

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 119 OF 2020

**(Arising from Criminal Case No.01 of 2020 in the District Court of
Chunya at Chunya)**

Between

SHABANI JUMA ABDALLAH APPELLANT

Versus

THE REPUBLIC RESPONDENT


JUDGMENT

A.A. MBAGWA J.

The appellant herein is assailing the decision of the District Court of Chunya which convicted him of rape and subsequently sentenced him to life imprisonment in terms sections 130(1) and (2)(e) and 131(1) of the Penal Code.

The evidence which lead to his indictment and consequent conviction may briefly be narrated as follows;

It was alleged, in the charge, that on 10th day of November, 2019 at Ngonilima hamlet in Lyeselo village within the District of Chunya in Mbeya



region, the appellant had carnal knowledge of the victim (PW3), a girl aged 6 years.

The appellant disputed the allegations as such, the case went to a full trial. The prosecutions side called a total of ten (10) witnesses along with three exhibits namely, two PF3 and a birth certificate of the victim. In defence, the appellant stood a solo witness.

It was the prosecution evidence that on 10th day of November, 2019, the victim's mother PW1 went to the milling machine to grind maize. At home, she left the twin daughters namely, PW2 and PW3 (the victim). While away, the appellant sneaked in to PW1's home and found the twin sisters to wit, PW2 and PW3. The appellant tricked the duo by giving them sweets. He then took the victim PW3 to the nearby bush with the view to have sexual intercourse with her. On noticing a strange situation, PW2 became suspicious thus, she rushed to the neighbourhood and called Abdul Michael (PW5). PW5 also intimated Yusuph Aswile (PW6) to accompany him to the scene of crime.

On arriving at the scene of crime to wit, in the bush, PW5 and PW6 found the appellant on the victim having sexual intercourse with her. The appellant was found was half naked as he had undressed his trousers up to the knees. PW5 and PW6 apprehended the appellant at the scene of crime and instantly raised alarm. After the appellant's arrest but before leaving the scene of crime, the victim's mother PW1 and PW7 arrived. They found the appellant under restraint while the victim was crying. PW1 hastily examined the victim's private parts and observed spermatozoa and bleeding. It is worthwhile to note that the victim (PW3) is physically disabled person in that she is dumb and cripple.



The appellant was taken to the village office and subsequently to police. As such, the matter was reported to police whereat PF3 was issued to the victim for medical examination. According to PW1, they took the victim to Chunya District Hospital on the very fateful day but there was no doctor to attend them. As such, they returned to the hospital on the following day i.e. 11th day of November, 2019 when they were attended by Dr. Morice Msangola Mdoe (PW9). Dr. Msangola observed bruises in the victim's vagina. He also found the hymen perforated along with swelling. PW9 filled the PF3 which was tendered and admitted in evidence as exhibit PE2.

Further, on 22nd day of November, 2019, the victim (PW3) was referred to Chunya District Hospital again for examination of cerebral palsy (CP). This time the victim was attended by Dr. John Francis Gungumka (PW8) who found the victim with speech disability. PW8 consequently filled PF3 which was admitted in evidence as exhibit PE1.

During hearing of the case, the victim (PW3) was brought in court to testify, as reflected at page 10 of the typed proceedings, but she could not testify as she was unable to speak. The trial court was also satisfied that the victim was incapable of speaking due to physical disabilities.

In addition, PW10 WP 9673 DC Veronica tendered a birth certificate of the victim(exhibit PE3) indicating that the victim was born on 3rd day of March, 2013. The evidence was further corroborated by PW4 Conrad Nikolaus Simiche. Therefore, it was undisputed throughout the evidence that the victim PW3 was six (6) years old at the time of the commission of an offence.

As already hinted above, the appellant denied the allegations and stood the only witness of his case. He claimed that the case was concocted against him by PW4 Conrad Nikolaus Simiche due to their grudges arising from money which PW4 gave the appellant. The appellant said that PW4 gave him Tanzanian shillings one hundred fifty (Tshs 150,000/=) to bring him labourers from Manyara but the appellant delayed to travel. As such, PW4 thought that the appellant had defrauded him hence he decided to victimize him by fabricating the case against him.

After hearing the evidence of both sides, the learned trial magistrate was satisfied that the case was proved beyond reasonable doubt. He thus, convicted the appellant of rape and proceeded to sentence him to life imprisonment.

Dissatisfied with both conviction and sentence, the appellant resorted to this Court to protest his innocence.

When the matter came for hearing, the appellant was present in person and had representation of Omary Issa Ndamungu who was holding briefs of Aneth Mrema, learned advocate. However, before the matter could take off, Mr. Ndamungu informed the Court that advocate Aneth Mrema had instructed him to inform the court that she had withdrawn her services for want of proper instructions from the appellant. The appellant readily welcomed the withdrawal. He thus, prayed to argue the appeal on his own. Furthermore, the appellant prayed to abandon the petition of appeal dated 9th day of August, 2012 which had been prepared and filed by Anneth Mrema, advocate. The appellant therefore prayed to argue the appeal based on his petition of appeal filed on 13th day of August, 2020.



