

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 116 OF 2021

(Originating from the District Court of Mkuranga at Mkuranga, in Criminal Case No. 55 of 2020, Hon. K.P MROSSO-RM dated 22nd day of January, 2021)

CHARLES KASSIM@KITOBE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 11/8/2021

Date of Judgment: 27/8/2021

ITEMBA, J.

In the District Court of Mkuranga at Mkuranga, the appellant, CHARLES KASSIM@KITOBE was charged with and convicted of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, [CAP 16 R.E 2002]. He was sentenced to life imprisonment and ordered to pay the victim a compensation of Tanzanian shillings five hundred thousand (Tsh. 500,000).

It was prosecution's case that on or about 10th February 2020 at Mkuranga area within Coastal region, the appellant had unlawful sexual intercourse with XD, a girl of 17 years.

In proving its' case the prosecution paraded 4 witnesses, tendered a medical examination report and a victim's birth certificate (Exhibit PE 1 and PE2 respectively). The appellant testified on oath but did not call any witness. XD who testified as PW2, stated that she is student who has finalized her ordinary level education and was waiting to join high school. She knew the appellant as her co-tenant. On 26/12/2020 the appellant entered their living room and seduced her with a promise to pay her school fees and provide her with other needs. Later that day, PW2 went into the appellant's room, he undressed her and they had sexual intercourse. She stated further that in the morning of 10/2/2020 her mother, PW1 has taken her younger brother to board a school bus. The appellant phoned PW2 and they met at the market place. The appellant picked and took PW2 to one Mama Sara. He told Mama Sara to stay with PW2 as she was his niece. The said Mama Sara later sensed that PW2 is the appellant's lover and at around 8pm on the same day, she chased PW2 away. The appellant took PW2 to 'Kwa Mboya' Guest House where they spent a night. PW2 stated that at the guest house she had sexual intercourse with the appellant. PW2 states further that in the following morning, the appellant took her to Mkuranga Police Station to the Officer Commanding Station, herein OCS. The OCS had told him that her mother was looking for her. The appellant threatened PW2 not to disclose what happened between them, he asked PW2 to state that she slept at the bus stand under the mango tree. At the police station, PW2 met PW1, and PW2 justified her disappearance according to the appellant's coaching. Shortly thereafter, PW2 decided to tell the truth that she was with the appellant whereas she was taken to the hospital by PW1 for medical test.

PW1 who the victim's mother, corroborated PW2's evidence to the extent that the appellant is their co-tenant and that on 10/2/2020 her daughter, PW2 disappeared and that she found her at the police station on the following day; and that she took her to the hospital. She stated further that upon PW2's disappearance, she asked the appellant who claimed to know nothing about it. PW1 suspected that the appellant was involved after noting that the appellant had bought PW2 a sim card. On 10/2/2020 PW1 reported the appellant to the OCS Mkuranga Police Station, yet the appellant maintained to know nothing about PW2's whereabouts. On 11/2/2020 PW1 was called by OCS and informed her that PW2 was brought to the station by the appellant. The OCS arranged for a settlement between PW1 and the appellant and three police officers whose details were undisclosed before the Court.

PW4, WP. 2867 D/SGNT. BEATRICE who was the investigator tendered the birth certificate of PW2 which showed that she was 17 years at the time of the incidence. A medical examination was done by PW3, Herswida Musa, who found that the victim was not pregnant and she did not have sexually transmission infections. She however observed that PW2 was carnally known. PW3 tendered a PF3 to that effect.

In his defence, the appellant denied to have committed the said offence. He stated that on the material date, he was working in a night shift, the following morning he was informed by PW1 about PW2's disappearance. He called PW2 who informed him over the phone that she was at the bus station, he picked her and took her to the police station.

The learned trial magistrate found prosecution evidence was sufficient to prove that the appellant actually had carnal knowledge with PW2. The appellant was convicted and sentenced as mentioned earlier on.

