

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 85 OF 2021

(Arising from the District Court of Serengeti at Mugumu Criminal Cases No. 103 of 2020).

RYOBA NGOBIRO @ SOSWA.....APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

1st September and 1st November, 2021

F.H. MAHIMBALI, J.:

The appellant, Ryoba Ngobiro @ Soswa was arraigned and charged before the district court of Serengeti at Mugumu with four counts namely; abduction, rape, impregnating a school girl and preventing a school girl from attending school regularly.

It was alleged by the prosecution that on the 23rd day of September, 2019 at Kitunguruma village within Serengeti district the appellant took the victim (in this case referred to as AB to disguise her identity) a student from the protection of her parents and had sexual intercourse as a result impregnated her and prevented her from attending school regularly.

Before, proceeding further, I find it appropriate to highlight the material facts leading to this appeal;

On the 23/9/2019 at 02:00 hours, Ghati Mwita (PW1) AB's mother was asleep at her house together with her two children namely; Easter and Bhoke. When he woke up in the night AB was missing. When she woke up the following day, she reported the matter to Machochwe police station and at AB's school. She was given a letter from the school. She was later informed that the appellant was with AB and he was arrested. Her testimony was corroborated by AB (the victim), that on the 23/9/2019 at 2:00 hours while they were asleep, the appellant came and took her to Mugumu. At Mugumu the appellant checked in with her into a guest house and they had sexual intercourse. On the 24th of September, 2019 she was taken to Nkerege's house at Tarime and they lived there. On the 24th day of November 2019, the victim was returned to Mugumu. On her arrival, she was taken to Mugumu police station where they were given a PF3 and AB was taken to DDH hospital accompanied by WP Sijali for check-up. At the hospital, AB was attended to by Albert Kasanga @ Mnalimi (PW3) a clinical officer. He tested the victim's urine and his final medical report was that the victim was not a virgin, she has been having sexual intercourse and she is pregnant.

PW3 filed in the PF3, that he later tendered in court and it was admitted and marked as exhibit PE1 without any objection from the appellant.

On the 1st day of March, 2020 this case was assigned to F. 6443 DC Pius (PW4). The mother of the victim (PW1) was the complainant in this case and she told the police officer that she had reported the matter to the village chairman where she was given a letter that was tendered by the PW4 and it was marked and admitted as exhibit PE2. She had also gone to the victim's school and was also given a letter. That she admitted and tendered in court as exhibit PE3. He arrested the appellant on the 30/10/2019 and prepared his charges on 02/3/2020 and the appellant was arraigned before the court.

The court found the appellant with a case to answer and he was given his right to testify under oath and to call witnesses. Under oath he defended for himself that on the 30th day of October, 2019 at 10:00 am he was at Nyamburi village where he had gone to buy chickens. He was arrested and Mwita Mwema told him he had taken his daughter. He was taken to the police station and to court on 02/03/2020.

The trial court heard the parties and held that the prosecution had proved its case beyond reasonable doubt in regards to the first and third count only. The appellant was convicted and sentenced as follows; in respect the first count he was sentenced to six months imprisonment

and in regards to the third count he was sentenced to 30 years imprisonment.

This decision did not amuse the appellant, he has come to this court to challenge the trial's court conviction and sentence by filing his petition of appeal containing 4 grounds of appeal. The grounds of appeal summarized are as follows;

1. The trial court erred when it received wrong evidence of PW3 which did not state the date and time when the clinical officer received the victim.
2. That, the trial court erred when the prosecution did not bring the guest house book record to show he took the victim to the guest house.
3. That, the trial court erred as PW3, the clinical officer did not say how many months the victim is pregnant.
4. That, the trial court erred as there is contradiction on the age of the victim from the prosecution witnesses.

When this matter came up for hearing, the appellant was present in person and unrepresented while the respondent enjoyed the legal services of Mr. Nimrod Byamungu, learned state attorney. The matter was heard by way of audio teleconference.

Succumbing in support of the appeal, the appellant prayed his grounds of appeal be adopted as part of his submission as he had nothing further to add.

Replying, Mr. Byamungu objected to the appeal grounds number 1 and 2 but conceded to grounds number 3 and 4.

On the first ground it was the respondent's submission that the testimony of PW3 is very clear, he received the victim on the 3/12/2019 at the hospital. His report showed that the victim was pregnant, her hymen removed and her vagina penetrated. That it was not stated in the judgment is irrelevant as the judgment can not contain everything stated during the proceedings. It was his submission that this ground is baseless as per the circumstances of this case.

On the second ground, it was the appellant's grief that prosecution did not tender the visitor's guest book. He conceded to the fact that it was not tendered but it was his view that PW2 testified on that account that the appellant abducted the victim and had sexual intercourse in that guest house. According to the court's typed proceedings the appellant did not cross examine PW2 on that. This suggests that the appellant concurred with what PW2 testified. It was his view that documentary evidence was not better than oral testimony. The fact that the appellant did not cross examine PW2, suggests that

the appellant had nothing to counter or contradict. To cement his submission, he cited the case of **Nyerere Nyague v Republic**, Criminal appeal No. 67 of 2010, CAT, at Arusha at page 6 ; an accused person who fails to cross examine the witness on important aspects, is presumed that he admits with the truth of the prosecution witness / testimony.

He submitted further, that what matters is not quantity but quality, thus a mere miss of the guest house register did not make the fact of abduction and rape not established as they were testified. He prayed this ground to fail.

