

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(DC) CRIMINAL APPEAL NO. 40 OF 2021

(Arising from Criminal Case No. 108/2021 of Kibondo District Court,
before Hon. M.M. Majura - RM)

BASHIRAKANDI S/O EMMANUEL..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

17/11/2021 & 08/02/2022

L.M. MLACHA, J.

The appellant Bashirakandi Emmanuel (61), a Burundian by nationality living Nduta Refugees camp, was sent to the district Court of Kibondo charged of Rape Contrary 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 R.E. 2019. It was alleged that he had canal knowledge of Aziza Alise, a girl aged 13 years. He was found guilty, convicted and sentenced to the mandatory sentence of 30 years. Aggrieved, he has come to this court by way of appeal armed with two grounds of appeal which read thus:



1. *That the trial magistrate erred in law and facts by basing his judgment and conviction on weakness of the prosecution side and not strength of defence side.*

2. *That the trial magistrate erred in facts and law as the prosecution side did not prove its case beyond reasonable doubt.*

Ground one is confusing. I think it should read that *the trial magistrate erred in law and facts by basing his judgment and conviction on the weakness of the defence and not on the strength of the prosecution case.*

I will make this correction in the interest of justice.

Before going to examine the grounds of appeal and submissions, I propose to give a summary of the evidence given by both parties to put us in a good position to follow the discussion which will follow. PW2 Aziza Alice (13) was addressed in terms of section 127(2) of the Evidence Act, Cap. 6 R.E. 2019 and found to have no knowledge of an affirmation but she knew the meaning of telling the truth. She made her promise to tell the truth saying '*I promise I will tell the truth and not lies*' and was allowed to give evidence. She told the court that she knew the accused Bashirakandi Emmanuel who lives at zone 6, village 5, Nduta Refugees Camp, house

No.3. PW2 lived in the same area in House No. 75. The accused worked as a shoe repairer. Now on 22/3/2021 at around 12:00 noon, she went to the accused's house to repair her shoes. The accused held her hand and pulled her inside the house. He undressed her underpants (chupi na taiti). He then undressed himself. He put her on the bed and inserted his penis in her vagina. She felt pains. Blood came out. She could not raise an alarm because the accused's hand was on her mouth in the course of sex. Her grandmother, PW3 Wimana Sabina (64), came and met them in the sexual act. She entered inside after hearing sounds of sexual pains and met the accused raping her. Other people came who tied the accused ropes and sent him to the police station. Meanwhile her mother went to call her mother who lived in zone 19.

PW3 lived with PW2 in zone 6, village 5 House No.75 Nduta Refugees camp. She told the court that her daughter had gone to the accused to repair her shoes and was late. She decided to make a follow up. Upon arriving at the accused's house she heard sexual complaining noises. She entered in the house and found the accused on top of her granddaughter raping her. She rose an alarm which alerted many people including PW4 Bukuru Rosalia who lives in house No. 4. Bukuku found the accused



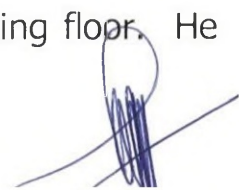
wearing his trouser after raping the complainant. The ten cell leader and the village chairman came also. They tied the accused and sent him to the police station. Her granddaughter was in pain and could not walk properly. She sent her to hospital.

PW4 Bukuku Rosalia (56) lives close to PW3. She saw PW3 crying calling her from afar. He moved to the place which was the house of the accused. He found shoes on the door. They found the accused on top of the girl with his trousers on his knees. He was holding the girl on her mouth to prevent her to speak. The accused came and wanted to beat PW2. Other people came and other steps were taken. PW5 Gerald Nizingimana (36), the ten cell leader. He told the court that on 22/3/2021 at around 14:00 hours, he heard an alarm from PW4 and PW2 and moved to the house. He entered inside the house and met the accused fitting his trouser at the sitting room. He asked him on what had happened. The accused told him that it was true but it was not his fault but the girl who went inside his bed room. He entered inside the bedroom and found the victim's underpants (chupi na kaptula) on the accused's bed. The victim came out crying. They arrested the accused and sent him to the police station. He added that the accused wounded him by a machete on his hand in the course of arresting

him. PW6 Ndekazo Leonidas (46) lives at nduta camp and is the village chairman. He told the court that PW5 came to him on that day and told him that the accused had raped the girl. They moved to the house and met the girl inside the accused's house. The accused was outside the house. He asked the accused on what had happened who said that nothing had happened. The girl said that, the accused had raped her. He reported the matter to the police who picked the accused. They also picked the underpants.

