

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL NO. 49 OF 2022

(Arising from Muleba District Court in Criminal Case No. 58 of 2020)

FRANCES JOSEPHAT----- APPELLANT

Versus

THE REPUBLIC----- RESPONDENT

JUDGMENT

Date of Judgment: 17.02.2023

Mwenda, J.:

Before Muleba District Court of Muleba at Muleba, the appellant was charged for rape contrary to Section 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap 16 RE 2019]. He was alleged to have raped the victim, a school girl aged 17 years old. The prosecution's side called four witnesses to testify in support to its case. The appellant defended himself and at the end of the judicial day, the Hon. Trial Magistrate was satisfied that the prosecution's side discharged its duty of proving its case beyond reasonable doubt. The appellant was then convicted as charged and sentenced to serve a statutory penalty of 30 years jail imprisonment.

This conviction offended the appellant as such he preferred the present appeal. He marshalled seven (7) grounds of appeal which, for the reasons which I am going to discuss herein after, I am not going to reproduce them.

When this appeal was called on for hearing, the appellant appeared in person without legal representation. As for the respondent's side, Mr. Yusuf Mapesa, learned State Attorney was in attendance. Upon invitation to argue the grounds of appeal in support of the present appeal, while resending his right of rejoinder after the learned State Attorney's submissions the appellant prayed the court to consider his grounds of appeal in making its findings.

In reply thereof, Mr. Mapesa learned State Attorney informed the court that the republic does not support this appeal. In respect of the first (1st), second (2nd) and seventh (7th) grounds of appeal, Mr. Mapesa, submitted that the prosecution's side proved its case relying on the victim (PW2) who testified how she was raped. While citing the case of ALFAN RAMADHAN V. REPUBLIC, CRIMINAL APPEAL NO. 2 OF 2011 and DOMINIC KASUNZU V. REPUBLIC, CRIMINAL APPEAL NO. 67 OF 2013, (unreported), the learned State Attorney said that true evidence in rape cases is that of the victim, and according to him there was no need of conducting DNA profiling test.

As regard to the third (3rd) ground of appeal regarding contradiction between PW1 and PW2 over the appellant's names, the learned State Attorney was of the view that although the said contradiction exist, since both PW1 and PW2 made a dock identification, then both names as described by them(PW1 and PW2) referred to none other than the appellant himself. After all there was no issue over identification of the victim's assailant, the learned State Attorney emphasized.

As for the fourth (4th) ground of appeal alleging that the appellant's defence was neither summarized nor analysed, the learned State Attorney was of the view that such complaint is not true. He said that the appellant's defence was recorded and analysed by the trial Magistrate as seen at page 4, 5 and 6 of the typed judgment.

As for the appellant's complaint that his cautioned statement was recorded contrary to Section 50 (1) (a) of Criminal Procedure Act [Cap 20 RE 2019], the learned State Attorney was of the view that such complaint is unfounded as the records do not show if the prosecution's side tendered the appellant's cautioned statement.

As for the sixth (6th) ground of appeal complaint by appellant over failure by the prosecution's side to summon one SAJIDA (victim's young sister) to testify in court, the learned State Attorney, while relying on Section 143 of Evidence Act, [Cap 6 RE 2019] and the case of YOHANES MSIGWA V. REPUBLIC [1990] TLR 148 Submitted that there is no specific number of witnesses required to prove a particular fact. According to him what matters is the witnesses' credibility. In his conclusion, the learned State Attorney prayed this appeal to be dismissed.

In a brief rejoinder, the appellant said that the case against him was framed up and added that the victim was telling lies. He prayed this appeal to be allowed and the court to order his immediate release.

That being the summary of the submissions by both parties this court is now obliged to resolve the outcome of this appeal.

Before dwelling on the grounds of appeal and submissions in respect thereof, this court detected a point of law which it found pertinent to deal with it first. The said is the variance between the charge sheet and the evidence regarding the specific dates of the commission of crime. While in the particulars of offence within a charge sheet it is alleged that the offence was committed on 10/3/2020, at Nshamba village within Muleba District, the victim PW2 in her testimony was not specific on the exact date she was raped. In her testimony in chief, the victim said that in October, 2019, while on her way to fetch water with one Sajida, having passed near the appellant's resident the appellant stopped her and told her that he was in love with her. Further to that, the victim said on the second time, the appellant told her he would marry her upon her completion of studies. She said, on the third time, the appellant told her to enter into his (appellant's) resident and therein she got raped. She however did not specify the exact day. However during cross examination she said that she and the appellant started their relationship in September, 2019. By looking on the way the victim narrated her story on how she was raped, it is not certain as to when exactly she was raped.

It is therefore pertinent to note that, in the circumstances of this case the prosecution side was bound to prove beyond reasonable doubt that the offence of rape was committed on 10/3/2020 and that it was the appellant who was responsible. While dealing with a similar scenario, the court of appeal in DPP V. YUSUFU MOHAMED YUSUFU, CRIMINAL APPEAL NO. 331 OF 2014 (unreported), held as follows, that;

"It is always the duty of the prosecution to make sure that, what is contained in the particulars or statement of the offence including dates when the offence was committed is proved and supported by the evidence and not otherwise".

While discussing the above legal position, the court of appeal in KASSIM ARIMU @ MBAWALA V. THE REPUBLIC, CRIMINAL APPEAL NO. 607 OF 2021 (unreported), while citing the case of MATHIAS SAMWEL V. THE REPUBLIC, CRIMINAL APPEAL NO. 271 OF 2009 which was also referred in SALUM RASHID CHITENDE V. THE REPUBLIC, CRIMINAL APPEAL NO. 204 OF 2015 (both unreported) held that;

"When specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place..."

Further to that, the court, while making reference to the case of RYوبا MARIBA @ MUNGARE V. THE REPUBLIC, CRIMINAL APPEAL NO. 74 OF 2003 (unreported), held that;



"It is essential for the republic which has charged Ryoba with raping one Sara Marwa on 20/10/2000 to lead

evidence showing exactly that Sara was raped on the day, a charge the accused was required to answer”.

Guided by the above authorities, the variance of a charge and evidence is material which weakened the prosecution’s case. Since this issue suffices to dispose off the present appeal without considering other grounds, I allow the appeal. In the event, I quash the conviction and the sentence of thirty (30) years is set aside. I thus order the immediate released of the appellant from prison, unless he is held for other lawful cause.

 
A.Y. Mwenda
Judge
17.02.2023

Judgment delivered in chamber under the seal of this court in the presence of the Appellant and in the presence of Mr. Mapesa learned State Attorney for the Respondent.

 
A.Y. Mwenda
Judge
17.02.2023