

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

(DC) CRIMINAL APPEAL NO 72 OF 2021

(Originating from Makete District Court at Makete

Criminal Case No. 57 of 2021)

FRANK WILBARD SANGA ----- APPELLANT

VERSUS

REPUBLIC ----- RESPONDENT

Date of Last Order: 25/4/2022

Date of Ruling: 18/05/2022

JUDGMENT

MATOGOLO, J.

The appellant Frank s/o Wilbard Sanga was charged before the District Court of Makete with the offence of rape contrary to Sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap. R.E. 2019]. It was alleged that on 7th day of October, 2021 at Iniho village within Makete District Njombe region the appellant unlawfully did have carnal knowledge to one Angela d/o Edger Mbogela a girl aged 13 years old and STD six pupil at Iniho Primary School.

The appellant pleaded not guilty. At the end of the trial he was found guilty convicted and sentenced to thirty (30) years imprisonment. Aggrieved with both conviction and sentence, he was come to this court and filed petition of appeal with a total of eight grounds as follows:-

1. That, the appellant pleaded not guilty to the charge.
2. That, the trial court learned magistrate erred in law and fact by convicting the appellant basing on circumstantial evidence.
3. That, the evidence of PW1 and PW2 should not be entertained as their testimonies were uncorroborated.
4. That, the key witnesses (father, mother and police officer) were not called before the court of law to testify. Even the victim's age in the PF3 was not stated.
5. That, the elements of penetration as the important ingredient in rape offences were not clearly stated by the Doctor as the age of the victim was not given.
6. That, the learned trial magistrate erred by not taking into account on the bad behaviour of the victim as she had more than two guys dealing with her on sexual intercourse.
7. That, the trial magistrate erred in convicting the appellant basing on contradicted and uncorroborated evidence given by the prosecution side.
8. That, the prosecution side failed to prove their case beyond reasonable doubts.

The appellant prayed to this court to allow the appeal, set aside conviction and sentence and setting him at liberty.

On 25/04/2022 when the matter came on for hearing, the appellant filed additional grounds of appeal six in number but which relate to the first grounds he formerly filed.

At the hearing, the appellant appeared in person. Mr. Basilius Namkambe learned Senior State Attorney appeared for the respondent Republic. Mr. Namkambe supported the appeal on the following grounds;

Doubts on the evidence of the medical doctor.

The charge alleged that the incident occurred on 07/10/2021 but the Medical doctor examined the victim on 13/09/2021 who was suspected to be pregnant after been raped. Upon examining her he found the victim with pregnancy of three (3) months.

He said this is contrary to what alleged in the charge sheet. He said this shows that the victim had love relationship with another man.

Another complaint by the appellant what the Republic supported is that while the victim being cross-examined she said she was taken by the appellant into his room, it is on record that the appellant was arrested on 12/10/2021 and kept in the police lock up until on 15/10/2021 he was taken out and sent to court. Mr. Namkambe questioned as to how possible for the appellant to commit rape on 13/10/2021 at the time he was in the police lock up. He said the victim's evidence is not consistency and coherent.

Mr. Namkambe also supported the appeal on the age of the victim and discredited the evidence by the Medical doctor. If the evidence of the Medical doctor would not have been discredited, the PF3 would prove age

of the victim but also her parents. But the victim's parents did not testify. Mr. Namkambe referred the case of ***Karim Seif @ Slim vs. The Republic***, Criminal Appeal No. 161 of 2017 CAT (unreported) in which the court explained ways of proving the victim's age.

Basing on those grounds the learned Senior State Attorney prayed for the appeal to be allowed.

The appellant, apart from his prayer for his grounds of appeal to be considered, he had nothing to rejoin.

I have carefully read the grounds of appeal filed by the appellant. I have also gone through the trial court records. As pointed out at the beginning, the charge sheet alleged that on 07/10/2021, the appellant raped the appellant. The victim of the offence testified before the trial court on 18/10/2021 to the effect that on 07/10/2021 he went to the shop to buy a rim of papers. On her way back she met with the appellant who hold her and took her to his room where he undressed and raped her. After been raped she informed her father. It was the second time for the accused to rape her. The first time he raped her was on 21/08/2021. He raped her without using condom for protection.

