

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)**

AT IRINGA

(DC) CRIMINAL APPEAL NO 70 OF 2021

*(Originating from Iringa District Court at Iringa
Criminal Case No. 36 of 2019)*

TANO LUPA ----- APPELLANT

VERSUS

REPUBLIC ----- RESPONDENT

07/03 & 23/03/2022

JUDGMENT

MATOGOLO, J.

The appellant Tano s/o Lupa was arraigned in the District Court of Iringa with the offence of rape contrary to Section 130(1)(2)(e) and 131(1) of the Penal Code. It was alleged that, in the month of December, 2018, at Nyang'oro village within Iringa Rural District in Iringa Region had carnal knowledge to one Eva s/o Mhegele a girl aged fifteen years to which he pleaded not guilty. At the end of trial, he was found guilty, convicted accordingly and sentenced to thirty (30) years imprisonment.

Aggrieved with both conviction and sentence the appellant has appealed to this court where he filed petition of appeal with five grounds of appeal as follows: -

1. That, the trial court grossly erred in law and fact by basing conviction on mere circumstantial and uncorroborated piece of evidence.
2. That, Doctor's recommendations are null and void since the fact that it doesn't connect the appellant with the alleged charged crime.
3. That, the prosecution failed to establish their case beyond reasonable doubt since the evidence adduced by all prosecution witnesses are mere hearsay which is inadmissible.
4. That, trial court erred in law and fact by failure to properly scrutinize the age of the said victim, since the fact that the question of age determination at most cases require expert evidence which was not conducted.
5. That, the trial court grossly erred in law and fact by admitting the cautioned statement which the appellant repudiated it since he made the confession after he was promised to be set free.

The appellant prayed for the appeal to be allowed, conviction quashed and sentence set aside and for an order for his immediate release from the prison.

At the hearing of this appeal the appellant appeared in person, unrepresented, on the other hand Ms. Blandina Manyanda learned State

Attorney appeared for the respondent Republic who resisted the appeal from the outset. The appellant told this court that he has filed petition of appeal with a total of five grounds of appeal.

He had no any ground to add but asked this court to act of his grounds of appeal presented before this court.

On her part Blandina Manyada learned State Attorney in reply to the appellant's grounds of appeal submitted in respect of first ground that, the evidence leveled against the appellant was not only circumstantial and corroborated, she said looking at the evidence of PW1 one Eva Mhengele, as found at page 7-8 of the trial court proceedings shows that, she started love affairs with the appellant in December, 2018, the relationship which led her to conceive. She explained where the two were meeting. That is at her residence when her parents have left to the pombe club. After report at school she was discovered that she was pregnant. Her evidence was corroborated by the evidence of her mother (PW2) who testified to the effect that after being discovered that PW1 was pregnant, she asked her as to where she got that pregnancy, she mentioned the appellant to be responsible. But that evidence of the victim (PW1) was corroborated by the medical doctor (PW4), who in his evidence stated that he examined the victim and found her without hymen, but she was also pregnant.

Ms. Blandina Manyanda submitted further that the victim evidence was also corroborated by the evidence of PW5 , the police officer who recorded cautioned statement of the appellant (exhibit P3) in which the appellant admitted to have sexual intercourse with the victim. She said the

victim of the offence was a child thus even if the victim consented to the sexual intercourse that is legally rape.

She further submitted that the evidence of the victim alone would suffice to prove the charge against the appellant. But there is corroborating evidence that corroborate evidence of the victim. The appellant himself confessed to have committed the offence. She said it is trite law that in criminal trials the good evidence is that of the accused who confess and supported her argument by citing the case of ***Wilson Mussa vs. Republic***, Criminal Appeal No. 109 of 2018 CAT (unreported), in which the court also at page 12 referred the case of ***Seleman Makumba vs. Republic (2006) TLR 379***.

