

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 7 OF 2022

(Arising from Criminal Appeal No. 100/2021 of Kigoma District Court, before Hon. E.B. Mushi -
RM)

MAJALIWA FOKASI @ BENERO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

18/8/2022 & 3/10/2022

L.M. Mlacha,J

At the district court of Kigoma in Criminal Case No. 100 of 2021, the appellant, Majaliwa Fokasi @ Bonero was charged of Rape contrary to section 130 (1) (2) (e) and section 131 (1) (3) of the Penal Code Cap 16 R.E 2019. It was alleged that he had carnal knowledge of Catherine Livingstone, a girl of 3 years old on 27/4/2021 at Mwanga Majengo area with the district and region of Kigoma. He was found guilty, convicted and sentenced to the mandatory sentence of Life imprisonment. He was also

sentenced to six (6) strokes. Aggrieved, he has now come to this court by way of appeal.

The grounds upon which the appeal is based read thus:

1. That, the trial resident magistrate erred in law and fact on failure to consider that the alleged offence was not proved on the standard as required by the trite of law that is beyond reasonable doubt.
2. That, the presiding magistrate erred in law and fact on convicting the appellant regardless that there was delaying the victim PW2 to be attended at the hospital for medical check up from on 27th April 2021 up to 02/05/2021 without reason and if the victim would be able to stay for longtime.
3. That, the trial magistrate erred in law and in fact on convicting the appellant relying solemnly on the hearsay evidence as no eyes witness, witnessed or was present at the crime scene.
4. That, the trial court erred in law in convicting the appellant without any cogent evidence as the key witness, the two men

who alleged to assist the victim was not called to justify the allegation.

5. That, the resident magistrate erred in law and in fact that by convicting and sentencing the appellant with much weakness of evidence the local authorities was not reported the crime.

The appeal was heard online through our virtual court services. The appellant was in Bangwe prison unrepresented while the respondent Republic was represented by Mr. Raymond Kimbe who was at the NPS office Kigoma. Before going to examine the grounds of appeal and the submissions, this being a first appeal which amounts to rehearing, the summary of the evidence will be reproduced for easy of reference. PW1 Aisha Amani (25) is the mother of the victim, Catherine Livingstone (PW2). She told the court that her daughter was born on 16/1/2018 at Ujiji Hospital Kigoma. She tendered a birth certificate, exhibit P1. She said that on 27/4/2021 at night hours, she was at home while her child was at her uncle's hair cutting soloon playing her fellow Alhamdu. She come saying "Msaluni baka". Msaluni is the name of the accused. PW2 undressed and examined her vagina. She found sperms on her chest. Her underwear was wet. Her vagina had raptured. They could not go anywhere that right. On

28/4/2021 the accused came. Her brother asked if he had carnal knowledge of the girl and he admitted. He then disappeared. The victim's father came on 1/5/2021. He called the appellant who admitted to have had carnal knowledge of the girl. He asked for forgiveness. They reported the matter to the central police who issued a PF3. They went to Maweni Hospital for treatment.

PW2 was tested in terms of section 127 (2) of the Evidence Act and found with no knowledge of oath. She promised to tell the truth not lies. She gave an unsworn evidence. She said that she was with her friends Zamda, Ikra, Bibi and Almood playing at the saloon. They have a habit of playing there. Msaluni took her to his saloon. He undressed her and inserted his "Kidudu chake" into his "Kishimo". She said *Kishimo* while directing a finger to her private parts. She also identified the accused at the dock. PW3 Amani Ramadhani is a brother of PW1. He is the owner of the saloon. The appellant was his employee. He said that on 27/4/2021 he received a call that the appellant had raped PW2. He went home and met PW2 with her mother crying. She mentioned "Msaluni" as the one who had raped her. The appellant came at the saloon in the morning. He questioned him and he admitted. They reported the matter and he was arrested.

PW4 Innocent Gasper (31) is a doctor at Maweni Hospital Kigoma. He is a holder of a Diploma in medicine with 2 years' experience. He said that while on duty on 2/5/2021 during morning hours he received PW2 for medical examination. The girl had been raped 3 days ago. He examined her vagina. The outer part of the vagina had no any effect. He found bruises in the inner part. She felt pains as he was trying to touch it. There was no any hymen as the finger penetrated without any block. He filled the PF3 form, exhibit P2 and gave it to them. He said that the bruises might have been caused by a blunt object. PW5 WP 6874 CPL Diana (32) told the court that on 3/5/2021 morning hours she was at work at the central police. She received a file KGT/IR/102/2021 for investigation. The appellant was already in police custody. She questioned PW2 who told her that she had been raped by the appellant who work at the saloon of her uncle. She questioned the appellant and visited the scene of crime. The appellant admitted to rape PW2 saying "Shetani alinipitia". She tendered the sketch map, exhibit P2. She said that the crime was committed on 27/4/2021 at 9:00 PM.

