

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 96 OF 2021

(C/O Criminal Case No. 23 of 2021 Mpanda District Court)

(R.M. Mwalusako, RM)

**KIDANA S/O KINAMHALA @ MSUKUMA APPELLANT
VERSUS**

THE REPUBLIC RESPONDENT

JUDGMENT

17/03 & 06/04/2022

NKWABI, J.:

The appellant is still protesting his innocence over conviction and sentence to 30 years imprisonment by Mpanda District Court in Katavi region. He was alleged to have raped a girl aged 16 years. He was charged for rape contrary to section 130 (1) and (2)(e) and section 131 (1) of the Penal Code Cap 16 R.E. 2019.

The offence was allegedly to have been committed by the appellant on 16th January, 2021. The prosecution evidence seems to suggest that the appellant went to the home of the victim brandishing a knife. Dismissed some of the children who were there with the victim. They dispersed. He then held

the victim and took her to the room where he sexually molested her. She did not report to her aunt when she came back as she had been threatened by the appellant. She was found with her colleague siblings crying. They too did not report the matter to elders. Nevertheless, the appellant was arrested and arraigned before the court on 29th day of January 2021.

In his defence the appellant admitted to be the neighbour of the victim but added that that does not mean that he committed the offence. He alleged that the prosecution had not proved the charge. The trial magistrate was satisfied that the appellant had committed the offence, convicted him and sentenced him as shown above.

The appellant, having been seriously irritated with the conviction and sentence, lodged a petition of appeal to this court to protest that he is without doubt impeccable. The essence of the justification of the petition of appeal is that the appellant was convicted and sentenced on a charge that was not proved beyond reasonable doubt.

In this appeal, the appellant who stood unrepresented implores upon this court to believe his defence and find that the offence was not proved against

him. He prays he be released from prison on the one hand. On the other hand, the respondent, was represented by Ms. Safi Kashindi, learned State Attorney, who pressed that the charge was proved beyond reasonable doubt. She was of the view that the victim was a credible witness and her evidence was corroborated by PW2 and the other evidence. But in rejoinder submission, the appellant insisted that he did not commit the offence and witnesses contradicted in evidence.

After considering the evidence of both parties and their submissions, what resonates to me is the view of the Court of Appeal of Tanzania in **Nathaniel Alphonse Mapunda & Another v Republic [2006] TLR 395 (CAT)** where it was stated:

"... it was better to release 100 guilty men than convict one innocent person wrongly."

In my view, the above position of the Court of Appeal insists that in a criminal case, a court of law is required before convicting the accused person has to be satisfied that the offence has been proved beyond reasonable doubt.

On my own evaluation of the evidence in the record, I am inclined to agree with the appellant that the prosecution failed to prove the case against the appellant. That is prompted by my feeling that the victim is a self-claimed liar. This is what she said in her evidence:

PW1: *"I tried to rescue myself but I failed hence I turned upside down and its when he put his penis inside my anus. ... I stood up, took water and went to bath. Upon arrival of my aunt I thought of telling him but I was scared the threat given by accused. I only told her that I had a headache and she bought a painkiller."*

Her aunt had this to say in evidence:

PW2: *"I found the victim (name withheld) sick ... I asked for her relatives and said they went to church. ... The next day she insisted that she had a headache. But I was surprised"*

If she had her anus penetrated, why was she not examined and the PF3 reveal that? Why is the evidence contradictory as to where her relatives went after it is allegedly that were threatened by the appellant? The Court of Appeal has ever dealt with evidence of this nature in **Ahmed Said v**

Republic, Criminal Appeal No. 291/2015 CAT (unreported) where the alleged victim was a self-confessed liar and it held:

"In our view, the statement of principle equally befalls on a witness in the shoes of Yusra who withheld the details of the sexual occurrence for quite a while. To further complicate her non-disclosure and, as was correctly formulated by the learned Senior State Attorney, Yusra was a self-confessed liar. ..."

See also **Mathias Timoth v. R. [1984] TLR 86** HC Lugakingira, J.

Held: (1) In testimony of a witness, where the issue is one of false evidence, the falsehood has to be considered in weighing the evidence as a whole; and where the falsehood is glaring and fundamental its effect is utterly to destroy confidence in the witness altogether, unless there is other independent evidence to corroborate the witness.

In this case, there is no other cogent evidence to corroborate PW1's evidence. The prosecution evidence is tainted with grave contradictions which cannot be resolved.

In criminal trials an accused person cannot be convicted on the weaknesses of his defence as clearly stated in **Christian s/o Kale and Rwekaza s/o**

Bernard v R. [1992] TLR 302 (CA) Omar JJA, Ramadhani JJA, Mnzavas JJA:


"Although second appellant's defence, like that of his co-accused, was a cock-and-bull story of what happened on the material day; and it must be conceded that he obviously has a talent for fiction; an accused ought not to be convicted on the weakness of his defence but on the strength of the prosecution case."

Finally, having deliberate this appeal as I have shown above, I do not see the need to discuss the rest of grounds of appeal. I endorse the appeal preferred to this court by the appellant. Conviction is quashed and sentence thereto is set aside. The appellant is to be set free from prison unless held there for other lawful cause(s).

It is so ordered.

DATED at SUMBAWANGA this 06th day of April, 2022.




J. F. NKWABI
JUDGE