

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT BUKOBA**

**CRIMINAL APPEAL NO. 39 OF 2022**

*(Arising from Muleba District Court in Criminal Case No. 58 of 2021)*

**THABITI RISASI----- APPELLANT**

**Versus**

**THE REPUBLIC----- RESPONDENT**

**JUDGMENT**

***Date of Judgment: 10.02.2023***

***A.Y. Mwenda, J.:***

This appeal stems from the decision of the District Court of Muleba at Muleba where the appellant THABIT RISASI was charged and convicted for rape contrary to section 130(1) and (2) (e) and 131 of the Penal Code, [Cap 16 RE 2019]. The prosecution's side alleged that on 20<sup>th</sup> day of April 2021, at Chakazimbwe - Ikuza Island in Muleba District within Kagera Region, the appellant had carnal knowledge of the victim, a girl who was 14 years old.

The facts of the case as gleaned from the records appear as follows.

The victim (PW1) had, on the fateful day arranged with one person going by the name of Esther Julius, a resident of Bukoba to engage her as a domestic worker. In the cause, the duo agreed and arranged the victim to travel to Bukoba where

her prospective boss was residing. However, bus fare for the said trip was not given to the victim as it was agreed that the same would be paid at Bukoba upon her (the victim's) arrival. When the victim boarded the bus, the bus conductor was informed by the victim regarding the fare arrangements. In a bid to satisfy himself regarding the said arrangement, the bus conductor attempted to call the victim's prospective boss but unfortunately, the said boss's (Esther Julius) mobile phone was offline. The bus conductor became bitter to the victim regarding her failure to pay bus fare. As the appellant was sitting nearby the victim he asked if the victim would allow him to foot the bus fare but with a condition that she should join him towards his destination. The victim conceded to that offer and bus fare was footed for her. Following that offer, the victim joined the appellant in his route towards Chakazimbwe village which is the appellant's destination. They disembarked at Magalini area where they took a boat to Chakazimbwe Island. At Chakazimbwe Island, the appellant rented a room at Titanic Guest House, where they spent a night together. At night, the victim was ordered to undress and the appellant fornicated her. On the following morning, they went at the restaurant within the same Guest House for breakfast. While there at, the victim's mother spotted them and reported to the police. The appellant was arrested and investigation of the matter commenced.

The victim was issued with a PF-3 and upon being examined at Ikuza Dispensary by PW4, it was discovered that she was raped. After completion of investigation, the appellant was arraigned in court. In his defence he denied any involvement. The trial court analyzed the evidence and at the end of the judicial day, the Hon. Trial Magistrate was satisfied that the case against the appellant was proved beyond reasonable doubt. The appellant was then convicted and sentenced to serve a term of 30 years jail imprisonment.

Aggrieved by the conviction meted against him, the appellant came before this court challenging the same. His petition of appeal contain nine (9) grounds which may be summarized as follows;

1. That there was unfair hearing as he was not supplied with the copy of proceedings and the complainant's statement C/S 9 (3) of the Criminal Procedure Act [Cap 20 RE 2019].
2. That the case against him was a fabricated one as the PF-3 was filled by unknown Medical Officer from Ikuza Dispensary and was not tendered in court.
3. That there was no evidence regarding DNA profiling test.
4. That the victim's age was not proved vide birth certificate, baptism and/or victim's clinical attendance certificate.

5. That the court erred to rely on the Guest House's (Titanic) register book's evidence that he hired (rented) room no. 106 while there is no receipt book which was tendered to support the claim.

This appeal was called on for hearing before me on 06/02/2023. The appellant appeared in person while the respondent appeared through Mr. Amani Kilua, learned State Attorney.

When invited to argue his appeal, the appellant, while reserving his right to rejoinder, adopted his grounds of appeal and prayed the learned State Attorney to respond to them.

While Responding to grounds of appeal, Mr. Amani Kilua informed the court that the republic opposes this appeal. He submitted that, the trial court was justified to enter conviction against the appellant on the following reasons. He said that the victim (PW1) testified, how she and one Julieth arranged for her trip to Bukoba to be engaged as domestic worker. He said the victim testified how her bus fare was agreed to be paid upon arrival at Bukoba but as the bus conductor tried to check with her boss in Bukoba regarding arrangements of payments of fare, her mobile phone was off line. As such the bus conductor became furious over the fare issue. Being one of the passengers in the same bus in which the victim was travelling in, the appellant volunteered to foot the bus fare for her but with a condition that she should join him towards his destination. The learned State Attorney submitted

further in that the record are clear that having paid the victim's fare, the victim joined him and instead of proceeding to Bukoba they disembarked at Magalini village and took a boat to Chakazimbwe - Ikuza where the appellant rented a room at Titanic Guest House where during the night he raped the victim. The learned State Attorney submitted further to the effect that the victim was a credible witness whose testimony was not shaken. He said that the best evidence in rape cases is that of the victim. In support to this point he cited the case of SELEMAN MAKUNDA V. REPUBLIC [2006] TLR 379.

