

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF TANGA
AT TANGA

CRIMINAL APPEAL No. 18 OF 2021

(Originating from the District Court of Korogwe at Korogwe in Criminal Case No. 17 of 2020)

ATHUMANI MUSSA ZOAZOA APPELLANT

Versus

THE REPUBLIC RESPONDENT

JUDGMENT

22.11.2021 & 29.11.2021

F.H. Mtulya, J.:

This appeal was registered in this court by Mr. Athumani Mussa Zoazoa (the appellant) to protest conviction and sentence for the offence of rape allegedly committed to a girl aged below eighteen years (the victim) imposed by the **District Court of Korogwe at Korogwe** (the district court) in **Criminal Case No. 17 of 2020** (the case) delivered on the 8th day of October 2020. The charge against the appellant was brought in terms of section 130 (1) (2) (e) and 131 (1) of the **Penal Code** [Cap. 16 R.E 2002] (the Code).

The facts registered on record show that the appellant is alleged to have carnal knowledge of the victim on the 18th day of February 2020 at Mabogo Village within the District of Korogwe in Tanga Region. When the charge was read over and fully explained to the appellant, he pleaded not guilty. The Republic was thus put to the proof of each of the elements of the charge of rape except for the

issue of consent, which is irrelevant considering the young age of the victim. The trial commenced on 09th July 2020 and the Republic brought to the stand its four (4) witnesses, the first was the victim herself, the second Ms. Asha Shabani, the victim's mother, the third Ms. Luciana Linus, a neighbour and the fourth Ms. Angelista Cyprian a medical officer who examined the victim and filled a Police Form Number 3 (PF3). The appellant was the only witness to give evidence in his defence in the trial. At the end of the trial, the appellant was subsequently convicted of the charge and as a result, sentenced to serve thirty (30) years imprisonment. Being dissatisfied with the decision of the district court in the case, the appellant has appealed to this court raising four (4) grounds of appeal listed as follows, in brief:

- 1. That the trial court erred in law and fact for failure to note that the charge laid down upon the appellant was incurable and defective;*
- 2. That the trial court erred in law and fact for failure to realize the exact date in which the incident alleged offence had been committed as from the testimonies of PW1, PW2 and PW3;*
- 3. That the trial court erred in law and fact as it failed to realize that the exact date, month and year in which the incident took place at Saadani Magoma area Korogwe District where*

as it was said the offence is allegedly to had taken place at Mombo and not Saadani Magoma; and

4. *That the trial court erred in law and in fact by convicting the appellant with rape without bearing in mind the evidence adduced in court was full of contradictions.*

The appellant finally prayed this court allows the appeal, quash the conviction and set aside the sentence. For an easy understanding of what transpired in the trial court, I find it important to recapture though summarily the evidence given out in the trial court.

PW1 gave her unsworn evidence but promised to tell the truth that on 18th February 2020 she was at school and at 12:00 pm, probably during lunch break, she went back home to prepare lunch for herself and her youngster. After having cooked the lunch and ready for school, the appellant appeared. She recognised him by the name Zoazoa as he picks used iron alias *chuma chakavu*. PW1 identified the appellant from the dock and informed this court he undressed her clothes followed by his own and then: *alinifanyia kitendo kibaya on the ground* and left. During cross examination by the accused, PW1 stated that she does not remember the day the accused went to her home and her young brother was playing nearby and that the appellant used to go there to visit her father.

During re-examination, the victim stated that the appellant is the one who went to her home and performed on her a bad thing on the ground, he closed her mouth so she would not shout. Ms. Asha Shabani (PW1) testified that PW1 is her daughter and was born on 13th May 2011 at Mabogo. PW2 brought in the district court a clinic card to prove the age of the victim and was admitted as Exhibit P.1. She went on testifying that on the 20th February 2020, she was at work on a sisal estate at Mabogo until 14:30 hours. According to her, she went back home and found PW1 unwell hence decided to examine her by the help of a neighbour and they made an impression that the victim was raped. Upon being asked, the victim mentioned the appellant as the perpetrator of the crime.

According to PW2, they noted the problem when it was late in the evening hence decided to go for a sleep and reported to the police and went to hospital in the following morning, 21st February 2020. Following the report, the appellant was arrested later on the day. Ms. Luciana Linus (PW3) on the other hand testified that on 18th February 2020 she was at her home and after some time, she heard a cry of a child hence left her home residence to see what was going on. Upon arrival at her neighbour's house, she found PW2 and the victim and inquired on why the child was being beaten and PW2 replied that the victim was beaten because of bad behaviour.

Having heard this, PW3 went back to her home and soon thereafter PW2 and the victim arrived. It was evidence of PW3 that PW2 asked her to see whether the girl was sexually assaulted or not and PW3 ordered the victim to lay down on a jacket and examined her to find that she had bruises and swelling in her private parts. PW3 asked PW1 as to who caused all that but she remained silent. When asked for the second time she mentioned one *mnunua mabati* Zoazoa who is the appellant.