Aggrieved with trial court decision, the appellant filed the present appeal. He had raised eleven (11) grounds of appeal, however in his written submission he re-grouped the said grounds and narrowed them into three (3). I have gone through the appellant's petition of appeal and written submission and the grounds can be condensed into the following:

***First,** there were procedural irregularities in admission of PF3 (Exh. PE-1) and the victim's birth certificate (Exh. PE-2) as they were tendered by the Public Prosecutor.*

***Secondly,** there was contradiction on the dates on commission of offence between PW1 and PW2.*

***Thirdly,** that the prosecution failed to call material witnesses; a guest house attendant and Mama Sara (the appellant's lover) and the 'OCS' who were the material witnesses.*

***Fourthly** the evidence was irrelevant and that the case against the appellant was not proved beyond reasonable doubt.*

*And **lastly** the trial magistrate 'added salt' in the evidence of PW3 as there was no evidence of bruises in the victim's sexual organs.*

At the hearing, the appellant appeared in person while Ms. Jenifer Masue, learned State Attorney represented the respondent.

The appellant argued his appeal by way of written submission. The respondent opted to proceed orally.

Arguing the 1st ground, the appellant complained about procedural irregularities by prosecutions in tendering of exhibits PE1 and PE2, namely the PF3 and victim's birth certificate respectively. He stated that the same were tendered by the public prosecutor an act which was incorrect.

In his 2nd ground, the appellant states that there is variance of dates between the victim (PW2) and PW1, PW3 and PW4 which raises doubts on whether the said rape was committed on 10/2/2020.

The 3rd ground refers to prosecutions' failure to call the guest attendance, Mama Sara and the OCS as witnesses. The appellant argues that it was important for the prosecution to established how was the victim taken to Mama Sara's place to the Guest house and to the police station. To cement on his preposition, he cited the case of **Aziza Abdallah vs. R** [1991] T.L.R 71 which states among others that the court may draw an adverse inference to the prosecution, if it fails to call a witness who has material facts and who is within reach. He then urged this court to invoke section 122 of TEA which empowers the court to presume existence of certain facts. He submitted that the said omission by prosecution raises a reasonable doubt which should benefit the appellant.

The fourth ground touches the weight of prosecution evidence in its totality; the appellant's states PW1 addressed the appellant as KASSIM s/o CHARLES and CHARLES s/o KASSIM @ KITOBE. The appellant also complained that PW2 did not describe how the appellant's room looks like.

The last ground relates to the testimony of PW3, that the trial magistrate 'added salt' in the evidence of PW3 as there was no evidence of

bruises in the victim's sexual organs while the records are completely silent on that.

In reply, Ms. Masue stated that she supports the conviction entered by the trial court, however she had reservation to the sentence imposed. She contended that upon conviction the appellant was sentenced to life imprisonment and was ordered to pay a fine amounting to Tshs. 500,000/= . It was the contention of the learned state attorney that as the victim aged 17 years at the time of commission of the offence, the proper sentence for the appellant is thirty (30) years imprisonment as per section 131 (1) of the Penal Code [Cap 16 RE: 2019] and not life imprisonment. She then prayed for the court to reduce the sentence against the appellant.

Addressing the first ground, Ms. Masue explained that, the PF3 (Exh. PE-1) and birth certificate (Exh. PE-2) were properly tendered in court as they were tendered by competent witnesses the medical Dr and the investigator. Responding to the 2nd ground, Ms. Masue stated that the evidence referring to the date of incidence relies on the victim herself where at page 12 of proceedings she mentioned that she was raped by the appellant twice, on 26/12/2019 and on 10/22020. She added that PW1 mentioned that her daughter went missing on 10/2/2020 because she (PW1) did not know of the incidences of 26/12/2020 therefore there is no contradiction and if any it does not go to the root of the case.

Ms Masue was of the opinion that the absence of the guest attendant and Mama Sara as witnessed did not affect prosecution's evidence as PW4 inspected the attendance register at the Guest House and found the appellant name as a guest who visited the place on 10/2/2020 and that the

oral evidence by the investigator on that aspect was satisfactory. She further stated that Mama Sarah was not a key witness as she was not at the crime scene. She argued that even in the absence of the said register, in rape cases the best evidence is that of the victim and referred the court to the case of **Tumaini Mutayoba v R** criminal appeal no 217/ 2002 at page 14. To cement her argument, she cited section 143 of the Tanzania Evidence Act (TEA), [Cap 6 RE: 2019] which provides that in any case no exact number of witnesses is required to prove a fact.

On the claim that the case was not proved beyond reasonable doubt, Ms. Masue highlighted that section 130 (1) (2) of the Penal Code which creates the offence of rape, stating that one of the key elements is penetration. She relied on the evidence of PW2 at page 13 and 14 and the PW3 as well at page 18, which proved that there was penetration. That quoting from the testimony of the Doctor that "I also examined her and found that she was carnally known."

