

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA

CRIMINAL APPEAL NO. 44 OF 2021

*(Originating from District Court of Liwale at Liwale Criminal Case No. 12
of 2021)*

MEEDRAGE MOHAMED NAHEKAAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of last order: 09/03/2022

Date of Judgment: 30/03/2022

JUDGMENT

Muruke, J.

The appellant Meedrage Mohamed Naheka, was charged and convicted with an offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 R.E 2019, thus convicted to serve thirty (30) years imprisonment with four (4) strokes of cane on 20th May 2021 by the District Court of Liwale. Being dissatisfied, he filed present appeal raising four grounds.

On the date set for hearing, Principal State Attorney, Ajuaye Bilishanga represented the respondent, while appellant was unrepresented, he thus prayed for his grounds of appeal to be received as his submission in

chief, and reserve his right to make rejoinder where necessary, prayer which was not objected by respondent counsel. Court then, asked learned State Attorney to submit replying grounds of appeal. The age of the victim is below 18 years, her name will be hidden and she will be referred as **VICTIM** and **PW1** interchangeably to preserve her decent in the society.

Respondent counsel supporting conviction and sentence meted by trial court. Respondent counsel submitted that; appellant was convicted for an offence of rape to a child below 18 years. To prove statutory rape following must be exist victim is below 18 years, proof of penetration, lastly whether it is the appellant who raped her. Victim age is at page 11 of typed proceedings. PW2 the father of victim, proved his age. PW3 Doctor at page 18 said on the age of the victim. So, the victim was below 18 years. Second issue is whether victim was penetrated. At page 10 of typed proceedings victim PW1 she said that appellant is his lovers for long time. They have been doing sex periodically until when they were found inside the room. While PW1 testifying appellant did not cross examined on what she was saying. Doctor PW3 who examined the victim proved, that he found fluid in the victim vagina, that resulted from sexual intercourse.

Whether appellant was the one who raped the PW1 victim. Evidence of PW1 proves that it is the appellant who was doing sexual intercourse. PW1 and PW5, they both found appellant and victim in the room. Appellant did not cross examined PW2, PW5 and PW7 who testified to find him with victim. Thus, the evidence of PW2, PW5, PW7 all corroborated evidence of PW1 who is the victim. In all evidence of PW1, PW2, PW5, PW6 appellant did not cross examine the witnesses who testified to prove the offence charged. Thus, ground one lacks merits.

On ground two, complain is that evidence of the witnesses was not reliable. It is not true. All witnesses who testified were credible, even appellant failed to cross examine the witnesses of PW1, PW2, and PW6. At page 12 of the trial court judgment, it was said that, court believed the evidence of prosecution thus grounded conviction. In totality prosecution evidence were not contradicted second ground lacks merits. On ground three, appellant complained of his evidence not to have been considered. According to the records, trial court took into consideration defense evidence in particular DW1, DW2 and DW3. At page 9 and 10 of the trial court judgment, evidence of defense was taken into consideration, finally trial court convicted the appellant upon taking into considerations of his defense evidence. Ground four complaint is on lack of corroboration to ground conviction. Evidence of PW2, PW5 and PW6 they all corroborate the evidence of PW1 the victim. PW1 was found inside appellant room, thus appeal lacks merits insisted State Attorney.

In rejoinder, appellant argued that, PW3 explained in court, that there were no bruises, so, no penetration at all. Appellant admitted not cross to have examined the witness, because he did not know. He failed to cross examine the witness on the fluid found at PW1 vagina whether, fluid was his or other person. Caution statement was not voluntarily given there was serious push for him to admit the caution statement. Police went to his home they threatened them to open the door. They found PW1 in the outer house not in his room. Appellant admitted that he did not know how to cross examine the witnesses, that was the reason he was found guilty.

Having gone through trial court records, grounds of appeal and parties' submissions, it is worth nothing that. The appellant is alleged to have raped a girl aged bellow 18 years thus the most important ingredients to

be proved in statutory rape is age and penetration. The appellant was charged for that offence because the allegations are that PW1 was a young girl of below 18 years. As the appellant in this appeal was charged under the section 130(1)(2) (e) of the Penal Code, the charge was for statutory rape. That section provide as follows;

“(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a) to (d) N/A

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and not separated from the man.”

Court must satisfy itself as to whether the appellant was the one who raped the victim. Prosecution paraded seven witnesses to prove its case. PW victim, testified at page 10 of the typed proceeding that;

“.....Then I put off the short dress I was wearing and remained with brazier and pantie then after that accused said I want to have sex with you and I did not object if I agree on it we did sex together as he unless himself as well and all remained naked and do sex together. We did not use any protective gear on that day we do sex once on that day and on that day, it was a third day meeting with him and have sex.”

PW1 explained clearly how appellant then accused asked her to have sex, and how the preparation of sex was done until the act was committed, and lastly how many times the appellant raped her. At the time when the appellant asked to cross examine the witness PW1, he did not do so, and he even never asked anything in respect of her testimony. The law is clear that, failure to cross examined the witness

during the trial means acceptance of what is testified. In the case of **Jacobo Manyani Vs. The Republic, Criminal Appeal No. 558 of 2016** (unreported) Court held that;

“It is a trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as silence is tantamount to accepting its true.”

PW1(victim) evidence was supported by the testimony of PW2 Steven Alubano Mtakula victim's father who also proved the age of the victim. Age of the victim in statutory rape is paramount important. In the case of **George Claud Kasanda Vs. Republic, Criminal Appeal No. 376 of 2017(unreported)**, The court of Appeal described statutory rape, stated that;

“In essence that provision (section 130(2)(e) of the Penal Code) creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense age of is of great essence in proving such an offence.”