Regarding second ground of appeal that, the doctor's recommendations are null and void for not connecting the appellant with the charged offence, it is the submission by the learned State Attorney that the ground is baseless as what PW4 did is just to examine the victim and record his recommendations in the PF3. His role was not to prove as to who raped the victim. But in the PF3 the medical doctor found the victim not virgin, but she was also pregnant, the evidence which corroborated the evidence of the victim who has already mentioned the appellant that he had love affairs with her.

As to the third ground of appeal, it is the submission by the learned State Attorney that, looking at the evidence of the prosecution witnesses, PW1, PW2, PW3, PW4 and the appellant's cautioned statement recorded by PW5 who interviewed him, and by further evidence of PW6 the appellant's

father who witnessed while statement of the appellant being recorded at the police station that, appellant gave his statement freely and was not compelled or promised. This evidence as a whole proved the charge against the appellant beyond reasonable doubt.

Regarding the fourth ground of appeal for the trial court failure to scrutinize age of the victim of the offence, it is the submission by Blandina Manyanda that, PW1 proved before the court that she was below 18 years. At the time she was testifying she was 15 years old. She said she was born on 05/03/2004, while testifying in December, 2014. Her mother PW2 confirmed the age of the victim who said the victim was born on 05/03/2004. The learned State Attorney argued that the issue of age of the victim of the offence where statutory rape is involved, the Court of Appeal of Tanzania has established a principle that age of the victim can be proved by certificate of birth, the victim herself, her parents, her teachers, her friends or any other person who properly know the victim as it was held in the case of *Jafari Mussa vs. DPP*, Criminal Appeal No. 234 of 2019.

Regarding fifth ground of appeal that, the trial court grossly erred to admit and rely on the appellant's cautioned statement which he repudiated as was taken after been promised to be set free. The learned State Attorney viewed this ground as baseless because the trial court proceedings reveal at page 18 that, while the said cautioned statement being tendered and admitted in court the appellant did not object. He never raised the issue of promise at the time PW5 was testifying and praying to tender the statement in court. What the appellant objected is for the cautioned statement not to be admitted because it was not read to

him. But he admitted to have signed the same. She said the issue of promise was raised during his defence. His act of raising it now is an after thought.

But also PW6 in his evidence stated that the appellant was not compelled to give statement and said he witnessed while appellant confessing to have love affairs with the victim the affairs which led to the victim to become pregnant.

The learned State Attorney argued that, PW6 being the appellant's father, in normal circumstances he could not lie against his own child. He was in a position to testify in favour of his child. The learned State Attorney supported the conviction.

In rejoinder appellant had nothing to challenge what was submitted by the learned State Attorney.

Having read the grounds of appeal, the reply submission by the learned State Attorney and the court records, the issue for determination is whether given the evidence levelled against him appellant was properly convicted or in other words whether the charge was proved against him.

The appellant has alleged number of things as contained in his grounds of appeal contending that the prosecution did not prove the case against him beyond reasonable doubt.

As pointed out at the outset, the appellant was charged of rape. The victim of rape is said to be under the age of 18 years old as there is evidence establishing that she was born on 05/03/2004. The victim's age is

also disclosed in the particulars of offence in the charge sheet which appears is perfect, and has no any problem.

At the trial the prosecution fielded a total of six witnesses, the victim of the offence (PW1), the victim's mother (PW2), the victim's teacher (PW3), the medical doctor (PW4), the police officer who recorded appellant's cautioned statement (PW5) and the appellant's father (PW6). On the basis of the evidence of these prosecution witnesses, the trial court convicted the appellant.

His complaint in the first ground of appeal is that the trial court erred to base conviction on circumstantial and uncorroborated evidence. It was correctly pointed out by the learned Stated Attorney that it is not correct for the appellant to argue that he was convicted basing on circumstantial evidence and which is not corroborated. Among the prosecution witnesses is PW1 who is the victim of the offence.

