

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 88 OF 2022

***(Appeal from the Decision of the District Court of Bagamoyo in
Criminal Case No. 262 of 2020)***

RAMADHANI JUMA SHIDA@KICHE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

30th September & 07th October, 2022

BWEGOGI, J.

In the District Court of Bagamoyo, one Ramadhani s/o Juma Shida @ Kiche, the appellant herein, was charged and convicted for committing an unnatural offence c/s 154 (1) (a) of the Penal Code [Cap. 16 R.E. 2019]. He was sentenced to serve thirty (30) years in prison. Being aggrieved by the conviction and sentence the appellant has appealed to this court on

seven (7) grounds of appeal. In substance, all grounds of appeal amount to one main ground that the charge levelled against the appellant was not proved beyond reasonable doubt to warrant his conviction.

The facts of this case, as gathered from the evidence adduced by the prosecution witnesses are as follows: The victim in this case, resides at Nia njema area within Bagamoyo town. Her age was 15 years when she was allegedly sexually assaulted. The same had testified as PW2 in this case. On the fateful day of 29th August, 2022, the victim left home to visit her aunt. She had met the accused herein along the way, who was said to be a stranger in the locality. The same lured the victim to escort her to the saloon in the neighbourhood. Along the way, he seduced her for sex. Later on, the appellant led the victim to his residence where he had anal sexual intercourse with her before he chased her away. On her way back home, the victim reported the crime to her uncle, namely, Juma Athumani Haji (PW1) who had escorted her home. PW1 had found the victim's mother leaving her residence to search for the victim. She had demanded an explanation from the victim for coming home late. While the victim was narrating, her father (PW3) interfered and started to punish her for coming home late. PW1 had opted to take the victim back to his residence for her safety. The following day, PW1 led the victim to her mother who

had reported the crime to the police. Later on, she escorted the victim to attend a medical examination at the hospital.

The victim was examined by one, Yahaya Gimbu (PW4), a medical practitioner. His findings were to the effect that the victim complained of anal pain occasioned by sexual assault whereas neither bruises nor discharge was found in the victim's genitalia. Nevertheless, PW4 had opined that something unusual was inserted into the victim's anus. The medical examination report was tendered and admitted by the trial court as exhibit P.1 The law enforcement agent namely, Stansila Charles Kalinga (PW5) was the investigator in this case. He had recorded the statement of the victim and later arrested the appellant herein and taken his caution statement which was later tendered in this court and admitted as exhibit P.2. The appellant, when called upon to make defence, he vehemently disputed the allegation levelled against him.

It is worth reckoning that the trial court had purchased the victim's testimony wholesale, and in applying the best evidence rule, found her evidence credible and convicted the appellant as charged, hence this appeal.

The appellant had fended for himself whereas the respondent Republic was represented by Mr. Grey Buhagire, State Attorney. When this case was brought for hearing, the appellant had informed this court that he has already filed his written submission and he had nothing to add. He prayed this court to consider his grounds of appeal and written statement of the argument to determine this appeal.

In substance, the argument of the appellant may be briefly stated as follows: That the victim (PW2) had deponed incredible, inconsistent, untruthful, and improbable evidence which the trial court solely relied on to procure his conviction. Likewise, the appellant has averred that the trial court had acted on his cautioned statement which was illegally procured to corroborate the victim's evidence. The appellant has also contended that the medical examination report authored by PW4 did not corroborate the testimony of the victim, let alone his failure to establish his credentials.

Lastly, the appellant contended that he was prosecuted out of mistaken identity. That he was not properly identified as the actual offender who had executed the alleged criminal enterprise according to law. On the above premises, the appellant concluded that the prosecution failed to prove the charge beyond reasonable doubt. He prayed his appeal to be allowed.

