

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No.123 OF 2021

(Arising from the District Court of Bunda at Bunda in Criminal Case No. 193 of 2020)

MASATU WEBIRO @ NYAMTENGE KITONGOTI APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

15.02.2022 & 22.02.2022

F.H. Mtulya, J.:

The **District Court of Bunda at Bunda** (the district court) in **Criminal Case 193 of 2020** (the case) on the 22nd day of February 2021 convicted Mr. Masatu Webiro @ Nyamtenga Kitongoti (the appellant) for two offences, namely: first, rape contrary to section 130 (1) (2) (e) and 131 (1) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code); and second, unnatural offence contrary to section 154 (1) (a) & (2) of the Code, and was sentenced to thirty (30) years imprisonment for the first count and thirty years (30) imprisonment with six (6) strokes for the second count and to pay compensation to the victim at the tune of Tanzanian Shillings Five Hundred Thousand.

It was alleged by the prosecution side at the district court that the appellant had carnal knowledge and carnal knowledge against the order of nature to a girl child of thirteen (13) years of age (name withheld and for convenience of this judgment, she will be referred

as the victim) on the 5th day of July 2020 at Nyang'aranga Village within Bunda District in Mara Region.

At the district court, the appellant had denied the allegations as a result the case proceeded to trial where the prosecution called a total of five (5) witnesses and tendered one (1) exhibit to support its case, whereas the appellant appeared in person without any evidence to tender. After the decision of the district court, the appellant was aggrieved and approached this court to protest the decision and registered seven (7) grounds of appeal.

The seven (7) grounds filed by the appellant briefly display the following grievances: first, no DNA test was conducted on the sperms found at the victim's private parts (PW1); second, it was impossible the offence to be committed in presence of family members of the appellant namely wife, grandmother and six (6) children; third, failure to consider appellant's evidence; fourth, the appellant does not sale school uniforms or own a shop; fifth, the evidences of PW1 and PW2 were fabricated; sixth, the appellant's did not confess commission of the offence; and finally the appellant registered a prayer of presence during the hearing of the appeal case.

The appeal was scheduled for hearing on the 15th day of February 2022 and the appellant prayed all seven (6) grounds of the appeal be adopted to form part of his submission and prayed to this

court to scan the record and deliver justice for him. However, ground number seven (7) was formulated in form of a prayer and the Republic, represented by Ms. Agma Haule, learned State Attorney, declined to reply the ground. In her brief submission in reply of the grounds of appeal, Ms. Haule contended that all six (6) grounds have no merit because: first, in rape cases, DNA test of the appellant's sperms is not necessary as the best evidence is that of the victim (PW4) as established by the precedent in **Selemani Makumba v. Republic** [2006] TLR 376 and in the present case it was collaborated by the evidence of medical doctor (PW1).

Secondly, Ms. Haule submitted that the materials registered by the victim and her Aunt (PW2) show that the appellant was alone during the commission of the offence as appellant's family had travelled, including his wife who had departed to her parents. With regard to the third ground, Ms. Haule submitted that the appellant's testimony was considered by learned magistrate who heard and determined the matter as depicted at page 4 of the judgment. On the issues of school uniforms and shop, Ms. Haule submitted that the record show that the appellant's asked the victim to go to his residence to be assisted with school uniforms. To her opinion, Ms. Haule submitted that the issues is not school uniforms or ownership of the shop, but evidence which shows that the appellant raped the victim.

Ms. Haule submitted further that the evidences registered by PW1 and PW2 cannot be said to have been fabricated as the witnesses had no any interest to serve and unassociated with the victim. Ms. Haule argued that PW1 was a medical doctor and PW2 was victim's Aunt who cannot have any interest against the appellant, and in any case the appellant did not cross examine them on important facts related to the case. To Ms. Haule's opinion, the appellant remained mute even when the Village Chairman, Mr. John Mriho (PW3) was giving his testimony. Ms. Haule contended further that failure on part of the appellant to cross examine the witnesses during the trial at the district court on important matters, such as complaint on fabrication of evidences and land disputes, shows that the appellant raised them as an afterthought in this appeal and the practice is prohibited by the decision in **Martin Misara v. Republic**, Criminal Appeal No. 428 of 2016.