According her teacher PW3, the victim was admitted at Nyang'oro secondary school in form one on 08/01/2019. Two weeks later her parents went to PW3 seeking for permission of PW1 that she was sick. But she never returned to school, later PW3 heard that PW1 was pregnant. Her mother, PW2 told the trial court that, two weeks after the victim has reported at school she felt sick. PW2 reported at the school and asked the school administration to permit her so that she could send her to the dispensary. After recover the victim absconded to Mafinga. She reported at the school after return, she took her to the village office where she disclosed that she was pregnant and named the person who was

responsible for that pregnancy. In her evidence PW1 mentioned the appellant to be her husband who impregnated her. She even explained as to when they started their love relationship, that is in December, 2018 when she was 14 years old. The evidence of PW1 is direct evidence, it is from the person against whom the offence of rape was committed, it is not circumstantial evidence. And as it was correctly submitted by the learned State Attorney, it was corroborated by the testimonies of PW2, PW4, PW5 and the cautioned statement of the appellant himself (exhibit P2) in which he confessed to have love relationship with PW1. That they met for several times and have sexual intercourse. The appellant therefore confessed to have sexual intercourse with the victim (PW1). Under such circumstances appellant cannot argue that the trial court relied on circumstantial evidence which was not corroborated. This case therefore is based on both direct-evidence and circumstantial evidence. Direct evidence is from PW1 and the cautioned statement of the appellant himself. It was rightly pointed out by the learned State Attorney that, in criminal trials the best evidence is that of the accused who confesses his guilty as it was held in the case of ***Wilson Mussa vs. Republic*** (supra). The same position was taken by the Court of Appeal in the case of ***Bahati Makeja vs. The Republic***, Criminal Appeal No. 118 of 2006 CAT (unreported). But the evidence of the victim of the offence is all important which by itself would suffice to convict the appellant. In the case of ***Seleman Makumba*** (supra) the court at page observed that:-

"True evidence of rape has to come from the victim, if an adult,

that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration'.

The complaint in the first ground of appeal is therefore baseless.

Regarding the second ground that the doctors recommendations are null and void since the facts do not connect the appellant with the alleged crime. I view this ground as baseless. It was correctly submitted by the learned State Attorney, the role of the medical doctor is not to prove rape and who raped the victim. But only to prove that there was penetration. In his evidence the medical doctor stated that he examined the victim and found her not virgin but also she was pregnant. That was recorded in the PF3 which was tendered in court and admitted as exhibit P1.

Ordinarily the duty of the medical doctor like PW4 in this case is not to prove that it is the accused who raped the victim but to prove that there was penetration. As to who raped the victim it is the victim who is in a better position to tell. As pointed out above the best witness in sexual offence is the victim of the offence (***see Seleman Makumba case***). It is not correct for the appellant to allege that the recommendations by the medical doctor are null and void only on the ground that did not connect the appellant with the committed offence.

As to the third ground of appeal that the prosecution failed to prove the case beyond reasonable doubt, it relied on hearsay evidence which is

inadmissible. The evidence tendered and received by the trial court is not wholly hearsay evidence. There is direct evidence by PW1, PW4, PW5 and the appellant's cautioned statement. That is direct evidence. But also the evidence of PW2 is direct in respect of the victim's age.

Looking at the evidence on the prosecution as a whole from PW1, PW2, PW3, PW3, PW4, PW5 and PW6 the same has proved the charged offence against the appellant. PW1 the victim of the offence named the appellant to have love affairs with her. They used to meet at the time her parents have left to the pombe club. But appellant himself in his cautioned statement exhibit P2 admitted to have love affairs with the victim with whom they were having sexual intercourse for some days he was using condoms but for other days he was doing without condom. There is evidence by PW2 that after the victim has reported at school at a certain period she fell sick but later absconded from home to Mafinga. After return she disclosed that she was pregnant. The pregnancy was proved upon medical examination by the medical doctor, PW4 as indicated in the PF3. PW3 proved that the victim shortly after reporting in form one she absconded from school. PW5 who recorded the appellant's cautioned statement testified to the effect that the appellant admitted to have love affairs with the victim as appears in his cautioned statement. PW5 told the court that the appellant gave the statement voluntarily and freely as it was also proved by his father (PW6) who was present at the police station and witnessed while appellant giving statement. In his evidence he said the appellant gave statement voluntarily and that he was not compelled. The appellant alleged that he confessed because he was promised to be set

free but PW6 who is his father could know that if real he was promised anything. It was correctly pointed out by the learned State Attorney that, it is not expected for PW6 to lie against his own son, otherwise he would testify in favour of the appellant. The prosecution evidence proved the offence appellant was facing beyond reasonable doubt thus this ground lack merit.