On 13/10/2021, she said she met him on the road when he took her to his room where he put off her dresses and penetration his penis into her vagina. With such evidence, there is no doubt that the victim of the offence was not consistent in her evidence. As stated above she first said she was raped on 07/10/2021, but again she said the appellant raped her for the first time on 21/08/2021. But again she said she met with the appellant on the way on 13/10/2021, took her to his room undress her and inserted his

penis into her vagina. With such kind of evidence it is difficult for this court to take which is the correct version of the victim among the three times she said she was raped between 07/10/2021, 13/10/2021 and 21/08/2021. Her testimony is therefore unreliable. On the other hand the Medical doctor who testified as PW.1 told the trial court that on 13/10/2021, he received the victim suspected to have been raped.

After examining her he realized that the victim was pregnant and had bruises in her vagina caused by penetrating penis. The victim was three months pregnant.

Looking at the evidence of the victim, there are two things this court has discerned. One, the evidence given and received is at variance to what is alleged in the charge sheet. Two, there is no certainty as to when the victim was raped, and who raped her. If the charge alleges that rape happened on 07/10/2021, or even on 13/10/2021, how is it possible for the victim to be found with a three months pregnancy on 13/10/2021 when she was examined by PW1 if the victim was also raped on 21/08/2021, who was responsible for that pregnancy. This is because even if we assume that the victim is correct in her allegation that she was also raped on 21/08/2021, up to 13/10/2021 when PW1 conducted medical examination for the victim that would only be one month and 24 days from the date the alleged first rape was done against her. But if so why the appellant was not charged on that first act of rape done on 21/08/2021

It is settled principle of law that in criminal trials when the evidence given is at variance to the particulars disclosed in the charge sheet, the charge is to be amended so that the particulars of offence conform to the

evidence adduced. This was also the position of the Court of Appeal in the case of ***Ryoba Mariba @ Mangare vs. Republic***, Criminal Appeal No. 74 of 2003 in which it was stated:-

"If there is variation in dates then the charge must be amended forthwith and the accused explained his right to require the witnesses who have already testified recalled. If this is not done the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right short of that a failure of justice will occur".

In the case at hand despite the fact that PW2, the victim of the offence disclosed different date (s) to that indicated in the charge sheet but no any amendment to the charge was made, the charge therefore remained unproved. But also PW1 testified to the effect that upon examining the victim he found her with three months pregnancy, that alone shows that the said pregnancy was not caused by the appellant because the dates alleged that he raped the victim and when she was examined two months would have not elapsed. If there was any sexual intercourse to the victim it would have been done earlier before the alleged rape was committed thus it was not the appellant who caused that pregnancy but must be a different man whom the victim did not name. Another thing PW1 stated in his evidence is that he found bruises in the victim's vagina which he said was caused by penetrating "penis". It is surprising to hear that firstly, PW1 did not explain as to how long bruises

will remain intact after the alleged rape, secondly, PW1 did explain as to what enable him to conclude that what penetrated the victim's vagina is the penis. By stating so it means that PW1 concluded that the victim was raped. But it is not necessary for bruises to be caused by the penis. It may be by any other blunt object. What PW1 was required to do as the Medical doctor is to give expert opinion of the possible object which must have penetrated the victim but not to conclude that it was penis as if he was present at the scene and saw the appellant while committing rape.

Having so stated, I agree with Mr. Basilius Namkambe learned State Attorney who supported the appeal. I find merit in this appeal. The same is hereby allowed. The conviction against the appellant is quashed and sentence of thirty (30) years imprisonment set aside. The appellant be released from the prison custody with immediate effect unless lawfully held for other causes.

DATED at IRINGA this 18th Day of May, 2022.




F.N. MATOGOLO
JUDGE.

18/05/2022

Date:	18/05/2022
Coram:	Hon. F. N. Matogolo – Judge
Appellant:	Present
Respondent:	Magreth Mahundi – State Attorney
C/C:	Charles


Magreth Mahundi – State Attorney:

My Lord I am appearing for the Republic. The appellant is present and the appeal is for judgment we are ready.

COURT:

Judgment delivered.




F. N. MATOGOLO
JUDGE
18/05/2022