

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA**

**CRIMINAL APPEAL NO.47 OF 2021**

*(C/f Criminal case No.129 of 2019 at the resident Magistrates Court of Arusha at Arusha.)*

**JOHN THADEI SEBASTIAN.....APPELLANT**

**Vs**

**THE DPP.....RESPONDENT**

**JUDGMENT**

*Date of last Order:6-6-2022*

*Date of Judgment:28-6-2022*

**B.K.PHILLIP,J**

The appellant herein together with one Gabriel Loilang'wake, not a party in this appeal were charged with rape contrary to section 130 (1) (2) (a) and 131(1) of the Penal Code, Cap 16. The particulars of the offence were to the effect that on different occasions in the year 2017 the accused persons did have sexual intercourse with a woman called "SP" (Not her real name) without her consent. In proving its case the prosecution paraded five witnesses, including the victim ( SP).The accused persons did not bring any witnesses. Upon analysis of the evidence made by the prosecution witness, the trial Magistrate ruled that the accused persons had a case to answer and were accorded the right to defend themselves. Finally, the trial Court delivered its judgment in which it convicted the accused persons of the offence of rape with and convicted them to thirty (30) years imprisonment each.

Aggrieved by the decision of the trial Court the appellant herein lodged this appeal on the following grounds;

- i) That the trial Magistrate erred in law and in fact to convict the appellant for the offence of rape while there was no evidence at all to prove the case against the appellant.
- ii) That the trial Court erred in law and fact to use one of the witnesses in the case that is, PW1 to be the interpreter of another prosecution witness ( PW4 ), the victim.
- iii) That the trial Court erred in law and fact to convict the appellant for the offence of rape while there was no evidence to prove that the victim was raped.
- iv) That , the trial Magistrate erred to convict the appellant despite doubt the name of the victim as the same was not cleared by the prosecution , thus rendering the charge to be defective. The name of the victim stated in the charge sheet is different from the one stated by the victim during the hearing of the case.
- v) That the Honourable Magistrate erred to convict the appellant for rape despite that the age of the victim was not established.
- vi) That , the trial Magistrate erred to convict the appellant of rape without the element of penetration being established and proved beyond reasonable doubt.
- vii) That the trial Magistrate erred in law and fact to believe that PW4 was credible despite her failure to disclose the rape earlier and despite that she never said when the offence was committed.

viii) The Honourable Magistrate erred for shifting on the appellant the burden to prove that he did not commit the offence.

At the hearing of this appeal the senior learned State Attorney Felix Kwetukia appeared for the respondent whereas the appellant was unrepresented, thus appeared in person.

The appellant submitted for all grounds of appeal cumulatively. In his submission was as follows; That prosecution failed to prove that there was penetration, which is an important ingredient for offence of rape. The trial court erred to allow PW1, Rogathe Mathayo Ayo, a teacher at Moivaro Primary School, in the mental disability department, where the victim was studying, to be the interpreter of the PW4, the victim. PW1 had been changing his names. When he giving his testimony he introduced himself as Rogathe Mathayo but later on when he was appointed as the interpreter for PW4 he introduced himself as Rogathe Ayo. The name of the victim indicated in the charge sheet was different from the name of the victim who appeared in Court and testified as PW4, thus the charge sheet was supposed to be amended pursuant to the provisions of section 234 of the Criminal Procedure Act, ("CPA").

Other arguments raised by the appellant were as follows; That since the accused persons were more than one, each accused person was supposed to be charged in his own count, but that was not done. Thus, the charge sheet was defective. The age of the victim was not established. The offence of rape was not proved since the victim failed to testify on the date when the offence of rape was committed. The trial Magistrate

erred to trust PW4's testimony and shifted the burden of prove to the accused persons. The appellant prayed this appeal to be allowed.

In rebuttal, Mr. Kwetukia argued as follows; That the court's records reveal that there is ample evidence adduced by the prosecution witnesses which prove that the appellant raped the victim. The evidence of PW4, the victim shows clearly that she was raped. The same is corroborated by the testimony of PW5, the Doctor. To cement his argument, Mr Kwetukia referred this Court to Pages 18-22 of the typed proceedings and the testimony of PW1 found at page 11 of the typed proceedings. He went on submitting that the burden of proof was not shifted to the appellant. The prosecution evidence was water tight to the effect that the victim was raped.

With regard to the name of the interpreter (PW1), Mr. Kwetukia submitted that at page 10 of the typed proceedings it is indicated that PW1 introduced himself as Rogathe Mathayo Ayo. At page 18 of the typed proceedings PW1 introduced himself as Rogathe Ayo. He just omitted the middle name, that is Mathayo and the victim, PW4 called him Ayo. Mr. Kwetukia strongly argued that names of the interpreter are Rogathe Mathayo Ayo, and they are same names which are appearing in the Court's record. Thus, there is nothing wrong with the names of PW1. In addition, Mr. kwetukia contended that no error was committed by the trial Magistrate by allowing PW1 to be the interpreter of the victim (PW4) because the victim is mentally retarded. Therefore, someone was needed to interpret what she was saying.

