

IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 02 OF 2022

(Appeal from the judgment of the District Court of Bukombe in Cr. Case No. 300 of 2020)

MAMBO SIZYA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

16th May & 14th June, 2022

DYANSOBERA, J:

Before the District Court of Bukombe at Bukombe, the appellant Mambo Sizya was charged with and convicted of rape contrary to sections 130 (2) (e) and 131(1) of the Penal Code [Cap 16 R.E. 2019]. He was sentenced to thirty (30) years term of imprisonment. He was not satisfied with the trial court's decision hence this appeal in which four grounds have been raised.

The brief facts of the case for deciding this appeal are that the victim (PW 2) is a STD V pupil and the fourth daughter of Margareth Mwakalinga (PW 1), a resident of Masumbwe. The appellant is well known to both the victim and her mother as he was the work mate of PW1's husband who is now in prison.

On 30th day of March, 2020 in the evening, the appellant went to PW 1 in order to assist them with some food. The victim was permitted to accompany the appellant to the shop so that the he, the appellant, bought some food for PW1's family. The victim tarried to go back home and PW 1 made a follow up at the appellant's homestead. She managed to find the victim in the appellant's house, naked and the victim was complaining to have been raped by the appellant. She was later taken to the police station, given a PF 3, went to Masumbwe Health Centre and medically examined. The appellant fled but was arrested on 14th December, 2020 and taken to the police station whereby H.686 D/C Muyenji recorded his cautioned statement. The following day that is on 15th day of December, 2020, the appellant was taken to Grace Sylvester, (Pw5), the Masumbwe Ward Executive Officer and had his extra judicial statement recorded (Exhibit P4). The appellant was arraigned in court in which he denied to have raped the victim.

The learned Resident Magistrate heard the prosecution evidence and was satisfied that the offence of rape had been proved to the required standard. He convicted and sentence him accordingly.

At the hearing of this appeal, the appellant stood on his own, unrepresented whereas Ms. Margareth Mwaseba, learned Senior State

Attorney represented the respondent. The appellant told this court that he had filed five grounds of appeal and had nothing useful to add.

On her part, the learned Senior State Attorney, supporting both the conviction and sentence, had the following to submit. On the first ground of appeal, she told this court that after the appellant denied the charge, the prosecution called five witnesses, who, according to her, proved the case. She submitted that PW 1 and the victim proved the age of the victim 12 years old and that the victim who had left with the appellant was found at the appellant's house. The Doctor who medically examined the victim was clear that the victim was penetrated and the appellant admitted before Grace Sylvester the Justice of the Peace to have committed the charged offence. Ms Mwaseba was of the view that the evidence proved the offence as per the law requires. She was, however, quick to point out that the appellant's cautioned statement should be expunged from the record because the appellant had objected to its admissibility and the court admitted it without conducting an inquiry.

Learned Senior State Attorney refuted the appellant's complaint that the judgment of the trial court was incomplete and argued that the decision of the trial court was arrived at after the trial court had

considered the mitigation, and therefore, the trial magistrate complied with the law.

Regarding the third ground, it was argued on part of the respondent that all the ingredients of the offence charged were proved and the law is clear that in rape cases, the best witness is the victim. The court was referred to the case of **Selemani Makumba v. R.** [2006] T.L.R. 379. On the complaint that the appellant was not given the right to be heard, learned Senior State Attorney, referring this court to page 7 of the typed judgment, contended that the appellant was heard, accorded the right to call his witnesses and his defence was considered.

Replying the fourth ground, she submitted that there was cogent evidence that the appellant carnally knew the victim. She pointed out that usually, rape is not committed in public but in secrecy and the best evidence to prove its commission comes from the victim as was the case here where the victim was found in the appellant's room as indicated at page 11 of the typed proceedings.

The appellant's complaint that the prosecution used the affidavit to prove the age of the victim instead of a birth certificate was also challenged and the learned Senior State Attorney contended that the

age can be proved by either the parent, guardian or a birth certificate. She contended that in this case, PW 1 who is the victim's mother, proved the age of the victim to be twelve years and stated when the victim was born.

On the complaint against the sentence, it was submitted on part of the respondent that the sentence was proper.

Having considered the grounds of appeal and the submissions, I am, in the first place constrained to agree with the learned Senior State Attorney that the appellant's cautioned statement recorded by PW 3 on 14th day of December, 2020 was improperly admitted. The record of the trial court is clear that the appellant objected to its admission but no inquiry was conducted to ascertain if the appellant was a free agent when recording it and if was voluntarily made. I accept the invitation that this cautioned statement which was improperly admitted in court and marked exhibit P 1 be expunged from the record and I so expunge it.

I now turn to consider the grounds of appeal. In tackling them, I will start discussing the 2nd, 3rd and 4th grounds of appeal and the 1st ground of appeal will be tackled at last.

In his 2nd ground of appeal, the appellant is complaining that the trial Magistrate used incomplete judgment to convict him as he failed to write the total sentence leading him to get imprisoned. According to him, the trial Magistrate at p. 18 of the copy of judgment simply wrote, "*I hereby convict the accused of the charge of rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16 R.E.2019*". In his view, the law enjoined the trial Magistrate give a complete, clear and detailed judgment.

I think the appellant is partly right and partly wrong. He is right because the typed judgment does not show the sentence and how it was passed against the appellant. The appellant is wrong because the handwritten copy of the judgment in the original record indicates that after the learned Resident Magistrate convicted the appellant, he proceeded to embark on sentence hearing where he received both the information on the appellant's previous record and the mitigation of the appellant and then made the following

orders: -

Sentence: *accused is hereby sentence (sic) to thirty years imprisonment term.*

Court: *sentence read over to accused in presence of Ms. Sarafina for Republic*

Right of appeal explained.

