

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SUMBAWANGA
AT SUMBAWANGA
CRIMINAL APPEAL NO. 60 OF 2021

*(From District Magistrate's Court of Sumbawanga at Sumbawanga,
Criminal Case No. 17 of 2021)*

DAVID S/O JOSEPH.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

9th September & 12th Nov, 2021.

NDUNGURU, J.

The appellant, David s/o Joseph was charged at the District Magistrate's Court of Sumbawanga at Sumbawanga with the offence of Rape contrary to Section 130 (1), (2), (e) and Section 131 (1) of the Penal Code, Cap 16 (R.E 2019). It was alleged by prosecution that on 16th January, 2021 at Ilemba village within Sumbawanga District and Region of Rukwa the appellant had carnal knowledge to one **GG** a girl of 17 years of

age. The names are hidden to protect her identity. Upon trial the court being satisfied that the prosecution has discharged the duty of proving the case beyond reasonable doubt the appellant was convicted and sentenced for 30 (thirty) years imprisonment.

Briefly, the prosecution case in which the appellant conviction was grounded is as follows: PW3 is the biological father of the victim. His testimony was that, the victim was born in 2003. She was then 17 years old. He went on telling the court that the victim was born with health complications. She was experiencing chest pain and headache, waist problem and the breasts were not growing. That he got information that the appellant with his fellow were traditional healers commonly known as Lambalamba. That having paid 80,000/= as treatment fee he instructed PW2, the mother of the victim to take the victim to the appellant for treatment. PW3 told the court that PW2 took the victim to the appellant for treatment. That on 16/01/2021 while working at his shamba the victim rushed to him is telling him to have been raped by the appellant. PW3 testified that he immediately reported the matter to Kitongoji chairperson then to the police where the victim was given PF3 for medical examination

and treatment. That he took the victim to Ilemba dispensary for medical examination.

PW2 is the mother of the victim. Her evidence was that on 16/1/2021 she took the victim to the appellant a traditional healer who was living at Ilemba village. That upon arrival, the appellant welcomed them in the hut where he was alone. That the appellant asked PW2 go out so that he may attend the victim. PW2 told the court that she left out leaving the two in the hut. The witness told the court that she stayed outside for about an hour. Then the victim came out while crying. That when asked what had befallen her; the victim replied that the appellant had sexual intercourse with her while the two were in the hut. PW2 said she took the victim home and reported the episode to PW3 (her husband).

Testifying on how the incident happened, the victim (PW1) told the court that upon arrival to the appellant, her mother was taken out. She remained with the appellant in the hut. The appellant smeared the substance on his fingers alleging to be medicine. He undressed her. He inserted the smeared fingers into her vagina pretending to apply.

It was a further evidence of the victim that, the appellant undressed himself and fell the victim down and inserted his penis into her vagina.

That she tried to scream but the appellant shut her mouth by his palm and managed to have sexual intercourse with her. The appellant warned her not to reveal the incident. Having got out the hut the victim told her mother what had transpired then her mother reported to the father and finally the matter was reported to the police station. The victim was taken to the Dispensary where PW4 attended her.

PW4 told the court that having received the victim she medically examined her. The examination result was that the victim had bruises in her labia majora and minor majora. He also observed that the victim's vagina was open. No hymen indicating that something blunt had penetrated therein.

Fended himself the appellant vehemently distanced himself from the offence charged. He told the court that he was arrested on 16/01/2021 on his private walk at Ilemba. He was sent to the police station where he was notified of the incidence of rape. He also met the victim at the police station. While denying to have committed the offence the victim insisted to have been raped by him. The appellant was then arraigned for the offence.

Dissatisfied with the conviction and sentence imposed upon him, the appellant is now appealing to this court against both. In his memorandum

of appeal, the appellant has raised five grounds of appeal which I reproduce as hereunder:

- 1. The offence of rape was not proved beyond reasonable doubt as required in the criminal cases.*
- 2. That, the evidence of PW1 and PW2 was not credible since they failed to report the incident to the local leaders where appellant was residing.*
- 3. That, failure by PW2 not to query out the appellant's action to PW1 is denting the prosecution's case credibility.*
- 4. That, the defence was rejected without proper cause.*
- 5. That, analysis and evaluation of the evidence on record was poorly done that caused unfair decision, PW3 was not credible.*

When the appeal was called for hearing, the appellant appeared in person while Mr. John Kabengula represented the respondent/Republic. The learned State Attorney vehemently resisted the appeal. Arguing for his appeal, the appellant had no substantial submission. He rather prayed the court to adopt his grounds of appeal and consider his appeal.

