

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MUSOMA SUB- REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO. 80 OF 2021**

*(Originated from criminal case No. 108 of 2020 of the District Court of  
Musoma at Musoma)*

**JOHN LUCAS @MALIMA..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

31<sup>st</sup> Aug and 28<sup>th</sup> Sept, 2021

**F.H. MAHIMBALI, J.:**

The late Kurt Cobain, an American Musician once said "***Rape is one of the most terrible crimes on earth and it happens every few minutes ...***". Mara region is no exception to this quote. In the Municipality of Musoma at Kiara area, a girl of 14 years and a standard six pupil of Kiara primary school who resides with her parents and her two siblings was a victim to this terrible crime. The victim in this case will be referred to as XY (to hide her identity).

On unknown dates of May, 2020 XY as a child was enjoying her right to play with the other children, then she was called by the

appellant who was their neighbour. She obeyed and went to listen to what he had to say. When she entered into the appellant's house, the appellant locked the door and undressed her and had sexual intercourse with her while seated on the coach. This act was very painful to XY, therefore she screamed but the appellant covered her mouth using his hand. The appellant threatened XY if she kept on screaming, he would kill her and he warned her not to tell anyone of what had happened. XY went home and never uttered a word to any living soul as she was afraid.

After a week had passed, as she was playing football with Nyakwesi her sister near the appellant's house, the appellant called her again. When she went, he gave her money and asked her to go buy for him 500 Vodacom air time recharge voucher. She bought the voucher and when she took it to the appellant who was at his place, the appellant pulled XY into his house and locked the door. Then he covered her mouth, undressed her and raped her two times. He threatened her not to tell any living soul and if she disobeys, he would kill her.

Three days later, when the victim was playing "KOMBOLELA", the appellant called her and sent her to buy for him buns (maandazi) of a thousand shillings. She went and bought the buns and when she

entered into the appellant's house, again he locked the door. As she was playing with her siblings, they had to stop and wait for her return so as to proceed with her for want of coram. However, to their surprise XY could not return timely and that they noticed that she was locked in the house of the appellant. They started calling her so that she could come out of the house and the appellant told them to leave as they were disturbing him with their noise. The appellant raped XY three times. The testimony of the appellant calling XY when she was playing with her siblings was corroborated by PW2 who also stated further that on the day the appellant sent XY to buy for him buns (mandazi). That, when she returned the buns, the appellant took the victim girl XY inside the house and then locked his door. Seeing this, they were interested to go and peep through the window to see what was happening there in. To their surprise they saw the victim (XY) blindfolded with a piece of cloth, naked and the appellant was having sexual intercourse with her. However, during cross examination PW2 stated that XY is the one who told her about the incident.

When XY returned home, her siblings inquired from her why she was crying inside the appellant's house and why the door was locked. She told them that the appellant had raped her. XY also informed her

father (PW4) and her aunt that she was raped by the appellant. PW4 informed their neighbour one Eugenia Ekama (PW3).

XY's aunt and PW3 took XY to Musoma police station. They were given a PF3. On 22/6/2020 at 13:00 hours XY was taken to the hospital and she was attended to by PW5 who is a doctor. After conducting her examination, the report showed that XY was raped and there were sperms and bruises on her vaginal part and she had no hymen. The PF3 was tendered in court and admitted as exhibit PE2.

In his defense testimony following a ruling of a case to answer, the appellant defended himself on oath and brought one witness (DW2) for his defense case. He stated that the case against him was fabricated by PW4. The reason being that, he bought flour for PW4's family instead of giving them money. On the other hand, his witness (DW2) stated that as the chairman of Kiara 'A' he received a complaint from the appellant, that he had issues with PW4. He called them at his office, where PW4 told him that the appellant was raping his daughter, while he was not there. DW2 tried to mediate the matter but PW4 used abusive language as he was mediating on rape issues.

