

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

DC CRIMINAL APPEAL NO. 20 OF 2022

(Emanating from Criminal Case No. 38 of 2021 Songea District Court at Songea)

JOHN LUOGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 10/08/2022
Date of Judgement: 05/10/2022

MLYAMBINA, J.

By way of petition of appeal, the Appellant herein lodged his appeal to challenge both the conviction and sentence entered by the Songea District Court (henceforth the Trial Court) against him on 2nd March, 2021 before Hon E. R. Rwehumbiza, RM. The grounds of appeal are as follows: *First*, the trial Court erred in law to convict and sentence the Appellant to suffer life imprisonment while the proceedings are encountered with the irregularities or unprocedural. *Second*, the trial Court erred in law to convict and sentence the Appellant basing on the Prosecution evidence which was not proved beyond reasonable doubt.

From the records, the brief facts of the case are as follows: The Victim knows the Accused as he is a friend of her father. The Accused

person used to visit them frequently. He was treated as a family member. Sometimes her parents gave him some food or a shelter to warm up during the cold season. On the fateful day, the Accused arrived at their house as usual. He was welcomed by the victim's father and they warmed up together. The Victim went to the toilet and saw the Accused with her father. Thereafter, she went back to sleep. After a while, the victim's father went to sleep and the Accused remained outside.

Furthermore, the Accused entered into the room where the Victim and her young brother were sleeping. He undressed the Victim and raped her. He used his hand to cover the victim's mouth to prevent her from screaming. Hardly the Victim managed to scream for help. Her father went to their room and found the Accused on top of the victim, raping her. Therefore, the Accused was arrested while committing the indepicable. He was arraigned before the trial Court for the offence of rape. After full hearing, the Accused (Appellant herein) was found guilty, convicted and sentenced to serve life imprisonment. Being aggrieved with the conviction and sentence, the Accused appealed to this Court.

At the date scheduled for the hearing, the Appellant appeared in person while the Republic was represented by Ms. Tumaini Ngiruka learned Senior State Attorney. The case was heard orally.

The Appellant argued on the first ground of appeal that the procedure before the trial Court was encountered with the irregularities.

In reply, Ms. Tumaini said that all procedure was followed properly by the trial Court. The Accused pleaded not guilty as a result the Prosecution paraded five witnesses including the Victim who was PW1 in the proceedings to prove their case. PW1 promised to say the truth. The Prosecution supported their argument with the case of **Msigala Salum v. The Republic**, Criminal Appeal No. 130 of 2019, High Court of Tanzania at Shinyanga. After she finished to testify, the Accused did not cross examine the Victim (PW1).

Furthermore, Ms. Tumaini added that; the procedure to prove the age of the Victim was followed too. PW2 who is a victim's mother told the trial Court that the Victim was born on 2015. That means, at the time when she was raped, the victim was only six years of age. The evidence of PW2 was corroborated with the evidence of PW3, the victim's father and PW5 a Medical Doctor who examined the victim. The PF3 was procedurally tendered and the Accused person did not object its admission before the trial Court.

Ms. Tumaini went on to argue that; when the Court found that the Accused had a case to answer, the Accused was given a right to chose in which way he could defend his case as per *section 231 of the Criminal*

Procedure Act (supra). The Accused objected the evidence of PW4 and PW5 unlike to the evidence of PW1. The Court adhered to the procedure at judgement stage by analysing the evidence of both sides and convicted the Accused under *section 131 (3) of the Penal Code [Cap 16 Revised Edition 2022]* and sentenced him to life imprisonment.

Before going to the merit of the case, it is wise to remind our self that the first appellate Court is duty bound to re-evaluate the evidence adduced before the trial Court to satisfy as to whether the findings of the trial Court were correct. This was the position in the case of **Tanzania Cigarette Company Limited v. Mafia General Establishment**, Civil Appeal No. 118 of 2017, Court of Appeal of Tanzania at Dar es Salaam and the case of **Leopold Mutembei v. Principle Assistant Registrar of Titles, Ministry Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017, Court of Appeal of Tanzania at Mwanza (both unreported), to mention the few.