Ms. Angelista Cyprian evidence (PW4) on the other hand testified that she works at Mombo Health Centre as a medical doctor and on 21st February 2020, examined the victim and found her with bruises in her private parts, some discharge and foul smell without any hymen intact. The victim was tested with HIV/AIDS and Pregnancy which gave negative results. According to PW4, she then prescribed medicines for the victim and filled the PF3 which was tendered and admitted in the case as Exhibit P.2. After registration of all the materials, the district court found the prosecution had succeeded to establish a *prima facie* case against the accused person whereby, he was addressed on how to give his defence and he opted to give his defence on oath and called no witness.

The accused on his defence testifies that on 21st February 2020 at around 06:00pm, he was going to the mosque from his home residence, but along the way he was arrested by policemen who

were searching for him and took him to police station where he was interrogated on Mzee Omari of Mabogo. According to the appellant, he admitted knowing him as a security guard at the estate and used to sell him scrappers. The appellant testified further that he saw Mzee Omari about three (3) months back at his home residence. Following interrogation, according to the appellant, he was alleged to have raped the victim, Mzee Omari's daughter. The appellant claimed that Mzee Omari had his Tanzania Shillings Fifteen Thousand (15,000) and suspected the appellant to have love affairs with his wife. The appellant also protested doctor's evidence because he claimed that the victim went to Mazinde Dispensary and not Mombo Health Centre.

In this appeal the appellant appeared himself unrepresented while the Republic was represented by Ms. Elizabeth Muhangwa, learned State Attorney. The matter was argued by way of written submissions and the parties duly complied with the set scheduling order.

In his submission in support of the appeal, the appellant stated that in general the prosecution failed to prove the case beyond reasonable doubt. In giving reasons of his contention, the appellant stated that PW2 testified that the incident occurred on 20th February 2020 whereas PW1 and PW3 stated that it occurred was on 18th February 2020. In the circumstances, the appellant questioned the

court to believe that the date of the offence is not known to the prosecution. The appellant also stated that the district court failed to comply with section 233 (3) of the **Criminal Procedure Act** [Cap 20 R.E 2002] and faulted the prosecution for not bringing a police who investigated the case.

The Respondent on his side replied to the grounds of appeal in general even though they were not submitted for in the appellant's submission in chief. According to the respondent, the charge against the appellant was proper and fulfilled all ingredients of a proper charge sheet. On the second ground of appeal Ms. Muhangwa concedes that there are variances on the date of the occurrence of the alleged offence when looking at the evidence of PW1, PW2 and PW3. However, she clarified and submitted that 20th February 2020 is the date when PW2 found out that the victim might have been sexually assaulted.

Ms. Muhangwa submitted that even if that was a contradiction then it does not go to the root of the case and cited the case of **Chukwudi Denis Okechukwu & Three Others v. Republic**, Criminal Appeal No 507 of 2015, contending that minor defects may not fault prosecution case. On the third ground of the appeal, Ms. Muhangwa was surprised as to where the appellant got the fact that the incident occurred at Saadani Magoma while the charge sheet and the evidence adduced during trial revealed that the incident took

place at Mabogo Village in Korogwe. Concerning the fourth ground of appeal, Ms. Muhangwa reiterated that nothing was wrong with the charge sheet and that the evidence adduced proved the offence of rape especially because in cases of this nature, the best evidence is that of the victim.

On my part, I have carefully canvassed through the submissions registered by the parties in this case and going by the grounds of appeal as brought forward by the appellant, I will determine the merit of each. Ground one of this appeal faults the charge sheet for being defective and he claims the same defect is incurable. I have seen the charge sheet with which the appellant was charged at the district court and it reads:

CHARGE

STATEMENT OF OFFENCE

Rape contrary to section 130 (1) (2) (e) and 131 (1) of the **Penal Code** [Cap. 16 R.E 2002].

Thus, it is the appellant's contention that the Republic wrongly cited the law as Revised Edition of 2002 instead of 2019. I am persuaded by this court's decision in the case of **Gideon Mandesi v. Charles John Mkanga**, Misc. Land Application No. 637 of 2020 when dealing with a similar situation where it was stated that:

Another point of objection which the learned advocate for the respondent raised is improper citation of enabling

*provisions that is R. E. 2002 instead of R. E. 2019. This court have considered this point and noted that the omission to properly cite enabling provision was not occasioned by the applicant's negligence and **it would not occasion any injustice on the Respondents.** In *Mussa Hamisi Mariamoja v. Mussa Selemani Mussa and Another* (Misc. Land Application No. 431 of 2020) the court among other things stated:...for the court to tolerate omission by a party to cite a proper enabling provision of the law, the omission should have resulted from inadvertence and without there being an element of negligence. It should have well not occasioned failure of justice.*

Since the citation of law above has not caused any injustice to the appellant, I see the first ground of appeal registered by the appellant has no any merit and hereby marked failed.

