

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA

CRIMINAL APPEAL NO. 82 OF 2020

*(Originating from Judgment of the District Court of Lindi, in Criminal Case
No 31 of 2020)*

KITUO JUMA MAGENDO APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Hearing date on: 01/3/2021

Judgement on: 14/4/2021

NGWEMBE, J:

The Appellant, Kituo Juma Magendo is in this court challenging the conviction and sentence meted by the trial court. He found his way to this court after issuing notice of appeal within the prescribed time frame and lodged seven (7) initial grounds of appeal and five (5) additional grounds of appeal forming a total of twelve (12) grounds of appeal. According to the charge sheet, the accused was charged for rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E. 2019. It is on record that on 6th April, 2020 at Namangale village within the District and



Region of Lindi, unlawfully, had carnal knowledge with a girl aged seventeen (17) years old. According to the Law of the Child, the victim is baptized as "RB" with a view to preserve and protect her respective privacy and integrity in the society.

The facts of the case indicate that immediate after the act of sexual intercourse, the two were restrained and taken to the Village Executive Officer and Ward Executive Officer, finally were taken to police at Nyangao police station, while RB was taken to hospital for medical examination. The appellant was finally, landed to the District Court of Lindi for trial. The prosecution lined up four (4) witnesses and the appellant defended himself. Finally, was found liable, convicted and sentenced to imprisonment for the period of 30 years, twelve (12) strokes of cane and compensation to the victim of TZS 500,000/=.

Despite the fact that the appellant has filed in this court 12 grounds of appeal, yet the same may be summarized into one ground that is whether *the prosecution failed to prove the case of rape against the appellant*. On the hearing date of this appeal, the appellant being unrepresented and may be lacking experience on court matters, he prayed the respondent to have first right to argue the appeal and reserved his right to respond thereafter.

In turn the learned senior State Attorney, supported the trial court's conviction and sentence. That all elements of rape were established and proved by reliable witnesses. That penetration and age of the victim were



proved beyond doubt. Thus, the appellant's grounds of appeal, lack legal backing. To bolster his argument, he referred this court to the judgement of the Court of Appeal in **Criminal Appeal No. 173 of 2014 between Andrea Francis Vs. R**, whereby the court considered on proof of age of the victim. Above all, referred this court to **Criminal Appeal No. 103 of 2012 Hassani Bakari @ Mamajicho Vs. R**, where the Court of Appeal took pain to define the meaning of rape and its elements of rape, which same were vividly established in this appeal. He rested by making a prayer that the appeal be dismissed for lack of merits.

Exercising his rights to respond therein, and being unrepresented, the appellant had no viable contributions to his appeal, rather relied solely on his grounds of appeal and prayed this court to find him not guilty.

Since the introduction of statutory rape in year 1998 through amendments of Penal Code (Sexual Offences Special Provisions Act 4 of 1998 - SOSPA) to date, the definition and ingredients of rape have received proper definition. In other words, to prove rape cases is now settled. In statutory rape, penetration, however light may satisfy the legal requirement. Section 130 (4) (a) of the Penal Code Cap 16 R.E. 2019, provide as follows:-

"Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"

To supplement that statutory meaning of penetration, the Court of Appeal in the case of **Godi Kasenegala Vs. R, Criminal Appeal No. 271 of**



2006 (CAT) (Unreported), asked the question on what constitutes the offence of rape? They answered as quoted hereunder:-

*"under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of 18 years without her consent. Two, having sexual intercourse with a girl of the age of 18 and below with or without her consent (Statutory rape). In either case, **one essential ingredient of the offence must be proved beyond reasonable doubt. This is the element of penetration i.e. the penetration, even to the slightest degree, of the penis into the vagina**"*

In similar pronouncement the Court of Appeal in the case of **Mbwana Hassan Vs. R, Criminal Appeal No. 98 of 2009 (CAT – Arusha)** (Unreported) held:-

