

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

CRIMINAL APPEAL NO.86 OF 2021

(Originating from Criminal Case No. 207 of 2020 Shinyanga District Court)

JUMA CHARLES.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

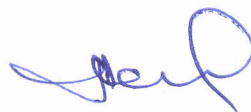
JUDGMENT

30th September, 2022
6th October, 2022.

L. HEMED, J.

At the Resident Magistrates Court of Shinyanga, the Appellant Juma Charles was charged with an offence of rape under section 130 (1) (2) (e) and 131 (1) of the penal Code [Cap 16 RE 2019]. It was alleged that on 11th day of November 2020 at Kitangiri Area within Shinyanga Municipality, the appellant had sexual intercourse with a girl of 9 years old.

The prosecution evidence was to the effect that one Mariam Eliya (PW1) told the trial court that the victim is her daughter. The Appellant is young brother of her husband (PW4). She narrated that on 14/22/2020 at 18:00hrs,



the victim complained to her to have abdomen pain. When the victim wanted to attend short call, Pw1 gave her a baby pot for her to attend her call. When she finished, PW1 observed a drop of blood. When she tried to ask, the victim was scared. She took the victim to her bedroom where she inspected her and found some blood coming from her vagina, and the vagina was wide. The victim told PW1 that the Appellant was the one who raped her. PW1 took the victim to the hospital where she was examined and confirmed to have been raped. PW1 informed her husband PW4.

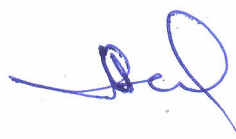
The victim testified in court that on the alleged date her uncle, the appellant told her to brush her teeth. She took her toothbrush and went to the hut where ducks are kept. The Appellant followed her, covered her mouth and inserted his penis in her vagina. She was scared that she could not tell her mother because she was afraid of being carried. On the next day she went to the toilet she discovered blood coming from her vagina. She decided to tell her mother.

PW4 the father of the victim took her to Buhangija hospital where it was confirmed that she was raped. He went to the police station and was given a PF3. He took the victim to the Government hospital. The doctor examined the



victim and confirmed that she was raped. The medical doctor namely Hamis Machubya (PW%) stated to have examined the victim on 20/11/2020 and found her to have injury scar and the hymen was perforated and there was evidence of penetration.

In his defence, the appellant stated that on 09/11/2020 he was at Gilon Cotton Mill he received a call from his brother who required him to go house where he arrived him to go 17:00 hrs. and found his father who informed him about the meeting which was to be held at 21:00 hrs. He attended the meeting and heard about the accusation that he had raped the victim. After five days he was taken to the hospital for medical check up to find out if he had gonorrhea or other sexual transmitted diseases, he was found negative. He told the court that he was living with PW1 and PW4 but PW1 hated him that he decided to leave the place and went to live with his parents. After having scrutinizes the presented evidence, the trial Court found the Appellant guilty of the offence of rape and sentenced him to life imprisonment. He was aggrieved hence the presented Appeal on the following ground;



"1. THAT, the trial Court erred in law and fact to accept the PF3 as an exhibit from an expert which was processed 9 days past after the alleged rape occur.....(sic)

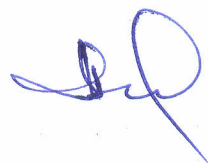
2. THAT, My Lord, advice dire examination was not conducted upon the victim

3. THAT, My Lord, the time gape of the alleged offence and the examination of the purported victim at is dramatic and tantalizing (sic)

4. THAT, The ingredients of the alleged rape were not sufficient established by the prosecution.....

5. THAT, the learned trial Magistrate totally erred in law and fact when failed to summon a first doctor of Buhangija hospital who examine a victim for first examination. (sic)

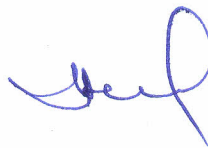
6. THAT, The learned trial Magistrate totally erred in law and fact to misapprehending the nature and quality of the persecution evidence against appellant which did not prove the charge beyond reasonable doubt. (sic)"



When the Appellant was called to submit on his appeal, he asked the Court to accept his grounds of appeal and release him from prison. The respondent was represented by Ms. Wapumbulya Shani, learned state attorney who submitted to counter the appeal. Her counter arguments will be considered in the process of determining the ground of appeal.

Let me start with ground one 1 of the appeal. In ground 1 the Appellant seems to challenge the admissibility of PF3 into evidence as according to him it was processed nine (9) days after the alleged rape. Ms. Shani was of the view that the duty of the Court while admitting exhibits such as document, is to satisfy itself as to whether the criteria for receiving such exhibit have been met. I do agree with the learned state attorney that for the court to admit anything into evidence it has to satisfy itself that such document/ exhibit is relevant to the fact at issue. It has also to satisfy itself as to the competence of the witness trying to tender it and the authenticity of the document intended to be tendered.