PW7 WP 1111 PC Juliana, PW8 WP9703 PC Alinda, PW9 WP5208 D/CPL Frida and PW10 H5647 DC Paul said the way they received PW2, filled the PF3 and sent her to hospital. PW1 Dr. Jackline Nkwabi explained the way she received PW2 in the company of PW3 and a PF3. She examined her sexual areas and found bruises in the vagina measuring 0.5 centimeter. The vagina was red. It was discharging white fluids. . She had no virginity. She had the opinion that the bruises were caused by a blunt object like a penis, finger or other objects which penetrated in the vagina. The PF3 was tendered and received marked exhibit PE1

The accused was the only defence witness. He said that PW2 entered his house on 25/12/2021 and stole cash Tshs 7,000/= and cooking floor. He



met her inside her bed room seated. Soon her grand mother entered and alleged that he had raped her. She rose an alarm and people came. They put him under arrest. He was sent to the police station. He denied to rape the girl. He defined the case as a fabrication to cover the theft. As pointed out, the trial court did not see substance in the defence. It believed prosecution witnesses and found the appellant guilt as charged. He was convicted and sentenced hence the appeal.

The accused appeared in person. The respondent republic was represented by Ms Happiness Mayunga and Ms Magreth Bilal state attorneys. The appellant spoke through an interpreter, Abel Katindi who interpreted Swahili to Burundi and vice versa. He opted for the state attorney to start to submit while reserving his right of rejoinder.

It was the submission of the state attorney that there was good evidence to convict the appellant. That the victim moved to the house of the appellant and met the appellant. She was pulled inside, undressed and raped by the appellant. PW2 explained the way the penis was inserted to her vagina and the way she was prevented to raise an alarm. A hand was put on her month to prevent her to raise an alarm. PW3 came and found the appellant doing the act. PW3 rose an alarm and people came. PW4

met the appellant on top of PW2. His trouser was at the knees at the time. The learned state attorney went on to submit that where the victim is aged below 18 years, the prosecution has to prove age and penetration only. The victim had bruises. She had no virginity. The vagina was reddish with some white substances. That is evidence of rape according to **Selemani Makumba v. R.** [2006] TLR 397. The court said that the evidence of the child was sufficient but in this case her evidence is supported by that of PW3 and PW4, she submitted. It is also supported by the evidence of PW1, the doctor. She proceeded to say that the cautioned statement of the accused was recorded after 4 hours and thus illegal. It can be expunged, she said, adding that there was still heavy evidence to convict the appellant. She referred the court to **Iddi Muhidini @ Kitabano v. R.**, Criminal Appeal No. 101 of 2008 for reference on the point. She argued the court to dismiss the appeal.

It was the submission of the appellant that the source of all this is his 'Njegere'. He entered the house and met the girl who came out claiming that she had been raped. He denied to know PW3 or PW4. Submitting in reply, the state attorney said that the record does not show anything about



'Njegere'. She reiterated her earlier position that there was strong evidence to convict.

I will address the grounds of appeal as they appear. Ground one the complaint is that the trial magistrate based his conviction on the weaknesses of the defence not the strength of the prosecution case. The accused being a lay man could not address this ground. The state attorney made a submission showing that the conviction was based on the strength of the evidence from the prosecution side not the weaknesses of the defence. She reiterated what is in the judgment. That the accused was seen ready handed by PW3 and PW4 playing sex with the girl. What was done in the room and what was inside was explained by witnesses from the prosecution. PW2 explained what happened to her, that she was pulled to the room and raped. The doctor said what she saw corroborating the story of the girl and the eye witnesses. It is this evidence which made the lower court to convict the appellant and not what was said by the accused. It is thus not correct to say that the accused was convicted based on the weaknesses of his defence not the evidence adduced by the prosecution. The ground one is thus baseless and dismissed.

In ground two the complaint is that there was no good evidence to convict. This will take us to the offence with which the accused was charged, its ingredients and the evidence of records. I will start by examining some principles established by case law.