Upon hearing the case, the trial court was dully satisfied that the appellant is guilty, thus accordingly convicted and sentenced the

appellant to thirty years imprisonment. The appellant was not amused with the conviction and sentence; hence he appeals to this court raising a total of six grounds of appeal contained in his petition of appeal. The grounds of appeal in verbatim are as follows;

- 1. That the Honourable trial magistrate erred to believe and rely on piece of evidence arising from implications of accused person.*
- 2. That the doctor's autopsy report and exhibit P.2 raises strong doubt and vitiates the accused implication in the offence of rape of the Miss X (PW1).*
- 3. That the trial magistrate erred in law and in fact in admitting the Medical Examination Report (PF3) which was recorded outside the statutory time.*
- 4. That the learned trial Magistrate erred in law and fact by convicting and sentencing the accused person to serve thirty (30) years imprisonment while he knew that the prosecution side has failed to prove the case beyond reasonable doubts.*
- 5. That the learned trial magistrate erred in law and fact to believe the hearsay evidence from the prosecution side while he knew that the victim testified before the court to be raped*

*three times in the month of May 2020 and PW3 Eugenia Ekama stated that the victim was raped 20<sup>th</sup> June 2020, PW4 Andrea Ekama testified that the victim was raped on 19<sup>th</sup> June 2020 and PW5 Dr. Anne Kisiri admits to receive the victim on 22<sup>nd</sup> June 2020.*

*6. That the trial court misdirected itself on point of law and fact for failing to analyze evidence adduced before it and therefore arrive at a wrong conclusion.*

When this appeal came for hearing, the appellant fended himself whereas the respondent enjoyed the legal services of Mr. Tawabu, State Attorney. The appeal was heard by audio teleconference from prison and NPS offices simultaneously.

During the hearing of the matter, the appellant asked the court to adopt his grounds of appeal contained in the petition of appeal as part of his appeal.

Replying, Mr. Tawabu, State Attorney submitted on the first ground, that the verdict reached by the trial court was proper. The witnesses were credible. To cement this he cited the case of **Mathias Bundala vs Republic** , Criminal appeal No. 62 of 2004 CAT at Mwanza at page 12 where it approved the case of **Goodluck**

**Kyando vs Republic** (2006) TLR 363, where the court held that "*it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness*".

He went further to state that in the case at hand, the appellant has not established anything of cogent reason to make those witnesses to be discredited by the court. The proceedings on cross examination are clear. Hence this ground falls short of merit unless the appellant had established it under section 146(2) of TEA Cap. 6, the ground would have made good sense.

In regards to the second ground of appeal, he submitted that he did not understand this ground thoroughly, as there was no autopsy in this case. However, considering the ground of appeal on the other angle, the appellant might have mixed it up with the PF3. Legally speaking there is no specific time to examine the victim by PF3 until when it is the right time to do so. In the case at hand after the offence of rape had been known to have been committed that is when the examination by PF3 was done. Hence, ground no. 2 and 3 are bankrupt of any merits.

On the fourth ground, the appellant's grief is that the trial magistrate erred in law and fact by convicting and sentencing the accused person to serve 30 years imprisonment while the prosecution did not prove the case in legal standard of proof beyond reasonable doubt. The learned state attorney responded by stating that the trial court's records (proceedings and judgment) is clear on why the appellant was convicted. The judgment on page 11, the last paragraph shows how the prosecution proved the matter beyond reasonable doubt. Thus, the 30 years imprisonment awarded to the appellant was after the case has been well proved as per the law and upon conviction being entered following the guilty of the accused. He prayed this ground of appeal be dismissed as well.

On the fifth ground of appeal, the appellant's grief is that the trial court believed hearsay evidence. The victim testified before the court that she was raped three times in the month of May, 2020 and PW3 Eugenia Ekama stated that the victim was raped on 20<sup>th</sup> June, 2020, while PW4 Andrea Ekama testified that the victim was raped on 19<sup>th</sup> June, 2020 whereas Dr. Annie Kisiri admitted receiving the victim on 22<sup>nd</sup> June, 2020. Mr. Tawabu responded that this ground is conflicting and it lacks merits as in rape cases the best evidence

comes from the testimony of the victim. However, the other witnesses may corroborate the testimony of the victim. He went further to state that, in this case the other witnesses did not prove the rape case but they explained the circumstances surrounding the commission of the said rape. What they did in this case is explaining the role they played in dealing with the matter not that they witnessed the commission of the offence. At page 20 of the typed proceedings, PW4 states when he got the information and on page 24 of the typed proceedings, PW5 states when she received the victim. The dates mentioned by these other witnesses are not the date of the commission of the offence but the dates they became aware and what they acted. Hence, this ground is out of place and bound to fail.