"It is trite law also that, for the offence of rape, there must be unshakeable evidence of penetration"

Based on the section and precedents aforementioned, I may summarize the fundamental elements of the offence of rape as follows:- **first** is sexual intercourse without consent to a woman above the age of eighteen years, but if she is eighteen or below, consent is immaterial; **second**, is penetration of male penis to a female reproductive organ (Vagina); **third**, is availability of unshakable evidence proving the offence of rape beyond reasonable doubt. Upon prove of these three elements of rape, among others, (the list is not exhaustive), may lead the court to conviction and subsequently pronounce statutory minimum sentence against the accused.



In respect to this appeal, the prosecution proved penetration by relying on the evidence of PW2 who by then was 17 years old. She testified that on 6th April, 2020 at 04: 00 am in the very early morning, left her sister sleeping in their room and went out of the house, straight to the accused house. She managed to knock the door to the appellant's house. In the cause, the appellant opened the door and she went straight to the appellant's bed and slept ready for sexual intercourse.

The fact that she had sexual intercourse at that early morning, was rightly supported by PW3 who is a clinical officer working at Namangare Health center as early as 06:15 am in the morning. PW3 proved the existence of male spams in the victim's vagina. He added that the victim had just having sexual intercourse. Therefore, the first element of rape which is penetration or having sexual intercourse was unshakably proved by reliable witnesses.

The second element is on proof of age of the victim. That PW2 testified with precise date, month and year when she was borne. That she was born on 9/12/2003. Thus by year 2020, she was 17 years old. In support to her assertion, the prosecution invited PW4 who tendered a birth certificate which was admitted during trial as exhibit P2.

The third element is on reliability and unshakable evidences directing the offence to have been committed by the appellant. In other words, who had sexual intercourse with "RB" at that early morning or night? Whether, there are clear evidences that the appellant was the one who committed the



alleged offence and not anyone else. What was the distance from the house where the victim was sleeping and the appellant?

These questions are answered only by revisiting the whole evidences adduced during trial. To begin with, PW2 among other testimonies, had this to say:-

*"After we finish sexing at 5: 00 am, I told accused I am going back home. It follows that accused opened the door for me and I went out. I took the way going home when it happened someone hold me my hand. I noticed that the one who hold my hand is the sister of my mother – Aunt. My Aunt asked me where I came from. I remained silent. She asked me the second time. **Then I told her I was at Kituo's house. My Aunt took me back to Kituo's house**"*

When this piece of evidence is read along with the evidence of PW4, who was an aunt looking for the victim during that night, together with Mariam upon arrival to the appellant's house, she found the victim. *"I saw the victim coming outside at the back side where I was and I followed her and hold her handI decided to assault the victim and I went at Kituo's house and call him and he responded.....I closed the door after knowing he is inside"*

The eye witness, if any ought to be PW4 who tirelessly was looking for the victim during that night. However, she found the victim outside at the backside of the appellant's house, not inside the appellant's house. Above all, the evidence of the victim PW2 is clear like a brightest day light, that



she was caught by her aunt when she was on the way going home. *"I noticed that the one who hold my hand is the sister of my mother – Aunt. My Aunt asked me where I came from. I remained silent.* It seems after being assaulted by aunt the victim disclosed where she was coming from.

Taking the evidence of the victim as cornerstone in statutory rape, obvious, the victim was found on the way home as supported by PW4 who testified that she found the victim at the backside of the appellant's house. Consequently, PW4 initiated the process by ensuring if the appellant was inside his house; *"I went at Kituo's house and call him and he responded, so I closed the door after knowing he is inside."*

Much as I would agree with the learned senior State Attorney on proof of major elements of rape, yet the question is who did it to the victim during that night? If the appellant was at his house sleeping and the victim was caught on the way to her home at 05:00 a.m, which under normal circumstances, was still dark, whether it is safe to conclude that she was coming from the appellant's house and not from another man? Whether there is no possibility that the victim had her boyfriend who arranged to spend that night together, but pointed the appellant as a means to save the true culprit. According to the testimonies of PW4, the victim disclosed where she was after being assaulted.