In **Kayoka Charles v R** CAT Criminal Appeal No 325 of 2007 (Tabora-unreported) at page 7 the Court of Appeal quoted the case of **Selemani Makumba V R** CAT Criminal Appeal No. 94 of 1999 (unreported) where it was stated as under:

"true evidence of rape has to come from the victim, if an adult, that there was a penetration and no consent, and in case of any other women where consent is irrelevant that there was penetration"

See also **BURUNDI DEO v. THE REPUBLIC**, CAT - Criminal Appeal No.33 of 2010, **SAIDI ALLY MKONG'OTO V. R** Criminal Appeal No.133 of 2009, **HAKIZIMANA SILVESTER V R** Criminal Appeal No. 181 Of 2007 (unreported).

In **AMIGO MGIMBA v. THE REPUBLIC**, CAT Criminal Appeal No. 25 of 2010 it was said thus:



*"we wholly subscribe to the pertinent observation in **SULEMANI MAKUMBA V.REPUBLIC** [2006] TLR 379 that true evidence of rape has to come from the victim. However, the decision in **SULEMANI** (supra) makes no proposition that the victim's evidence is the only evidence that should prove rape. Similarly, we see nothing in that decision suggesting that the evidence to prove rape **must** always come from the victim. **It seems to us that ultimately the determining factor should be the circumstances**"(Emphasis added)*

The Court of Appeal also quoted the case of **Matayo Ngalya @ Shabani V R** Criminal Appeal No.170 of 2006 (unreported) where it was said as follows:

*"The essence of the offence of rape is penetration of the male organ into the vagina. Sub section (a) of section 130(4)(a) of the Penal Code Cap 16 as amended by the Sexual Offences (special Provisions) Act 1998 provides for the purpose of proving the offence of rape, **penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence**". (Emphasis added)*

That was also said by the Court of Appeal in **HASSANI BAKARI @MAMAJICHO V. THE REPUBLIC**, CAT Criminal Appeal No. 103 of 2012 Pages 9 where it was said thus:

"... for the purpose of proving the offence of rape

*(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and
..... "*

The accused is charged of rape Contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 R.E. 2019. This victim was aged 13 years. This is what is otherwise known as statutory rape where consent is immaterial. The prosecution have to prove the sexual act only. Key to it is the evidence on penetration. The issue now is whether there was penetration within the context of the above authorities to prove the offence with which the accused was charged.

We have the evidence of PW2 who said how he was pulled to the room, undressed and raped. The accused inserted his penis in her vagina. She felt pains and blood came out. The doctor saw bruises in the vagina which had white materials. It was reddish and had no virginity. PW3 and PW4 saw the accused on top of PW2 playing sex. He was found ready handed. The under pants of the girl was seen on the bed at the material hour. His trouser was on her knees. Other witnesses saw him at the sitting room adjusting his trousers. The evidence of the unlawful sexual act was clear.



The trial magistrate who had the advantage of seeing the witnesses believed them.

In **PIA JOSEPH v REPUBLIC** [1984] TLR 161 (HC) (Lugakingira, J as he then was) had this to say at page 163:

*"The law as regards the role of an appellate court in matters of credibility is settled beyond peradventure. The trial court which has seen and heard the witnesses, thereby being privileged to observe their manner and demeanour, is certainly in a better position to assess their credibility than an appellate court which has not had these advantages. It has therefore been consistently held that **an appellate court will not lightly interfere in the trial court's finding on credibility unless the evidence reveals fundamental factors of a vitiating nature to which the trial court did not address itself or address itself properly.** (Emphasis added)*

I could not see those elements. I see no base for interfering with the findings and decision of the trial magistrate. The defence of the accused was thus correctly rejected. He was rightly found guilty and convicted. That disposes ground two.

In view of what has been said above, I find no merits in the appeal which is accordingly dismissed.



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L.M. Mlacha

Judge

9/2/2022

Court: The judgment is read and delivered through the virtual court services to the accused who is in Bangwe prison Kigoma and Happiness Mayunga State Attorney who is in her office at the offices of the NPS kigoma.

Right of Appeal Explained.



A handwritten signature in blue ink, appearing to be 'L.M. Mlacha', written over a horizontal line.

L.M. Mlacha

Judge

(9/2/2022