Finally, Ms. Haule submitted that the appellant in ground number six (6) complains on cautioned statement and confession statement, but the record is silent on the subject or admission of any exhibits related to confession statement hence she cannot reply an issue which is not reflected on the record.

Rejoining the submission of Ms. Haule, the appellant claimed that there are not enough evidence to prove rape against him as the sperms were not tested; he slept with his wife on the day which

is alleged to have committed the offence; the learned magistrate did not consider his defence and told him: *utajijua mbele kwa mbele*, it was impossible for the victim's Aunt (PW2) to allow him to leave with the victim for his residence in assisting the victim with school uniforms, as they had previous quarrels with PW2; the Village Chairman participated in selling lands of the appellants family hence cannot be good witness. Finally the appellant supported the submission of Ms. Haule with regard to cautioned/confession statement. However, the appellant declined to reply the issue of cross examination on important facts to witnesses who were brought before the district court contending the court did not consider his defence properly.

I have had an opportunity to peruse the record of this appeal. The record shows that the victim (PW4) registered the following materials at page 13 & 14 of the typed proceedings:

On 5th July 2020 at 07:00PM, I was at home. Nyamtengela Kitogoti came...he told my aunt that he wants to take me so as to give me school uniforms. My aunt agreed and the accused took me to his home...he came with bush knife threatening to kill me...he locked the door...he asked me to put off my clothers. I started crying. He threaten to beat me...He undressed my underpants and pulled up clothers...akachukua uume wake akaingiza kwenye uke

wangu. Akaanza kunibaka. Baadae alihama na kuniingiza uume wake [nyuma]...I told my aunt what transpired after she asked me where I was for a long time. My aunt inspected my vaginal and anus...we went to hamlet chairman John Mriho...John Mriho communicated with the police officers...we went to the police station. I was taken to Mugeta Health Centre and a doctor examined me and gave me some tablets...

At page 15 of the proceedings, the victim stated that: *the accused is married and his wife has gone to her parents.* The facts registered by the victim were collaborated by PW1 and PW2. PW1 stated at page 7 of the typed proceeding of the district court, in brief, that: *on 6th July 2020, he examined the victim on vagina and anus and found them erupted with sperms and little blood. To PW1's one opinion, the process indicated a high UTI or Msugvano and gave the victim treatment for the pains.* Finally, PW1 stated that he had filled a medical examination form PF3, which was tendered in the district court as exhibit P.1, which revealed that the victim was raped.

On her part, PW3 stated that on the 5th day of July 2020, she was at her residence with the victim and the appellant showed up and requested to leave with the victim for his residence. The reason of taking the victim, as depicted at page 9 of the typed proceedings

of the district court, is to give the victim school uniforms. According to PW2, the victim returned back home late and when was questioned on late coming, she mentioned the appellant to have raped and sodomized her. Following the victim's statement, PW2 took measures to inspect her, report the matter to neighbours Makasi & Makuru and village authority of Mr. John Mriho. The record shows that Mr. John Mriho reported the matter to the victim's mother Gishanga Nyachuma and Mugeta Police Station and the appellant was arrested. During the proceedings in the district court, Gishanga Nyachuma (PW5) and John Mriho (PW3) were marshalled and testified on their participation in matter.