When the testimonies of PW2 and PW4 are read along with the defence case (DW1), they tally to the extent that the appellant remembered very well on the fateful date, that on 5:00 a.m, he heard one knocking his door,



but refused to open it. They locked his door at outside. The village Executive Officer came to his house and opened his door, which was locked outside. Going outside, he found the VEO, Rehema and 4 others. Consequently, he was taken to the village offices and locked therein.

Undoubtedly, the door of the appellant at that fateful night was locked outside by PW4 who found the victim on the way to her home. Above all, I have carefully visited the evidence on record together with the trial court decision with a view to find, apart from PW2 evidences whether there was another eye witness on the alleged offence? Unfortunate the answer is in negative. I therefore, find serious danger, to rely on these uncoordinated pieces of evidences from the prosecution side to confirm the conviction entered by the trial court.

Due to the intrinsic nature of rape cases, where only two persons are usually involved, the testimony of the victim must be scrutinized with extreme caution. In the same vein, the evidence of the prosecution must stand or fall on its own merits.

I have seen in court, almost every day, an accused when appears for hearing of his case and when the court asks him to proceed with his grounds of appeal, he becomes nervous, confused, ignorance and unexperienced to stand in court, instead of arguing on his case, stand up in court saying nothing. This has been happening not only to uneducated persons, but even to the most educated ones. Such state of mind has triggered me to suggest to the legislature through Regulations if applicable,



to facilitate accused persons on rape cases to have a help of an advocate to speak for them. That cannot be a new thing, for the Government pays for advocates on homicide cases, some of them, especial Manslaughter, may end up on total acquitted or acquittal under certain conditions, but a person who is facing a statutory rate with minimum sentence of thirty (30) years up to life imprisonment is not assisted by legally trained brain for the costs of the Government.

Perusing the old books of law, I have come across the judgement in the House of Lordships in England which had similar reasoning in the case of **Pett Vs. Greyhound Racing Association Ltd [1969] 1 B. 125** held:-

*"It is not every man who has ability to defend himself on his own... he may be tongue – tied, nervous, confused or wanting in intelligence, we see it every day. A magistrate says to a man, you may ask a question you like, whereupon the man immediately starts to make a speech. **If justice is to be done, he ought to have the help of someone to speak for him**"*

In the absence of another person to speak for the accused in rape related cases, majority of young and inexperienced male persons are likely to end up their lifetime in jail on similar cases. Such long incarceration in prison, the court must undoubtedly satisfy itself beyond reasonable doubt that the evidence adduced in court are unshakably directing to none than to the accused himself.

In this appeal, I have reviewed with due care the whole evidences adduced in court, I find the prosecution evidence was marred with material



contradictions and doubts, which in effect weakened its case. It is a settled legal principle that always, doubts need to be resolved in favour of the appellant. I accordingly, allow the appeal, quash the conviction and set aside the sentence meted by the trial court, consequently order an immediate release of the appellant from prison unless otherwise lawfully held.

I, accordingly order.

Dated at Mtwara in Chamber on this 14 day of April, 2021



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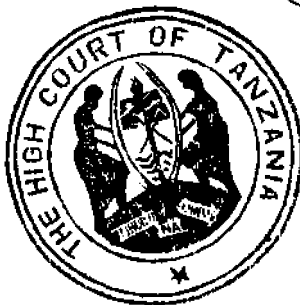
P.J. NGWEMBE

JUDGE

14/4/2021

Court: Judgement delivered at Mtwara in Chambers on this 14th April, 2021 in the presence of the appellant and Mr. Gideon Magesa, State Attorney for the Republic.

Right to appeal to the Court of Appeal explained.



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P.J. NGWEMBE

JUDGE

14/04/2021