

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 73 OF 2021

(C/F Criminal Case No. 228 of 2020 in the District Court of Rombo at Rombo)

GIDO FERDINAND MROSSO.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT


20/06/2022, 18/7/2022

JUDGMENT

MWENEMPAZI, J.

The appellant was charged with the offence of Rape contrary to section 130(1), (2) (e) and 131(1) of the Penal Code, Cap. 16 R.E.2019 whereby it was alleged that the appellant on the 10th day of October, 2020 at about 16:30 Hours at Ngaseni Village within Rombo District in Kilimanjaro Region did have carnal knowledge with one "AA", a girl of 7 years old.

When the charge was read over and explained to the accused (appellant) he denied to have committed the offence. The prosecution had to prove the case by trial and six (6) witnesses were called. The prosecution called five (5) witnesses and the defence had one witness who is the appellant himself.



At conclusion the appellant was found guilty as charged. He was thus convicted with the offence of rape contrary to section 130(1)(2)(e) of the **Penal Code, Cap. 16 R. E. 2019** and sentenced to serve a term of life imprisonment. The appellant is aggrieved with the findings, conviction and sentence hence has filed this appeal to challenge the decision of the trial court. He has filed a memorandum of appeal raising seven (7) grounds of appeal.

The grounds of appeal raised by the appellant have focused on the areas of taking the evidence of the victim contrary to the provisions of section 127(2) of the Tanzania Evidence Act, Cap. 6 R.E. 2019; that the age of the victim was not proved as witnesses differed on the age. While the victim testified to be 7 years old, PW4 (her guardian) and PW5 the medical doctor testified that she is 8 years old; that despite of the fact that the victim child of 7 or 8 years and was raped by the adult (the accused) still her virginity was not broken (understood that the hymen was intact); that the prosecution evidence was weak and contradictory and very unreliable; that the trial magistrate shifted the burden of proof to the defendant and that the charge was not proved beyond reasonable doubt.

At the hearing the appellant was appearing in person, unrepresented and the Respondent was being represented by Ms. Mary Lucas, learned State Attorney. The appellant in his submission started by attacking the probative value of the evidence by PW2, the victim of the offence. In the submission the appellant has submitted that the evidence by the victim, a child of 7 or 8 years was not admitted properly. It was admitted in contravention of the



provisions of section 127(2) of the **Tanzania Evidence Act, Cap. 6 R.E.2019.**

The appellant submitted that the witness did not promise to say the truth as is required by law. What was recorded by the court at page 8 of the proceedings is as follows;

"this court found out that the witness herein above she is the child of seven years old, has the intelligence to speak, however she did not understand the nature of oath and she is hereby promise to speak the truth and not lie before this court, and states as follows:- "

The magistrate continued taking down the evidence of the particular witness. The witness who is a child did not promise to speak the truth as required by section 127(2) of the Tanzania Evidence Act, Cap. 6 R.E. 2019. The mere statement by the court and not recording what exactly was said by the child cannot be said to be a promise which has been made and thus the law has been complied with. It has been submitted that it was held in the case **Philipo Emmanuel vs. The Republic, Criminal Appeal No. 499 of 2015, Court of Appeal of Tanzania at Mbeya** that such testimony is wrongly and improperly received. The evidence must be expunged from the record. A similar situation happened in the case of **Rajabu Ngoma Msangi vs. Republic, Criminal Appeal No. 22 of 2019**, whereby His Lordship Twaib, J. (as he then was) relying on the case of **Godfrey Wildson Vs Republic, Criminal Appeal No. 168 of 2018**,



Court of Appel of Tanzania at Bukoba (unreported) held that such evidence has no evidential value.