The petition of appeal contained complaints which can be summarized in the following grounds;

1. That the trial magistrate erred in law and fact to convict the appellant by relying on the PF3 (exhibit PE2) whilst the same was illegally admitted in that it was recorded after twenty four hours.
2. That the trial court erred in law and fact to believe and rely on the evidence of PW9 (a medical doctor).
3. That the trial court erred in law and fact to convict the appellant based on the evidence of PW2, PW5 and PW6 whilst their evidence was contradictory
4. That the trial court erred in law and fact to convict the appellant whereas the prosecution case was not proved beyond reasonable doubt

Submitting in support of appeal, the appellant said that PF3 (PE2) was wrongly admitted and therefore erroneously relied on in that the victim was examined after expiry of twenty four hours.

Moreso, the appellant faulted the trial court for relying on the evidence of PW9. It was his submission that PW9 found the victim HIV negative whereas the appellant is HIV positive. The appellant was opined that had the victim been raped by him, she would have been found HIV positive. In that regard, the appellant said that the findings by PW9 were questionable hence unreliable.

The appellant also assaulted the evidence of PW2, PW5 and PW6 on the ground that their testimonies were contradictory. He elaborated that PW5



said that he found the appellant committing the offence at 16:45 whereas PW6 said that it was 17:00hrs.

The appellant lamented that the prosecution case was not proved beyond reasonable doubt because **one**, the victim did not testify and there was no evidence to prove that she (PW3) was a dumb, **two**, no village leader came to testify in court on how the appellant was arrested until he was referred to police. And **three**, the prosecution did not produce in evidence the skirt that the victim was wearing on the fateful day. According to the appellant, the skirt would be dirty and shrouded with blood. He finally prayed the Court to consider his submission and allow the appeal.

In contrast, Mr. Hebel Kihaka, learned Senior State Attorney for the Republic resisted the appeal.

Mr. Kihaka argued that the PF3 (exhibit PE2) was legally admitted and therefore rightly relied on. He contended that there is no time limitation in law for examining the victim and filling PF3. He stressed that what was important was the medical examination and consequent findings which proved that the victim was penetrated. Kihaka continued to submit that PF3 was admitted without objection from the appellant.

In a similar vein, the learned Senior State Attorney submitted that the trial court was right to accept and rely on the evidence of PW9 because he clearly testified that the victim's vagina had been inserted a blunt object. Mr. Kihaka said that it is immaterial whether the victim was infected or not because what is necessary in rape cases is penetration in terms of section 130(4)(a) and (b) of the Penal Code.

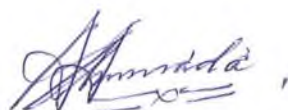
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With regard to contradictions in the evidence of PW2, PW5 and PW6, the learned Senior State Attorney dismissed the complaint saying that there were no material contradictions. He said that these are witnesses who eye witnessed the appellant raping the victim. Kihaka contended that the difference between 16:45hrs and 17:00hrs as testified by PW5 and PW6 cannot be held to be material contradictions in that they do not go to the root of the offence. He relied on the case of **Twalaha Ally Hassan vs the Republic**, Criminal Appeal No. 127 of 2019, CAT at Dar es Salaam to support his position.

With respect to non-production of the skirt, Mr. Kihaka said that it was immaterial in this case nor did its absence affect the case. Also, the learned Senior State Attorney submitted that there is no specific number of witnesses required to prove a certain fact. He said that the ten (10) prosecution witnesses and three (3) exhibits were enough to prove the charge. He cited section 143 of the Evidence Act in support of his argument. Moreso, he said that the village leader was not a material witness for he was not at the scene of crime.

Concerning the complaints that the victim did not testify, Mr. Kihaka said that the trial court was satisfied that the victim (PW3) could not speak due to physical disability. He said that the fact on her speech impairment was supported by PW8 and through exhibit PE1 to the effect that the victim had speech disability since her early childhood.

Lastly, Kihaka firmly submitted that the case was proved beyond reasonable doubt in particular via the evidence of PW2, PW5 and PW6. In addition, the learned Senior State Attorney said that the appellant was arrested at the scene of crime something which credits the prosecution



evidence. Mr. Kihaka referred the Court to the case of **Ibrahim Ally Mwadau vs the Republic**, Criminal Appeal No. 11 of 2018, CAT at Dar es Salaam at page 11. He submitted that the Court held that where the accused is found ready handed committing the offence, such evidence should be considered conclusive.

I have thoroughly canvassed the appellant's grounds of appeal as well as the submissions by both parties. I also had occasion to navigate through the record of appeal.

