

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

CRIMINAL APPEAL NO. 179 OF 2020

AMOS MAGAMBO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

*(Appeal from the Judgment the District Court of Bunda at Bunda
(Hon. S.A. Manento-RM) dated 28th September 2020
in Criminal Case No. 233 of 2019)*

JUDGMENT

21st April and 6th May, 2021

KISANYA, J.:

Amos Magambo, the appellant herein was arraigned before the District Court of Bunda for the offence of rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code [Cap. 16, R.E. 2002]. It was stated by the prosecution that, on 28th September, 2019 at Nyamuswa Village within Bunda District, the appellant had carnal knowledge of one, JN (name withheld to disguise his identity) a girl aged 7 years. Consequently, the appellant was then sentenced to a custodial sentence of thirty (30) years.

The material facts of this case can be stated as follows: JN hereinafter referred to as the victim or PW1 was leaving with her parents

at Nyamuswa village within Bunda District. The appellant was a relative to the victim's father. He was also the victim's neighbour. On the material day (28/09/2019) around 09:00 pm, the victim and other two children were playing at the house of one Pili. The appellant carried her into his bedroom and closed the door. Other children did not notice that event. Upon entering the bedroom, the appellant closed the victim's mouth. He then undressed and had carnal knowledge. Thereafter, he threatened the victim not to tell any person. He let her go and opened the door after hearing the victim's mother calling for her.

When the victim arrived at home, she was beaten by her mother one Nyange Nyamueko (PW2). That is when she told her mother that the appellant had raped her and that it was the third time. The victim was taken to Ikizu Health Center where she was examined by Cecilia Lukalawa (PW3). PW3's examination confirmed that the victim had been raped because she had bruises in her vagina. Her oral testimony was supported by the PF3 (Exhibit P1).

The appellant defended himself on oath. He also called his fiancée one, Neema Shadrack (DW2) to supplement his evidence. He vehemently denied to have raped the victim. He contended that the case had been

fabricated by PW2 who was not ready to see him marrying DW2. DW2 deposed further that she was with the appellant on the fateful day.

In view of the above, the prosecution was satisfied that the prosecution had proved its case beyond all reasonable doubts. It went on to convict and sentence him as stated earlier.

Dissatisfied with the conviction and sentence, the appellant lodged this appeal. His grounds of appeal were to the following effect: -

1. The trial court convicted the appellant while the charge was charge.
2. The trial court erred in convicting the appellant without any medical report to report that the victim had been raped.
3. The trial court failed to consider and analyze the appellant's evidence that the prosecution evidence was fabricated.
4. The trial court failed to consider that the matter was not reported to the police and that PW2 went to the hospital with PF3.
5. The trial court failed to evaluate the veracity if not reliability of the three witnesses called by the prosecution.
6. The trial court erred in law by not considering that the appellant was first offender.
7. The trial court considered evidence not adduced by the parties.

At the hearing of this appeal, the appellant appeared in person to argue his appeal while the respondent was represented by Mr. Nimrod Byamungu, learned State Attorney.

The appellant was called first to submit in support of his appeal. In his short submission, the appellant told the court that justice was not rendered to him. He prayed to adopt the petition of appeal and urged me to allow the appeal.

Mr. Byamungu resisted the appeal and supported the conviction and sentence. Responding to the first ground, Mr. Byamungu submitted that the charge was not defective.

As regards the second and fourth grounds, the learned State Attorney argued that rape is not proved by medical evidence. He submitted further the victim's evidence is sufficient to convict the appellant. When probed by the court on whether PW1, PW2 and PW3 did not contradict each other thereby affecting their credibility, Mr Byamungu contended there was no contradiction in their evidence.

On the issue whether the defence case was considered, the learned state attorney argued that the trial considered evidence adduced by both parties. He was of the view that, the trial magistrate was satisfied that the

prosecution evidence was watertight and given by credible witnesses. Citing the case of **Goodluck Kyando** (1996) TLR 263, Mr. Byamungu argued that every witness is entitled to credence. He also submitted that it is the trial court which was in a good position of assessing credibility of the prosecution witnesses.