On the other hand, primarily, Mr. Buhagire supported the conviction and sentence imposed against the appellant. His reasons for supporting the conviction and sentence entered by the trial court are as follows. First, contrary to the appellant's averment that the trial court acted on improbable and unreliable evidence, he opined that the trial court had acted on the truthful, cogent and credible evidence adduced by the victim and corroborative evidence of other witnesses brought by the prosecution. That the victim had given a coherent account of what had transpired between her and the appellant that fateful day including the alleged anal sexual intercourse committed by the appellant against her. That there is nothing available to diminish the credibility of the victim. Therefore, the victim's testimony should be entitled to credence in absence of cogent grounds which imputes her credence.

Secondly, with regard to the appellant's allegation that the trial court had admitted and acted on his caution statement which was illegally procured, the record has it that the appellant didn't object to its admission or otherwise cross-examine PW5 who had tendered it. Thus, the appellant's contention is an afterthought. Thirdly, the trial court rightly acted on corroborative evidence of the medical practitioner (PW4) whose credentials entitled him to conduct a medical examination on the victim.

Fourthly, the alleged mistaken identification of the appellant is misconceived as the victim was familiar with him as well as his residence. Fifthly, the testimony of the victim didn't contradict the evidence adduced by the other prosecution witnesses. Lastly, Mr. Buhagire opined that the prosecution case was proved beyond reasonable doubt as required in criminal proceedings whereas the trial court had properly convicted and sentenced the appellant as charged. On the above premises, the counsel for the respondent Republic prayed this court to dismiss the appeal herein.

The issue for determination by this court is whether the prosecution had proved its case beyond reasonable doubt to warrant conviction and sentence entered by the trial court. This court, being the 1st appellate court, has a duty to re-evaluate the evidence brought before the trial court objectively and make its factual findings therefrom, if necessary. This court shall attempt to discharge this duty as hereunder.

From the outset, this court finds it pertinent to reiterate that the whole prosecution case depended solely on the testimony of the victim. The other remaining witnesses, save the medical practitioner (PW4), had replicated what they were informed by the victim.

It is now a settled principle that the best evidence in proof of sexual offences emanates from the victim as propounded in the case **Seleman**

Makumba vs. Republic [2006] TLR 379 and many others. However, notwithstanding this cherished principle, before acting on the evidence of the victim of a sexual crime, the court is legally obliged to:

“.....satisfy itself upon assessment of credibility of such evidence, that the witness in question is telling nothing but the truth.” See **Rehani Said Nyamila vs. The Republic**, Criminal Appeal No. 222 of 2019 [2021] TZCA 301.

In the same vein, the superior court in the case of **Mohamed Said vs. The Republic**, Criminal Appeal No. No. 145 of 2017 [2019] TZCA 252 held as thus:

“We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness.....”

Likewise, this court has accorded weight to the guidance evoked in the decision of the supreme court of the Philippines in the case of **People of the Philippines V. Benjamin A. Elmancil**, G. R. No. 234951, cited in the case of **Mohamed Said vs. Republic (supra)**, at pg.16 whereas it was aptly held:

"In reviewing rape cases, this Court has constantly been guided by three principles, to wit: (1) an accusation of rape can be made with falsity; difficult to prove but more difficult for the person accused though innocent to disprove; (2) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of things the accused may be convicted solely on the basis thereof."

Having reminisced the guiding principles, this court attempts to test the prosecution case to find whether it passes the scales. As aforesaid, the whole prosecution case at the trial court depended solely on the evidence adduced by the victim (PW2). And this court finds obliged to revisit her testimony to clarify pertinent issues that remained unresolved before certifying her credibility.

