

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)
AT BUKOBA**

CRIMINAL APPEAL NO. 106 OF 2020

(Arising from Criminal Case No. 129/2019 in the Resident Magistrate Court of Bukoba at Bukoba.)

JOVITH ISHENGOMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Judgment: 02/09/2021.

MWENDA, J

This appeal originates from Criminal case No. 129 of 2019 where, before the Resident Magistrate's Court of Bukoba at Bukoba, the appellant was charged and convicted for Rape contrary to **Section 130 (1), (2)(e) and 131 (1) of the Penal Code, [Cap 16 RE 2019]**. He was the sentenced to serve a term of 30 years jail imprisonment.

Aggrieved by the conviction entered by the trial court, he has preferred this appeal which contain seven grounds. This court after going through the said grounds of appeal noted that they may be summarized into one ground, which is whether the prosecution's side failed to prove its case beyond reasonable doubts.

The brief facts of the case which led to the appellant's arraignment in court are as follows: The victim one KIISHA D/O GEORGE was a girl aged 17 years old. She was residing with her parents at Kikukwe village within Misenyi District in Kagera region. Sometimes in early March, 2019 the victim went missing from her parents' home. Her whereabouts were not known for about five days. On the 11/03/2019 her parents shared this news with their neighbour who testified later as PW.1. Search was mounted and at the appellant's home the victim and the appellant were found sleeping together in bed. The appellant was apprehended and the incident was reported before the relevant authorities. Investigation ensued and upon its completion, the appellant was charged for Rape as stated above.

When this appeal came for hearing, the appellant appeared in person and the respondent Republic was represented by Mr. Emmanuel Kahigi, learned State Attorney.

When invited to make submissions in support of his appeal, the appellant had nothing to submit to that effect. He prayed the contents of his memorandum of appeal to be adopted and considered in making this court's findings.

On his part, the learned State Attorney informed this court that the Republic supports this appeal due to failure by the prosecution to prove its case beyond reasonable doubt.

Mr. Kahigi submitted that the prosecution's side alleged that the victim of rape was 17 years old but they failed to prove that fact. He said that the investigator who testified as PW2 just mentioned that the age of the victim was 17 years by relying only on the contents of birth certificate without sufficient explanation. In support to his argument he cited the case ***of Rwekaza Bernado V. Republic, Criminal Appeal No. 477/2016(Unreported)*** where it was stated inter alia:

"that sufficient explanation on the age of the victim is important in deciding the age of the victim".

He further submitted that although the birth certificate was tendered as exhibit P2, in the circumstances of this case only two witnesses were capable of testifying on the age of the victim, these are the victim and victim's mother.

The learned state attorney further submitted that the issue of penetration ought to be dealt with by the prosecution's side. Although the PF3 of the victim was produced and accepted as exhibit P.2, the learned state attorney was of the view that it did not state if there was any penetration and on top of that he said that the best evidence comes from the victim. According to him failure by the victim and victim's mother to be summoned and testify draw adverse inference on the republic's case. To support this argument he cited the case of ***Nkaanga Daud***

Nkanga V. Republic Criminal Appeal No. 316/2013 page 6, where, citing with approval the case of ***Aziz Abdallah V. Republic (1991) TLR page 11*** the court held inter alia that adverse inference must be drawn if some witnesses are not summoned to testify.

The learned State Attorney concluded his submission that the prosecutions side failed to prove its case to the standard required and he thus, prayed this appeal to be allowed.

The issue for determination in this appeal is whether the case against the appellant was proved beyond reasonable doubts.

This court went through the trial court's records as well as the submissions by the learned State Attorney who did not resist this appeal. From the records, it is clear that in convicting the appellant, the trial court's magistrate relied on the contents of the cautioned statement which was tendered without any objection by the appellant as exhibit P2. The trial magistrate was of the view that the best witness is an accused person who confess his guilty provided that a confession is beyond suspicion. He stated that in his cautioned statement, the appellant confessed at page 4 to have raped the victim and to him that was sufficient to establish ***actus reus*** and ***mens rea***. This court took time to go through the appellant's cautioned statement (Exhibit P.2) and noted that the appellant and the victim had love affairs. The appellant in his confession before PW.2 narrated how

he and the victim started their friendship and later on becoming in love affair. Further to that, the appellant narrated how on the fateful date the victim went at his house, begged him to accommodate her for a night after she was chased away by her parents. Also, the appellant narrated how his efforts to persuade the victim to go back to her parent's home failed as she insisted to remain thereat or else she would commit suicide. From the appellant's narration in a cautioned statement it is evident that if there was any fornication between the duo then the victim consented to it.

Since this court found that the victim consented to fornicate with the appellant it is thus important to see if there is evidence to prove that the victim was 17 years old when the incident occurred. During hearing of the case before the trial court, the prosecution's side tendered the victim's birth certificate collectively with the victim's PF-3 as exhibit P.2. The records also show that the said exhibits were tendered and read over collectively.

From exhibit P.2 this court noted two things of concern with regard to the victim's birth certificate. One, the prosecutions side did not call the victim or any of her parents to testify. It is trite principal that in Rape cases the best evidence is that of the victim. This principle is stated in the case of ***Selemani Makumba versus Republic, [2006] TLR 379***. As was rightly submitted by the learned state attorney for the respondent Republic failure to call the victim and her parents

draws adverse inference against the prosecutions' case (See ***Nkanga Daud Nkanga V. Republic, Criminal Appeal No. 316 of 2013 (unreported)***). Two, the victim's birth certificate which is the only evidence available to prove the age of the victim was tendered and read omnibusly with the victim's PF.3 as Exhibit P.2(collectively). In the case of ***Mathias Dosela @Adriano Kasanga V. R, Cr. Appeal No. 212/2019(unreported)*** citing the case of ***Anthony M. Masanga V. Penina (mama Mgasi) and Lucia (mama Anna), Civ. Appeal No. 118/2014 CAT***, it was held inter alia that;

"Admission of documents in a collective way or Omnibusly denies a person entitled to challenge the said documents an opportunity to challenge them".

In the present appeal, although the appellant did not oppose the tendering of the said exhibits this court is of the view that the appellant being a layman the said exhibits ought to be tendered and read one after the another. Also under the circumstances of this case, PW.2 was not a competent witness to tender the victim's birth certificate because firstly, he did not testify on how did the same come into his possessions and secondly, he was not capable of explaining its contents and respond to cross examination properly. Omnibus tendering and collective reading of the contents of Exhibit P.2 prejudiced the appellant and

therefore this court hereby expunge the said documents from the trial court's records.

Since the birth certificate is expunged from the trial court's record, then the prosecution's case lacks legs to stand on.

This appeal therefore succeeds, conviction is hereby quashed and set aside the sentence imposed on the appellant. I also order immediate release of the appellant unless he is lawfully held for other reasons.


A.Y. Mwenda

Judge

02.09.2021

This judgment is delivered in chamber under the seal of this court in the presence of the appellant Mr. Jovith Ishengoma and in the presence of the respondent Learned Counsel Mr. Emmanuel Kahigi.




A.Y. Mwenda

Judge

02.09.2021