In relation to the sentence, the learned State Attorney argued that in terms of section 131(1) and (3), the trial court ought to have imposed life imprisonment. His argument was based on the evidence that the victim was aged 7 years.

As regards whether the trial court was biased thereby considering evidence which was not adduced, Mr. Byamungu replied that the court took into account evidence deposed by the parties and not otherwise. Therefore, he moved me to dismiss the appeal.

When the appellant rose to rejoin, he contended that the victim was taken to hospital after three days. He also stated that the PF3 shows that the matter was reported after 3 days. In view of the said contradiction, the appellant prayed the Court to discharge him.

On my part, it is a principle of law that the prosecution is duty bound to prove its case beyond all reasonable doubts. Apart from proving

that the offence was committed, the prosecution must prove THAT it is the accused person who committed the offence. See also **Maliki George Ndendakumana vs R**, Criminal Appeal No. 353 of 2014 (CAT) - Bukoba (unreported). That is the principle which will govern us in determining the merit of this appeal.

The appellant contends in the first ground that the charge was defective. However, he did not give details as to defectiveness of the charge. I am mindful that every charge is required to contain statement regarding the offence and particulars of offence which are necessary to provide reasonable information as to the nature of offence. This stance was taken by the Court of Appeal in **Isidori Patrice vs R**. Criminal Appeal No. 224 of 2007 (unreported).

The offence of rape in this case was predicated under section 130(1) (2) (e) of the Penal Code (supra). These provisions provide for the offence of rape committed to a girl below 18 years. It is commonly called as statutory rape. The said offence has two ingredients namely, penetration and age of the victim. There is no need of proving whether the victim consented to rape. Therefore, the charge was required to show particulars reflecting the said ingredients.

Save for sentencing provision, I find no defect in the charge read over to the appellant. It informed him that he had carnal knowledge of the victim who was a girl aged 7 years. Therefore, since the victim was below 10 years, the statement of offence ought to have cited section 131(3) of the Penal Code (supra). However, the said omission did not prejudice the appellant. Thus, I find the first ground devoid of merit.

Therefore, save for the six ground, the main issue in the remaining grounds is whether the offence of rape was proved beyond all reasonable doubts. As stated herein, the prosecution was required to prove penetration and age of the victim.

Starting with age of the victim, the law is settled that such age may be proved by the victim, her parents or medical practitioner. See **Isaya Renatus vs R**, Criminal Appeal No. 342 of 2015, CAT at Tabora (unreported).

In the instant case, the victim's mother (PW2) testified under oath that the victim was 7 years old. Also the victim (PW1) deposed that she was 7 years and in Standard II. The prosecution evidence on the victim's age was not challenged by the appellant during cross examination. Thus, the appellant is taken to have agreed on the age of the victim.

As to the second ingredient on penetration, it is trite law that the best evidence to prove the same comes from the victims herself. This principle was stated in **Selemani Makumba v Republic**, [2003] TLR 203 when the Court of Appeal held:

"True evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in case of any other women where consent is irrelevant that there was penetration" [Emphasis supplied]

Similar stance was stated in reached **Godi Kasenegala vs R**, Criminal Appeal No. 10 of 2008 (unreported). In that case, the Court of Appeal held:

*"It is now settled law that proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors may give corroborative evidence; see for instance, **Selemani Makumba vs Republic,...**, **Alfao Valentino Vs Republic**, Criminal Appeal No. 459 and 494 of 2002 (unreported). Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so. See *C.D Desouza Vs B.R Sharma (1953) EAC4 41*"*

In our case, the victim (PW1) testified on oath that the appellant penetrated his manhood in her vagina. The said evidence was

corroborated by the victim's mother (PW2) and a doctor (PW3) who examined her. The appellant does not dispute that the said evidence was given by PW1, PW2 and PW3. His concern in the 5th grounds is credibility of the said PW1, PW2 and PW3. Thus, he called upon the Court to disbelieve the victim and find her unreliable. On the other hand, Mr. Byamungu was of the position that the prosecution's witnesses were credible and reliable.

