

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

DC. CRIMINAL APPEAL NO. 30 OF 2021

(Appeal emanating from the Judgment of the District Court of Tanga at Tanga in Criminal Case No. 19 of 2020)

HASSAN SELEMAN.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 24/03/2022

Date of judgment: 31/03/2022

AGATHO, J.:

In this appeal, the Appellant is aggrieved with the decision of the District Court of Tanga at Tanga in Criminal Case No. 19 of 2020 where he was charged and convicted with an offence of Rape, Contrary to Section 130 (1) (2) (e) and 131 of the Penal Code [Cap 16 R.E 2002].

The particulars of the offence as per the charge sheet were that on the 9th of October, 2018 at Pande Kona Z area within the District, City and Region of Tanga, the accused person did have carnal knowledge of the victim allegedly a girl of 16 years old. The Appellant denied the charge and the trial was conducted.

During the trial, the prosecution had five witnesses. PW1 was a victim of the incident who testified that on 09/ 10/2018 when she arrived home from school had lunch and went for a rest in bed, then the Appellant entered the room and raped her by inserting his penis into her private parts and when medically examined at school she was found pregnant and that later she was handled a letter to the guardian who is the Appellant herein where she stated that he could not appear at school and that on 11/06/2019 she delivered a baby girl.

PW2 was a Social Welfare Officer who testified that he received information from a Samaritan, conducted a social inquiry to satisfy himself on the information he acquired and then reported the incident to the OC-CID. He also testified that he participated during interrogation and that the suspect narrated that it was her step father who raped her.

PW3 was a Police Officer who arrested the Appellant while PW4 was a Police Officer who recorded cautioned statements of both the victim and the Appellant. He also took the DNA samples to the Chief Government Chemist for laboratory test and obtained a report therefrom whereas PW5 was the victim's school teacher who

noticed that the victim was pregnant following the pregnant test that was conducted to female pupils.

Upon closure of the prosecution case, the Court found that the prima facie case had been established and the Appellant defended himself and brought only one witness.

In his testimony, the Appellant (DW1) denied to have raped the victim. When he was cross examined, he testified that when he and the victim's mother asked the victim who raped her, she responded that it was a sand loader. DW2 was Anna Marcelli, the victim's mother who testified that when she asked the victim about the incident, she did not respond and promised to commit suicide. She also denied her husband to have involved in the incident.

Having heard both parties, the trial Court found the Accused/ Appellant guilty and was convicted as charged and sentenced to serve thirty years (30) imprisonment in jail, hence this appeal which is based on the following grounds;

1. That, the District Court Magistrate erred in law and in fact by convicting the Appellant on the fabricated evidence which was adduced in court by the prosecution side.

2. That, the charge that was laid against the Appellant was not clear as to whether the offence that the Appellant was charged was rape or impregnating the victim.
3. That the trial Court Magistrate erred in fact and in law to find the Appellant guilty on the defective charge and jumped to conclusion.
4. That, the prosecution has failed to prove its case beyond all reasonable doubt.

On the 2nd day of November 2021, the Court ordered the matter to proceed by way of written submissions. In the appeal, the Appellant was not under representation while the Republic/Respondent was represented by Ms. Tussa Mwaihesya, State Attorney.

Determining this appeal, I prefer to merge the first and the fourth grounds of appeal.

Regarding the first ground of appeal on the alleged fabrication of evidence, the appellant submitted that on the basis of the testimony of PW4, DNA samples were taken to the Chief Government Chemist on 14/01/2020 before he was arraigned in Court to answer the charge on 24/02/2020. It was therefore his argument that the DNA

test was taken before he was charged with rape and that was contrary to the law.

The appellant further argued that the prosecution charged him with an offence of rape and failed to charge him with the count of impregnating the victim. He added that regarding Exhibit P1 which was a Chief Government Chemist Report on DNA, the Chief Government Chemist was not called to testify as required by Section 240 (3) of the Criminal Procedure Act [Cap 20 R. E 2019].

With respect to the fourth ground of appeal, the Appellant contended that the prosecution failed to prove its case beyond reasonable doubt since the incident of rape was not reported immediately after its commission. He referred to the testimony of PW1, paragraph 5 of the proceedings of the trial Court stating that the victim did not reveal the incident to anybody and that similarly at page 15, she never revealed the alleged incident to her mother that she was pregnant. It was therefore his argument that the circumstance renders the reliability of the testimony against him doubtful.

