

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

HIGH COURT CRIMINAL APPEAL NO. 100 OF 2021

*(Originating from Criminal Case No. 42 of 2021 at the District Court of
Rungwe)*

BARAKA CHARLES MLONGANILE-----APPELLANT

VERSUS

THE REPUBLIC -----RESPONDENT

JUDGEMENT

Date of last order: 28.03.2022

Date of Decision: 13.05.2022

Ebrahim, J.:

Baraka Charles Mlonganile, the appellant herein was charged and convicted for the offence of rape contrary to **section 130(1)(2) and 131(1) and (3) of the Penal Code, Cap 16 RE 2019**. The particulars of the offence read that on May 2021, the appellant, unlawfully had sexual intercourse with one JSM (identity concealed) a girl of six years old.

The offence of rape was mounted following the reporting of the incident by the victim's parents to the police on 31.05.2021. The mother of the victim (**PW1**) told the court that during the afternoon of the above-mentioned date, the victim (PW2) complained to have pain in her vagina. When she examined her, PW2 noticed pus oozing from her vagina. Together with the victim's father they went to collect PF3 and go to Rungwe District Hospital for check-up. At the hospital, they were informed that the child has been penetrated (raped). When PW2 was asked she said one day she went to play with Joel and Jeny who are appellant's children at their home. She did not find them but the appellant was there. It was when the appellant called her into his bedroom, asked her to sit on the bed, smeared oil in **PW2**'s vagina and raped her. PW2 said the appellant told her not to tell anyone otherwise he would kill her.

After hearing the evidence from both parties and evaluating the same, the trial Magistrate found the appellant guilty of the charged offence, convicted and sentenced him to the mandatory sentence of life imprisonment.

Aggrieved, the appellant has lodged an appeal in this court raising six (6) grounds of appeal faulting the trial court for considering the evidence of the doctor which was doubtful and did not prove penetration. He also faulted the trial court for disregarding his defence of alibi and denying him opportunity to call his witnesses to prove the same; and that the facts narrated by the victim were instigated by her mother whom they had bad blood.

When the case was called for hearing, the appellant who appeared in person adopted his grounds of appeal and prayed for the court to consider his grounds of appeal.

The learned State Attorney, Ms. Mgeni beginning with the 2nd ground of appeal argued that the testimony of PW4 (the doctor) had no doubts or contradiction and corroborated the testimony of the victim as he explained how he examined PW2 and found redness and bruises in her vagina. He also tendered PF3 (exhibit P2). Responding further in respect of ground no 3, Ms. Mgeni argued that in terms of **section 130(2)(4) of CAP 16**, penetration however slight proves rape. Talking about the appellant's defence of alibi, the

learned State Attorney contended that not only that the appellant never asked to call a witness to prove his alibi and refused by the court, but the law i.e., **section 194(4) of the Criminal Procedure Act, Cap 20 RE 2019** required the appellant to issue notice but he did not. She argued therefore that the defence was an afterthought.

Responding on the 5th ground of appeal, counsel for the respondent challenged the fact that the appellant did not cross examine the victim on establishing that she was coached by her mother. Rather, the victim said that it was the appellant who penetrated her, hence the said ground is also an afterthought as the same defence was not raised during his defence at the trial.

Re-joining, the appellant reiterated his prayers.

I have carefully followed the rival submissions and the grounds of appeal as adopted by the appellant. I am further cognizant of the fact that this is the first appellate court hence I can step into the shoes of the trial court and make evaluation and analysis of evidence observant of the fact that I was not privileged to observe the demeanour of the witnesses as illustrated in the case of **Mzee**

Ally Mwinyimkuu @ Babu Seya Vs Republic, Criminal Appeal No. 499 of 2017.

Going through the grounds of appeal, the appellant is mainly complaining that the evidence of PW4 was doubtful and penetration was not proved, his defence of alibi was not considered, there were no facts to prove rape and that the victim was coached by her mother following a long existing conflict. In essence, the appellant is complaining that the case was not proved beyond reasonable doubt.

Beginning with the testimony of **PW4**, Justine Malecela, a medical officer testified under oath that he received the victim (PW2) in the evening of 31.05.2021 who was brought by her parents coming from the police with a PF3. He said he examined the victim and discovered the bruises on the victim vaginal walls and it was reddish. He also observed that the hymen was intact. He filled in PF3 which was tendered and admitted in court without objection as **exhibit PE2**. Exhibit PE2 showed that the redness of the vaginal wall establishes penetration.

Going by the testimony of PW4 I find nothing contradictory or doubtful in his testimony. Nevertheless, the appellant did not cross examine PW4 on either his observation or on the report. It is a settled principle of the law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence. See the holding in the case of **Damiani Ruhele v. Republic, Criminal Appeal No. 501 of 2007 CAT** (unreported). Furthermore, the law i.e., **section 130(4) (a) of the Penal Code, Cap 16 RE 2019** provides clearly that *penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence.*

Thus, corroborating with the evidence of the victim who she told the court that the appellant after daubing oil in her vagina, he inserted his penis. While the medical observation (exhibit PE2) concludes that the hymen was not perforated, under the law, the slight penetration proves rape. Again, according to the testimony of PW4 there is nowhere that he admitted that there was no penetration as the appellant would wish the court to believe. On that background, I

find the 2nd and 3rd grounds of appeal to be unmeritorious and I dismiss them.