In his rejoinder, the appellant did not have much to add. He insisted that Mama Sara was an important witness to be called, and regarding the attendance register, what was brought in court was a page of the Guest House register book and not the book itself. The said page had his name without his signature.

I have objectively considered the grounds of appeal and both parties' submissions. Having so done, the central issue for determination by this court is ***whether this appeal is meritorious.***

Regarding the 1st ground, I agree with the learned state attorney that it was PW3 and PW4 who tendered the PF3 and birth certificate respectively. Looking at the proceedings at page 19, the 6th line reads

“PP: “I pray PW3 to tender the PF3 as an exhibit” and at page 22 the 4th line reads **“PP:** *I pray PW4 to tender the birth certificate of XD as an exhibit”.*

In this statement there is no suggestion that the public prosecutor was asking to tender the relevant exhibits himself but for PW3 and PW4 respectively, to tender them. A similar situation occurred in the case of **William Kasanga v R.** Criminal Appeal No. 90 of 2017 (unreported) where during the hearing, the public prosecutor stated: *“I pray your honour that PF3 be tendered as an exhibit.”* And the Court decided that:

“Looking at the phrase by the public prosecutor, we are satisfied that, it does not show that the prosecutor was asking to tender it himself but he was praying to the trial court for the PF3 to be tendered as exhibit by someone else or rather a person other than himself”.

Therefore, the PF3 was tendered by the competent witness, PW3, a doctor who examined the victim (PW2) likewise, the birth certificate of the victim was tendered by its’ custodian who was PW4, the police investigator. Further to that, both documents were read out loud before the Court. This means the appellant understood the essence and relevancy of the said PF3 and birth certificate; and as per the records the appellant was given an

opportunity but he did not object for the same to be admitted as exhibits. Thus, there was no irregularities in the admission of exhibits PE2 and PE3. As to the guest house register, it was not admitted during trial therefore it cannot be relied upon. The first ground is dismissed.

As regard the 2nd ground, I agree with the learned Senior State attorney that there is no variance on the dates of commission of offence between the particulars on the charge sheet and the prosecution witness. As stated by the learned Senior State Attorney, the trial court relied on the evidence of the victim, PW2 who stated at page 13 of the proceedings that she was carnally known twice on different dates, on 26/12/2019 and 10/02/2020. However, PW1 mentioned only 10/02/2020 because she might not have been aware that PW2 had been carnally known by the appellant on 26/12/2019. As the records stands, the charge was read over to the appellant on 18/2/2020 and he pleaded not guilty, thus he was aware of the nature of the accusations that he was facing him which include the date of the alleged commission being 10/2/2020. This date which features in the chargesheet has been mentioned consistently by PW1 and PW2. Therefore, there is no contradiction of the dates in the prosecutions' evidence.

For that reason, the fact that PW2 did mention the exact date and also another date which was unknown to the rest of the witnesses, this cannot affect the conduct of the trial. Henceforth, the second point of grievance has no merit.

As regard the 3rd ground, being led by PW1'S testimony, based on records, the evidence by Mama Sara relates to what happened at Mama Sara's home prior to the commission of the offence by the appellant. That,

before going to the said Guest House, the appellant visited Mama Sarah together with PW2. However, the appellant is charged with the offence which took place at Kwa Mboya Guest house and Mama Sarah was not there. Mama Sara was not a necessary witness to establish the offence of rape against the appellant. The same applies to the guest attendant. Both were not 'material' witnesses as termed by the appellant because their testimonies were not relevant to establish the charge against the appellant. As correctly submitted by learned state attorney, the Evidence Act section 143 of the Tanzania Evidence Act which states that there is no exact number of witnesses required to prove a fact and that what is required is the credibility of the evidence. See also: **Yohanis Msigwa v. Republic**, [1990] TLR 148; and **Hassan Juma Kanenyera v. Republic** [1992] TLR 100).

Besides, the appellant had an opportunity to call Mama Sarah, whom they were closed related, as his witness so as to contradict the prosecutions' evidence as he desired to, but he opted not to.