At page 11 of the typed proceeding, PW2 testified that;

“PW1(victim) is of 16 years old, and was born on 2/2/2006 at Lupaso Masasi and I have her birth certificate which indicated on her age.”

PW2 evidence was supported by the testimony of PW3 Dr Godfrey Lucas Amani, who at page 18 of the typed proceeding is recorded to have said; **“the victim come conscious, a female approximately 16 – 17 years.....”**. As the requirement of the law, to prove the age of the victim in statutory rape, the evidence of PW1, PW2 and PW3 both proved the age of the victim.

Another crucial element to be proved is penetration. The law is very clear that penetration however slight it suffices to prove that the offence of rape was constituted. Under section 130(4) (a) of the Penal Code, Cap 6 R.E 2019, stated that;

“130(4), for the purpose of proving the offence of rape;

(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;”

This requirement of the law was also stated by The Court of Appeal of Tanzania in the case of **George Mwanyigili Vs. Republic, Criminal Appeal No. 335 of 2016** (unreported) that;

*“Bruised an aspect which was indicative of the fact that there was rape **penetration which is a crucial ingredient of the offence of rape.**”*

The same requirement was observed in the case of **Burundi s/o Deo Vs. Republic, Criminal Appeal No. 33 of 2010** (unreported) that;

*“In proving rape one of the ingredients that must be established is, **Penetration.**”*

In a simple word you cannot prove an offence of rape if you have not proved that there is penetration of male genital organ to a female genital organ. PW1(victim) who is a key witness of the prosecution, narrated very clear how the appellant(accused) committed the alleged offence and how she was penetrated by appellant. At page 10 of the typed proceeding, she said;

“While doing sex there come police car, and they knocked the door, I open the door and entered another room, and later wanted to move using the back door, when I opened the police officer, entered

inside and arrest me and they were looking for meed/accused as well.”

Notably, during cross examination. Appellant did not cross examined the witness (PW1) with reasons that he did not know if he is supposed to do so. The testimony of PW1 was corroborated by the evidence of PW3 Medical Doctor from Liwale District Hospital who examine the victim. At page 18 of the typed proceeding, he was recorded that;

“I examine her and upon medical examination I found some fluids in instrument ND taken to laboratory for further examination and analysis. The fluids only get into vagina via sexual intercourse.”

PW3 also tendered PF3 admitted as exhibit P2, in which he indicated that there is sperm detected in victim vagina which is indication that victim was penetrated by the appellant. The appellant when give chance to cross examine or to object PW3 in tendering the exhibit PF3 he did not objected/ cross examine the witness. In the case of **Baraka Kivuyo Vs. The Republic, Criminal Appeal No. 121 of 2020** (unreported) HCT Arusha Registry, court held that;

“The appellant was given chance to cross examine all witnesses and even raise objection during tendering of an exhibit (PF3) but opted not to do so. It means his silence is deemed equal to accepting the truth. He cannot complain at the appeal stage that he was denied the right to be heard,”

It is my opinion that, prosecution witnesses PW1, PW2 and PW3 both are the best witnesses, reliable and credible witnesses who managed to connect the facts of the case with the offence appellant then accused charged. In the case of **Goodluck Kyando Vs. Republic [2006] TLR 363**, court stated that;

"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 reason for not believing a witness."

I have keenly, reviewed the evidence of prosecution witnesses. Their testimonies are very clear, credible and reliable. I have no reasons for not believing their testimonies.

In last aspect, whether appellant is the one who raped PW1 victim. The evidence of PW1 at page 10 of the typed proceeding, speaks lauder that;

"In 2020 is when I started having sexual relationship with accused, we are just neighbor at street. Meed/accused is not a student. We had a sexual relationship that all."

PW1 evidence pointing fingers to the appellant not someone else. PW2 Steven Alubano Mtakula victim's father and PW5 Mariam Mshamu also supported the testimony of PW1, that they found the victim inside the house with appellant. They were both arrested then taken to police. The appellant also complained that, the trial magistrate ignored the defense witnesses. Records of the trial court speak by itself. At page 9 and 10 of its judgment, the trial court properly considered defense evidence. The said pages is quoted below;-

"With the second point for determination on the involvement of accused in the commission of the offence. DW1 Meedrage Mohamed Naheka who will interchangeably referred to as DW1 or accused, in his entire defense nowhere denounced the commission of the charged offence. What levelled in his defense is being invaded by unknown people at his house and commanded him to open the door and due to fear he decided to hide himself at the upper roof and cause the invaders to break the doors and entered inside the house"

Trial court went further stating that, "in this case the tenants responded to the call as the doors were broken and goes outside and found police officers as stated by DW2." There after trial magistrate proceeded to discuss the evidence of DW3. In view of the foregoing findings, Court clearly took on board defence case. I am certain that, prosecution proved its case to the required standard of the law. This appeal has no merits, same is dismissed.

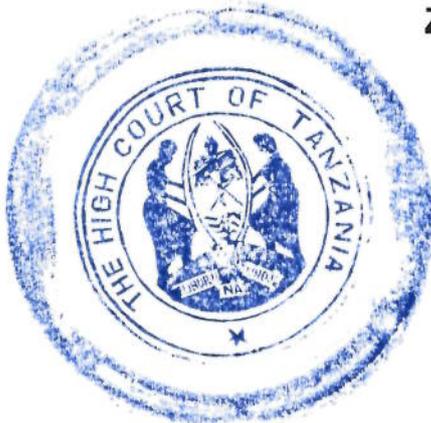


Z.G. Muruke
Z.G. Muruke

Judge

30/03/2022.

Judgment delivered in the presence of appellant in person and K. G. Makasi For the respondent. Right of appeal explained.



Z.G. Muruke
Z.G. Muruke

Judge

30/03/2022.