Regarding the sixth ground of appeal, the appellant's grievance is that the trial court failed to analyse the evidence adduced before it and therefore arrived at a wrong conclusion. Replying, Mr. Tawabu stated that as per the judgment of the trial court dated 28<sup>th</sup> March, 2021 from page 11 it shows how the trial court summarized, analysed the case for both sides and reached a conclusion of the case. He also found this ground bankrupt of merit

and prayed it be dismissed. In the final analysis, he found this appeal devoid of merits and prayed it be dismissed in its entirety.

Having gone through the court's records and hearing the rival submissions of the parties, the ball is now on the court to determine if this appeal is meritorious.

On the first ground the appellant's main grief is that the trial court erred in believing and relying on the evidence adduced before the court. As earlier narrated in the facts of this case, PW1 was the victim and she stated how on different dates she was raped by the appellant. She also knew the appellant before as he was their neighbour and he used to send her on small errands. The other witnesses PW2, PW3, PW4, and PW5 were all told about the incident by the victim (XY). During the hearing PW2 stated that it was the appellant who raped XY, but when cross examined, she stated she was told about the rape by XY. Gathering from their testimony, it is only the victim who is in a better position to tell what happened against her in respect of this reported criminal incidence. I am at one with the learned state attorney on his submission on the case of **Mathias Bundala vs Republic** (supra), that every witness is entitled to credence. The law is very clear that an appellate court can not interfere with the trial court's decision on the

credibility of the witness unless there was miscarriage of justice and the trial court is supposed to state the reason for not believing that evidence. The reason of the appellate court not interfering with the evidence and credibility of the witnesses is because the trial court had the advantage of hearing, seeing and assessing the demeanor of the witnesses. There is a plethora of decisions on this matter. Just to mention, but a few are the case of **BAKIRI SAIDI MAHURU V. THE REPUBLIC**, Criminal Appeal no. 102 of 2012 at page 6 where it cited the case of **OMARY AHMED V. R (1983) TLR 32 (CAT)** where the court held;

*the trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility.*

In the case at hand the trial court had the advantage of seeing the demeanor of the victim and other witnesses and it found them to be credible. I find myself not in a proper position to hold otherwise at this in the absence of strong and convincing ground to hold that. Having stated the above this court holds that the first ground of appeal is devoid of merit and it fails.

On the second and the third grounds of appeal, there was no autopsy hence this point will not detain us. On the point that the PF3 was recorded out of the statutory time, this point is baseless as there is no known law that stipulates on the time a PF3 should be recorded. These grounds are devoid of merits and are dismissed.

The fourth complaint of the appellant is that the prosecution did not prove its case beyond reasonable doubt. In the case at hand the appellant was charged and convicted of the offence of rape c/s 130(1)(2)(e) and 131 (1) of the Penal Code [ Cap 16 R.E 2019]. In order to establish the offence of rape and to be more specific statutory rape as it is against the girl below 18 years the prosecution has to prove penetration and age of the victim. At page 13 of the typed proceedings the victim stated that she was born on the 4<sup>th</sup> of August, 2007, hence she was 14 years old and this was corroborated by PW4 who is the father of XY. The law is settled that issue of age may be proved by the victim, her parents or medical practitioner. In this case, the victim deposed her age when she promised the court to tell the truth and her father also testified that she was born on the 4<sup>th</sup> of August, 2007. As this testimony was not challenged during cross examination, therefore, the age of the victim was well proved by the prosecution. On the ingredient

of penetration, the law is settled that the best evidence to prove penetration comes from the victim 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 **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."*

By the way, penetration however small, is sufficient to constitute rape.