With regards to ground no. 3, I agree with the appellants averment that the testimony of PW3 (page 24 of the typed proceedings) did not testify on the age of the pregnancy. This makes it uncertain as to when the pregnancy was acquired. PW2 testified that the victim had sex with the appellant on the 23/9/2019 but she delivered on 30/7/2020. Ten months had lapsed from the date they had sexual intercourse to 30th July, 2020. He stated that it is very much possible that the victim might have conceived on later dates other than 23rd September, 2019. PW2 did not testify on other dates she had sexual intercourse with the appellant, hence this ground has merits and should be allowed.

Submitting on the appellant's grief on the fourth ground of appeal on the contradiction from PW1 and PW2 on the age of the victim. It was the respondent's submission that he concedes to this ground as one of the witnesses testified that the victim was 15 years and the other stated that the victim was 17 years. PW1, the mother of the victim testified that the victim was 15 years, the doctor (PW3) stated she was 17 years. While the victim and the police officer (PW4) testified that she was 15 years. For statutory rape to be proved two ingredients are important, that is penetration and age of the victim (below 18 years). It was his submission that it is a minor contradiction and he is of the firm view that the appellant was not prejudiced and the contradiction is of no benefit to the appellant. This is because both ages fall under the minimum age as per section 130 of the Penal Code.

In this case the proper person to testify on the victim's age was PW1 who is the parent of the victim. The contradiction is minor as it is brought by the doctor who did not testify whether he also examined the age of the victim. It was his humble view it is slip of the pen to record 17 years instead of 15 years. Regarding the second ingredient of penetration, PW2 testified it well. Though there is no practical explanation by PW2 on how the said sexual intercourse was done, but she testified on how the appellant had sex with her. In the case of

Hassani Bakari a.k.a mama jicho, Criminal Appeal No. 103 of 2012 CAT at Mtwara, held that it is not necessarily that the victim explains practically step by step how the said sexual act was done, but explaining its circumstances was sufficient. With all this, rape and abduction were proved beyond reasonable doubt

With abduction, the same was proved as the victim was under the care of her parents and she was under age and was then abducted by the appellant. The accused person did not cross examine the prosecution witnesses on that fact as well. In totality, he prayed that this appeal is bankrupt of merit and it should be dismissed.

Re-joining, he submitted that there is inconsistency with the testimony Of PW1 and PW2. PW2 stated until night time she was with PW1, PW1 stated while sleeping at her home around 2:00 pm (noon time), he had gone and abducted the victim. The timing of the incident is very doubtful on the two witnesses. He asked the court to look at the trial court's judgment at page 4 para 3, as his host had not come to court for his testimony to establish the alleged facts of abduction. Also, what PW1 testified in court is purely hearsay. He prayed for this court to find merits in his appeal and discharge him.

Having heard the rival submission of the parties and gone through the court's records the matter is now up to the court to determine whether this appeal has merits.

The appellant's first complaint was that the clinical officer (PW3) did not testify on when he received the victim. This ground was objected to by the respondent. I have gone through the court's record and at page 24 of the typed proceedings PW3 testified to receiving the victim on 3/12/2019 at 9:30 pm. It is not also a must for the judgment to contain all what was testified during the proceedings. This ground is baseless and it is dismissed.

The appellant's second ground is that the visitor's book was not tendered in court. The respondent also objected to this ground. It is my humble view that the best evidence in rape cases is from the victim as per the law and the victim also testified on the rape and the abduction. This court is also at one with the respondent's submission that the appellant accepted the facts testified by the victim that she was abducted and taken to the guest house to be rape as he did not cross examine her on those facts. (See; **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 OF 2010, CAT at Arusha). That said, this ground is also found without merits and it is dismissed.

On the third complaint, the appellant complained that the clinical officer did not state the age of the victim's pregnancy. The respondent did not object to this ground. According to the prosecution testimony the victim was raped on 23/9/2019 (date of abduction) and she delivered on 30/7/2020. That was after the lapse of ten months, therefore there is a big chance that the victim conceived on later dates. Hence, this ground has merits.

The last complaint of the appellant was on the age of the victim. The mother of the victim testified that the victim was 15 years, the clinical officer stated she was 17 years, the police officer and the victim both testified that she was 15 years. It was the respondent's submission that all the ages mentioned fall under the minimum age as per section 130 of the Penal Code. In order to prove statutory rape, there are two main ingredients which are age of the victim and penetration. Starting with age of the victim, the law is settled that such age may be proved by the victim, her parents or medical practitioner. See **Isaya Renatus vs R**, Criminal Appeal No. 342 of 2015, CAT at Tabora (unreported). In this case it is true that there was contradiction on the age of the victim but the age stated by the prosecution witnesses is not above 18 years. This means it still falls under the statutory rape. It is also safe to state that it did not prejudice the appellant in any way.

On the second ingredient of penetration. The best evidence is from the victim and she also testified in court that they had sexual intercourse. She lived with the appellant for some weeks that means she knew him very well and there is no chance of mistaken identity. It is not necessary to state each stage until she they had sexual intercourse. That said, the second ingredient was established.

In fine, this appeal is allowed in regards to the third count which is in respect of impregnating a school girl, which the appellant was not convicted and sentenced of. The other grounds are found without merits and dismissed.

DATED at MUSOMA this 1st day of November, 2021.




F. H. Mahimbali

JUDGE

01/11/2021

Court: Judgment delivered this 1st day of November, 2021 in the presence of the appellant and Mr. Frank Nchanila state attorney for the respondent and Mr. Gidion Mugo – RMA.

Right of appeal is explained.


F. H. Mahimbali

JUDGE

01/11/2021