The Appellant further argued that penetration was not proved as per Section 130 (4) (a) of the Penal Code Cap 16 R.E 2002 now R.E

2019 through a PF3 (a medical examination report) since the same was not tendered in Court and that there was no evidence from the doctor to corroborate that the victim was raped.

Apart from that, he argued that the charge sheet indicated that the victim was 14 years old while in the trial Court proceedings the age is 16 years and that it was a contradiction to the prosecution case.

In response of the appeal, the learned State Attorney for the Respondent submitted that the prosecution proved its case beyond reasonable doubt since all witnesses were credible.

In the case of **Mathias Bundala v Republic, Criminal Appeal No. 62 of 2004 CAT at Mwanza (unreported)** it was held that every witness is entitled to credence and must be believed and his credence accepted unless there are good and cogent reasons for not believing a witness. This was also held in the case of **Goodluck Kyando v Republic [2006] T.L.R 367** and according to the case of **Shabani Daudi v Republic, Criminal Appeal No. 28 of 2000 (unreported)** it was held that credibility of a witness can be determined either by assessing coherence of the testimony of that witness or when the testimony of that witness is considered in relation with the evidence of other witnesses including that of the

accused person. At that juncture, this Court being a first appellate Court will therefore analyse the evidence from both sides and make a finding.

In the case of **Mapambano Michael @ Mayanga v R Criminal Appeal No. 268 CAT at Dodoma (unreported)** it was held that the duty of the first appellate Court is to subject the entire evidence on record to afresh re-evaluation in order to arrive at decision which may coincide with the trial Court's decision or may be different altogether.

To proceed, the learned State Attorney further submitted that prosecution evidence was corroborative and that it was reliable and that there was no fabrication of evidence whatsoever.

She stated that from the prosecution testimony, PW1 testified that she did not reveal who impregnated her as she was afraid of being beaten. That, on page 14 of the trial Court's proceedings, PW1 stated that she did not reveal the incident to anybody and that the testimony of DW1 who is the Appellant was corroborative that when DW1 asked the victim as to who impregnated her, she did not respond. She further submitted that PW1's testimony was sufficient enough to prove the case, referring the case of **Selemani**

Makumba v Republic [2006] T.L.R. 379 she argued that the best evidence in sexual offences comes from the victim and added that notwithstanding such evidence is corroborated the Court can proceed to convict after assessing its credibility. This is the position of the law as per Section 127(6) of the Evidence Act [Cap 6 R.E 2019].

The learned State Attorney further submitted that it was the victim's testimony that it was the Appellant who raped her on the 19th day of October, 2018 and as a result she conceived and that PW1's testimony is corroborated with the DNA Report from the Chief Government Chemist which provided that the victim's child belonged to the Appellant.

She further submitted that the Report is governed by the Government Chief Laboratory Authority Act, No. 8 of 2016 and not by the Criminal Procedure Act currently [Cap 20 R.E 2019] and that Section 19 of the respective Act provides that the Report issued by the Government Laboratory Analyst shall be admissible and shall be sufficient evidence of the facts or observations stated therein unless the opposite party requires that the Chief Government

Chemist or Government Laboratory Analyst who issued it be summoned as a witness.

She added that the law imposes the duty to the witness to ask for the Chemist to testify in Court and not the Court.

Having considered submissions from both sides and the records of the Court with respect to the first and fourth grounds of appeal, let me begin with the issue of the victim's age.

Having read the records, it is my observation that the victim's age as per the charge sheet was 16 years old and PW1 mentioned during trial that she was 16 years old and since there was no dispute about the victim's age then the argument has no merit.

Regarding the issue of fabrication of evidence, the fact that the samples were taken to the Chief Government Chemist on 14/01/2020 and that he was arraigned to the Court on 24/02/2020 that does not amount to fabrication of evidence and there was no violation of the law.

Again, the fact that the Republic elected to charge the Appellant with an offence of rape instead of an offence of impregnating the victim that in my view is a matter of preference. In criminal cases,

the accepted practice has been that to charge an accused with a serious offence. The latter attracts heavy punishment. The relevant issue that remains is whether the charge of rape against him has been proved beyond reasonable doubt. In the case of **Maliki George Ngendakumana v Republic, Criminal Appeal No. 353 of 2014 CAT at Bukoba (unreported)** it was held that;

"It is the principle of law in criminal case, the duty of the prosecution is two folds, one to prove that the offence was committed and two, that it is the accused person who committed it."