It was the defence of the accused (28) that all what was said of him are not true. He said that he was in Kibondo in April. He came to Kigoma in

June. He said that he worked for PW3 at the saloon but he did not pay him. He then gave him the accusations which are false. He said that he was arrested as he was coming from the church and sent to a military camp where he was tortured. He decided to admit to serve his life. He also decided to admit before the police on the same way. He challenged the evidence of PW1 saying it could not be possible to rape PW2 in the area which have 3 other shops without being noticed. He wondered why the owners of the shops did not come to testify. He wondered the way a child of 3 years could be left out at 9:00 PM. He went on to say that PW2 said what she was coached by the public prosecutor. He said that the evidence of PW1 contradict that of PW4 on the issue of sperms. That whereas PW1 said she saw sperms on her chest, PW4 said they were on her thigh. He added that PW4 said that he found bruises not sperms.

When the appeal was called for hearing, the appellant sought for the state attorney to start while reserving his right of rejoinder. Submitting on ground one, Mr. Raymond Kimbe told the court that the case was proved beyond reasonable doubts. He said that there was evidence from PW1 Aisha Amani who said that she heard PW2 saying that she had been raped by Saluni Baka which is the name of the appellant. He went on to submit

that PW2 who is a child of 3 years said that the appellant took her to her saloon and inserted his "Kidudu" in her private parts. She could also identify him at the dock. She could also tell her uncle, PW3 that she had been raped by the appellant. PW3 said that the appellant confessed to do so before him.

Counsel proceeded to submit that there was evidence from the doctor who said that he examined PW2 and noted that she had no virginity. His finger penetrated without a block. He referred the court to **Selemani Makumba v. R** (CAT) Criminal Appeal No. 94/1999 saying the best evidence in rape cases comes from the victim. He argued the court to be convinced by the evidence of the victim (PW2) and enter up hold the decision of the lower court. He had the view that there was good evidence to convict the appellant.

Counsel submitted on ground two and told the court that the delay in sending the victim to hospital was caused by the absence of his father. He proceeded to submit on ground three that there was direct evidence from PW2 who proceeded to tell her mother on what had happened. In ground four counsel had the view that there was no key witness other than PW2, her mother (PW1) and the doctor (PW4). In ground five counsel submitted

that there is no Law compelling people to report crimes to local leaders. He argued the court to dismiss the appeal.

It was the submission of the appellant in rejoinder that a girl of 3 years could not receive his penis inside her vagina and manage to go home. He went on to say that the time of rape is not specified. Further, it was not possible for a child of 3 years to go to the saloon during the night. He went on to say that the child could not identify him in court. He was merely guided by the Public Prosecutor to point at him. He added that he confessed after being beaten, to avoid being killed. He did so to save his life.

I will start with ground one; whether there was evidence proving the case beyond reasonable doubts. There is the evidence of the victim who said that he moved to play at the saloon with her friends. It was night at around 9:00PM. The accused took her inside, undressed her and inserted his penis into her vagina. She then went to tell Bibi Hawa and her mother that the appellant had inserted his "Kidudu" into his "Kishimo" meaning the accused had inserted his penis inside her vagina. We have the evidence of her mother who told the court that while at home that night she saw her child coming. She told her that the appellant had raped her. She undressed

and examined her. Her underwear was wet. Her vagina had been ruptured. She saw sperms on the chest. They could not do anything that night. The accused came on the other day on 28/4/2021 and admitted before his brother that he had carnal knowledge of the girl. He disappeared. He also admitted before the victim's father. He asked for forgiveness. They reported the matter to the police. She delayed to report because the victim's father was absent. We have the evidence of PW4 who examined the child. He examined the child on 2/5/2021. He examined the vagina. Its outer part looked okay. He found bruises on the inner part. She felt pains as he was penetrating his finger inside. She had no hymen, the finger could pass without a block.

The defence of the accused was that he was not present at the area on the day. He was at kibondo. He also said that he had a grudge with PW3 who did not pay salary. He framed the accusation because of his request for salaries. He also said that he admitted to avoid being beaten or killed. He also challenged the reason as why other shop owners could not be called as witnesses. He added that the evidence of PW4 is hearsay.

The evidence of the prosecution on this area is based on the evidence of PW1, PW2 and PW4. PW2 came from the saloon where she had been

raped and told her mother that she had been raped by the appellant. She also gave the story to her uncle. Her mother observed her and found sperms on the chest. She also found a wet under pant. Her vagina had been raptured. PW2 narrated the story saying "Kidudu" and "kishimo" meaning penis and vagina. She said so why pointing at her private parts. She said that it was the appellant who did so. The doctor had similar observations. He saw bruises inside the vagina which had no hymen. His finger moved inside freely save for the pains from the child.