After re-evaluation of the evidence on record, this Court is of the finding, as rightly as submitted by Ms. Tumaini, the trial Court adhered to the procedures before, during the hearing and at disposal of the case. The Accused person did not elaborate as to where the trial Court failed to conduct the case procedurally. For those reasons, this Court has not

seen any irregularities committed as per the Court records. It is the principle of law that Court records accurately represent what happened in Court. This was the position in the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527.

On the second ground of appeal, the Appellant prayed for the Court to quash and nullify the proceedings, decision, conviction and sentence entered by the trial Court and set him free because the Prosecution failed to prove their case beyond reasonable doubt.

In reply Ms. Tumaini averred that, the republic proved their case through the Victim (PW1) who testified to know the Accused for a long time? Apart from being their neighbour, he was a friend to the Victim's father. He had a tendency to visit them quite often. On the incident day the Victim saw the Accused warming up with her father when she went to urinate. She saw him because there was a light from a solar bulb.

Moreso, the Accused entered into the victim's room few minutes after the Victim father went to sleep. He undressed and raped her. PW3 caught the Accused on top of the Victim raping her. PW1, PW2, PW3 and PW4 they went to the office of PW4 who is the Village Chairman. There was no any mistake of facts. The Accused prayed for forgiveness. The Accused was apprehended and taken to the Police Station.

Ms Tumaini averred further that, the evidence of PW1, PW2, PW3 and PW4 was corroborated with the evidence of PW5 a Doctor who examined the victim. He discovered that the Victim had bruises, no hymen found but there was penetration to the extent that the Victim was unable to work normally. Ms. Tumaini supported her submission with the case of **Selemani Makumba v. The Republic** [2006] TLR 375, where the Court said that, the best evidence in rape cases is the evidence of the Victim herself.

Moreover, Ms Tumaini added that; the Accused was well known by the Victim. Ms Tumaini insisted that there was no any confusion on identification. She prayed the appeal to be dismissed for lack of merit.

In his brief rejoinder, the Appellant contested to be caught inside *flagrante delicto* raping the victim. He claimed to be caught outside warming himself near the fire. It was very dark no any source of light. The Village Chairman found him outside too.

After careful consideration, as rightly as submitted by Ms. Tumaini, the best evidence in rape cases is the evidence of the Victim herself as it was stated in the case of **Selemani Makumba (supra)**, PW1 told the Court that she was raped. Her evidence was supported by PW5 a Doctor who examined the Victim and it was cemented by Exhibit P1. The Victim

private parts had bruises and there was a penetration. The Victim went further and said that a person who raped her was the Accused person.

Few minutes before she was raped. She saw the Accused person with her father. Also, at her room she identified the Accused by using the light from a torch. If it was not enough, the Accused was caught on top of the Victim raping her. PW3 arrested him on top of the victim. There is no any mistake on identification. All conditions for positive visual identification were proved clearly by the Prosecution side. Though the light was not much bright, the Accused was well known, they saw him few minutes before the incident. He was also familiar with the witnesses. In the case of **Deogratius Deemay Gurtu v. The Republic** [2018] TLR 116, where the Court said that:

Source of light at the scene, distance between the witnesses and the Appellant, their familiarity and the duration of the incident all are condition for positive visual identification. [Emphasis added]

The Accused was caught laid handed on top of the Victim raping her and there was no any explanation to the contrary rather than the Accused being arrested in *flagrante delicto* raping the victim. This Court is in agreement with Ms. Tumaini that the issue if identification does not arise. This was the position in the case of **Daffa Mbwana Kedi v. The**

Republic, Criminal Appeal No. 65 of 2017, Court of Appeal of Tanzania at Tanga (unreported). The Court convicted the Appellant on ground that he was found by the witness raping the deceased.

In the upshot, this Court is satisfied that the evidence of the Prosecution adduced before the trial Court proved the case against the Appellant beyond reasonable doubt. Given the fact that the Victim was under 10 years when the Accused raped her, the sentence entered by the trial Court is statutory as per the nature of the offence. The appeal, therefore, is dismissed for want of merits.


Y. J. MLYAMBINA
JUDGE
05/10/2022

Judgement pronounced and dated 5th October, 2022 in the presence of the Appellant and learned State Attorney Tumpare Lawrence for the Respondent. Right of Appeal fully explained.


Y. J. MLYAMBINA
JUDGE
05/10/2022