Further, on the issue of delay in reporting the incident and the issue of consent, those are to be considered independently. According to the case of **Festo Mawata v The Republic, Criminal Appeal No. 729 of 2007(unreported)**, it was held that delay in naming a suspect by a witness or witnesses without a reasonable explanation is not supposed to be taken lightly by Courts and that such witnesses always have their credibility doubted to the extent of having their evidence discounted.

According to the evidence adduced at the trial Court, PW1 stated in Court that she did not reveal the incident because she feared that

her mother would have beaten her and PW4 testified that the victim notified him that the Appellant threatened the victim not to reveal the incident to her mother. That was the reason for the delay in naming the suspect, that in my view was reasonable.

Additionally, since the victim was 16 years old, the issue of consent is immaterial. In addition, even if the victim would have been incestuous relation, which a crime. In the case of **Selemani Makumba (supra)** it was held 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. Penetration may be proved by tendering PF3 report and may also be proved by DNA report.

Also, on the requirement of proof of penetration and the tendering of the PF3, it was held in the case of **Mathayo Ngalya @ Shabani v Republic, Criminal Appeal No. 170 of 2006 (unreported)** that the essence of rape is penetration of the male organ into the vagina. The Court referred to Section 130(4) of the Penal Code R.E 2002 now R.E 2019 stating that for the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence.

In the instant matter, the circumstance is that the victim did not reveal the incident of rape on the date that it was committed and there was no PF3 that was tendered in Court. It is therefore difficult to establish that there was penetration, however in the case of **Mohamed Mpera Hamisi v Rep, Criminal Appeal No. 79 of 2016, High Court of Tanzania at Mtwara (unreported)** it was held that only when carnal knowledge is in dispute would medical evidence be required to prove whether rape has been committed on the victim.

In the instant matter, it is not disputed that there is no witness who proved that there was penetration but it was only the victim. Therefore corroborating evidence was necessary. Under that circumstance DNA test was required. The Prosecution tendered a DNA report test from the Chief Government Chemist, according to page 29 of the trial Court's case proceedings, the accused person was addressed in terms of Section 240 (3) of the Criminal Procedure Act, now Cap 20 R.E 2019 as to whether he would require the Chief Government Chemist or the Government Laboratory Analyst be summoned as a witness as per Section 18 (3) and Section 19 of The Government Laboratory Authority Act No. 8 of 2016 but he opted not to do so. He cannot therefore state that

the exhibit P1 was wrongly admitted while all the procedures were complied.

Regarding the second and third grounds of appeal, they both relate to the defectiveness of the charge sheet. It is clear that the accused 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 2002. The charge sheet is not defective and there is no contradiction. The fact that the appellant was not charged with the offence of impregnating the victim that does not render the charge sheet defective.

The Court having considered all grounds of appeal and submissions from both sides have found the prosecution evidence was credible, there was no fabrication of evidence and the accused was properly charged. Under that circumstance therefore I have no reason to interfere the finding of the trial Court, the appeal is considered to have no merit, hence it is dismissed.

DATED at **TANGA** this 31st Day of March 2022.



Date: 31/03/2022

Coram: Hon. Agatho, J

Appellant: Present

Respondent: Ms. Mwaihesya, State Attorney

B/C: Zayumba

Court: Judgment delivered on this 31st day of March, 2022 in the presence of the Appellant, and Ms. Mwaihesya the Respondent's State Attorney.

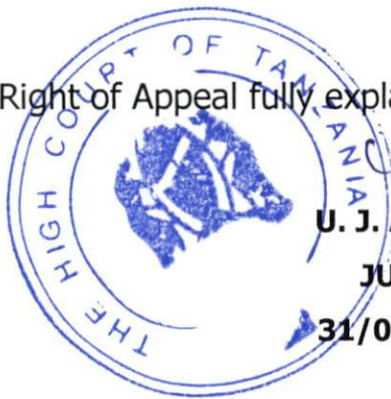


U. J. AGATHO

JUDGE

31/03/2022

Court: Right of Appeal fully explained.



U. J. AGATHO

JUDGE

31/03/2022