

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

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 70 OF 2021

(C/O Criminal Case No. 14 of 2017 Mlele District Court)

(G.B. Luoga, RM)

**RICHARD S/O CHAMBANENJE APPELLANT
VERSUS**

THE REPUBLIC RESPONDENT

JUDGMENT

15/03 & 06/04/2022

NKWABI, J.:

For the 1st time, the appellant was arraigned before Mlele District Court on 25/01/2017 in respect of this case. He was accused of raping a girl aged 6 years contrary to section 130 (1) (2(e) and section 131 (3) of the Penal Code. That girl is the daughter of his employer namely Joseph Felix (PW2). He was convicted as charged and sentenced to life imprisonment on 21/06/2017 by T. Swai, RM. That conviction and sentence were reversed by Mrango, J. as he then was, and ordered a retrial.

On 10/07/2019 a retrial commenced. A preliminary hearing was conducted on that very day. He admitted that he used to work at Joseph Felix as a shamba boy.

The prosecution's evidence is that on 20/01/2017 the victim was raped on that day where the appellant forced her to have sex with him and pressed her mouth so that she would not raise an alarm. PW1 felt pain and blood flowed from her vagina. It was Peter, her brother, who made the appellant run away when he approached the scene. The victim did not tell her mother of the incidence but it was PW2 Peter who did. While PW2 said he was with the children in the shamba, PW1 did not say so. He said the appellant ran away when he approached. It was PW2 who told the mother of the victim that the victim was raped.

It was also the evidence of PW2 that the appellant did not go to the house as he disappeared until when he was arrested. (then, when did he take his belongings?). PW4 Jane inspected her daughter and found she had discharge like sperms and blood and saw her private part swollen. They took her to the hospital where a PF3 was filled in and PW1 was given drugs. PW5 too, saw blood discharging from the vagina of PW1. He arrested the appellant in

the farm of Mzee Kanyika. In cross-examination however, he replied the appellant was arrested at Kanika's home. In re-examination PW5 replied they arrested the appellant in Kanika's house.

PW6 Joseph Mtafya said the appellant was arrested and sent to him and he was told that he was arrested in the tobacco ovens, who in turn said he committed the offence under the influence of Satan and apologized. The caution statement of the appellant (exhibit P1) was recorded by PW7 WP 9261 DC Joyce during the night of 21/01/2017 at 03:00 to 04:45.

The victim was medically examined by PW8 Amadus who opined, in the PF3 (exhibit P2), that the victim had bruises on her thighs, her hymen was not intact and concluded that she had her vagina penetrated by a blunt object. He fell short of saying he saw sperms or blood in the vagina of the victim. In addition, PW9 Happimaki, a primary school assistant head teacher of Kamsisi primary school, confirmed that the victim was their pupil at the primary school and was aged 9 years according to the records at the school. He tendered the certified copy of the pupils' registration book as exhibit P3

In his defence the appellant disputed to have committed the offence. He added that since the age of the victim contradicted as mentioned by witnesses, then the offence was not proved. He said the case was fabricated against him since he was demanding to be paid his wages, he had worked for three years without being paid. In cross-examination, he admitted not to have cross-examined PW5 on the alleged unpaid wages.

The appellant, being unsatisfied 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. As the victim was under age, that was proved to the required standard and cited **George Claud Kasanda v The DPP**, Criminal Appeal No. 376 of 2017 (CAT) (unreported) and **Godfrey Wilson v The Republic**, Criminal Appeal No. 168 of 2018 (CAT) (unreported). But in rejoinder submission, the appellant insisted that he did not commit the offence and witnesses contradicted in evidence.

I have carefully gone through the evidence of both parties in this case. I admit, this case has considerably exercised my mind. The appellant did not cross-examine PW2 on his alleged fabrication of the case due to his claim of money. He failed to assail the caution statement that was admitted in court. Then all that fell to the reality that that plays around the position that the defence of the appellant was weak. But it is trite law that conviction cannot be based on the weakness of the appellant's defence but on the strength of the prosecution case, see **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."

Now, is the prosecution evidence strong enough to sustain the conviction?

The appellant alluded to contradiction in respect of the age of the victim of the offence. The learned State Attorney did not touch on any of the contradictions in the prosecution case and say whether they do not go to the root of the matter. Indeed, the appellant alleged that the case was not proved beyond reasonable doubt, maybe due to the contradictions found in the prosecution evidence. I have, found in the evidence, regrettably, serious contradictions which in my view, go to the very root of the matter. One of the contradictions is that while PW2 and PW5 said they saw blood flowing from the vagina of PW1, PW8 did not see a trace of blood therein. The medical examination was done almost immediately after the incidence. The contradiction greatly exercised my mind.

Another contradiction which has exercised my mind is at what exactly place the appellant was arrested? Was it in the farm? Was it in the house? Was it in the oven?

There are also uncertainties as to the appellant's clothes. Did he take them after the incidence or before? How did he take them and at what exact time?

Should I turn a blind eye to the contradictions and uncertainties? Or should I take the warning taken out by 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 the situation like this, one has also to have reference to **Mathias Timoth v. R. [1984] TLR 86** HC Lugakingira, J., as he then was, held:

"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."

It is regrettably to say that in this case prosecution evidence is tainted with grave contradictions which, to me seem, to be difficult to resolve.

In fine, 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