The appellant also submitted that the case against him was a fabricated one. Scrutiny of the evidence tendered would show that there were discrepancies in the evidence of the prosecution witnesses. The trial magistrate relied on the evidence of the victim, PW2 and that of the medical doctor, PW5. The victim said the appellant found her praying with her young brother and dragged her to the farm nearby the house. He undressed her the skirt she was wearing and underwear and his trousers too then pushed her down. He came on the top of her and inserted '***dudu lake kwenye kidudu chake***' where she felt pain and saw blood coming out from her vagina and white water too, there after the appellant gave her Tshs. 500/= so that she could buy sweets. PW5 Batura Abduli Msuya testified that he conducted examination on the victim and he found that her vagina had bruises and clothes were very dirt. He saw blood in her private parts. Her virginity was not ruptured and her anus was normal and he did not see remains of sperms.

The appellant has submitted that it is inconceivable for a girl of 7 to 8 years to be raped by a male person the like of the appellant and still her virginity not to be ruptured.

Again, PW2 testified that after the act, she was given money Tshs. 500/- by the appellant. PW3 Simon Michael Uiso and PW4 Nimfa Ulirick Uiso they testified that they found the accused in the act with the victim and when he saw them, he ran and they were able to arrest him in the night. He has



submitted that it is not clear the time they found the appellant in the act, when did the accused/appellant give the said money to the victim. He is asking where was the young brother who was praying with the victim when the victim was grabbed and dragged to the farm by the accused (the appellant) and later being raped.

The respondent's counsel is supporting the appeal by the appellant on the reason that the Republic has failed to prove the case beyond reasonable doubt. The prosecution evidence which the trial magistrate used to convict the appellant has a lot of doubts and those doubts are touching the root of the case.

In sexual offences, the best evidence is that of the victim as it was decided in the case of **Selemani Makumba Vs. Republic [2006] T.L.R.379**. But in order for the court to rely solely on the evidence of the victim the said evidence need to be credible and proves nothing but the truthfulness as per section 127(6) of the Evidence Act, Cap. 6 R.E. 2019 as well as it was held in the case of **Goodluck Kyando vs. Republic [2006] T.L.R.**

The prosecution evidence tendered by the victim herself (PW2) raises doubts. She testified that the appellant found the victim playing with her young brother. He grabbed her and dragged her to the farm area whereat he undressed her and himself and then pushed her to lie down. He then came on top and inserted his penis into her vagina. While they were in the act, there appeared two persons known by the names Mama Aidan and Baba Mika who saw them. Mama Aidan took a club hit the appellant with it

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and Gido ran away. Basing on this, it shows that they were caught red handed but the appellant escaped. (Refer page 8 of the proceedings).

PW3 Simon Michael Uwisso at Page 9 of the proceedings said that he saw the accused(appellant) at the back of the house near the farm while naked with his trousers dropped down to the level of the knees, he was on top of the victim of the event. The victim was lying on her back holding her underwear on her hand; from the point of observation, it was estimated to be six paces. He did not say anything, he went to call the victims elder mother, Nimfa (PW4) together they came back, they found the appellant in the act of raping the victim, after seeing them, the appellant ran away. They took the victim home.

While the witness, PW3 testified that the event occurred at the back of the house near the banana farm. She said also she saw the appellant with his trousers dropped to the knees having sexual intercourse with the victim. They were in the act. The victim was holding her underwear on her hands. He also testified that the victim had Tshs. 500/- holding in her hands.

It has been submitted by the learned state Attorney that the three witnesses had different account of the event which leave doubts to the listeners. These are key witnesses. They differed on the way they managed to identify the appellant at the scene of crime, and the place where the incident occurred. It is difficult to understand who is telling the truth on where did the act of rape take place. Is it near the banana farm, at the banana farm or at the back of the house. The accounts of the event raise doubt on the credibility of the prosecution witnesses. The counsel led the

court to refer to the case of **Eliah Barik Vs. Republic, Criminal Appeal No. 321(2016)**, [tanzlii], where the court held that:

"it is the settled principle that on assessing the credibility the court is tasked with the duty of, first, assessing the coherence of the testimonies of each one of them, and second, by considering each witness's account with that of other witnesses."