The victim deponed to have left home heading to her aunt before she met the appellant who had enticed her to escort him to the saloon and later

to his residence where it was alleged, he had anal sexual intercourse with her by force. The victim didn't mention the exact time she had left her residence. However, it is found in the testimony of the investigator (PW5) that the victim had made a statement before him pointing out that the appellant had raped her at his residence around 18:00hrs. Her uncle (PW1) had testified in court that it was at about 22:00hrs when the victim knocked on his door to inform him about her misfortune. And, her father (PW3) had told the court that the victim called home at 22:45 hrs. If the testimonies of PW1, PW3 and PW5 are truthful, it is obvious the victim had been absent from home for not less than four hours after nightfall. It should be noted that the victim had deponed in court that the appellant had subjected her to anal sexual intercourse for about an hour. There remain three hours of darkness of unexplained whereabouts of the victim. This court is alive with the fact that the victim had deponed to have escorted the appellant to the saloon before he changed his mind and opted to retire at his residence.

A pertinent query, taxing the mind of this court, arises herein, was the victim with the appellant all the time or happened to be with someone else at some point in time? The victim insisted she never parted with the appellant though she could not account for the time spent with him save

one hour mentioned above. It should be noted that the victim told the court that the appellant was a stranger to her.

It is obvious, on account of the above, there are undisclosed events remaining only in the knowledge of the victim. It cannot be ascertained what had transpired after the victim parted with the appellant, if at all she was with him. The wanting particulars pertaining to her lengthy absence from home during the hours of darkness diminish her credibility.

Apart from the above observations, PW1 testified in court that the victim had knocked on his door that fateful night while shouting loudly "open the door, he is coming..." When PW1 opened the door and asked who was coming, the victim had given an explanation indicating the appellant was still chasing her after she had left his residence. However, PW5 testified in court that the victim made the statement before him that the appellant having raped her, he paid for her transport back home. If this testimony is truthful, then it is obvious that the victim had made up a story alleging the appellant to have pursued her at the residence of PW1 at 22:00hrs.

Lastly, this court has been perplexed by the testimony of PW3, the victim's father. The same deponed that, having learned from his wife about the victim's allegation against the appellant that fateful night, he had asked

his wife, on what ground she had believed the victim. The record has it that his wife found refuge on the victim's medical report. Honestly speaking, this court is still haunted by the same question asked by PW3 herein, the medical report notwithstanding.

It suffices to point out that the evidence adduced by the victim, needed corroboration to stand. Unfortunately, corroborative evidence is wanting in this case. It is obvious that the cautioned statement tendered by the PW5 bears the fact that the appellant had denied the allegation levelled against him apart from acknowledging he met the victim at some point in time that fateful day. The medical examination report doesn't help this court either. It contains contradictory findings. PW4 had recorded he observed normal female genitalia, with no injury, lesion, blood, or any discharge seen. Yet he had concluded that there was evidence of penetration. PW4 had maintained the same stance when he had testified at the trial court, though he opined that "something unusual might have been inserted into the anus of the victim" without assigning grounds for arriving at that conclusion.

In the totality of the observation made above, this court arrives at the conclusion that the prosecution case at the trial court had left sane

doubts. In criminal proceedings, doubts should benefit the accused person.

In the upshot of the above, notwithstanding the best evidence rule, the victim's evidence in this case, fails to pass the test of truthfulness to be relied upon. Thus, in wanting corroborative evidence, this court is of the considered opinion that the prosecution case at the trial court could not sustain a conviction for the heinous unnatural offence.

This court finds the appeal herein with substance. The appeal herein against conviction and sentence is hereby allowed. The conviction entered by the trial court is hereby quashed and the sentence imposed thereon is set aside. The appellant is to be released from prison unless otherwise lawfully held.

Order accordingly.

DATED at DAR ES SALAAM this 07th of October, 2022.




O. F. BWEGOGÉ
JUDGE

The judgment has been delivered this 07th October, 2022 in the presence of Emmanuel Maleko, State Attorney for the respondent Republic and the appellant who is unrepresented.

Right of appeal explained.



O. F. BWEGOG
JUDGE

The seal of the High Court of Tanzania is circular. It features a central emblem with a scale of justice and a book. The text "THE HIGH COURT OF TANZANIA" is written around the perimeter of the seal, with a small star at the bottom.