

IN THE REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA
CRIMINAL APPEAL NO 71 OF 2021

(Originating from Masasi District Criminal Case No. 15/2021)

OSCAR ROBERT MPAPA @ MANAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MURUKE, J

Lucy Jasani Maulusi aged 15 years old lived with her mother and grandmother at Nambaya village within Masasi District Mtwara Region. She went missing from some days, thus necessitated her mother to report to the village chairman. In the course of investigations as to where about Lucy, village chairman saw her coming from the shop holding cooking oil, while wearing Oscar Robert Mpapa house. He then went to the Lucy mother and report. Lucy's mother, village chairman and two militia man went to Oscar house and knocked at about 05:00 hours. They were replied by Oscar opening the door. When asked about Lucy, he said she is inside, followed with Lucy coming out herself. They were both arrested and taken to police station. After investigations Oscar Robert Mpapa was charged with two



counts namely Raped Contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 of the laws R.E 2019.

Upon hearing, trial court found Oscar Robert Mpapa (the appellant) guilty and thus sentenced him for 30 years imprisonment. Being dissatisfied he filed present appeal raising 10 (ten) grounds of appeal and one additional ground filed on 20th May 2022. On the date set for hearing of the appeal, Wilbroad Ndunguru Learned State attorney represented respondent while appellant was in person. He thus requested his ground of appeal to be adopted as his submission in support of his appeal with right of rejoinder after respondent submission.

Respondent counsel joined ground 1,2,3,4,7,8,9 and 10 of the main petition as they speak of lack of evidence to ground conviction, and submitted that:-

She was raped apart from abduction. Victim herself testified that she has also proved that, victim was being penetrated, thus evidence of rape is so direct from the victim PW1 and the Doctor PW4, insisted Learned State Attorney.

On ground 6 of the main petition and ground one of additional ground complaint is Caution Statement being taken contrary to the law, thus, wrongly admitted. Learned State Attorney submitted that, Caution Statement was not objected as seen at page 11 of typed proceedings. Section 169 of the CPA insist on objection to be raised during trial not any other time, citing case of **Chande Zuberi Ngayaga and another Vs. republic, Criminal Appeal No. 258/2020 Court of Appeal at Mtwara, (unreported)** Respondent counsel,



concluded that the two grounds lack merits. Appellant complaint at ground 5 of the petition is failure to mention the name of victim in the PF 3. Learned State Attorney attacked this ground for lack of merits on account of clarity of PF3 that clearly mentioned victim name.

In rejoinder, appellant insisted that Caution Statement was not voluntarily given. He was seriously beaten under arrest. He insisted that he did not abduct Lucy, he only resquired her from witchcraft accusations by the whole village that is why he stayed with Lucy in his house, in the absence of his wife.

Having heard both parties, gone through trial court records, following issue is not in dispute, that: - Lucy Jasani Maulusi, (the victim) was found at Appellant home, after missing for number of days.

State Attorney in cause of replying grounds of appeal combined some of grounds. For clarity of resolutions of grounds of appeal and appeal itself, I will resolve one ground after another. Ground one of main petition, complainant is contradiction of witness on time Lucy victim went missing. Appellant complained that PW2 said 6 months while PW1 said about 9 weeks, citing case of **Rashid Chitende Vs. Republic Criminal Appeal No. 204 of 2015 (unreported)** to support his assertions.

According the trial court records at page 14, of trial court proceedings, PW2 Lucy, the victim, while being cross examined by the accused now appellant she replied:-

In fact, it is more than a week I speak with you at your house. You were offering me with food stuffs which I took to my grandmother. My mother is not staying far away from where my grandmother is staying.

On the same aspect of time at page 10 of typed proceedings PW1 is quoted to have said.

I remember in January 2021, Lucy disappeared without a trace. I had to go to the village Chairman to report disappearance of promised me that he will look for her in the localities and the neighboring villages was about 6 days after her disappearance when I made a report to the village.

Thus, there is no contradiction of the time victim spent with appellant. More so, contradiction if any it does not affect strength of the evidence of PW1 and PW2. Ground one lacks merits, accordingly dismissed.

