

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF BUKOBA  
AT BUKOBA**

**CRIMINAL APPEAL NO. 04 OF 2021**

*(Originating from Criminal Case No, 137/2017 in the District Court of Bukoba)*

**AMUDY KYABUSHUKURU ..... APPELLANT**

***VERSUS***

**REPUBLIC ..... RESPONDENT**


**JUDGMENT**

*12<sup>th</sup> May & 20<sup>th</sup> May 2022*

***Kilekamajenga, J.***

In this case, the appellant was arraigned at the Resident Magistrates' Court of Bukoba for the offence of rape contrary to Sections 130 (1) (2) (a) and 131 (1) of the Penal Code, Cap. 16 RE 2002 and unnatural offence contrary to Section 154 (1) of the Penal Code, Cap. 16 RE 2002. It is alleged that, on 06<sup>th</sup> July 2017, during night hours at Kashai Matopeni within Bukoba District in Kagera Region, the appellant did rape and committed unnatural offence against the victim (name withheld). During the trial of the case, the appellant pleaded not guilty prompting the prosecution to parade three witnesses to prove the case to the required standard.

The gist of the prosecution evidence shows that, PW1 (victim) testified that, on 06<sup>th</sup> July 2017 at 9 pm she agreed with her boyfriend to meet at the appellant's house. The victim therefore went and met the appellant and continued to wait



her boyfriend until at 2 am. The victim felt asleep; suddenly she saw the appellant undressed and demanded to have sex with the victim. When she denied, the appellant pulled down the victim's child who was only one year old and undressed the victim. Thereafter, the appellant raped her and had sex with her against the order of nature; the victim screamed for help but there was no response from the neighbours. As a result of rape, the victim's clothes were torn. She tendered the clothes which were admitted as exhibit P1. She further testified that, she reported the incident to the village chairman in the evening at 8 pm and reported the incident at the police station at Bukoba. She was later admitted in hospital for a week.

PW2 who was the Medical Doctor from Bukoba Government Hospital testified that, on 06<sup>th</sup> July 2017, while on duty, she received the victim at 11 am. She examined her and found out that she was raped and had sex against the call of nature. PW2 filled-in the PF3 form which was admitted as exhibit P1. PW3 was a social welfare officer who worked at Bukoba Referral Hospital. On 10<sup>th</sup> July 2017, PW3 received a report about the victim who was admitted at Ward No. 10; PW3 counselled the victim.

Thereafter, the Court was fully convinced that the appellant committed the offences charged. He was convicted and sentenced to serve 30 years in prison

for each count. Such sentences however ran concurrently. The appellant was aggrieved with the decision of the trial Court hence this appeal. The appellant coined five (5) grounds of appeal thus:

- 1. That, there was no corroborative evidence supporting PW1 (victim)'s testimony that she was instructed by her x boyfriend sitting and waiting him at appellant's home at material night.*
- 2. That the evidence by PW2 was unbelievable and incredible to prove exh. P1 (PF3), the said medical witness who testified to conduct examination test to victim on hours (timee0 when on the rape alleged to be committed at appellant's vein.*
- 3. That, the evidence of PW1 (victim) and PW2 had material contradictory each other to support the same purporting the said offence of rape in allegation.*
- 4. That, the said rape was fabricated against appellant whilst it was not reported earliest possible moment to a person (police) therefore no one who testified about for supporting victims in her testimony if she was reported the rape soon after the incident.*
- 5. That, the pertaining circumstances was so exceptional to support the said rape where as a person who named by victim as her boyfriend was not came to appellant's home, to meet with victim at material night which leave a lot of doubt that her testimony was not credible to prove whether the said rape was actually committed to appellant's home.*

On the date when the case came for hearing, the appellant appeared in person and without representation whereas the learned State Attorney, Ms. Naila Chamba appeared for the respondent, the Republic. In his submission, the

appellant argued that the victim did not know him. The victim agreed with her boyfriend to meet at his (appellant) house at 9 pm. The allegation that he raped the victim at 2 am is not true. He argued further that the PF3 form tendered seemed to have been in the hands of the victim before the alleged rape. Also, there is no evidence to suggest that the victim reported the incident at the Ward office. Also, the victim's clothes were admitted but not identified. The appellant insisted that the case was framed against him.

In response, the learned State Attorney stated that, there was no an illegality in the trial of the case. The victim testified on how she was raped; she raised an alarm but she did not get any assistance from neighbours. The victim immediately reported the incident at the Ward office and was later advised to report the incident at the police station. The learned State Attorney further argued that, in rape cases, the best evidence always comes from the victim as it was stated in the case of **Selemani Makumba v. Republic [2006] TLR 379**. The learned State Attorney further averred that, the PF3 form was properly filled-in. the victim was examined by the Medical Doctor on the same day (06/07/2017). Also, the evidence of PW2 squarely fits that of PW1. The victim tendered the clothes torn during the rape. The same clothes were admitted and the appellant did not object. The learned State Attorney finally supported the

conviction and sentence meted against the appellant and urged the Court to uphold the decision of the trial Court.

When rejoining, the appellant did not raise any substantial argument rather than insisting that he did not know the victim.

Having considered the arguments from both sides, the pertinent issue for determination is whether proved its case beyond reasonable doubts. As already stated above, the conviction in this case relied on the evidence of PW1, PW2 and PW3. PW1 being the victim of the incident, PW2 being the Medical Doctor and PW3 being the welfare officer working at the Hospital. For this reason therefore, the most pertinent evidence is that of the victim. As stated earlier, during the trial, the victim informed the Court that, she arranged to meet her boyfriend at the appellant's house. She arrived at the appellant's house at 9 pm but the alleged boyfriend did not appear. As a result, the victim was raped by the appellant at 2 am. However, the evidence clearly shows that, the victim lived within the same street with the appellant (Kitopeni street at Kashai). When the victim was cross-examined, she informed the Court that, she had a husband and have children but her husband's house has no room to enjoy sex. In my view, the victim's evidence leaves a lot of facts to desire. If she agreed to meet her boyfriend at the appellant's house at 9 pm, why did she remain at the appellant's

house until at 2 am despite the absence of her boyfriend? Again, if the victim raised an alarm at night and she was not assisted, why did she not inform the neighbours about the incident after getting out of the appellant's house? Furthermore, the victim's evidence shows that she reported the incident at the village chairman at 8 pm and was advised to report the incident at the police. Also, the evidence of the Medical Doctor shows that, she received the victim on 06<sup>th</sup> July 2017. However, the evidence does not tell when the victim reported the incident to the police and when she arrived at the hospital. Unfortunately, there is no evidence from the police who investigated this case.

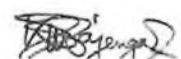
In the circumstances where the victim was raped on 06<sup>th</sup> July 2017 but the appellant was arrested on 18<sup>th</sup> July 2017, the Court must take extra-caution on merely banking on the statement of the victim. Courts should not compromise the standard of proof especially in criminal cases of these nature because there is a danger of sentencing a person for a fabricated case. In my view, I find the prosecution evidence loose to sustain a conviction. I find merit in the appeal and order the release of the appellant from prison unless held for other lawful reasons. It is so ordered.



**Ntemi N. Kilekamajenga**

**JUDGE**

**20<sup>th</sup> May 2022**



**Court:**

Judgment delivered this 20<sup>th</sup> May 2022 in the presence of the appellant and the learned State Attorney, Mr. Mwasimba. Right of appeal explained.



**Ntemi N. Kilekamajenga**

**JUDGE**

**20<sup>th</sup> May 2022**