

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 1 OF 2021

(C/F Criminal Case no 193 of 2020 of Sumbawanga District Court)

(J. O. Ndira, RM)

MASOUD S/O ABDALLAH @ SAID APPELLANT

VRS

THE REPUBLIC RESPONDENT

JUDGMENT

11 & 30/03/2022

NKWABI, J.:

The old adage, *misfortune never comes singly* which is similar to *it never rains but it pours*, seems to be relevant to the victim in respect of this case.

After being sexually assaulted, she conceived and dropped school thus crashing her ambitions as a young girl and that of her family for her to get better education. The perpetrator of the awful offence, 'statutory rape', was brought to the book. He is now challenging his conviction and sentence meted out to him by the District Court which is thirty years imprisonment.

His grounds of appeal are that, the case was not proved beyond reasonable doubt as it based on a single witness, lack of DNA evidence to prove the responsibility of the pregnancy meant the case was not proved. Lastly, he was convicted by the trial court without considering his relative had no good relationship with the victim's family (They are both relatives). He prayed this court to quash the conviction, set aside the sentence and release him from prison.

During the trial, the respondent brought 4 witnesses in an attempt to prove the charge they laid at the door of appellant. It was the prosecution evidence, which was denied by the appellant, the victim used to visit the appellant at his house for sexual gratification. She would spend up to two hours and then she would go back to her home place. It is as a result of sexual intercourses with the appellant, the victim conceived. She then started to abscond school which prompted her father PW1 to make follow-up which ended into medical examination which concluded that PW1 was pregnant as per exhibit P. 2. PW3 recorded the caution statement of the appellant which was admitted as exhibit P1.

The appellant's defence was that he had never known the victim, never raped the victim, never known how to have sexual intercourse, and had never known how to seduce. To his surprise, he was charged with raping the victim. That he recorded statements at the police but never confessed the offence.

At the hearing of the appeal, the appellant appeared in person while the respondent (the Republic) was represented by Ms. Safi Kashindi, learned State Attorney. In his submission in chief, the appellant, merely stated that the charge sheet was not proved beyond reasonable doubt.

On their side, Ms. Kashindi vibrantly resisted the appeal. Referring this court to section 143 of the Evidence Act, and **Yohanes Msigwa v. Republic** [1990] TLR 150 she argued the ground of appeal that only the evidence of one witness the trial court relied on is lame. She argued, since this is statutory rape, it was essential to prove age, and that was done. She cited **George Claud Kasanda v. The D.P.P.**, Criminal Appeal No. 376 od 2017 to fortify her argument. She further vigorously maintained that, PW2 (the

victim of the offence) explained how the accused had sex with her and where. She cited **Seleman Makumba v. Republic**, [2006] TLR 379. She added that the evidence of PW2 was corroborated by the evidence of other witnesses and the caution statement of the appellant which he did not challenge its admission. She prayed the ground of appeal be dismissed.

As to the ground on lack of DNA evidence, Ms. Kashindi, advanced that the appellant was convicted of statutory rape and the evidence of the victim is important than that of DNA.

Turning to the claim by the appellant that his defence of bad blood was not considered, Ms. Kashindi was of the view that that ground of appeal is unmerited. The defence was considered by the trial court as could be seen on page 5 of the typed judgment.

In rejoinder, the appellant argued that he objected the admission of the caution statement by saying that it was not the one he recorded. He insisted the defence was not considered.

I will start with the appellant's claim that his defence was not considered. As argued by Ms. Kashindi, this ground of appeal is lame and does not advance the case of the appellant. It has been decided by the Court of Appeal that progressive jurisprudence currently allows an appellate court to consider the defence of the appellant at an appellate stage. That was said in **Jafari Musa v. DPP, Criminal Appeal No. 234 of 2019**, CAT (unreported), see also **Deemay Daati & 2 Others v, Republic, Criminal Appeal No. 80 of 1994** (CAT), (unreported):

"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of evidence, an appellate court is entitled to look at the evidence and make its own findings of fact."

The appellant alleges bad blood with the family of the victim. PW1 was not cross-examined by the appellant on the alleged bad blood. That claim is meritless and dismissed since it was also not raised in the appellant's defence. As to the exhibit P1 the caution statement, the record of the trial court is silent as to whether, it was supplied to the appellant for his examination (looking at it), though it appears that the appellant said he had no objection, in my view, in the absence of the record indicating that he examined it before making his comment it is unsafe to rely on the caution statement to ground conviction. I do not consider the caution statement in the determination of this appeal. Undoubtedly, I base my view on **Hassan Hussein Tinna vs Republic, Criminal Appeal No. 33/2011** (CAT) at Dodoma (unreported):

"However, and as correctly observed by the learned Senior State Attorney, all the documents were purported to have been admitted in evidence as exhibits without the appellant being given an opportunity to see them and give his remarks on them. This was the right of the appellant. ... Section 172 of the law of Evidence Act says that before any documentary evidence is admitted in court; it must be shown to the other party so that he

can comment on such document. The other party also has the right to cross examine the witness on that document. The omission to show the appellant the documents denied him the right of fair hearing."

Turning to the complaint in respect of the lack of DNA test exhibit, I accept Ms. Kashindi's contention that DNA evidence is not a legal requirement. That view, is not only supported by the authority of **Seleman Makumba** (supra) but also **Goodluck Kyando v Republic, [2006] TLR 363**, CAT had these to say:

"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness. Their testimony was not challenged."

One could have reference as well to **Christopher Kandidius @ Albino v Republic, Criminal Appeal No. 394/2015** CAT (unreported) and **Mussa Sebastiani v Republic, Criminal Appeal No. 406/2018** CAT (Unreported):

It is, we think, enough for us to say DNA test is not a popular means of proving rape in our jurisdiction, given its limitations, perhaps.

The ground of appeal is dismissed.

I now revert to consider the complaint in respect of one witness grounding conviction. This ground will not detain me much. I reject it while accepting Ms. Kashindi's submission that it is not a requirement of law that more than one witnesses are needed to prove a fact, see **Shenyau v. Republic Criminal Appeal No. 27 of 1993** (Unreported) (CAT) at Arusha. The trial court accepted the evidence of PW2 who told the court how she would visit the accused at his house and have sex with him. Her evidence was corroborated by the evidence of PW1 and PW4 as well as exhibit P2. In my view, conviction was well grounded. This ground of appeal goes down swinging.

Having indicated and decided as I have hereinabove, the conviction and sentence can be rationally supported. I therefore, dismiss the appeal as it

has no merits. I agree with the learned State Attorney and I am of the view that in the circumstance of this case, conviction and sentence have to be upheld. I so uphold.

It is so ordered.

DATED at **SUMBAWANGA** this 30th day of March 2022.



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi".

J. F. NKWABI

JUDGE