Although the sentencing proceedings are not reflected in the typed judgment, the typed proceedings and the handwritten copy of judgment is clear that the judgment was complete. The error might have been occasioned during the typing. It is my opinion that this error did not, in the circumstances of the case, prejudice the appellant as it was indicated that the sentence was read over to him in the presence of Ms Sarafina for the Republic and the appellant was duly received in prison. I find this 2nd ground without merit and dismiss it.

In the 3rd ground of appeal, the appellant is faulting the learned Resident Magistrate for convicting him without giving him opportunity of being heard and that his defence was not considered. I think this complaint lacks any factual or legal basis. First, the proceedings are clear that after the prosecution closed their defence of five witnesses, the learned Resident Magistrate ruled that the appellant had a case to answer and then, at p. 26 of the copy of the proceedings, the trial Magistrate recorded: -

Court: *the accused is hereby informed that he has right to defend himself under oath or otherwise and may call witness in his defence. S. 231 (1) of Cap 20 is complied with.*

The appellant then responded by stating: -

Accused: *I shall defend myself alone, I am ready today.*

There then followed his sworn testimony as indicated at pp. 27 and 28 of the typed proceedings.

Second, in the judgment dated 30th September, 2021, the learned Resident Magistrate, after stating at p. 2 of the typed judgment that, *'the accused defence was rather a general denial of criminal liability, and he paraded himself alone as the defence witness-DW 1. He maintained that it all down to the debt PW 1 and family owes to him that there exists bad blood between them. He was only surprised to be arrested on 14/12/2020 and charged with rape'*, discussed in detail the defence evidence as reflected from pages 6 to 7 of the copy of judgment. For this reason, the appellant's complaint that he was convicted without been given the right to be heard and that his defence was not considered is not true. The 3rd ground is dismissed.

In his 4th ground, the appellant is complaining that no witness was brought in court to prove that they saw him carnally knowing the victim

and that the evidence was hearsay and no birth certificate was brought in court to prove the age of the victim.

I think this ground need not detain me. As rightly pointed out by the learned Senior State Attorney, acts of rape are usually committed in secrecy and not in public and the victim was clear in her evidence that she was carnally known by the appellant on the fateful day in the appellant's house before she was called out by her mother, PW 1. PW 1 supported this evidence. Settled is the principle that the best proof of rape must come from the complainant whose evidence, if credible, convincing and consistent, can be acted upon alone as the basis of conviction. In the case of **Selemani Makumba v. R.**(supra) cited by the learned Senior State Attorney, the Court of Appeal observed:-

"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 law is also clear on this aspect under section 127(6) of the Evidence Act [Cap. 6 R.E.2019].

This 4th ground of appeal is without merit and I dismiss it.

In 1st first ground of appeal, the appellant is faulting the trial court in convicting him while he had pleaded guilty and the alleged confession was caused by misunderstanding after he was tortured. On her part, the respondent was of the view that the prosecution which called a total of five witnesses proved the case beyond reasonable doubt.

There is no dispute and the record is clear that the appellant, at his initial appearance before the trial court, pleaded not guilty to the charge of rape. This necessitated the prosecution to have to discharge the burden of proving their case beyond reasonable doubt. As rightly pointed out by the learned Senior State Attorney, the prosecution proved its case to the required standard. To prove the offence of rape as laid under sections 130 (1) (2) (e) and 131 (1) of the Penal Code, the prosecution had to establish that the appellant had sexual intercourse with the complainant who was under 18 years, that means the prosecution had to establish that there was penetration into the complainant's vagina, the complainant was under 18 years, and that the appellant was the perpetrator of the sexual act.

In the instant case, the available evidence on the record sufficiently proves the case. The victim's evidence was clear, reliable and had detailed account of what had happened between her and the

appellant in the appellant's house. This evidence was corroborated by PW 1, the victim's mother who found the victim in the house of the appellant naked and was complaining to have been carnally known. Both the victim and PW 1 were familiar with the appellant and they properly identified him. The appellant when recording his extra-judicial statement (exhibit P 4) before PW 5, a Justice of the Peace, was clear that he slightly penetrated the victim as that was her first time to have sexual intercourse and was feeling pain. In other words, the victim was a virgin. This evidence was confirmed by PW 4, a clinical officer at Masumbwe Health Centre. The same PW 4 tendered in evidence the PF 3 (exhibit P 3).

Apart from proof of penetration caused by the appellant, the prosecution also proved that the victim was aged 12 years. According to PW 1 who is the victim's mother, the victim was, at the time of the commission of the offence, aged 12 years. PW 1 managed to prove the victim's age beyond reasonable doubt by not only stating that the victim, that is PW 2, was born on 26th day of December, 2007 but also supporting her evidence by tendering in court an affidavit to that effect. The 1st ground of appeal fails and is dismissed as well.

The appellant, after conviction, earned a sentence of thirty years term of imprisonment. This sentence is the bare minimum the law prescribes.

In the final analysis, I find this appeal devoid of any merit and I dismiss it in its entirety. I confirm the judgment of the District Court.


W.P. Dyansobera

Judge

14.6.2022

This ruling is delivered at Mwanza under my hand and the seal of this Court on this 14th day of June, 2022 in the presence of the appellant but in the absence of the respondent who, through Mr. Deogratias Richard Rumanyika, learned State Attorney, was aware of the date of the delivery of this judgment.

Rights of appeal explained.




W.P. Dyansobera

Judge