

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA**

**HC. CRIMINAL APPEAL NO. 03 OF 2021**

*(Arising from Criminal Case No. 206/2020 of Chato District Court)*

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**MAJALIWA S/O ZAKARIA CLAUD .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*12/08/2021 & 17/09/2021*

**W. R. MASHAURI, J;**

The District court of Chato meted out to the appellant Majaliwa Zacharia @ Claudi a sentence of 30 years' imprisonment upon convicted him for the offence of rape c/s 130 (1)(2) (e) and 13(I) of the Penal Code Cap. 16 R.E. 2019.

It is the prosecution's evidence on record that, between the period as from August, 2020 and September, 2020, at Mbuye village, within Chato District in Geita Region, the appellant did carnal knowledge know one Agness d/o Peji a girl of 15 years of age.

Being aggrieved with both the conviction and sentence, the appellant has now come to this court. He has fronted four grounds of appeal namely: -

1. That, the trial court erred in law and fact to convict the appellant without proving that, the appellant did rape the victim who said was her first time to do sex and that she did sex with others like Elisha. That, if the appellant was found not guilty for the 2<sup>nd</sup> count of impregnating the victim then why was found guilty for the first count of rape without proving that he raped the victim.
2. That, the trial magistrate erred to convict and sentence the appellant without sufficient evidence on the age of the victim PW1 and PW2 who testified that the victim is 15 years of age while the doctor mentioned the victim to be of 16 years of age.
3. That, the trial magistrate did not pass the evidence produced before the court of which the doctor said that the sperms was that of the appellant/accused but there was no body who took the infant to hospital from the accused. He therefore prayed the court to allow his appeal, declare the decision a nullity and acquit the prisoner from prison custody.

The prosecution evidence was to the following effect, the victim Agness Peji (PW1) as she was told by her mother, her age was 15 years. She was born on 12/07/2005 and she knew the accused who is her neighbor for the name of Majaliwa and was living in her home village Mayi with his grandmother.

That, one time was told by the appellant that he loves her and she positively responded. And for the period from August, 2020 and 18<sup>th</sup> September, 2020, she ever met with the appellant in a street when she was coming from Kariakoo street at Mbuye village and he promised her to meet on another day. She met with Appellant on another day she did not remember the date. She met the appellant along the road at about 17.00hrs and he told her to meet him at his place where she knows and she went there at about 20.000hrs in August 2020.

Upon reached the house of the appellant she knocked at the window of a house he was living with his grandmother, but in different rooms. He had shown his room earliar before. He opened the door and she entered inside his room and he closed the door and slept with the appellant on a mattress and the appellant told her would use a condom in doing sex. She lied down supine on a mattress all being naked. The accused wore a condom

and raped her. She did not feel anything as it was not her first time to make sex, she had first made sex with Elisha in 2019. And upon done sex she slept there in the appellant's room till next morning.

While sleeping she heard voices calling the appellant from outside requesting him to open the door but he refused and started to put on his clothing's she also put on her clothing.

The appellant went to the sitting room and tried to ran away and she also went to the sitting room. People who were outside entered and the appellant held a machete but she deprived him with it and threw it outside. The persons she saw at the scene of crime were her uncle Mawazo, Mbuye hamlet chairman and Gordian of Mbuye village and they took them to police station at about 00.00hrs in the morning and Majaliwa was taken to hospital so as herself. She did sex with the appellant several times.

PW2 Simon William said the victim (PW1) is his cousin schooling at Mbuye Primary School in Std VI and was born on 12/7/2005 and now is 15 years of age.

On 17/09/2020 she met with his sister and told him that she is currently not used to sleep home. She is sleeping to other persons. He

promised his sister to make a follow-up at 20.00hrs at his mother's house and told him that the victim was not at home and had an information that the victim had used to visit the appellant, he went there at about 22.00hrs and through the window of the house of the appellant, he saw the appellant and the victim inside shareng talks and he used a mobile phone flash light he reported the matter to the village chairman and later to police station and the appellant was arrested while together with his daughter (the victim). Aloyce Joseph (PO3) said while was at home at 23.35hrs was visited by the village chairman. The appellant was arrested together with a school girl (the victim) sleeping. The appellant refused to open the door.

PW4 Frank Rwechungura said is a medical doctor stationed at Chato District hospital. That, on 18/9/2020 at 07:30hrs was at hospital where he works. During that time the victim was taken to him by a woman police officer and she had a PF.3 for examination as she was alleged to be raped. He examined the victim and found that she was raped. She had lost her virginity and her laymen was not there. The PF.3 was admitted in court as exh. PI.

In defence the appellant Majaliwa said while at home on 18/9/2020 at 14hrs was visited by three men who were police officers. He was arrested and put under custody at police station where he was not told of his fault.

That, in her evidence the victim said the incident took place at 20:00hrs, the victim said her age is 15 while the Doctor (PW4) said the victim is 16 years of age. They therefore gave contradictory evidence.

In his submission in support of the appeal, Mr. Hemed Senior State Attorney said that the contradictory evidence on the age of the victim is minor. The victim said is 15 and the doctor (PW4) said is 16 both ages of which even if the victim was raped at 16 yet the appellant is guilty for the offence of rape as the victim is below 18 years. he therefore prayed the court to dismiss the appellant's appeal.

The issue is whether the victim was raped by the appellant.

In her evidence, DW1 said is resident of Mbuye village even the appellant said in his defence is resident of Mbuye village. They are therefore well known each other.

In her evidence, the victim (DW1) said was raped by the appellant who was her long time paramour doing sex.


It is currently settled principle that:

*"The true evidence of rape has to come from the prosecutrix (victim) herself. A woman where consent is not required and a girl where consent is immaterial."*

In this matter, the victim said the appellant was her long time paramour who have ever done sex intercourse for more than six times. Being a girl of 15 and/or 16 years of age, her consent if any, was therefore immaterial.

The appellant's appeal is hereby therefore dismissed.



  
**W. R. MASHAURI**  
**JUDGE**  
**17/09/2021**

Date: 17/09/2021

Coram: Hon. W. R. Mashauri, J


Appellant:

Respondent:

B/c: Elizabeth

**Court:** Judgment delivered in court in absence of all parties on line this 17/09/2021. Parties to be informed of the outcome and explained the right to appeal.



  
**W. R. MASHAURI**  
**JUDGE**  
**17/09/2021**