Regarding the fourth ground of appeal that, the trial court erred for not scrutinizing the age of the victim, for failure to call an expert who could determine her age. This ground is baseless too. Age of the victim can be proved through various ways including presentation in court birth certificate, the victim herself, parents, teachers, friends and any other persons who know the victim properly as it was held by the Court of Appeal in the in the case of ***Jafari Mussa vs. DPP***, Criminal Appeal No. 234 of 2019 CAT (unreported).

In this case, the court at page 9 paragraph 2 had this to say:-

"If we may move a step further for completeness the proof of age particularly in sexual offence as expounded by case law, is proved by either production of the victim's birth certificate or may come from victim herself/himself, relative, parent, medical practitioner, a teacher, close friend or any other person who knows the victim".

In the present case age of the victim was proved by the victim herself in her testimony found at page 7 when she said she was 15 years born on 05/03/2004. Her mother PW2 also testified the same when she said Eva was 15 years old as was born on 05/03/2004. Her evidence is found of page 9 paragraph 2 of the typed proceedings. The issue of age of the victim was therefore properly proved.

In the fifth ground of appeal the appellant complained that the trial court grossly erred in admitting the cautioned statement which was repudiated by the appellant since he confessed after being promised to be set free.

The court record is clear as can be seen at page 18 of the typed proceedings that, the cautioned statement was tendered and admitted in court without appellant objecting that it was given after he was promised to be set free. As it was correctly submitted by Blandina Manyanda learned State Attorney, the appellant objected for the cautioned statement to be admitted because it was not read to him after being recorded. However he admitted to have signed the same. The issue that he was promised to be set free was raised by the appellant in his defence as can be seen at page 23 of the typed proceedings.

As the appellant did not raise that issue at the time of its production in court on the ground that he confessed because of promise, raising that later in his defence is an afterthought. Objection to the admission of a document must be raised at the time of its production and not later on. But

as I pointed out above, had there been promise to the appellant by PW5 who was recording his cautioned statements, PW6 the appellant's father who was there to witness recording of the statement would be in a position to know and would have revealed that in his testimony. But among other things he only say: - "TANO was not compelled to give his statement".

However, even when PW5 testifying appellant did not cross-examine him on the question of promise. If he did not cross-examine him on such important issue impliedly he admitted to what PW5 told the court in relation to the cautioned statement. He cannot later raise to have been repudiated the said cautioned statement. In the case of ***Nyerere Nyague vs. Republic***, Criminal Appeal No. 67 of 2010 the Court of Appeal of Tanzania held at page 5 that:-

"As a matter of principle a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said".

PW5 in his testimony explained the way he recorded appellant's cautioned statement but the appellant did not ask him on the question of promising to set him free if he confesses to have raped the victim. As I have pointed out earlier raising that during his defence and before this court on appeal is an afterthought. This ground of appeal also lack merit.

Having discussed as herein above, I find this appeal without substance. The same is hereby dismissed in its entirety.

DATED at **IRINGA** this 23rd day of March, 2022.



F. N. Matogolo
F. N. MATOGOLO

JUDGE

23/03/2022

Date: 23/03/2022
Coram: Hon. F. N. Matogolo – Judge
Appellant: Present
Respondent: Hackline Nungu – State Attorney
C/C: Charles

Jackline Nungu – State Attorney:

My Lord I am representing the Respondent. The appellant is present and the case is for judgment we are ready.

Appellant:

Honourable Judge I am ready.

COURT:

Judgment delivered.



F. N. Matogolo
F. N. MATOGOLO

JUDGE

23/03/2022