

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

CRIMINAL APPEAL No. 102 OF 2021

(Originating from Criminal Case No. 147/2020 of Muleba District Court)

EDIKUS JOSEPH.....APPELLANT
VERSUS
REPUBLICRESPONDENT

RULING

29th July & 05th August 2022

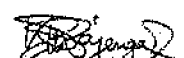
Kilekamajenga, J.

In this case, the appellant was arraigned in the District Court of Muleba for the offence of Incest by Males Contrary to **Section 158 (1) (9) of the Penal Code, Cap. 16 RE 2019**. It was alleged that, the appellant had carnal knowledge with his own daughter aged sixteen years believing that his daughter could be traditionally cured from a mental illness. The appellant was alleged to have carnal knowledge with his daughter on 30th July 2020 at Bushangara village within Muleba District. During the trial, the appellant entered a plea of not guilty prompting the prosecution to summon five witnesses to prove the case to the required standard.

The gist of the prosecution evidence is as follows; PW1, being the accused's neighbour, testified that, the accused lived with the victim and other children in their house. On 30th July 2020, PW1 was informed by the victim that, her father



raped her (victim) under the pretext that she was being cured traditionally. PW1 immediately informed the victim's teacher (PW4). On the other hand, PW2 (victim) testified that, she lived with her siblings called Evodia Edikus (DW3) and Enerieta Edikus (DW2). On 30th July 2020, she remained at home as she was not feeling well. Her father (appellant) sent Evodia (DW3) to go and fetch water from a river which is at a distance of half an hour walking distance. The victim was left behind with Evodia's child of seven months old. The appellant called the victim into a room and instructed her to lie on a mattress. The appellant undressed the victim and thereafter raped her. The victim did not call for help as she was afraid the appellant could kill her. When Evodia came back, the victim informed her about the incident. Thereafter, the victim went to buy some sardines from Derick and it is when she went to inform PW1 and went back home with the sardines. PW3, who was the village chairman, was phoned by PW4 about the incident on 30th July 2020. He participated in taking the victim to the police station and to the Hospital and in arresting the accused. PW4 confirmed that, the victim was a pupil at Kamachumu 'A' Primary school. He further informed the trial Court that, on 30th July 2020, he received a phone call from PW1 about the incident. PW4 went to the house of PW1 and found the victim with his motorcycle to the village chairman and finally to the police station. PW5, who was a clinical officer, examined the victim and found blood stains and some sperms at the victim's thighs. However, the victim was not HIV



positive. He filled-in the PF3 form which was admitted as exhibit P3. PW5 further confirmed that the victim was taken to her (PW5) by her teacher (PW4).

In his defence, the accused (DW1) testified that he was arrested on 30th July 2020 and taken to Kamachumu police station where he was informed about raping his own daughter. DW1 further alleged that the case was framed against him by PW4, a teacher who was also the closest friend to her daughter. He testified further that, in 2019, DW1's wife fell sick and DW1 borrowed Tshs. 225,500/= from PW4 for treating his wife. Unfortunately, his wife died. DW1 had financial difficulties in paying back the debt and the case was cooked through his daughter who so far suffers from epilepsy. The testimony of DW1 was supported with the evidence of DW2, who was another daughter of the accused. She testified that, on 30th July 2020, she came back from school and found her father arrested. DW2 further alleged that, PW4 had coached her that, when she goes to Court she should testify that her father raped the victim something which she refused to abide. DW2 was also informed by the victim that her father did not rape her but she was coached to say so under the promise that she could be taken to an English Medium school or else die of poverty. DW3 also testified that, on 30th July 2020, her young sister (victim) went to fetch water and buy sardines and left DW3 at home. Later, PW4 came at their home and fetched the victim and left them at home. DW3 further insisted that, the victim was coached to lie against her father on the promise to be taken to an English Medium School. In

her testimony, DW3 was also approached by PW4 to lie against their father on this case.

After the full trial of the case, the appellant was convicted and finally sentenced to serve thirty (30) years in prison. The appellant, thereafter, appealed to this Court armed with twelve grounds, which are however, haphazardly coached. Before this Court, the appellant, being a lay person and unrepresented, he only urged the Court to receive the grounds of appeal and grant justice in this case. On his part, the learned State Attorney, Mr. Joseph Mwakasege, supported the conviction and sentence meted against the appellant. He urged the Court to affirm the decision of the trial Court.

When rejoining, the appellant insisted that his daughter (victim) was suffering from epilepsy and therefore she did not go to school on the fateful day.