Going through the proceedings, I found that PF3 (exhibit P1) was tendered by PW5, the medical doctor who examined the victim and filled the Police Form No. 3 (PF3). Since PW5 was the one who filled the Form, he was

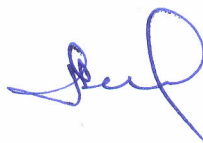


competent person to tender it. Additionally, PF3 form was tendered while in te original form and was relevant to the matter at issue, the rape case. Therefore, I find that the trial Magistrate was justified to admit into evidence PF3. The first ground of appeal, fails.

As to the 2nd ground of appeal the appellant is trying to fault evidence of the victim on the ground that *vore dire* examination was not conducted. Reacting to this ground of appeal, Ms. Shani was of the view that there was no need for *vore dire* test. Accordingly, to her, since the victim was of tender age, she was to promise to tell the truth only. I do agree with the submission made by the learned state attorney. The current position in receiving evidence from a child of tender age is provided under section 127 (2) of the Evidence Act, [Cap RE 2019], thus;

".... A child of tender age may give evidence without taking an oath or making affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lie"

I have examined the proceedings of the trial Court, and found that since the victim was 9 years old, (tender age), she promised to the court to tell the

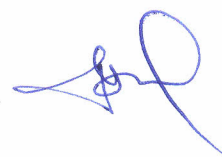


truth. Therefore, what was done by the trial court was in accordance with the law. Thus ground No.2 fails.

The Appellant in 3rd ground has asserted that there was time gape of the alleged offence and the examination of the victim at the hospital. Ms. Shani submitted that there was no gape between the date of commission of the crime and the date of examination of the victim. The learned state attorney stated that the little delay in examining the victim was resulted from the age of the victim who was scared from disclosing the commission of the crime.

I have gone through the proceeding and found that the victim was taken to hospital for examination after she was discovered by PW1 to bleed. When the victim was taken for medical examination, it was proved by PW5, the medical practitioner that the victim was raped. I am firm to hold that the fact it was proved that the victim was raped, the little delay, was immaterial. Ground No.3 fails.

Grounds 4 and 6 are interrelated as they are on the proof of the offence. The appellant is alleging that, the ingredients of rape were not proved to warrant conviction. Accordingly, to section 130 (1) and (2) of the Penal code



[Cap 16 RE 2019] in order to prove the offence of rape two elements must be established (i) penetration, and (ii) absence of free consent.

However, person who are under 18 years, pursuant to section 130(2) (e) of the Penal Code, (*supra*) consent is immaterial. In the present case the offence of rape was committed to a girl of tender age, that is 9 years. The prosecution was duty bound to prove only one element of penetration, which in fact was proved. It was also proved that the appellant is the one who raped her because the Appellant who is the uncle of the victim happened to live with the family of the victim, thus he was well known to the victim.

In the case of **Seleman Makumba Vs Republic** (2006), the court provide the principle of the best evidence of sexual offences which is in line with section 127 (7) of the Evidence Act, [Cap 6 RE 2019] that;

".....Where in criminal proceeding involving sexual offence, the only independent evidence is that of child of tender years or of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits not

withstanding that such evidence is not corroborated proceed to be convict if for reason to be recorded in the proceeding the court is satisfied that the sexual offence is telling nothing but the truth"


In the present case, the victim was consistent in her evidence. She mentioned the Appellant to her mother (PW1), she also did the same to her father (PW4). She repeated the same in her testimony before the court. It is thus, the evidence of the prosecution case was trust worth to warrant conviction of rape. In the premises, grounds 4 and 6 fail.

On the 5th ground of appeal, the appellant is trying to falt the decision of the trial court on the ground that the medical doctor of Buhangija Dispensary was not called to testify. I am of the view that since there was another medical doctor (PW5) who also examined the victim and filled PF3, it was enough for purpose of getting evidence from medical expert. In the circumstance, I find no merits in ground No. 5.

The fact that all grounds of appeal have failed, I have no option but to dismiss the entire appeal, as I so do. The decision of the trial court is upheld. It is so ordered



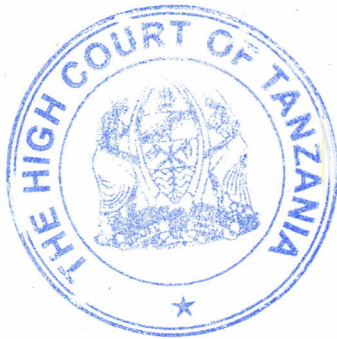
DATED at **SHINYANGA** this 6th day of October, 2022


L. Hemed
JUDGE

COURT:

Judgement is delivered this 6th October, 2022 in the presence of the Appellant appearing in person and Ms. Gloria Ndoude state attorney.

Right of appeal fully explained.




L. Hemed
JUDGE