

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 79 OF 2021

(Originating from Criminal Case No. 117/2013 in the District Court of Mpanda at Mpanda)

BARAKA JUMA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Last of Order: 21/09/2022

Date of Judgment: 07/12/2022

JUDGMENT

NDUNGURU, J.:

The appellant herein was arraigned before the District Court of Mpanda at Mpanda for the offence of rape contrary to Section 130(1), (2)(e) and 131 (3) of the Penal Code Cap 16 (R.E 2002 before its amendment in 2019). Despite contesting for his innocence, after a full trial he was found guilty and hence convicted. He was then sentenced to serve life imprisonment.

Aggrieved by the decision, the appellant filed this appeal having fourteen (14) grounds in his Petition of which at their entirety suggest that the charges against him were not proved beyond the required standards by

the law.

In this appeal, the appellant had no legal representation and that he represented himself meanwhile the respondent was represented by Ms. Safi Kashindi Amani, learned State Attorney.

As he was invited to submit for his grounds of appeal, the appellant prayed for this court to adopt his grounds of appeal as his submissions as they are self-explanatory, and prayed that his appeal be allowed.

On the other hand, Ms. Kashindi resisted this appeal and submitted that she will respond to all the grounds of appeal as filed by the appellant himself. She started that on the 1st ground, that it is their submission that the case against the appellant was proved beyond reasonable doubt. She added that during the trial, the prosecution side had five witnesses whereas, PW1 saw the appellant at the scene red handed and when found, the appellant threatened PW1 not to disclose the event. Ms. Kashindi insisted that the evidence of PW1 is direct evidence as per Section 62(1) of the TEA, and that PW1 told the court the victim was 4 years old.

Ms. Kashindi proceeded that the victim was examined by the medical officer who revealed blood stains and that the vagina was infiltrated and had no hymen. Thus, penetration was there and proved. She submitted that it is their humble submission that the offence of rape was proved. Therefore the 1st ground of appeal is devoid of merit.

The learned State Attorney proceeded to submit on the 2nd ground

that, what is required is the credibility of witnesses as it was stated in the case of **Mustapha Ramadhani Kihyo (2000) TCR 328**. The law does not prohibit the family members to testify on the same case. And therefore the 2nd ground is also meritless.

On the 3rd ground, she submitted that PW4 was a qualified medical officer as stated in the case of **Charles Bode Vs. the Republic**, Criminal Appeal No 46 of 2016 CAT (unreported). Thus, this ground of appeal is devoid of merit.

Ms. Kashindi submitted on the 4th ground that PW4 being medical expert can use even the hand in examining a victim, and the fact that he is vested with such knowledge must be trusted. See the case of **Mwita Charles Mbami Vs Republic** Criminal Appeal No 418 of 2017 CAT (Unreported).

She proceeded on 5th the ground that what was to be proved was penetration and not injuries. Ms. Kashindi insisted that PW1 found the appellant in "state" and PW4 testimony was that the victim was raped. Thus, this ground lacks merit.

On the 6th ground, Ms. Kashindi submitted that PW1 was threatened by the appellant that she will be killed if she raised an alarm thus this ground is devoid of merit.

She then submitted on the 7th ground that the law under section 143 of TEA does not provide a number of witnesses in proving the fact in issue

provided that the witnesses testifying are credible. That, this ground again is devoid of merit.

Coming to the 8th ground of appeal. Ms. Kashindi submitted that this ground is devoid of merit as testified by PW1, that the eye witness and the medical officer PW4 and that rape is not proved by injuries and bruises.

On the 9th ground, the learned State Attorney submitted that, section 127 (2) of TEA provides for circumstances in which the victim cannot testify. In the case of **Issa Ramadhani V. Republic**, Criminal Appeal No. 409 of 2015 CAT (Unreported) that the offence can be proved even if the victim has not testified. In the premises, she prayed for this ground to be dismissed.

On the 10th and 11th grounds, she submitted that there is no specific number of witnesses is required and therefore the two grounds are meritless.

As regards the 12th ground of appeal, she submitted that exhibit P2 (caution statement), it is true that it was admitted contrary to the law as after admission it was not read. I pray it be expunged from the record.

On the 13th ground of appeal, Ms. Kashindi submitted that this ground is devoid of merit because the age of the victim can be proved by himself, parent, relative or medical officer. She added that PW1 told the court that the victim was 4 years old only.

To top it up on the 14th ground, she submitted that the sentence

given to the appellant was legal and that they pray the appeal to be dismissed.

In rejoinder, the appellant submitted that the evidence was tendered by the family members, and that, he prays for it be taken with circumspection.

