

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 213 OF 2020

(Original Criminal Case No 188 of 2020 of the District Court of Geita at Geita)

JAMES EMMANUEL APPELLANT

versus

THE REPUBLIC..... RESPONDENT

JUDGMENT

27th July & 11th August, 2021

RUMANYIKA, J.:

Having been arrested and, according to records arraigned in court on 22/05/2020, James Emmanuel (the appellant) was charged with an offence of statutory rape C/sections 130 (1)(2)(e) and 131(1) of the Penal Code Cap. 16 RE. 2019. That on 8/5/2020 at Nyamilyango village, district of Geita he had carnal knowledge of Chautundu Janja (the name not real) aged 16 years. End of the day the appellant was convicted and sentenced to thirty (30) years in jail. He is aggrieved hence the 6(six) grounds of appeal without missing a point, when rephrased the grounds may boil down to five (5) points and essentially read as under:-

- (1) That the appellant wasn't clinically examined and established to be the rapist.
- (2) That the trial learned resident magistrate improperly evaluated the evidence.
- (3) That the daughter and father (Pw1 and Pw2) were not reliable therefore the prosecution case was not beyond reasonable doubts proved leave alone the contradictory evidence.
- (4) That the prosecution case lacked corroboration.
- (5) That if anything, the appellant was convicted only basing on his weak defence evidence.

When the appeal was, by way of audio teleconference called on 27/07/2021 for hearing, the appellant appeared in person and Ms. L. Meli learned state attorney appeared for the respondent Republic. I heard them through mobile numbers 0737977746 and 0717418929 respectively.

Very briefly, the appellant submitted that Pw1 was not reliable because ordinarily only the appellant should have visited her and not otherwise much as the girl was in his absence clinically examined but he was not. That is it.

The evidence on records went as follows:-

Pw1 Chautundu Janja (name not real) stated that she was born on 31/04/2002 and she knew the appellant as their neighbor whom she had visited on 8/5/2020 and, as they were in bed room just having had sexual inter course, her father and one Bundala Mchagula the local VEO stormed in, they apprehended and produced them to Nyawilimila police post.

Pw2 Baba Chautundu (name not real) father of the victim stated that the latter was born on 31/0/2004 at Kifuru dispensary (copy of the birth certificate – Exhibit P1). That as the victim was now reported missing at home, and, for that reason one Fred Bundala escorted him, they traced the victim in the appellant's room therefore apprehended the two lovers and produced them to Nyawilimilwa police post.

Pw3 Peter Andrew a clinical officer of Nyawilimilwa health centre stated that as he was at work, but following the incident in his ordinary course of business on 9.5.2020 having had duly examined the girl, he noticed some bruises in the latter's vaginal cavity but she tested pregnancy negative (copy of the report exhibit- P2).

The sole Dw (the appellant) he stated that as on 08/5/2020 at about 22.00hrs he was back home and the victim arrived looking for someone unknown to him, shortly, seven (7) people inclusive of the local WEO and the victim's father just stormed in, the last two ceased the appellant's property, they put him under arrest and produced him to the police post. That having had his cautioned statement been recorded he was transferred to Geita police station, just charged and was arraigned in court. That is all.

Having had sort of defined what statutory rape was the trial magistrate found the victim reliable (case of **Seleman Makumba v. Rep** (2006) TLR 350 (CA) and on that one she cited the case of **Ndendya v. Rep**, Criminal Appeal No. 340 of 2017 CA at Iringa (unreported) and she found the essential ingredient well established and proved such that for her, the learned trial resident magistrate was beyond reasonable doubts convinced, she convicted and accordingly sentenced the appellant much as also, according to her by admitting the fact that he was found with the victim in room, the appellant had taken the prosecution case further (case of **David Gamala & Another v. Rep**, Criminal Appeal No. 2016 of 2014 (CA) unreported).

The central issue is whether the prosecution case was beyond reasonable doubts proved. The best evidence of rape comes from the victim. The case of **Seleman Makumba (supra)** yes, but I think the principle only applied where the prosecution case was only built on the evidence of the victim unlike in the present case where the victim's father (Pw2) and, according to the victim's evidence some other six (6) witnesses who caught the two lovers almost red handed if at all in the appellant's bedroom. The other four may have had good cause not to appear in court yes, but what about Fred Bundala the local VEO and justice of the peace for that matter whom I think Pw2 wasn't accidentally accompanied with to the scene of crime. It was very unfortunate that no reasons were assigned for the VEO's failure to appear in court. The prosecution case therefore crumbles by adverse inference (case of **Hemedi Said vs Mohamedi Bilu** (1984) TLR 113 (HC) much as I am aware of the provisions of S. 143 of the Evidence Act Cap. 6 RE. 2019. That it was only evidence by quality not by quantity that counted. Grounds 2, 3 and 4 of the appeal succeed.

Second, in his evidence Pw2 did not tell how possible, it seems right away he and the company of six people they stormed into the appellant's home without telling from whom probably in the dark night they got the

material clues and, without failure or delay they traced the lovers. The possibilities of the father and daughter having had conspired to victimize and they simply laid the trap could not be ruled out. Not only Pw1 and Pw3 were not reliable, but also Pw1 wasn't credible and reliable (the case of **David Gamala** (supra) is distinguishable). I don't think that with the provisions of Sections 130(1)(2)(e) and 131(1) of the Code the legislature had intended to protect such able but untrustworthy girls of the victim's behavior suffice the points to dispose of the appeal.

The appeal is allowed, the conviction and sentence therefore are quashed and set aside respectively. Unless he was retained for some other lawful cause, the appellant be released from prison forthwith. It is so ordered.

Right of appeal explained.



S.M. RUMANYIKA
JUDGE
11/08/2021

Judgment delivered under my hand and seal of the court in chambers
this 11/08/2021 in the absence of the parties.




S.M. RUMANYIKA
JUDGE

11/08/2021