On the 4th ground of appeal, the appellant complained that his defence of alibi was not considered. Again, going through his defence he only said that on that particular day he was not at home but at work and encountered the accusations when he returned from work. First of all, the records do not show anywhere that the appellant requested to call witnesses to prove his alibi. Secondly, the trial court considered the appellant's defence and rejected the same on the basis that the same did not comply with the law in terms of **section 194(4) and (5) of the Criminal Procedure Code, Cap 20 RE 2019**. The trial court did not accord any weight as per the provisions of **section 194(6)** of the same Act giving the reason that much as the appellant was not required to prove his defence but he could have called people to support his defence. I find no reason to fault the trial magistrate on the reason that since the appellant said he was at work, it was easier to call a fellow worker or his superior to cement his defence considering the fact that he raised it during the

defence. Thus, I also find his defence of alibi to be an afterthought and I dismiss the 4th ground of appeal.

On the 5th ground of appeal which I shall address together with the 6th ground of appeal, the appellant is complaining that the victim was couched and the court did direct itself to the facts of the case as narrated by the victim. In essence the appellant is challenging the truthfulness of the testimony of the victim.

I am abreast of the cardinal principle that in sexual offence like one under consideration, the best evidence is that of the victim of the offence. This is according to **section 127 (6) of the Evidence Act, CAP 6 RE 2019** and the Court of Appeal decisions in a number of cases including the case of **Edward Nzabuga v. Republic, Criminal Appeal No. 136 of 2008, Court of Appeal of Tanzania at Mbeya** (unreported). However, the victim's evidence cannot be taken whole sale, as the same must pass the truthfulness and credibility test as held by the Court of Appeal in the case of **Mohamed Said v. Republic, Criminal Appeal No. 145 of 2017 CAT at Iringa** (unreported).

It is upon this court thus, to scrutinize the evidence adduced by the victim and decide whether it was true or not. The victim testified as PW2. After promising to tell the truth, she told the court that she is in standard one at Goje Primary School and that she knows the appellant. The fact that she knows the appellant was confirmed by the appellant himself and that they live in the same street. PW2 identified the appellant at the dock and said that he lives with Joel, July, Jesca and Jeny. She testified also that Joel and Jenny are the appellant's children. The fact that Joel and Jeny are his children was not controverted. PW2 testified also that on the incident day, she went to play at their home but Jeny and Joel were not around and it was when the appellant called her into his room, told her to remove her pants, laid her on the bed, daubed oil in her vagina, covered themselves with a blanket and raped her. She explicitly said that the appellant **"Aliniingiza dudu lake kwenye sehemu za siri"**. PW2 went further explaining that after the ordeal, the appellant used his shirt to wiped of the victim on her vagina and told her not to tell her mother or else he would kill her. The appellant again, did not challenge the testimony of PW2 regarding daubing her with oil, telling her not to tell

anyone and the fact he used his shirt to wipe her private parts. Responding to cross examination questions, PW2 confirmed that it was the appellant who raped her. Furthermore, the appellant did not question as to whether PW2 was coached by her mother nor did he ask PW1. More-so he did not raise it in his defence but rather said in examination in chief that PW1 quarrelled with his wife whom they no longer live together. As for PW1, when she was responding to re-examination questions, she said they had quarrelled with the family long-time ago and they were currently living in harmony.

From the victim's evidence, though I could not observe her demeanour, but following the coherence of her testimony which is also corroborated by the observations of PW1 and PW4 who managed to see her vagina, I have no flicker of doubt that PW2 was telling the truth. Besides, both the appellant and PW1 admitted that the conflict was resolved long time ago and the same could be observed on the fact that PW2 was freely going to the house of the appellant. Again, as rightly argued by the counsel for the respondent, the case is on rape and there is nowhere that the wife of the appellant was part of it. More also, in considering the age of

the victim, as per the testimony of PW1, it is not easier to remember the day of the week perfectly and it is also easier to be scared not to say anything after being threatened to be killed.

Not only that, as alluded earlier, PW2 saw the pus oozing from PW2's vagina and it was when she took her to the police and then hospital.

That being the position therefore, owing to the testimonies of PW1, PW2 and PW4, I join hands with the trial court and find that prosecution managed to prove their case beyond a shadow of doubt. That being said, I accordingly find the appeal to be unmeritorious and I dismiss it in its entirety.

Accordingly ordered.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim", is written over the printed name.

R.A. Ebrahim

JUDGE

MBEYA

13.05.2022

Date: 13.05.2022.

Coram: Hon. P.A. Scout, Ag -DR.

Appellant: Present.

For the Republic: Ms. Hanarose – SA.

B/C: Gaudensia.

Ms. Hanarose – State Attorney:

Your honour, the case is coming on for Judgment we are ready to proceed.

Appellant: I am ready too.

Court: Judgement is delivered in the presence of the Ms. Hanarose, State Attorney, Appellant and C/C in Chamber Court on 13/05/2022.

A.P. Scout

Ag-Deputy Registrar

13/05/2022

Court: Right of Appeal Explained to the parties.



A.P. Scout

Ag-Deputy Registrar

13/05/2022

DEPUTY REGISTRAR
HIGH COURT OF
MBEVA