

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

AT BUKOBA

CRIMINAL APPEAL NO. 84 OF 2021

(Originated from Resident Magistrates' Court of Bukoba, Criminal Case No. 183/2020)

TEOPHIL ERNEST..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

Date of Judgment: 13.05.2022

A.Y. Mwenda, J.:

The appellant was, before the Resident Magistrate's Court of Bukoba at Bukoba charged for rape contrary to Section 130 (1) (2) and 131 (3) of the Penal Code, [Cap 16 RE 2019].

It was alleged that on 4th of July 2020 at Bugashani area, Buhembe Ward, within Bukoba Municipality in Kagera Region he carnal knowledge one Vanesa d/o Ezekiel Mswahili, a girl of six years of age.

To support its case, the prosecutions side lined up four (4) witnesses including the victim who stood as PW1. On his part the appellant defended his case by appearing as DW1. After the closure of both, the prosecutions and defence case, the Honourable trial Magistrate analyzed the evidence tabled before him and was satisfied that the prosecutions has discharged its duty of proving the case beyond

reasonable doubt. The appellant was then convicted and sentenced to serve a term of 30 years jail imprisonment. He was also ordered to pay the victim a compensation to a tune of Tshs. 1,000,000/=

Aggrieved by the conviction and sentence meted against him the appellant appealed before this court. He filed a memorandum of appeal with six grounds.

The said grounds read:

1. That, the trial court erred in law and on facts to sentence and convict the appellant relying on the contradicting and uncorroborated evidences;
2. That, the trial court erred in law and on facts to sentence and convict the appellant without considering the fact that the case against the appellant was not proved beyond reasonable doubt;
3. That, the trial court did not consider the defense evidences;
4. That, the trial court did not comply with Section 312 (1) of the Criminal Procedure Act [Cap 20 RE 2019];
5. That, the trial court erred on facts and law, by relying on the evidence of PW4 who denied disclosing the personal give him information about incident (sic);
6. The trial court un reasonably did not consider the alibi of the appellant.

During hearing of the appeal the appellant was represented by Mr. Danstan Mujaki, learned counsel and for the respondent, Republic, Mr. Emmanuel Kahigi was in attendance. When invited to submit in support of the appeal, Mr. Danstan begun

by informing this court that he was going to argue the 1st, 2nd, 5th and 6th grounds collectively and the 3rd and 4th grounds separately.

With regard to the 1st, 2nd, 5th and 6th grounds of appeal, the learned counsel for appellant submitted that the victim's (PW1's) credibility is doubtful. He said she failed to name the assailant at the earliest possible opportunity. He said while during examination in chief she testified that after she was raped she told her sister Asimwe, during cross-examination she said she told her grandmother. He said this kind of testimony creates doubts and in support thereof he cited the case of **SAID MUSSA VS. REPUBLIC, CRIMINAL APPEAL NO. 93 OF 2020** (unreported).

The learned counsel further submitted that the victim said that she had been raped several times in the past by the appellant but did not say if she reported anywhere. The learned counsel said the victim testified that after she was raped she went to school but the doctor who examined her on 7/7/2020 said she was limping and to him this is not normal for a child of six years to get raped and still manage to go to school soon thereafter.

The learned counsel went on to state that at page 12 of the typed proceedings the victim testified that after the incident she informed her grandmother on what befell unto her but her grandmother who stood as PW2 testified that she was informed about the incident by PW4.

Another point of concern submitted by the learned counsel for the appellant is that the charge sheet shows the victim was raped on 4/7/2020 but the doctor (PW3) who examined her on 7/7/2020 said he saw sperms draining from her private parts. To him this create doubt as it is not normal for sperms to be in a liquid form for almost three days.

Another point raised by the learned counsel is that there is variance between a charge sheet and the evidence adduced in court in that while the charge sheet shows the victim was raped on 4/7/2020, PW2, PW3 and PW4 testified that the incident occurred on 7/7/2020.

Lastly, the learned counsel for the appellant submitted that the case against the appellant was fabricated by PW4 (WEO) who had grudges with him over a girl and boat engine which was handled and later got lost in the hands of PW4. The learned counsel submitted that PW4's active role in the case proves the said fact as he took the victim for a check-up even before collecting a PF-3 despite being aware of the procedure that PF-3 ought to be collected first. He then concluded his submission by a prayer that this appeal be allowed, conviction quashed and sentence be set aside.

On his part, when invited to make his submission responding to the submissions by the learned counsel for appellant, Mr. Emmanuel Kahigi learned State Attorney informed this court that the republic is not opposing this appeal.

The learned State Attorney submitted that there was a contradiction in the prosecution's evidence with regard to the date when the offence is alleged to be committed. He said while the charge sheet shows the incident occurred on 4/7/2020, the prosecution's witnesses such as PW2, PW3 and PW4 said it was on 7/7/2020. On her part, the victim (PW1) did not say when the incident occurred other than stating that it was on a fateful day.