With regard to the appellant's complaint that the victim's PF-3 was improperly admitted, the learned State Attorney conceded that the same was not read after its admission in court. He thus prayed it to be expunged from records. He however was of the view that, even if the same is expunged, the strength of the prosecution's case remain stable based on the victim's testimony. He went further to state that the victim was under age i.e 14 years old and her age was proved by her mother who stood in court as PW2.

Regarding the appellant's complaint that before fending his case he was not given the copy of proceedings and for prosecution's failure to furnish him with the complainant's statement, Mr. Amani Kilua was of the view that such failure did not prejudice him in any manner as he was in attendance during the trial. The learned State Attorney was of the view that after all, the appellant did not pray to be

supplied with the said copies. The learned State Attorney concluded his submission by praying the present appeal to be dismissed for want of merits.

In rejoinder, the appellant averred that he did not commit the purported offence. He said that he was arrested on 19/04/2021 at Chakazimbwe - Ikuza village where he went to buy fish. He said that shortly before his arrest, he saw the victim and her mother standing near a tea room where he was having breakfast. He said, he was told to pay TZS. 650,000/= or else he would be arrested. He said that since he had no money he failed to heed to their demands and as a result he was arrested and charged. He prayed this appeal to be allowed.

That being the summary of the matter this court resorts into determining the fate of the present appeal. To do so it is pertinent to begin with the appellant's complain that the case against him was framed up. A close look at the trial court's records, it is apparent that the trial magistrate was justified in her findings of guilty against the appellant. As it is revealed from the records, the incident in question occurred at Chakazimbwe – Ikuza Island in Muleba District within Kagera Region. It is important to note that neither the appellant, the victim (PW1) nor her mother are residents of the said village (Island). The record show the victim and her mother are residents of Chato (mainland) while the appellants was a resident of Buseresere. While the victim's mother went at Chakazimbwe – Ikuza to look (buy) sardines (dagaa), the victim's story which led them to finding themselves there at

is different. PW1 (the victim), as I have summarized above, while travelling to Bukoba in a view to start her new career as a domestic worker at Esther Julius's residence, found herself desperate as she failed to pay bus fare. This was so because the said Esther who was expected to pay her bus fare upon her arrival at Bukoba was offline when the bus conductor attempted to confirm the arrangement regarding payment of bus fare. Since the appellant was also travelling in the same bus he offered (to pay fare) for the victim, but this offer was with a condition that she (the victim) should join him towards his destination. PW1 testified how she heeded to the said offer and how they disembarked from the bus at Magalini and sailed in the boat to Chakazimbwe - Ikuza. The victim (PW1) also testified how the appellant rented a room at Titanic Guest House where they slept together (made love). In support to her testimony, PW3, one Rahel Charles being a Guest House attendant also testified on how on 20/4/2021 she received the appellant and the victim at her work place. This witness testified that she allocated them room no. 106 where the victim, the appellant and the appellant's young boy spent the night. Looking at the victim's (PW1's) testimony, there is no doubt that she was telling the truth. This can be discerned from her response to questions posed by the appellant during cross examination. It is trite law that the best evidence in rape cases is that of the victim. This legal proposition was promulgated in the case of ISSAYA RENATUS V. THE REPUBLIC, CRIMINAL APPEAL NO. 543 OF 2015, where

the Court of Appeal, whilst making reference to the case of SELEMANI MAKUMBA V. THE REPUBLIC, CRIMINAL APPEAL NO. 94 OF 1999 held as follows, that;

*"In the second ground of appeal, the appellant suggests that the prosecution ought to have proved penetration through medical evidence. With respect, whilst there may be cases where medical evidence is relied upon to establish the occurrence of rape **but as this court has consistently stated, the best evidence in any given occurrence of rape is that of the victim.**"*

The above proposition also tackles the appellant's complaint that the PF-3 was filled by unknown medical officer from Ikuza and his claim that there was no evidence regarding DNA profiling test. Much as this court agrees that there is a problem with the way the PF-3 was tendered in court as exhibit without explaining its contents to the appellant, still expunging it from the record as I hereby do, cannot affect the prosecution's case which hinge on the victim's testimony. On top of that, there was no need of conducting the DNA profiling test since the victim's evidence, in the circumstances of this case is sufficient to justify the trial court's findings of guilty on the appellant.