In the case at hand, XY being a minor and after promising to tell the truth in compliance to section 127(2) of the Tanzania Evidence Act, stated that the appellant took his manhood and inserted it into her vagina on different dates in May, 2020. Also, there was no possibility of mistaken identity as she knew the appellant very well as he used to send her on errands and he was their neighbour. Also, the doctor (PW5) corroborated her evidence as she reported that XY was raped and there were some sperms and bruises in her private parts and she has no hymen. From this I agree with the learned state attorney that the prosecution case was proved beyond reasonable doubt. In fact, I am aware that the position in **Selemani Makumba's** case (supra) is not a suggestion that whatever a victim of rape testifies be taken as gospel truth but only when the victim's sole testimony is absolutely trustworthy, unblemished and of sterling quality, conviction is based. Thus, in the absence of material contradictions from the evidence of the prosecutrix which say has not been corroborated by medical evidence, there is no other independent and cogent evidence to connect the accused with the guilt, there could be no scope to sustain the conviction. However, in the case at hand, I am satisfied that ordinarily, victim's testimony was enough to convict the accused person of rape because it was absolutely

trustworthy, unblemished and of sterling quality evidence in which conviction is safely based.

On the fifth ground, the appellant's grief is that the trial court believed a hearsay evidence as PW3 stated that XY was raped on 20<sup>th</sup> June, 2020 while PW4 stated that XY was raped on 19<sup>th</sup> June 2020 and PW5 received the appellant on 22<sup>nd</sup> June, 2020. I have gone through the court's record to be specific, the typed proceedings, at page 18 I will produce what PW3 stated

*" I reside at Buhare Mugaranjabo area as a peasant , on 20/06/2020 at 15:00 hours while at home, I was called by ANDREW EKAMA and informed me that ... was raped by our neighbour at Kigera area JOHN LUCAS ...".*

Gathering from the above , PW3 stated clearly that on the 20/06/2020 she was informed by Andrew Ekama that XY was raped by the appellant. With all due respect, it is my humble opinion that the appellant has misconceived this point. Also, PW4 at page 20 of the typed proceedings stated as follows'

*"...On 19/6/2020 at 17:30hrs while at home being sick my young lady .... Was raped by JOHN LUCAS ...".*

Going through the charge sheet, the prosecution alleged that on diverse dates of May, 2020 at Kiara area the appellant raped XY. Hence PW4's

evidence contradicts the charge levelled against the appellant as he states that on 19/6/2020 XY was raped. The law is settled that contradictions amongst witnesses cannot be avoided in any particular case. However, the court has to consider if the contradictions go to the root of the matter. In the case at hand PW4's testimony was not used to convict or sentence the appellant as he was informed and he only testified on what he did after obtaining the information. In that regard, it is my humble view that this contradiction does not go to the root of the matter. The issue of Dr. Annie (PW5) receiving XY on 22<sup>nd</sup> June 2020, I also believe it does not go to the root of the matter as the offence is proved by the victim. Therefore, the fifth ground of appeal is devoid of merits and it is dismissed.

In regards to the sixth ground of appeal, the appellant's complaint is that the trial court failed to analyze the evidence adduced before it. I have gone through the trial court's judgment and it is safe to state that at page 10 to 11 the trial court analyzed the evidence that was adduced before it. Therefore, this ground is bankrupt of merits and it is dismissed.

All said and done, since all grounds of appeal are devoid of merits, this appeal is dismissed in its entirety. Conviction and sentence dully entered are hereby upheld and enhanced respectively.

It is so ordered.

DATED at MUSOMA this 28<sup>th</sup> day of September, 2021.



F. H. Mahimbali

JUDGE

28/09/2021

**Court:** Judgment delivered this 28<sup>th</sup> day of September, 2021 in the presence of the Appellant and in the absence of Respondent and Miss Neema P. Likuga – RMA.



F. H. Mahimbali

JUDGE

28/09/2021

**Court:** Right of appeal explained.



F. H. Mahimbali

JUDGE

28/09/2021