On his part, the appellant testified before the district court that the witnesses were brought in the district court to fabricate evidences against him in order to take his farms. In his own words, as displayed at page 20 of the proceedings at the district court, the appellant stated that: *witnesses are fabricating this case so as to take my farms after the death of my mother...all evidences adduced are fake...Gishanga and sub village leader [they uttered]...chamoto nitakiona.. I did not report the threats.*

However, the appellant failed to cross-examine all witnesses who were brought by the prosecution in the case on important materials related to land disputes and threat directed to him by Gishanga (PW5) and sub village chairman (PW3). The practice of

this court and Court of Appeal on the subject is that failure to cross-examine witnesses on important matters entitles courts to draw inferences that the opposite parties agree to what was said by witnesses in relation to the relevant fact in issue (see: **Hatari Masharubu @ Babu Ayubu v. Republic**, Criminal Appeal No. 590 of 2017, **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2009 **Cyprian Athanas Kibogo v. Republic**, Criminal Appeal No. 88 of 1992, **Sebatian Michael & Another vs. the Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018 and **Mateso Juma v. Republic**, Criminal Appeal No. 12 of 2021). Additionally the appellant did not produce any relevant material which raised doubt to the victim's story as collaborated by the evidence of PW1, PW2 and PW3.

This was well noted by the learned Resident Magistrate who sat and determined the case. At page 4 of the decision, the learned magistrate doubted the defence materials registered by the appellant in the following words:

I had considered defence evidence [on] fabricated case due to [accused's] resistance to sign an agreement for sale of his mother's farm which defence did not raise any reasonable doubt to exculpate him from liability hence unworthy of credit against water tight prosecution evidence which suffice for conviction of the accused

*person. In **Republic v. Betram Mapunda & Another** [1999] TLR 1, the Court stated that to warrant conviction, the prosecution must prove its case beyond reasonable doubt that the accused is guilty. The evidence establishing case against an accused must be real and not perceive.*

In the present appeal, the evidence produced by the victim supported by PW1, PW2 and PW3 prove the case beyond reasonable doubt that the accused is guilty. In my considered opinion, the evidences against the appellant are real and cannot be said to have been fabricated. In my considered opinion, prosecution witnesses who were brought in the present case are reliable and credible as per requirement of the law and precedent of **Marwa Wangiti v. Republic** [2002] TLR 39.

As the allegations levelled against the appellant are related to sexual offences, the practice in place is that the best evidence is that of the victim. There is a large family of precedents on the subject (see: **Selemani Makumba v. Republic** (supra); **Yohana Said @ Bwire v. The Republic**, Criminal Appeal No. 202 of 2018; **Bashiri John v. The Republic, Criminal Appeal** No. 486 of 2016 **Abasi Ramadhani v. Republic** (1969) HCD 226; **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013; **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015; and **Mkohi Gagiri Matiko v, Republic**, Criminal Appeal No. 105 of 2021).

Following the precedents of this court and Court of Appeal decisions on the subject, this court has no mandate to change the course of the holding hence the complaint registered by the appellant with regard to the need of DNA test to prove the owner of the sperms has no any merit whatsoever.

I understand the appellant complained in this appeal that it was impossible for him to commit the offences of rape and sodomy in presence of his wife and other family members. However, the complaint is not displayed on the record of trial court in both the prosecution witnesses and during the defence hearing as depicted at page 20 of the typed proceedings of the district court. I think Ms. Haule is correct in stating that the appellant raised the issue as an afterthought in this appeal and this court cannot be detained on the subject. In any case, the victim stated at page 15 of the typed proceedings that the appellant's wife had travelled to her parents which gave room to the appellant to rape and sodomy the victim.

In view of the strong and clear evidence registered by the victim, PW1, PW2 and PW3, I entertain no any reasonable doubt that the appellant raped and sodomized the victim. I am satisfied that the prosecution evidence taken together with appellant's defence produced in the district court, the appellant was properly convicted with the offences charged. With respect to the sentence in both counts the district court rightly sentenced the appellant.

Therefore, I have no reasons to interfere the conviction and sentence of the district court. In the event, I find this appeal has been brought in this court without sufficient reasons and fails in its entirety.

It is so ordered.

Right of appeal explained.



F.H. Mtulya

Judge

22.02.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Ms. Agma Haule and in the presence of the appellant Mr. Masatu Webiro@Nyamtenga Kitogoti through teleconference.

F.H. Mtulya

Judge

22.02.2022