To commence with the complaints on the PF3 (exhibit PE2), I have read the testimony of PW9 Dr. Morice Msangola Mdoe. The record tells it well that he examined the victim (PW3) on 11th day November, 2019 and found bruises in her vagina. Further, the victim hymen was perforated. The PF3 was properly tendered and after its admission, it was read out. Further PW1 i.e. the victim's mother clarified that they took the victim to the hospital on 10th day of November, 2019 but there was no doctor to attend them. Consequently, they returned to the hospital on the following day i.e. 11th day of November, 2019 when they were attended by PW9. I therefore find no substance in the appellant's complaints. The exhibit PE2 was legally admitted by and rightly relied on by the trial court. The delay in examining the victim was unavoidable as it was well explained by PW1. Moreover, there is no legal time frame within which medical examination should be conducted. Although as a general rule early examination is likely to give the best results and therefore more reliable findings, in this case the delay was not inordinate and there were plausible explanations from PW1.

Similarly, throughout the record there is no reason to disbelieve the testimony of PW9. It is a principle of law that every witness is entitled to

credence and must be believed unless there are good and cogent reasons to disbelieve him. See **Goodluck Kyando vs the Republic** [2002] TLR 363. In this case PW9 clearly told the court how he attended the victim. He said that he examined the victim (PW3) and found bruises and swelling in her vagina which suggested that the victim was penetrated. When his evidence is assessed along with that of PW2, PW5 and PW6, it leaves no doubt that the victim was raped by the appellant. The mere fact that the victim was not found HIV positive is not a good reason to discount the evidence of PW9. After all, apart from the appellant's mere words, there is no other evidence to the effect that at the material time he was HIV positive. It should be noted that contamination or infection of sexual disease is not necessary wherever there is sexual intercourse. As such, the fact that the victim was found HIV negative does not rule out that there was no sexual intercourse between the appellant and victim.

With respect to the complaints that there are contradictions in the testimonies of PW2, PW5 and PW6 in relation to the time the appellant was found raping the victim, upon glance on the evidence, it is clear that the difference is fifteen (15) minutes. Whereas PW5 said that it was 16:45, PW6 stated that it was 17: 00hrs. In my view, the alleged contradictions are so minor and do not go to the root of the offence. Of course, normal inconsistencies and discrepancies are expected from witnesses due to human frailty as such, they cannot be consistent on every aspect. It is common cause that witnesses, by being human beings, are not infallible. See the case of **Deus Josias Kilala @ Deo vs the Republic**, Criminal Appeal No. 191 of 2018, CAT at Dar es Salaam. On all this account, I find this ground devoid of merits.



As I close to an end, I find it apposite to remark that the prosecution cited, in the statement of offence, sections 130(1) &(2)(e) and 131(1) of the Penal Code. They omitted to cite section 131(3) of the Penal Code which is the appropriate punishment section. However, on looking at the evidence and the proceedings in the trial court holistically, I am satisfied that the omission did not prejudice the appellant in any how as he was able to appreciate the nature of offence he was facing. It is the position of law that non or wrong citation of law is not fatal and may be cured under section 388(1) of the Criminal Procedure Act. See the case of **Feston Domician vs the Republic, Criminal Appeal No. 447 of 2016, CAT at Mwanza** and **Jamali Ally @ Salum Vs the Republic, Criminal Appeal No. 52 Of 2017, CAT at Mtwara**. I thus find non-citation curable.

Lastly, the appellant complained that the prosecution did not prove its case to the required standard. To determine this complaint, I had to go through and reevaluate the evidence adduced in the trial court. The evidence of PW2, PW5 and PW6 is crystal that the appellant was caught committing the offence (*flagrante delicto*). It is a settled position that where a suspect is arrested at the scene of crime such evidence should be accorded a much higher weight. See **Ibrahim Ally Mwadau vs the Republic**, Criminal Appeal No. 11 of 2018, CAT at Dar es Salaam. Though the victim (PW3) could not testify due to speech impairment, the evidence on rape was sufficiently corroborated by PW9 who confirmed that the victim's vagina was penetrated by a blunt instrument.

The appellant attempted to suggest that he was framed up the case because of grudges with PW4 Conrad Nikolaus Simiche. I have keenly gone through the evidence on record but failed to find justification of the




appellant's complaint. The said PW4 is not the one who arrested the appellant nor was he within the premises on the fateful day. The complaints are therefore baseless.

Thus, having dispassionately evaluated the evidence as narrated above, like the trial court, I am of unfeigned opinion that the prosecution proved the case against the appellant beyond reasonable doubt. In the result, I find this appeal devoid of merits and consequently dismiss it. The conviction entered and sentence meted out by the trial court are hereby upheld.

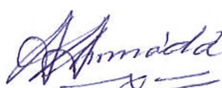
It is so ordered

The right of appeal is explained


A.A. Mbagwa
Judge
13/12/2021

Judgment has been delivered in the presence of Annarose Kasambala, State Attorney for the Republic and the appellant this 13th day of December, 2021




A.A. Mbagwa
Judge
13/12/2021