There is no coherence and resemblance of the prosecution evidence tendered by key witnesses as their testimonies differ and contradict each other.

It has been submitted by the learned state attorney that the offence of rape is proved by penetration, which it can be proved by the victim herself, if there is no other independent evidence and when the victim is the only witness. However, for the court to rely solely on the testimony of the victim particularly where the victim is of tender years, must make sure that the victim tells nothing but the truth as provided for under section 127(2) of the Evidence Act, Cap. 6 R.E. 2019.

The counsel for the Republic submitted that in the present case, the testimony given by the victim and other witnesses who are said to be eye witnesses has a lot of discrepancies that need corroboration. PW3 and PW3 who alleged to be eye witnesses, differed on the place where the act took place. The witness testified that the event occurred at back of the house and they observed at the distance of six paces. And that the victim was found to be bleeding in her private parts which shows she was raped.



PW5 is the doctor who examined the victim when she was taken to the hospital. The victim's vagina had bruises and her clothes were dirt. There was blood on her private parts. Her virginity was not ruptured and her anus was normal. No sperms were seen.

According to the testimony of the doctor there was no sign of penetration, as the hymen was intact. Hence according to the said evidence there was no any penetration. Although the trial magistrate on his judgement expunged the PF3, he still had duty to make sure the evidence by the prosecution witnesses met the requirements of law under section 127 of the Tanzania Evidence Act, Cap. 6 R.E. 2019.

The learned state attorney submitted in conclusion that the Republic is supporting the appeal by the appellant.

I have read also the evidence by the prosecution and the defence as well as the submission by the parties in the appeal. The question is whether the appeal has merit as submitted by the parties. This case involves a sexual offence. It is alleged the appellant did have carnal knowledge of the child of tender years, a child who is 8 years old. Under the law the offence is characterized to be a statutory rape. No need of consent but to prove that there was penetration.

In the case we have four witnesses who are key to the proof of the offence. The victim herself, PW3 and PW4 and the doctor who examined the child. The appellant challenged the evidence tendered by the child, who is the victim, that it was against the provisions of section 127 of the Tanzania Evidence Act, Cap. 6 R.E. 2019.



The record does not support as to how the trial Magistrate established that the child witness had intelligence to speak and that she did not understand the nature of oath. And that she promised to speak the truth. Without spending much time on the issue, I find the evidence of the child witness was taken against the provisions of section 127(2) and 127(7) of the Evidence Act, Cap. 6 R.E. 2019.

However, as submitted by both the appellant and the learned state attorney, the evidence of the prosecution was not coherent. It had contradictions on the similar occasions' material to the proof of the offence. While the child witness testified that she was dragged to the farm, the elder witnesses PW3 and PW4 testified that the event took place at the back of the house. The fact that PW4 took a club and hit the accused does not feature in the evidence of PW3 and PW4. In the same line, while the three witnesses have testified that the accused was seen having sexual intercourse with the child, the doctor, PW5 testified that there was no penetration and no sperms were found in the vagina of the child victim while the child testified to have seen blood and white fluid.

I find the doubts are material to the proof of the offence charged against the appellant (accused in the trial Court). The offence was not proved to the required standard. The doubts must be cleared in favour of the appellant.

Therefore, the appeal has merit and it is allowed. The judgement of the trial court is hereby quashed, sentence set aside and the appellant should be

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released forthwith unless otherwise he is being lawfully held. It is ordered accordingly.

Dated and delivered at Moshi this 18th day of July, 2022.



T. M. MWENEMPAZI

JUDGE

Judgment delivered in court this 18th day of July, 2022 in the presence of the appellant in person and Ms. Mary Lucas, learned State Attorney for the Republic.



T. M. MWENEMPAZI

JUDGE

Right of Appeal further appeal explained to the parties.