On ground two, appellant complaint on evidence of PW5 medical doctor that were used to ground conviction. He said, medical doctor was not sure of what actually used to penetrate the victim's vagina. PW5 did not state whether PW2 was raped or not as was required to do by PW4 the police officer. To be honest, this ground lacks merits. PW5 medical report is not the only evidence that ground conviction. It should be noted that, appellant is facing charge of rape to a girl below 15 years. Under this charge consent is irrelevant. What grounded conviction is corroboration of chain of evidence. Most serious is the evidence of victim herself. Her evidence was very clear and consistent all the time. At page 13 trial court typed proceedings she is quoted to have said:-

I remember in January 2021, it was staying with Oscar Robert Mpapa, at his house. I spent about a week at Oscar's house. He first saw me, I was returning from the well to fetch water. He approached me and asked me to date with him, but I refused. It was around his house. Later I accepted and he took me to his house. While at Oscar's house, nilikuwa nafanya nae mapenzi wote wawili tulivua chupi tukawa tunatombana, the acts were done during morning hours and at night. We had sexual intercourse in several occasion. I looked for him and

myself and washed his clothes also. On 15/02/2021 while at Oscar's house we were caught by village chairman who was accompanied by two people militia and my mother. We were taken to village office, then brought to Masasi police station for questioning.

The above is the evidence of the victim herself. In sexual offences, the evidence of the victim carries more weight and mostly used to ground conviction. However, not only the evidence of the victim, but also the evidence of appellant himself at page 28 of typed proceedings That:-

"I took Lucy home and she had to spend her time at home with me. During that time my wife Theresia was not at home, we were separated"

The fact that, victim proved even during cross – examination by the accused that, she was being penetrated by the accused on morning and night all the days she stayed with appellant, and the fact that, appellant admitted to have stayed with Lucy at his home until found on 15 days of February 2021, it is obvious that, appellant had raped Lucy. Complaint that it is only medical report that grounded conviction, can not be accepted. The above argument disposes ground 2 and 3 altogether. Same are dismissed for lack of merits.

Ground 4 and 5 will be combined and argued together. Ground four appellant argued that it took 4 days to file exhibit P2. There is no time limitation for PF3 to be completed. It is just reasonable time. 4 days is reasonable time, thus complain lacks merits. On ground 5 appellant complained that the name of victim not the one written in the PF3. That is not true. Exhibit P2 at paragraph two read that: -

***"I have the honour to request for Medical Examination of Lucy D/O
JASAN MAULUSI"***

It is the same name that is mentioned in the charge sheet. More so, the victim at page 13 in her evidence as PW2 she is called Lucy Jasani Maulusi, 15 years old, Makua, Christian, Peasant of Nambaya village. So, what appellant is complaining has no basis. Thus, ground five of the appeal lacks merits.

Appellant complaint on ground 6 and ground one in the additional ground of appeal is that Caution Statement was recorded Contrary to Section 50 (1) and 51 (1) of the criminal Procedure Act Cap 20 R.E 2022.

According to the proceedings appellant did not object production of Caution Statements. Appellant denounced his Caution Statement on his diffense. How appellant made a U – turn, deserve a lot to be desired. Looking at the caution statement did not comply with Section 50 and 51 of Criminal procedure Act. None compliance of section 50 and 51 of the Criminal procedure Act is fatal to the contents of the caution statement. Thus, caution statement is expunged from the court records. Thus ground 6 of main petition and ground 1 of the additional grounds of appeal have merits.

Ground 7, 8, 9 and 10 all speaks of discrepancies on the evidence of PW2. It is true as argued by appellant at ground 7 that, PW2 told trial court that, she was going to visit her grandmother who was nearby to take food staff provided by appellant. At page 14 of the trial court records PW2 victim is recorded to have said while being cross examined by the accused now appellant, that; -

Yes sometimes I would go home and came back with my younger sister. But my mother did not notice anything. In that house, when we were caught,

there were also the other people such as Penina and John, my relatives. I am older than Penina and John. I brought them at your house. Yes I remember they were brought to me by my aunt one Binti mwenye. In fact, it is more than a with, I spent with you at your house. You were offering me with food stuffs to my grandmother. My mother is not staying far away from where my grandmother is staying.

From the evidence above, it is clear that, PW2 was abducted. She was going out and coming back. Her grandmother knows. It is surprising why victim mother did not know while her two young children were sleeping in the same place with PW2 and appellant.

I have keenly gone through evidence of PW2, there is no proof of her age. She stayed with appellant and her two young sister and brother, Penina and John respectively. This fact was known by her grandmother and her aunt. In a charge of rape to a girl below 18 years, consent is immaterial but, proof of age is necessary. Without proof of age offence of statutory rape cannot be proved. In totality failure to prove victim age, is fatal to the case of rape to a girl below 18 years. At the end ground 7,8,9, and 10 has merits, conviction is quashed and sentence set aside. Appellant is set a Liberty unless otherwise withheld with other offences.




Z. G. Muruke

Judge

25/07/2022

Judgment delivered in the presence of appellant in person and Kauli G. Makasi State Attorney for the Respondent.



A handwritten signature in blue ink, appearing to read "Z.G. Muruke".

Z.G. Muruke

Judge

25/07/2022