With regard to the appellant's complaint that there was no birth certificate, baptism and/or her clinic attendance certificate to prove her age, this court looked at the



testimony of the victim's mother (PW2) and got satisfied that the same was well dealt with. PW2, the victim's mother testified that the victim is her third born daughter who was born on 5/1/2007. By simple mathematics, by the time the victim was raped, she was 14 years old. In a bid to provide legal guidance regarding proof of age of the victim the court of appeal in the case of ISSAYA RENATUS V. THE REPUBLIC (supra), at page 8 of the judgment, had this to say, that;

*"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or where available by the production of birth certificate. We are however, far from suggesting proof of age must, of necessity be derived from such evidence. There maybe cases in our view, where the court may infer the existence of any fact including the age of a victim on the authority of section 122 of TEA..." [Emphasis added].*

From the foregoing legal principle, it is clear that birth certificate, baptism and clinical attendance certificate is not the only way of proving the victim's age. As it was done in the present case, parents (PW2 in our case) can also prove the age of the victim.

Regarding the appellant's complaint that during the trial he was not supplied with the complainants statement vide Section 9 (3) of the Criminal Procedure Act [Cap 20 RE 2019] and that no proceedings was supplied before he defended his case, this court is of the view that, much as the said allegation is true, still through his engagement and involvement in the trial of the case, he was not prejudiced in any way. During trial the appellant did not request to be supplied with the said statement and when the victim (PW2) took the floor to testify, the appellant utilized fully his opportunity to cross examine the complainant as well as other witnesses. Faced with similar scenario, the court of appeal in the case of ELIBARIKI NAFTAL MCHOMVU V. THE REPUBLIC, CRIMINAL APPEAL NO. 332 OF 2019 (unreported) held inter alia that;

*"In the instant case, it has been conceded that the trial magistrate did not cause a copy of the information or statement to be given to the appellant. As we stated in ABDALLAH SEIF (supra), the accused's entitlement to such information or statement enshrined in section 9 (3)*

*of the Criminal Procedure Act is one of the key tenets of fair trial. Nonetheless, in this case, it has not been demonstrated that the omission caused the appellant any injustice. We agree with Ms. Mlenza that he utilized fully the opportunity to cross-examine the complainant as well as other witnesses, which suggests that he was able to marshal a formidable defence despite not having been served with a copy of the complainant's statement. Accordingly, we hold that the error did not occasion any failure of justice justifying our interference. It is therefore, curable under section 388 of the Criminal Procedure Act" [Emphasis].*

On the same basis, the omission to supply the appellant with the complainant's statement is curable under section 388 of Criminal Procedure Act and therefore this complaint also fails.

With regard to the appellants complaint that there is no guests house's register book which was tendered to prove that he rented room no. 106 at Titanic Guest House where they slept, this court have considered this issue and is of the view that despite failure to do so, PW3 was a credible witness whose evidence depicts what she was telling was nothing but the truth. After all she had no reasons of

telling lies against the appellant. Even if this court would disregard her evidence still, by relying on the victims' evidence (PW1) the prosecution's case would still remain strong.

In his defence, the appellant did not say anything of essence to defend his case. what he tried to say was that he was just found himself arrested for no apparent reason and that he is sick a he has hydrocele (busha). However, during cross examination, he agreed that on the fateful date he met the victim in the bus and volunteered to pay her bus fare. By looking at his defence the appellant seem to wonder why he was charged for rape on 21/4/2021. I have looked at this kind of defence and came to a conclusion that he did not refute the allegation that he raped the victim rather what astonishes him is being charged for rape on 21/4/2021. This kind of defence is like no defence at all and relying on the testimony of the prosecution's witnesses, especially the victim (PW1) I find that the prosecution's side discharged its duty of proving the case against the appellant beyond reasonable doubt. In the upshot this appeal is dismissed in its entirety.

Right of appeal fully explained.



A.Y. Mwenda

**Judge**

10.02.2023

Judgment delivered in chamber under the seal of this court in the presence of the appellant and in the presence of Mr. Amani Kilua learned State Attorney for the Respondent.



  
A.Y. Mwenda

**Judge**

10.02.2023