Another contradiction according to the learned State Attorney is that while PW2 said on 7/7/2020 she was at Kamachumu and returned home at night, PW4 said on 7/7/2020 at noon hours he went to PW2's home and instructed her to go to the village's office with the victim.

The learned State Attorney also submitted that failure to mention the victim's assailant at the earliest possible time affected the prosecution's case. He said the appellant and the victim are residing in the same area but he wondered as to why it took too long to report the matter and have the appellant arrested on 7/7/2020 from 4/7/2020 when it is alleged the offence was committed.

The learned State Attorney concluded his submission by praying this court to allow this appeal.

That being the summary of submissions by the learned counsels for both parties, it is now the duty of this court to determine this appeal. To do so the issue for determination is whether the prosecution's side discharged its duty of proving its case to the standard required.

To begin with, it is important to state that in criminal cases the burden of proof lies on the prosecution and the standard of which is beyond reasonable doubt. In the case of **SAID HEMED VS. REPUBLIC [1987] TLR 117**, the court held inter alia that:

"...It is elementary rule of that law that the burden of proof in criminal cases is on the prosecution's side and the standard is beyond reasonable doubt."

As I have stated earlier, to prove its case the prosecutions side called four witnesses including the victim. In convicting the appellant, the Hon. Trial Magistrate, relied on the testimony of PW1, the victim of the crime and PW3, a medical officer who examined the victim. The Hon. Trial magistrate was of the view that the victim's evidence is sufficient to warrant conviction. He said the victim testified that it was the appellant who raped her and that PW3 who examined her discovered that she was raped and to him this proved that there was penetration. This court went through the records and is in agreement with the learned counsels for the appellant and for the republic that the prosecution side failed to discharge its duty of proving its case beyond reasonable doubt.

Firstly, this court is in agreement that there was variance between the charge sheet and the evidence tendered. While the charge sheet shows the victim was raped on 4/7/2020 the evidence adduced by PW2, PW3 and PW4 shows she was raped on 7/7/2020 and bad indeed, the victim did not say when exactly was she

raped. The effect of such variance was discussed in the case of **SAID MUSSA SOWENI VS. REPUBLIC, CRIMINAL APPEAL NO. 93 OF 2020** where the Court of Appeal held inter alia that:

"The law is settled that, a charge which is in material conflict with testimonies materially shakes credence of the prosecution's case and renders the prosecution's case not proved to the required standard..." [emphasis added]

Guided by the above authority it is clear that the prosecution's case is shaken by variance between charge and evidence. Apart from that, this court also noted that there is no explanations by the prosecution's side as to why, despite the appellant and the victim being residents from the same area, it took long time to have the appellant arrested. From the charge it is indicated that the crime was committed on 4/7/2020 but the appellant was arrested on 7/7/2020. The records are clear that the victim and the appellant resides in the same area but one may wonder why did it take almost three day thereafter to have him reported and arrested while there is no evidence that he went at large after the commission of crime. This act creates doubt which should be resolved in favour of the appellant. This position has been propounded in many authorities of the court of appeal one of which is in the case of **ABUHI OMARY ABDALLAH AND 3 OTHERS VS. REPUBLIC, CRIMINAL APPEAL NO. 28 OF 2010 CAT** Dar es salaam where it was held inter alia that:

"Where there is any doubt, the settled law is to the effect that in such a situation an accused person is entitled as matter of right to the benefit of doubt or doubts."

Apart from the above doubts, there are other doubts which defies logic on the prosecution's case. One, the victims testimony that after she was raped, she reported the matter to her sister Asimwe and then went to school creates doubts. The records are clear that the victim was only 6 years old, and PW3 testified that when she appeared before her on 7/7/2020 for examination she was limping. Now one may wonder if on 7/7/2020 the victim was found limping, then in what state was she on 4/7/2020 when she was raped. In that condition one may ask how did she manage to go to school on the said date. This issue also creates doubts.

Another doubts is that while PW3 testified that when the victim was examined on 7/7/2020 there were sperms draining from her private parts then one may wonder how was it possible for sperms to be in a draining state (liquid form) for almost three days i.e from 4/7/2020 to 7/7/2020 when she was examined by PW3. As I have stated above this too creates doubt which should be resolved in favour of the appellant.

From the above analysis, this court is in agreement with the learned counsel for the appellant and the respondent (the Republic) that the prosecution's side failed to prove its case beyond reasonable doubt.

This appeal is therefore allowed, conviction quashed and sentence and any other orders set aside. The appellant should be released immediately unless otherwise lawfully.

It is so ordered.




A.Y. Mwenda

Judge

13.05.2022

This judgment is delivered in chamber under the seal of this court in the presence of the Mr. Emmanuel Kahigi, Learned State Attorney for the respondent and in the presence of Mr. Danstan Mujaki learned counsel, for the appellant.




A.Y. Mwenda

Judge

13.05.2022