With regard to the appellant's concern on the name of the victim, Mr. Kwetukia argued that the Court's records show that on the 1<sup>st</sup> day the victim was not able to give her testimony due to her health condition because she is mentally retarded. The probable reason for the difference of the victim's second name is the victim's mental health.

Furthermore, Mr. Kwetukia submitted that the charge sheet was not defective. Each accused person was charged in a separate count. The appellant's concern on the age of the victim is irrelevant because the accused was an adult. So, there was no need to establish her age.

In conclusion of his submission, Mr. Kwetukia maintained that the testimony of PW4 ( the victim ) was credible. She was not cross examined by the accused persons on any substantive issues. The credibility of a witness can only be assessed by the trial Court. Thus Court is not in a position to question the assessment of the credibility of the victim made by the trial magistrate. To cement his argument he cited the case of **Shabani Daudi Vs Republic , Criminal Case No.28 of 2000 ( CA)** (unreported). He invited this Court to dismiss this appeal for lack of merit.

In rejoinder, the appellant reiterated his submission in chief. He insisted that the names of the victim are at variance with the ones indicated in the charge sheet and the age of the victim was not proved.

Having analyzed the submission made by the appellant and the learned senior State Attorney as well as perused the Court's records, I am of a settled opinion that this appeal is void of merit as will elaborate soon hereunder;

The charged is not defective as alleged by the appellant. It indicates the count for each accused person. The court's record reveal that victim in this case is mentally retarded and the same was not disputed by the appellant. The testimony of PW1, the victim's teacher clearly shows how the victim explained to him how she had been raped by the appellant and how that affected her in her studies. PW1 also testified that he reported the victim's complaint to the village chairman, Mr. Wilfred Kimanani Mollel, ( PW2) who in return involved the Social Welfare Officer and the Victim's parent ( PW3). Finally they managed to apprehend the appellant and other accused persons. The testimony of PW4 , is corroborated with the testimony of PW1. In her testimony PW4 narrated how she was being raped by the appellant and the other accused person. Upon being cross examined by the appellant, PW4 said that the appellant called her in a room and raped her. She was not able to remember the date. That is understandable because the victim's mental health was not in good condition and was raped more than once by more than one person. The appellant's contention that the trial Magistrate erred to trust PW4 is unfounded because he did not give any explanation to support his assertion. Not only that the response made by PW4 to the questions posed to her during cross examination indicates that she was consistent and sure of what she was saying before the Court. As correctly submitted by Mr. Felix, the credibility of a witness can be assessed by the trial Magistrate. [see the case of **Ally Abdallah Rajabu vs Saada Abdallah and Others (1994) TLR, 132** ].In this case the trial Magistrate stated categorically in the judgment that PW4 was a credible witness. The position of the law is

that the best evidence for rape cases is the evidence of the victim. In the case of **Mohamed Said Vs The Republic, Criminal Appeal No.145 of 2017**, ( unreported) the Court of Appeal had this to say regarding the evidence in proving rape case;

*" We are aware that in our Jurisdiction , it is a settled law that the best evidence of sexual offence comes from the victim ( Magai Manayma Vs Republic ( supra). We are also aware that under section 127 (7) of the Evidence Act ( Cap .6 R.E 2002) a conviction for sexual offence may be grounded solely on the uncorroborated evidence of the victim.."*

In addition to the above, the testimony of PW5 (the Doctor) and Exhibit P1 (PF3) is a proof that the victim was raped. The appellant's argument that there was no proof that there was penetration is unfounded because Exhibit P1 proves that the victim's hymen had already been removed and PW5 testified that hymen can be removed by having sexual intercourse. In this case the evidence of PW4 ( victim) plus the testimonies of PW1, PW2 and PW5 proved the offence of rape beyond reasonable doubt. The appellant was convicted on the strength of the prosecution evidence. The burden of proof was not shifted to the appellant. After all the Court's record shows that the defence made by appellant did not shake the prosecution case in any way.

It is also noteworthy that as per the Court's records, the victim was an adult, so the issue of ascertaining her age is irrelevant and the appellant's concern on the name of the victim being at variance with the one appearing in the charge sheet is also of no significance because the first name of the victim indicated in the charge sheet is the same to the

victim's name indicated in the proceedings. It is only the second name which appears to be different from the one indicated in the charge sheet, but the variance of the second name was cleared by the fact that the victim's father testified in Court and during the hearing the appellant did not ask any question regarding the identity of either the victim or his father. In short, there was no concern raised by the appellant on the identity of the victim and /or her father. From the foregoing, as I have alluded earlier in this judgment, it is the finding of this Court that this appeal has no merit. Thus, I hereby dismiss it in its entirety.

Dated this 28<sup>th</sup> day of June 2022



A handwritten signature in black ink, appearing to read "B.K. Phillip", is written over a faint, circular official stamp.

**B.K.PHILLIP**

**JUDGE.**