In determining the instant appeal, I have carefully gone through the Court record and the copious number of grounds advanced by the appellant. The major point gleaned from the grounds is whether the prosecution proved its case on the level required by the law. This being a criminal; case, its proof does not go below the standard of proof beyond reasonable doubt. Section 3 (2) (a) provides that:

"A fact is said to be proved when:

- (a) in criminal matters except where any statute or other law provides otherwise, the Court is satisfied by the prosecution beyond reasonable doubt that the fact exists."*

To amplify further the above provisions of the law, the prosecution evidence, unlike in civil cases where proof is based on preponderance of probability, must not leave any question than the fact that the accused committed the offence charged. The evidence must be water tight and there should be no any further evidence that raises doubt on the prosecution evidence. The rationale for maintaining a higher standard of proof in criminal cases are legion. **One**, a criminal case may result into imprisonment of an accused. Therefore, only a person who committed the offence should be imprisoned. **Two**, the republic which prosecutes the case should not shoulder a case which has no proof. It may be damaging to the republic to sustain a conviction based on weak evidence. **Three**, a criminal case always damages the reputation of a convict in the whole community. The conviction therefore should not be based on flimsy evidence.

In the instant case, I am alive that, the best evidence in such case comes from the victim. This principle of law has been emphasized in a number of case including the case of **Yusufu Buruani v. The Republic, Criminal Appeal No. 4 of 2010**, CAT at Tanga (unreported) which stated that:

'First, we wish to point out that ordinarily the best evidence of rape comes from the victim of rape. However, that does not mean that that is the only evidence to establish the offence of rape. Depending on the circumstances of each case, there are times where the evidence may not necessarily come from the victim of rape and yet the same may as well be sufficient to ground a conviction.'

The victim in this case was the appellant's daughter who was 16 years old. In her testimony, she alleged that her father raped her on 30th July 2020. However, she did not raise an alarm under the fear of being killed by her father. After the incident, she went to their neighbour (PW1) who also phoned PW4. It is hard to imagine a sixteen old daughter could not have resisted such a wicked act from her father. An alarm could have prompted the response from neighbours. Her evidence, in my view, leaves a lot to be desired. Furthermore throughout the prosecution evidence, it is undisputed fact that the victim was suffering from epilepsy. Therefore, her credibility ought to be thoroughly investigated especially, as the appellant alleged the existence of grudges between him and PW4.

The defence evidence which was hinged on the testimony of three witnesses tried to convince the Court that the case was framed by PW4 as there were grudges between him and the appellant. DW2 and DW3 asserted that, they were approached by PW4 and urged to lie against the appellant. Upon reading the trial Court proceedings, I also picked-up something unusual in this case. For instance,

when the victim reported the incident to her neighbour (PW1), the neighbour's response was to phone PW4 who immediately came and fetched the victim. PW4 took the victim to the village chairman, police, and finally to the Hospital for medical examination. Unless PW4 was the victim's close relative, his volunteer in this case raises serious questions than answers.

On the other hand, the record does not show whether he was a relative to the victim. If not, then he was an unusual Samaritan who dared to leave job responsibilities to assist the victim who did not, so far, attend school on that day. The frequent featuring of PW4 in the prosecution's evidence is very suspicious. The same person is blamed for doctoring the case and coaching the appellant's children including the victim to testify against the appellant. In my view, the appellant's evidence raised some doubts on the prosecution case.

Moreover, the trial of this case commenced before Hon. Mwambeleko. Before the appellant entered defence, the case shifted to Hon. Hamza who only heard the defence witness and composed the judgment. Though the reason for change of the Magistrate was stated, but in my view, the Magistrate who composed the judgment did not have an opportunity to assess the credibility and demeanour of the prosecution witnesses. The trial judge or Magistrate is the only person who enjoys the sole privilege of observing the demeanour of the witnesses and the right to assess whether the witnesses were credible. In my view the successor

Magistrate missed the privilege of perceiving the prosecution evidence something which could enabled him to make a judicious decision. In this case, the Magistrate who composed the judgment had only one side of the story. In the situation where the accused raised doubt as in this case, the trial Magistrate might have deeply considered the defence evidence which, in my view, shed doubt on the prosecution case.

In conclusion therefore, I find that PW4 who was alleged by the defence to coach the victim to lie against the appellant had played a major role in this case to the extent of raising doubt. As said earlier, after the alleged rape, the victim went to the house of PW1 who was just their neighbour. PW1 immediately informed PW4 who immediately went to the victim's home and fetched her with his motorcycle. PW4 took the victim to the village chairman, police and finally to the Hospital. PW4 was the one who organised the arrest of the appellant. He was accused of approaching DW2 and DW3 for a false testimony in Court. On top of that, the victim never raised any doubt to solicit response from neighbours. I really find some doubts on whether the victim was raped by her own father. I find the prosecution failed to prove its case as the appellant raised reasonable doubt over the prosecution's case. I hereby allow the appeal and order the release of the appellant from prison unless held for other lawful reasons. It is so ordered.

Dated at Bukoba this 05th Day of August 2022


Ntemi N. Kilekamajenga
JUDGE
05th August 2022

Court:

Judgment delivered this 05th Day of August 2022 in the presence of the learned State Attorney, Mr. Amani Kirua. The appellant was also present in person. Right of Appeal explained.



Ntemi N. Kilekamajenga
JUDGE
05th August 2022