Further, he submitted that the sentence given to him was very excessive which was life imprisonment, of which the prosecution never tendered birth certificate of the victim, and he prays for this appeal to be allowed.

After a thorough perusal of the submissions from both sides, and the grounds of appeal as filed by the appellant, the major issue to be dealt with in this appeal is ***whether the charge against the appellant was proved beyond the required standards.***

However, I intend not to deal with all the grounds of appeal as it was held in the case of **SIMON EDSON @ MAKUNDI vs. THE REPUBLIC, CRIMINAL APPEAL NO. 5 OF 2017**, where the Court of Appeal stated that:-

"The appellate court is bound to consider the grounds of appeal presented before it and in so doing, need not discuss all of them where only a few will be sufficient to dispose of the appeal."

I also am aware of the settled position that the first appellate court is not bound and expected to answer the points for determination or issues

as framed by the trial court in Criminal and Civil cases respectively. It is also not bound to deal with the grounds as listed in the petition of appeal. Whereas, if the first appellate court finds it convenient, it could address the grounds of appeal generally or address the decisive ones only or discuss each ground separately.

The situation in the present appeal permits that course. Whereas, the first ground of appeal suffices to dispose of this appeal which refers the court to the point that the appellant was convicted for the offence which was not proved by the prosecution side to the standard required by the law.

At the trial court, PW1 testified that she saw the victim and the appellant being naked and the latter was on top of the former. She also told the court that, she did hear the victim screaming that she is being hurt. As PW1 went where the scream was coming from and saw the ordeal, she was then threatened by the appellant that she was to face death if she alarmed for help, and therefore she kept quiet, as time passed, she overheard the victim demanding for a beer she was promised by the appellant. PW1 did narrate the scenario to PW2 who in turn called PW3 who came the following day, and locked the appellant in his room after he had denied to have committed the offence.

It is unfortunate that the victim could not testify when summoned before the trial court, and the cautioned statement of the appellant as

prayed by the learned State Attorney, was expunged from evidence, which leaves this court with determining the testimony of PW1 as far as her credibility as a witness and if was there a need of corroboration testimony that vividly identified the appellant as the offender.

It is stated by the Court of Appeal in **Omary Ahmed V.R. (1983)**

TLR 32 (CAT):

*"The trial Court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which case for a reasement of credibility". (See also, **Jacob Tibi Funga V. R. (1982)** TLR 125; **Antonio Dias Caldeira V Frederick Augustus Gray (1936)** 1 ALL ER 540).*

However, it is also stated in the case of **Laribu Abdalla v. R., Criminal Appeal No. 220 of 1994** (unreported), that:-

*"In matters of identification it is not enough to look at factors favoring accurate identification. **Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence.**" [Emphasis is Mine]*

Reading between the lines the testimony of PW1, it evident that the trial court did not deal with the aspect of credibility of this witness. I will explain. PW1 had a scream from a room and after she entered the room,

she saw the appellant being naked and on top of the victim who is also naked. She was threatened not to make an alarm or else she will be murdered, considering that she is just from giving birth, she did keep quiet. After a while she had the victim welling that she is being hurt, but after a while, she overheard the victim (who was 4 years old) demanding a beer she was promised. However, PW1 seemed to overcome the threat of death she encountered from the appellant when PW2 arrived and she told her what has happened, and PW2 slept with the news with no need of reporting the matter either to the police station or the local leaders but only to her brother-in-law who arrived the following day.

It is undisputed that the victim was indeed raped as per the medical expert's examination and testimony, but was it really the appellant who did the ordeal?? With the records in my hands, PW1's testimony needed to be corroborated in order to believe that the identification of the appellant was not an exaggerated saga.

It is trite law that evidence is not corroborative unless it connects, or tend to connect the appellant with the commission of the offence (See: **Azizi Abdallah V R**, [1991] TLR 71; **R. V. Beck** (1982) 1 ALL E. R. 807; Whereas, in this appeal at hand, the victim did not testify and the caution statement was expunged from evidence, leaving only the testimony of PW1 which I consider not to be a credible witness for her testimony needed corroboration. In that situation, am confined that convicting a person

prayed by the learned State Attorney, was expunged from evidence, which leaves this court with determining the testimony of PW1 as far as her credibility as a witness and if was there a need of corroboration testimony that vividly identified the appellant as the offender.

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depending on such evidence is putting justice in jeopardy, and that, the case against the appellant was not proved beyond the required standard of the law.

In the event I allow the appeal. The conviction of the appellant is hereby quashed and the sentence imposed on him by the trial court is hereby set aside. Consequently, I order for immediate release of the appellant from prison unless he is being held for some other lawful causes.

It is so ordered.




D. B. NDUNGURU

JUDGE

07/12/2022