

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**CRIMINAL APPEAL NO. 52 OF 2022**

(Originating from the Resident Magistrate Courts of Singida at Singida in Criminal Case No. 172 of 2020)

**MARCO DANIEL HASSAN..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

*9/11/2022 & 10/11/2022.*

**JUDGMENT**

**MASAJU, J**

The Appellant, Marco Daniel Hassan, was charged with **RAPE** contrary to sections 130(1) (2) (e) and 131 (1) of the Penal Code, [Cap 16 RE 2019] but was convicted of Rape contrary to sections 130 (1) (2) (e) and 131(1) of the Penal Code, [Cap 16 RE 2019] and sentenced to serve thirty (30) years imprisonment by the trial court, the Resident Magistrate Court of Singida. The Appellant had allegedly raped a girl who was two (2) years old at 22:00 hours on the day 20<sup>th</sup> of September, 2020 at Iglansoni village within Ikungi District, Singida Region. Aggrieved by the said conviction and sentence, the

Appellant came to the Court with a Petition of Appeal bearing eleven (11) grounds of appeal.

When the appeal was heard before the Court on the 9<sup>th</sup> day of November, 2022 in his presence and his learned counsel, Ms. Maria Ntui, and the learned State Attorney, Ms. Bertha Kulwa, for the Respondent Republic, the Appellant vide his learned counsel, consolidated and reduced the said grounds into three grounds only, thus;

- (1) That, there was no proof of unmistakable identification of the rapist at the scene of crime.
- (2) That, the prosecution case was not proved beyond all reasonable doubt before the trial court.
- (3) That the statement allegedly recorded by the eyewitness Ms. Maria Mkupe (Exhibit P2) was unprocedurally admitted in evidence.

The Appellant argued that according to Spora Saimon (PW1), Amina Abdallah (PW2) and Maria Mkupe, the alleged offence was committed at 22:00 hours. Amina Abdallah (PW2) testified that she identified the Appellant by aid of solar light which was enough to identify anything at the scene of crime. Maria Mkupe [Exh. P2] testified that she identified the Appellant by aid of cellphone light as she found the Appellant in the sexual

act against the victim whose genitalia bled. The question here is that if solar light at the scene of crime was capable of identifying anything there why Maria Mkupe (Exh. P2) did use her cellphone light in order to identify the Appellant thereat?

That, the statement by Maria Mkupe (Exh. P2) was unprocedurally admitted in evidence as exhibit under section 34 B by the Public Prosecutor, Ms. Chiwalo (State Attorney), on the 26<sup>th</sup> day of October 2022 but later on tendered by F. 7175 D/Cpl Athuman (PW6) and again admitted in evidence and marked Exh.P2 on the 29<sup>th</sup> day of November, 2021. That, there was no proof that Maria Mkupe was dead because the letter by Iglansoni village Executive Officer to the Singida Regional Crime Officer dated the 23<sup>rd</sup> day of September, 2021 informing the Regional Crime Officer of the death of the said Ms. Maria Mkupe was not admitted in evidence as exhibit of the alleged death of witness. That, there was no proof that Maria Mkupe was indeed dead so as to warrant her statement to be tendered and admitted in evidence under section 34B of the Evidence Act [Cap 6 RE 2019].

That, the prosecution case was therefore not proved beyond reasonable doubt as against the Appellant as relates to the alleged

offence of rape of the victim of crime who was not even taken to the trial court for proof of her biological existence.

The Appellant prayed the Court to allow the appeal, quash conviction and set aside the sentence of thirty years imprisonment.

The Respondent Republic in the service of the learned State Attorney, Ms. Bertha Kulwa, did not contest the appeal on the basis of the apparent contradictions between the two alleged eyewitnesses Amina Abdallah (PW2) and Maria Mkupe (Exh. P2) on the aid of the identification of the Appellant at the scene of crime as to whether or not was the solar light or cellphone light. The doubt should be resolved in favor of the Appellant despite the fact that an offence of Rape had been committed, the challenge thereof being the identity of the rapist even as the victim of crime was not brought before the trial court although she couldn't have testified due to her extreme tender age.

That was all by the parties to this meritorious appeal.

The Court agrees *in toto* with the parties that the prosecution case before the trial court was not proved beyond all reasonable doubt due to the apparent contradictions between Amina Abdallah(PW2) and Maria Mkupe (Exh. P2) on the source of light which enabled them to identify the

Appellant at the scene of crime. Their contradictions, being allegedly eyewitnesses to crime, impeaches the credibility of their evidence.


Secondly, the statement by Ms. Maria Mkupe [Exh. P2] which was unprocedurally admitted in evidence by both the prosecutor and F. 7175 D/Cpl Athuman (PW6) cannot form valid evidence, to be acted upon by the Court to sustain already fragile prosecution case.

Whether or not the victim of crime, who was not even brought to trial court say, for proof of her biological existence was raped, the identification of the rapist in the light of the questionable evidence by Amina Abdallah (PW2) and Ms. Maria Mkupe (Exhibit P2) remains the mind boggling question whose benefit goes to the Appellant. This and the unprocedural admissions of Ms. Maria Mkupe's statement (Exh. P2) in evidence by the prosecutor and F.7175 D/Cpl Athuman (PW6) complicates further the chances of sustaining the Appellant's conviction. The prosecution exhibit "P2" is hereby expunged from the record of the trial court.

Thus, the meritorious appeal is hereby allowed accordingly. The conviction and sentence of thirty (30) years imprisonment against the Appellant severally are hereby quashed and set aside respectively. The

Appellant shall be released forthwith from prison unless there was another lawful cause. That said, in passing the Court guides that a person who is convicted of Rape of a child who is under ten years old is to be sentenced to suffer life imprisonment in accordance with section 130(1) (2) (e) and 131(1) (3) of the Penal Code, [Cap 16 RE 2019]. In the instant case, the victim of crime allegedly was two (2) years old. Upon conviction the Appellant should have been sentenced to serve life imprisonment.



  
GEORGE M. MASAJU

**JUDGE**

10/11/2022