In **Chacha Jeremiah Murimi and 3 Others v Republic**, (CAT) Criminal Appeal No. 551 of 2015 the Court of Appeal had a chance to consider the ability of a witness to name a suspect at an early stage. The court had this to say at page 20-22:-

*"The ability of PW1 to mention and describe the second appellant at the earliest possible moment is an assurance of her reliability.... We took the same position in our earlier decisions of **Jaribu Abdallah v. Republic** [2003] TLR 271 and **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39; In **Marwa Wangiti Mwita** (supra), this Court observed thus: "The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as*

unexplained delay or complete failure to do so should put a prudent court to enquiry".

See also **Mafuru Manyama & Two Others v. Republic**, Criminal Appeal No. 256 of 2007, **Kenedy Ivan v. Republic** Criminal Appeal No. 178 of 2007, **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 and **Yohana Dionizi & Shija Simon v. Republic**, Criminal Appeals No. 114 and 115 of 2009 (all unreported) all mentioned in **Chacha Jeremia Murimi** (supra).

PW2 mentioned the appellant at an early stage and therefore reliable. The trial court which had opportunity to assess her credit believed her. I find no reason to discredit her. Her evidence was also well corroborated by the evidence of the doctor who said that her vagina appeared to have been penetrated by a blunt object. Her hymen was missing and she had pains. Further, the appellant was a person well known to him leaving no room for mistaken identify. She said "Msaluni" which is the nickname for the appellant. She could also identify him in court. There was no mistaken identify so to say.

The accused said that he was not in Kigoma in those days. That is a defence of alibi. The defence of alibi is the defence of an accused who say

that he was not present at the scene of crime on the material date and time. It is subject to section 194 of the Criminal Procedure Code Cap 20 R.E 2019. This defence cannot assist him for want of notice of alibi. See **Richard Otieno @ Gullo v. The Public**, (CAT), Criminal Appeal No. 367 of 2018, **Masamba Musiba @ Musiba Masai Masamba v. The Republic**, (CAT), Criminal Appeal No. 138 of 2019 and In **Mwita Mhere and Ibrahim Mhere v. The Republic** [2005] TLR 107 to mention a few. He said that he had grudges with PW3 over his salary but could not give any evidence to support this claim. He said that he admitted to avoid being beaten or be killed but there is no any cautioned statement before the court. Neither is the prosecution relying on the confession to prove its case. He challenged the reason as to why shop owners could not be called as witnesses but the prosecution is not obliged to call each and everybody as a witness. He also said that the evidence of the prosecution was hearsay but that is not correct. There was direct evidence from PW2 and PW4. PW1 also saw the sperm and the wet vagina making her evidence direct. The defence of the accused was therefore correctly rejected by the trial court. There was therefore good evidence to prove the case in the standard required.

Ground two challenge the delay to report the crime. The crime was committed on 27/4/2021 and reported at the police station on 2/5/2021. There is a gap of five days. I agree that this period was unusually long. The explanation given was that the victim's father was away. She had to wait. I think that was good explanation given the knowledge of PW1 and local circumstances. I don't think that this snag can amount to a serious doubt so as to defeat the prosecution case. It is worthy neglecting.

Ground three talks of hearsay evidence. That the conviction was based on hearsay. I have discussed this aspect in the course of discussing ground number one. there is no hearsay evidence in this case. The conviction was not based on the evidence of PW1, PW2 and PW4 which was direct. It was also corroborated by the evidence of PW3 and PW5.


Ground 4 was also discussed above. I said that much there were people at the scene of crime who were not called but the prosecution have a discretion to choose who should come to testify or not. There is no law which compel the prosecution to bring each and everybody as a witness.

See **Richard Jared v. The Republic**, (CAT), Criminal Appeal No. 23 of 2018

In ground five the complaint is on failure to report the crime to local leaders. I agree with the views of the state attorney that, there is no Law which compel a person to report a crime to a local leader. He can inform local leaders for assistance where need be or go straight to the police. It depends on the circumstances of each case. If passing through the local leaders to get an introductive letter is practicable, it is advisable to do so. But if the circumstances does not allow, a person can just go to the police or primary court straight.

That said, I find that there was good evidence to convict. The sentence given is the minimum under the law. I find it to be too big. But I have no room for interference though if given a chance, I could give a lesser sentence to this young boy, the nation's manpower, who appears to have acted under ignorance and heat of passion. My hands are tied by the judicial oath. The appeal is found to be baseless and dismissed. It is ordered so




L.M. Mlacha

Judge

3/10/2022

Court: Judgment delivered. Right of Appeal Explained.

A handwritten signature in blue ink, appearing to be "L.M. Mlacha", is written over a circular stamp.

L.M. Mlacha

Judge

3/10/2022

ORIGINAL