (if any).*

The learned trial magistrate answered all the issues in the affirmed, hence, the conviction and sentence of the appellant. The learned Resident Magistrate was satisfied that the evidence of the victim and that of the Medical Doctor proved penetration. He was also satisfied that due to their familiarity, the bright moonlight, the time they spent in conversation before the rape and the naming of the appellant as the rapist immediately after the incident removed all the possibilities of a mistaken identification. The learned magistrate considered the alibi of the appellant and its supporting evidence and concluded that since DW2 parted company with the appellant at 20:30 hours, the possibility that he committed the offence thereafter cannot be ruled out. He held a firm view that by saying that the offence was committed

at around 20:00 hours the prosecution witnesses made no reference to exact time. On that account, he concluded that the defence of alibi was an afterthought for being raised without notice in terms of section 194 (4) of the Criminal Procedure Act.

On consent, the learned magistrate believed the victim that she never consented to sexual intercourse with the appellant. He considered the bruised face of the victim as supporting lack of consent. He discussed this fact in terms of section 130 (4) (b) of the Penal Code.

When the appeal was called up for hearing the appellant wished the respondent to start. Robert Magige learned State Attorney submitted that according to the evidence on record, the charge was proved beyond reasonable doubts. He argued that the victim gave credible evidence that the appellant used force to have sex with her and she properly identified him due to their familiarity and the moonlight. That penetration was proved not only by the victim but also her aunt and the medical doctor who saw blood flow from the vagina. He dismissed the allegation that the defence evidence was disregarded because it was well considered but found to be incredible. On the probative value of the evidence of the prosecution witnesses he said



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none of it was hearsay. Each witness gave evidence as to what he saw or heard.

In his rejoinder, the appellant prayed the court to consider all his grounds of appeal and rule that the case is a frame up for several reasons. Firstly, the victim had grudges because he refused to have love affairs with her and chose her friend instead. Secondly, it was impossible to rape her with a condom on his penis because the time to put on the condom would have enabled her to run away. Thirdly, no witnesses other than the victim saw him forcefully having sex with the victim. Fourthly, that the time spend from incident time to when he was arrested at 15:00 hours the next day is unaccounted for as he is a popular person at the village.

Let me state from the out set that the issue of grudges between the appellant and the victim is not borne out in evidence. I, therefore, consider it to be an afterthought. On the use of condom, the appellant advances possibilities which cannot be said are improbable. On witnesses to the incident, indeed, no witness other than the victim saw him raping her but their evidence corroborated that of the victim not as to who did it but as to the occurance of the incident. The aunt saw the underpants torn and with blood. The medical doctor saw a bruised and bleeding vagina and the investigator saw

the bloodstained underpants. However, as I shall demonstrate hereunder, the victim's evidence as to who raped her is credible. On the time of arrest, the evidence is clear that efforts to arrest him started the next day as the incident took place at night hours. It does not matter how long it took so long as the victim named him at the earliest possible opportunity. Consequently, I find no merits in the appellant's arguments at the hearing of the appeal.

The foregoing notwithstanding, I am duty bound to re-evaluate the evidence and determine if the charge was proved. Among adults, rape is sex between a man and a woman without the woman's consent. In this case the victim testified on how he encountered the appellant who had had sex with her without her consent. It was at night time but there was moonlight which assisted her to identify the appellant as they started with a normal conversation. Being a former schoolmate, I am satisfied she was able to identify him due to the time spent together and the moonlight. Her evidence is reliable because she reported the incident immediately and she persistently named the appellant as the rapist.



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On penetration her aunt (PW2) and the medical doctor observed her vagina and both concluded it had been penetrated by a blunt object. With this evidence and that of the victim, penetration was proved.

On consent, I am also satisfied that there was sex without consent. I find, like the trial court, that the evidence of the victim on this aspect is credible and reliable. If she consented, she would not have reported the incident.

The alibi raised by the appellant was rightly rejected by the trial court. Being with his friend up to 20:30 hours did not preclude him from committing the offence thereafter. Both the charge sheet and the witnesses did not say the offence was committed at 20:00 hours but around 20:00 hours. The allegation that the VEO demanded bribe cannot be accepted because in his evidence on cross examination the VEO testified that the appellant had offered him bribe. Looking at the evidence as a whole, the VEO is credible because he was not the source of the complaint. Further, whether there was bribe attempt between them is irrelevant to the fact in issue of who raped the victim.

Before winding up, let me say a word on the manner the learned trial magistrate record the oath of witnesses. After the usual personal particulars, he recorded: -

*"He/she swear to speak the truth".*

This is a new invention which I discourage. Court proceedings recording have traditions which are respected and honoured as good practices. Normally, after recording personal particulars including the witness's religion and the witness is already sworn/affirmed we write *"... is sworn/affirmed and states".* Observing this practice is important for uniformity and consistency.

In the event, I find the whole appeal without merits. I dismiss it.


**I.C. Mugeta**

**Judge**

**27/4/2021**

**Court:** Judgment delivered in chambers in the presence of the appellant and Edna Makalla, State Attorney for the respondent.

**Sgd: I.C. Mugeta**

**Judge**

**27/4/2021**