Moving to the second ground, the appellant blames the district court for not considering that the evidences of PW1, PW2 and PW3 were contradicting on the aspect of the date of the incident. Having perused through the testimonies of the prosecution witnesses, I found out that the testimony by PW2 mentioned the date when she recognised that the child had problems that was on 20th February 2020. However, the charge sheet states that the incident occurred

on 18th February 2020, the same is the testimony of the victim and PW4 who testified that the victim was allegedly raped three (3) days before she was brought to her on 21st February 2020. I think on this ground, the appellant has misconceived the facts of the case. The only witness who mentioned another date apart from 18th February 2020, was PW2 and mentioned that date as when she realised that the victim was not normal. For purposes of appreciation of her words, I will quote, in part, her testimony:

On 20th February 2020 I was at work cutting Mkonge at Mabogo until 14:30 hours. Then I went home and found "FO" is not okay / well.

Every other evidence that was given on the prosecution evidence mentioned 18th February as the date of the incident. In this case I see that there is no any contradictions with regard to the date of the incident. In any case according to the case of **Chrizant John v. Republic**, Criminal Appeal No. 313/2015, the Court of Appeal, at page, observed that witnesses are not expected to make a blow-by-blow mental recording of an incidents.

In the third ground of appeal, as it was rightly observed by Ms. Muhangwa that it is based on facts which are only known to the appellant alone. The charge sheet and every piece of evidence given at the trial court mentions the scene of crime to be at Mabogo Village of Korogwe District in Tanga Region. There is nowhere that it

is said that the incident occurred at a place called Saadani Magoma within Korogwe District. This court will not be detained and waste its precious time discussing the ground which is not reflected on record. Similarly, this court cannot be detained on the fourth ground which reiterates that the case had contradictions, something which have already been determined earlier in this decision.

Having resolved all grounds of appeal, this court cannot fault the district court's findings. In rape cases where the victim is a child, like the present one, the prosecution's duty is to prove that there was penetration and that it is the accused who raped the child. In this case penetration is well proved by the victim, who stated that the appellant: *alinifanyia kitendo kibaya on the ground* and that *kitendo kibaya* is proved to be rape by the testimonies of PW2, PW3 and PW4, two elderly women and a medical doctor who observed that the victim had bruises in her private parts, a foul smell, swollen vagina and had no hymen.

The materials registered by prosecution witnesses were supported by documentary evidence and expert opinion. All the materials in totality establish that the victim was raped. In any case, the victim mentioned the appellant at the earliest time possible as the one who raped her. The Court has consistently held that the best evidence of rape is that of the victim and considering she mentioned the accused at the earliest time possible, it is difficult to

fault such evidence (see: **Selemani Makumba v Republic**, Criminal Appeal No. 94 of 1994; **Alfred Valentino v Republic**, Criminal Appeal No. 92 of 2006; and **Shimirimana Isaya & Another v. Republic**, Criminal Appeal No. 459 of 2002. For instance, in the precedent of **Selemani Makumba v Republic** (supra) the Court stated that:

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 woman where consent is irrelevant that there was penetration.

The protest grounded on the defence that Mzee Omari had grudges with the appellant that is why the case against the appellant was fabricated has no legs to stand. It has been a norm in criminal appeals to come up with an allegation that one of the family members had grudges with him leading to a case to be made up against the accused. Without any corroboration of these mere words, like the trial court, I find it impossible to buy that defence. In any case, the victim stated and it was not disputed by the appellant that victim's mother had separated from his husband, victim's father, since she was attending class three (3) in primary school.

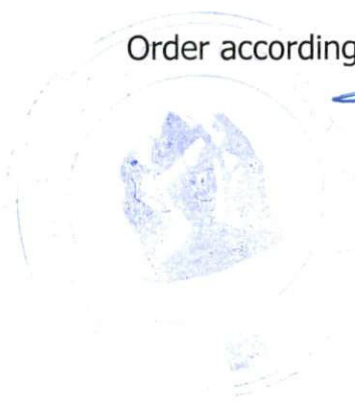
It must also be noted that this court as the appellate court is not in the position to see and hear the witnesses as it was for the trial court. In the case of Jacob **Tibifunga v. Republic**, Criminal Appeal

No 185 of 1980, this court held that the assessment of credibility of witnesses by the trial court must be upheld by an appeal court unless the same was not arrived at reasonably. This appeal is determined with reasons registered in facts and evidences.

Having regard to the totality of the evidence in the present case, I see no any reason to interfere with the district court's assessment of the whole evidence and credibility of witnesses. In the result, I am satisfied that this appeal has no any merit and hereby dismiss it.

Right of appeal explained.

Order accordingly.



F.H. Mtulya

Judge

29.11.2021

This judgment is delivered in Chambers under the seal of this court in the presence of the appellant, Mr. Athumani Mussa Zoazoa and in the presence of learned State Attorney, Mr. Winlucky Mangowi, for the Republic.



F.H. Mtulya

Judge

29.11.2021