Resisting the appellant's appeal Mr. Kabengula the learned State Attorney was of the argument that, all five grounds raised by the appellant

are centered on the first ground which is whether the case against the appellant was proved beyond reasonable doubt. Submitting against the appeal learned State Attorney was of the argument that the offence against the appellant was a statutory rape as the victim was 17 years old. That is due to the fact that the victim herself mentioned her date of birth and her age. That PW2 the mother and PW3 the father of the victim both testified that the victim was 17 years old as she was born in 2005. He said the age of the victim is not at issue.

It was his further argument that that it being a statutory rape the only question is whether the victim was raped by the appellant. The learned Attorney submitted that PW1, the victim, in her evidence explained how she was made to fall down, undressed and the way the appellant inserted his penis into her vagina. He said the evidence of the victim is paramount. He referred the case of **Seleman Makumba v R [2006]** TLR 379. The counsel submitted that there was penetration which is the key element of proving rape. He argued that the evidence of the victim was corroborated by the evidence of PW4, the medical officer who examined the victim and found her to have bruises in her labia majora and minora and her vagina was open.

Regarding the question of credibility of the witnesses, the learned State Attorney was of the submission that PW1 and PW2 were credible witnesses. That immediately after the event of rape reported the matter to PW3 the father of the victim and then to Kitongoji leadership then to the Police station. But again he contended that credibility is the monopoly of the trial court. The trial court found the witnesses credible.

As far as the appellant's defence is concerned, Mr Kabengula was of the argument that the trial magistrate considered the appellant's defence, but the defence did not raise doubt on the prosecution evidence.

On the analysis and evaluation of prosecution by the trial court, the learned State Attorney was of the contention that the trial magistrate made thorough analysis and evaluation of evidence and found the prosecution evidence was credible. That the appellant never shaken the prosecution evidence. He concluded saying the case against the appellant was proved to the standard required thus prayed the appeal be dismissed. Conviction and sentence be upheld.

The appellant was not tired, in making rejoinder just prayed the court to consider his grounds of appeal and allow his appeal by quashing the conviction and sentence passed against him.

After reviewing the evidence on record and the submissions by the appellant and the learned State Attorney, I am of the view that the whole appeal hinges on the issue of whether or not PW1 was raped and whether it was the appellant who committed rape. What needs to be considered is whether or not the evidence on record supports the allegation of rape.

I appreciate from the judgment of the trial court that the conviction of the appellant was based on the evidence of PW1, PW2, PW3 and PW4. That the trial court, relying on the decision of the Court of Appeal in **Selemani Makumba vs. Republic** [2006] TLR 379 found that the evidence of PW1, the victim, was crucial, clear, reliable and credible on what transpired on the fateful date.

According to the charge the offence was committed on 16th January 2021 at Ilemba village within Sumbawanga District in Rukwa Region. PW1 was the victim of the alleged rape. Her evidence is very crucial to prove the case basing on the principle that in rape cases, the true evidence comes from the victim. This principle was promulgated in the case of **Selemani Makumba**(supra) and followed in a number of cases like the case of **Ndikumana Philipo vs. Republic**, Criminal Appeal No 276 of 2009(unreported) where the Court of Appeal of Tanzania stated;

"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"

While I agree that the above is the correct position of law, but it does not mean that such evidence should be taken as conclusive, believed and acted upon to convict the accused person without the circumstances of the case. See of **Pascal Sele vs. The Republic**, Criminal Appeal No 23 of 2017 CAT (unreported). From the evidence on record PW1 gave her account of what transpired. Her testimony was supported by the testimony of PW2 who testified to have examined the PW1 by her finger and found that she had no hymen and that the clothes of PW1 had blood dyes.