In preface, I am at one with Mr. Byamungu that every witness is entitled to credence. Unless there are good and cogent reasons for not believing him, he must be believed and his testimony accepted as held in **Alyoce Maridadi vs R**, Criminal Appeal No. 208 of 2016, CAT (unreported). The reasons for not believing a witness include: One, contradictions, discrepancies or conflicting statement in the witnesses' evidence; Two, failure by the witness to name the suspect at the earliest opportunity possible; Three, giving implausible or hearsay evidence; Four; giving evidence basing on suspicion.

I also agree with Mr. Byamungu on the principle of law as held in **Goodluck Kyango** (supra) is to the effect that the trial court is in a better position of assessing the credibility and demeanor of witnesses.

This being a first appeal, I have dutifully examined the evidence adduced before the trial court to see the credibility of the prosecution witnesses, the victim in particular. I have noted the following factors which raise doubts on credibility of PW1, PW2 and PW3.

First, the witnesses contradict themselves on when the victim was taken to the hospital. The offence was stated to have been committed on 28.09.2019. Now, the victim (PW1) stated that she was taken to the hospital on the next day. On her part, PW2 did not state the exact date of taking the victim to hospital. However, her evidence suggests that the victim was taken to hospital on the very night. She deposed as follows:

"I took stick and started to beat her why is she playing outside in the night then she started to talk and say "Amos Maganga alinikuta nacheza akanibeba kwenye chumba chake akaniweka kwenye jamvi". He started to remove her clothes and had canal knowledge with her...I told my brother and we went to Nyamswa hospital. The doctor checked her and proved that she was raped."

The said evidence of PW1 and PW2 is contradicted by what is depicted in the evidence of PW3 and Exhibit P1. The later evidence is to the effect that the victim was received at Ikizu Health Centre on 30.09.2020.

Second, there is contradiction on when was the offence committed. Evidence of PW3 and Exhibit P1 suggest that 72 hours (3 days) had passed when the victim was examined at Ikizu Health Centre. This implies that the offence was committed on 27.09.2019 and not 28.09.2019 around 09.00 pm as adduced by PW2 and stated in the charge.

Third, PW2 and PW3 contradict each other on the hospital where the victim was examined. As shown herein above, PW2 told the court that the victim was taken at Nyamswa Hospital. However, a doctor who examined the victim testified that she was working at Ikizu Health Centre. Indeed, the seal Ikizu Health Center is affixed to Exhibit P1.

It is the position of law that contradiction among witnesses cannot be escaped or avoided in any particular case. The court is then required to consider whether those contradictions are material to the extent of going to the root of the case. This stance was taken by the Court of Appeal in **Said Ally Ismail vs. R.**, Criminal Appeal No. 249 of 2008, **Slahi Maulid Jumanne vs R.**, Criminal Appeal No. 292 of 2016, **Rajabu Ponda vs R.**, and **Chrisant John vs R.**, Criminal Appeal No. 313 of 2015 (all unreported) to mention but a few.

In my view, the above pointed out contradictions in the case at hand are not minor. They go to the root of the case and raise doubt

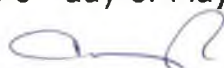
whether the offence of rape was committed thereby affecting credibility of the prosecution witnesses, PW1 in particular. This is so when it is considered that the appellant denied to have committed the offence and DW2 told the trial court that she was with the appellant on the fateful day.

Upon deciding that the prosecution witnesses were not credible due to the stated contradiction, the conviction and sentence imposed against the appellant cannot be allowed to stand. It is unfortunate that the issue of contradictions and credibility of witnesses were not brought to the attention of the trial court. Had it been done; the learned trial magistrate would have not found the appellant guilty of the offence.


In the event, I allow the appeal, quash the conviction and set aside the sentence. The appellant should be released from prison unless he is otherwise held for other lawful cause.



Dated at MUSOMA this 6th day of May, 2021.


E. S. Kisanya
JUDGE

COURT: Judgment delivered on the 6th day of May, 2021 in the presence of the appellant in person and in the absence of the respondent. B/C. Simon-RMA present.


E. S. Kisanya
JUDGE
06/05/2021