As regards to the OCS- Mkuranga Police Station, I agree with the appellant's submission that he was an important witness because he/she is the one who is said to have received the appellant when he brought the victim at the police station. The evidence is also silent on how the appellant was arrested. PW4 who is the investigator, apart from tendering the victims' birth certificate, he did not explain if it was the said OCS who assigned/handed over to him investigation of this matter. Nevertheless, the absence of the OCS as witness does not affect the central fact that of this case. It is an omission which does not go to the root of the case as mentioned earlier

on there is still another evidence by the victim herself which is strong enough to establish the offence of rape against the appellant.

The fourth ground is about how the prosecutions witnesses referred/identified the appellant, of which without using much energy, both names KASSIM s/o CHARLES and CHARLES s/o KASSIM @ KITOBE were referring to the appellant only that they were used interchangeably by PW1. The appellant did not seem not to understand the two names. He did not raise the issue of names during the trial. And as correctly sated by Ms Masue the identity of the appellant was not in question as the victim knew the appellant very well by name and appearance as both were co tenants. Likewise, description of the appellant's' room was irrelevant because the said room was not the crime scene. The victim mentions to have entered the appellant's room on 26/12/2019 but the charge sheet speaks about the incidence of 10/2/2020 which happened at Kwa Boya Guest House. This ground is therefore dismissed.

I partially agree with the appellant in the last ground which refers the evidence of PW3. Having gone through Exhibit PE 1 which is the PF3, bruises are not reported. As regarding the description of the 'physical state of and any injuries to the genitalia', the PF3 states "*there is penetration, it allows one finger*". It goes further and state "*no presence of venereal infections, no spermatozoa seen*". Briefly, this is what was reported. Therefore, the issue of bruises was not mentioned during trial it was indeed an added salt as stated by the appellant. These details were so important for the court to satisfy itself on the weight of the expert evidence given by PW3. What the trial magistrate relied was PW3's testimony at page 18 of proceedings, she

that “*I examined her and found that she was carnally known*” which was a shallow explanation. What helped her to arrive into that decision is not stated. This is my opinion was such a vague explanation from an expert, more details were expected to qualify the said observation that PW2 was carnally known. This situation creates shortfalls in PW3 evidence and the court finds it dangerous rely on it.

Once the evidence of PW3 is disregarded, the unshaken evidence remains to be that of PW1 and PW2. The question is the evidence of PW1 and PW2 and Exhibit PE 2 credible enough to warrant appellant’s conviction?

In a recent decision of **Majaliwa Ithemo vs. Republic**, Criminal Appeal No. 197 of 2020 (Unreported) it was decided that the best evidence is that of the victim and for such evidence to be relied upon, it must be credible and reliable. The Court of Appeal at **page 9**, made it clear that;

“...In *sexual related trials, the best evidence is that of the victim* as per our decision in *Selemani Makumba vs. R*, [2006] TLR 379. *We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point...*”[Emphasis added]

PW2 mentioned the appellant, who had sexual intercourse with her twice on 26/12/2019 and on the fateful date of 10/02/2020 at Kwa Boya Guest house. She explained how the two had sexual intercourse that they undressed themselves, and took bath, they laid on bed and the appellant

took his penis and insert it into her vagina. PW2 has also expressed how they started their relationship back in December 2019. The testimony given by the victim, PW2 who is the eye witness is sufficient to prove that there was penetration as she articulated on how the two did sexual intercourse. PW2's testimony has been corroborated with PW1 who reported PW2 being missing on the material date and the appellant bought PW2 a sim card to enable the two to have private communication. PW'2 birth certificate, Exhibit EP2 has proved the age of the victim being below 18 years. Nothing in PW2's evidence suggests that PW2 was not a credible witness.

On the basis of the foregoing, the appeal against conviction fails and therefore, I hereby dismiss it.

With regard to the sentence, I agree with the learned Senior State Attorney that the same is illegal. Under section 131 (3) of the Penal Code, the punishment of life imprisonment could only be proper if the victim (PW3) was under ten (10) years old. The proper imprisonment term for the appellant was to be thirty (30) years. The life sentence imposed on the appellant by the trial court is therefore, set aside and substituted therewith, the sentence of thirty (30) years of imprisonment as provided by the law. The remained order as to fine, remains undisturbed.

It is so ordered.



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L. J. Itemba

JUDGE

25/08/2021

Judgment read in the presence of the Appellant in person, Ms. Masilamba Record Management Assistant and in the absence of the Respondent.



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L. J. Itemba

JUDGE

27/08/2021

Right of appeal explained.



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L. J. Itemba

JUDGE

27/08/2021