While the evidence of PW3 was to the effect that she received PW1 having been raped while crying and that her clothes were full of blood. That when she asked PW1 what had faced her PW1 told her that she has been raped by the appellant. That it is PW3 who told PW2 the episode. Not only that, it is the evidence of PW3 that with her neighbours traced the appellant. Having found him when asked him of the fate, the appellant apologized and promised to give them some money so that the matter remain undisclosed but they reported the matter to local authority.

PW4 being the local leader (hamlet) told the court that, he found the appellant being surrounded by the people having been arrested. He rescued him from being harmed but when asked him if he has committed the alleged offence, the appellant confessed to have committed and apologized. That he is the one who sent the appellant to the police station. PW5 was the police investigator who recorded the cautioned statement of the appellant. His testimony was that the appellant confessed to have had sexual intercourse with PW1. It was this witness who tendered cautioned statement as exhibit (**Exh.PE2**).

The evidence on record reveals that apart from the word of PW1, the victim, there was no eye witness to the incident of rape. Neither of the prosecution witnesses claimed to have seen the appellant carnally knowing PW1. The same was the second ground of appeal. It follows therefore that while PW1 claims to have been raped by the appellant, the appellant denies to have committed the offence. The credibility of PW1 is therefore very paramount.

As I have stated earlier, the trial court having observed the PW1 was satisfied her to be credible witness, as reflected at page 11 of the typed judgment where the trial magistrate said "***the credibility and reliability***

of PW1 cannot be questioned at all. Her evidence is consistent and is corroborated by PW2, PW3 and PW4. Though it is not reflected in the record of the trial court which had opportunity to observe the demeanor of PW1 at the dock and so reached and thus reached a conclusion that she was a credible witness as stated in **Yusuf Simon vs. Republic**, Criminal Appeal No 240 of 2008 (unreported)

This being the first appeal this court had no opportunity to observe PW1 at the dock but there are other ways for which credibility of the witness can be deduced. Such as; accessing coherence of the testimony of such a witness, to consider the testimony of that witness in relation with other witnesses including that of the accused person. See **Rashidi Shabani vs .Republic**, Criminal Appeal No. 310 of 2015 (unreported). This court had an opportunity to re visit and re assess the evidence of PW1. This court is satisfied that PW1 was a credible witness. This is due to the fact that the witness was accurate, coherent and her evidence was of relevant material. Even when cross examined, she remained steady still and focused and unshaken. Likewise the appellant's defence has not raised doubt to discredit PW1, In his defence, the appellant said on the material date he was on his private walk he was arrested by police officer and sent

him to Ilemba Police station where he was told to have raped the victim. That by then the victim was at the police station. That he denied to have committed the alleged offence but the victim insisted to have been raped by him. The appellant told the court that having stayed at police station at Laela for 11 days on 28.01.2021 he was sent to the court. Evidence on record is that the appellant was witch doctor he pretended to treat the victim. That the father of the victim had consulted him and paid 80,000/= as treatment fee. The appellant had visited the home of the victim for checking the environment for better treatment. Thus he was a person known and trusted by the parents of the victim. Thus he was well known to the victim and the rest of the witnesses.

Evidence on record shows that, PW1 was sent to the appellant for getting traditional treatment. It was PW2, the mother of the victim who sent her to the appellant. Further that she left the victim and the appellant in the hut of the appellant while the appellant pretending to administer medicine then raped the victim. That the victim came out screaming and reported the episode to PW2 her mother who immediately reported to PW3 then to police station.

Evidence available is that the victim was sent to the hospital for medical examination. The medical officer, PW4 testified saying he revealed bruises into the vagina and hymen was no longer there. I find there was sufficient evidence to establish the offence of rape. Section 130(4) (a) of **the Penal Code** provides;

- (a) *penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;*

As regards the evaluation and analysis of evidence, I am at one with the learned State Attorney that the trial magistrate has thoroughly analyzed and evaluated evidence of both prosecution and defence and considered the evidence of both sides and reached to a fair and well-reasoned findings at page 11 the trial magistrate said "*I consider the defence of the accused which is nothing but a mere denial*" he went on saying "*..... The accused in his defence denies to have grudges with all the prosecution witnesses, including the victim. This reveals nothing but the fact that this case has not been fabricated at all*

Being said and done, I find no reason to fault the decision of the trial court. I hereby uphold the decision of the District court.

The appeal is hereby dismissed.




D.B NDUNGURU

JUDGE

12/11/2021