

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 35 OF 2021

SYLIVESTER S/O KIPYELA APPELLANT
VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the District Court of Nkasi at Namanyere)

(B. B. Nkomola, RM)

Dated 10th day of March 2021.

In

Criminal Case No. 129 of 2020

JUDGMENT

10/05 & 07/06/2022

NKWABI, J.:

I outrightly confess that it is unknown, albeit maybe to me, the date when the appellant was arrested in connection of the offence he was charged with. Further, it remains a mystery on my side the circumstances which the appellant was arrested for. Nevertheless, the appellant was tried and convicted in the trial court. In the end he was sentenced to serve 30 years imprisonment for rape offence which is contrary to section 130 (1) and (2)(e) and section 131 (1) of the Penal Code Cap 16 R.E. 2019.

A short account of what seems to have happened is that on 18th day of August 2020 at Ngundwe village in Kizumbi ward within Nkasi district in Rukwa region at 09:00 pm a child aged 6 years was raped. It is the appellant who is allegedly to have committed the offence. The victim who lives with her grandmother, was raped after the rapist had undressed her. She was later sent to Wampembe Health Centre for treatment. There she was attended by Jesca (PW3) who observed that the victim of the offence sustained bruises in her vagina. The chairperson of the sub-village was informed of the incidence.

Having in mind, I guess, the authoritative case laws of **Selemani Makumba v R. [2006] TLR 379** and **Goodluck Kyando v Republic, [2006] TLR 363**, the trial court, found that the testimony of PW1 the victim of the offence was corroborated and he grounded conviction.

The appellant was aggrieved with both conviction and sentence. He filed this appeal to this court. He was of the view that, 1. The case was not proved beyond reasonable doubt, 2. The evidence of the prosecution was not

corroborated, 3. The evidence was not properly evaluated and finally 4. The exhibits were admitted illegally.

On the hearing date, the appellant appeared in person, unrepresented. The respondent was duly represented by Ms. Marietha Maguta, learned State Attorney.

In his submissions, the appellant raised some questions and arguments that find purchase with me. He maintained that the father of the alleged victim gave hearsay evidence, which is true. Why did the victim fail to raise an alarm and the relative who was present at the scene arrest him? Which is also true. Why did that relative fail to arrest him only passersby claimed I raped, which is also true.

They claimed that the raped person was unable to walk. Why was she walking, she walked even up to the police station and from the police station to the hospital, which is true as per the evidence of the person who attended

her at the hospital. The case was not proved beyond reasonable doubt, which I think is the fact.

Be that as it may Ms. Maguta supported the conviction and sentence of the trial court on the appellant. She argued that the best evidence is that of the victim herself. The victim testified that she was raped by the appellant. PW1 also found the appellant at the scene of the offence while naked. PW5 and PW4 found the appellant committing the offence of rape. The evidence of PW3 at pages 13 – 16 is clear that the victim was found to have bruises in the vagina.

The father of the victim come to prove the age of the victim he tendered the clinic card. He was told of the incidence we supported case with **Seleman Makumba's case V. Republic**. We pray the 1st ground of appeal be dismissed. She vigorously submitted that the evidence was strong on the prosecution there was no need of corroboration, she added but there was corroboration is any case.

As to complaint that the defence was not considered, that is not true as at page 20 of judgment, the defence was duly considered. She also insisted that the exhibits which were tendered, as to the PF3 seems to have been objected though the record is not shown the appellant to have objected. It is because we said the objection had no merit. She prayed the appeal be dismissed as it has no merits.

In finalizing his arguments, the appellant contended that the evidence of the respondent is false. The doctor proved that the victim was walking. The called me so that they fabricate the case against me.

As I have indicated above, when, how, who and where the appellant was arrested remains a mystery. That is made even worse by the claim that some witnesses saw the appellant committing the rape offence. What made them fail to arrest or attempt to arrest the appellant is unclear.

The incidence happened during the night. The decision of the Court of Appeal in **Waziri Amani vs. Republic** [1980] TLR 250 comes into assistance where it was held:

If at the end of his examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbor, a close friend, a wake mate and the like, we think, he would in those circumstances, safely convict on the evidence of identification. On the other hand, where the quality of identification evidence is poor, for example, where it depended on a fleeting glance or on a longer observation made in difficult conditions such as a visual made in poorly lighted street, we are of the considered view that in such cases the judge would be perfectly entitled to acquit."

In this case, with the greatest respect to Ms. Maguta, I do not think that the conditions were such as good to enable accurate identification. It is not known if the incidence happened in the bed room, corridor or sitting room. The intensity of the solar light is unknown and at which place it was. The physical appearance of the appellant was not clearly described though he is alleged to be a relative. In the case of **Raymond Francis vs. Republic** [1994] TLR 100 (CA), the Court rejected the identification of the alleged

culprit after it had quoted the case of **Mohamed Alhui vs. Rex** [1942]9 EACA 72 where it was held that:

"In every case in which there is a question as to the identity of the accused, the fact of there having description given and the terms of that description given are matters of the highest importance of which evidence ought always too be given; first of all, of course, by persons who gave the description and purported to identify the accused, and then by the person or persons to whom the description was given."

See also **Juma Mussa v. Republic, Criminal Appeal No. 165 of 1991 (unreported) (CAT) (DSM):**

"....PW1 did not give any explanation as to how he purported to identify the appellants. The record is completely silent as the features of the appellant

Appeal allowed inter alia due to the above ground"

Even the seemingly, voice identification is very weak. I am fortified by the decision of the Court of Appeal in **Nuru S. v. Republic** [1984] TLR 93 (CAT).

"It is notorious that voice identification by itself is not very reliable. Appeal allowed."


It is for the above reasons, I agree with the appellant that the case was not proved beyond reasonable doubt against him. Thus, I accept the claim of the appellant that the trial magistrate, and in my view, failed to appraise correctly the evidence that is in the record.

In fine, I allow the appeal, quash the conviction and set aside the sentence against the appellant. I order for the appellant's immediate release from prison unless he is held therein for another lawful cause.

It is so ordered.

DATED at **SUMBAWANGA** this 7th day of June 2022.




J. F. NKWABI
JUDGE