

IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 44 OF 2022

(Original from Criminal Case No. 65 of 2019, Mbinga District Court)

MODESTUS SAMWEL KAWONGAAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

22/02/2023 & 7/03/2023

E. B. LUVANDA, J.

The Appellant was convicted for rape and sentenced to thirty years imprisonment. Now he is challenging both conviction and rape. In the petition of appeal, the Appellant raised five grounds of appeal:

At the hearing, the Appellant asked for the Court to consider his grounds of appeal.

Ms. Tulibake Juntwa learned Senior State Attorney, supported the appeal on ground that the evidence adduced by the victim (PW2) was unreliable. She submitted that the victim is a child aged below 15 years explained to have been raped by the Appellant whom is familiar. That PW2 explained that the Appellant was a witchdoctor who was healing PW2's relatives.

That on the material date, PW2 was summoned by the Appellant in his room, undressed and raped her. PW2 remain quite until when she was discovered pregnant, it is when she mentioned the Appellant. The learned Senior State Attorney misbelieved PW2 for reason that she never disclosed to anybody in her family. As a result the Appellant was connected by virtual of witchdoctor, because the evidence of PW1 who is a father of the victim, did not explain anywhere if he was told by PW2 to have been raped by the Appellant. That even after she was revealed to be pregnant, she did not inform PW1 to have been impregnated by the Appellant because she was raped. PW1 said he know the Appellant as the one who raped PW1 because of the spirit which told PW1 that the Appellant spoiled his work for impregnating a form one girl.

The learned Senior State Attorney submitted that, thereafter PW1 revealed that PW2 was pregnant, formed opinion that it was the Appellant because PW1 heard from those spirit. Also PW2 reflect explanation of spirit of the Appellant that the later spoiled his service because he raped PW2. She submitted that those explanation are doubtful, because court cannot rely on spirit or witchcraft, which is inadmissible. She submitted that the act of PW2 to remain quite until she was discovered pregnant and without saying why she remained quiet until when she revealed pregnant it create

doubt, because she did not disclose to her father or mother and she did not say if there were threats. She submitted that this create doubt if she was raped by the Appellant. The learned Senior State Attorney submitted that it is the law that the best evidence in rape is that of a victim, that we ought to read, understand and believe even without corroboration, citing **Seleman Makumba vs Republic**, TLR, 2006, 379. She submitted that, herein, the evidence of a victim is unreliable and corroboration is suspect. She was of the view that the case against the Appellant was not proved beyond reasonable doubt.

It is now a settled law in sexual offences that the best evidence is that of the victim of act of rape. This was elucidated in **Seleman Makumba** (supra), that

'True evidence of rape has to come from the victim if an adult, that there was penetration and no consent and in case of any other woman where consent is irrelevant that there was penetration.'

Herein, the victim (PW2) at the outset of her testimony, explained clearly that on 3/5/2019 when she resumed from school, she found her parents mother and father absent, only the Appellant a renowned family traditional healer, was present. PW2 explained that the Appellant,

summoned her into his room, pushed her on his bed, undressed her pants, took his member, inserted into her vagina and started to rape her.

Thereafter PW2 discovered to be pregnant, and according to her she knew to be it was the Appellant who impregnated her because she was not carnally known by anybody else. Indeed, the medical officer Emilian Ernest Ndunguru (PW4) confirmed that PW2 was pregnant, and expected date of delivery was 19/2/2020, as per a PF3 exhibit P4, which is well within the range of nine months available for a woman to get pregnant and delivery, counting from 3/5/2019. In other words the evidence which was tendered by the prosecution to prove rape was PW2 medically confirming to be pregnant, because PW2 asserted that in the particular epoch period of time she was not carnally known by anybody else other than the Appellant.

Surprisingly, instead of sticking into her guns above depicted, PW2 opted to twist and dilute her story, and fall into witchcraft belief that the spirit of the Appellant spoke that the Appellant spoiled the service of witchdoctor because he impregnated her. This fact was also introduced by PW1 (victim's father), that he (PW1) knew that the Accused (Appellant herein) is responsible because his (Appellant) spirit once spoke that the Appellant spoiled the service because he has impregnated a daughter girl

by the name Anna who is studying form one. One could even wonder if at all the so called demon were capable to name the girl by Christian name (Anna) including her curricular stage being in form one!

Apart from these demigod sense and believe, PW2 did not explain if at all at any time she heard from the mouth of PW2 that she (PW2) was raped or impregnated by the Appellant. PW2 neither stated to had reported to anybody, be her parents whom she (PW2) said she found them missing at home on the material time when she resumed from school, or teachers or any relative. The records suggest that PW2 remained silent from 3/5/2019 until 24/7/2019 when PW1 explained to had reported to Mbinga Police Station. No reasons were explained by PW2 as to why she kept it as a secret for all long, neither asserted any threats forthcoming from the Appellant. PW1 who is excessively credulous on superstition, did not say or support PW2 that on 3/5/2019 he and wife were not at home when PW2 was resuming from school.

It is not known if the alleged pregnancy was discovered by who and when. It is unknown if it was discovered through physical method, material part of life to say eyes, or through the alleged prophecy of spiritual healing.

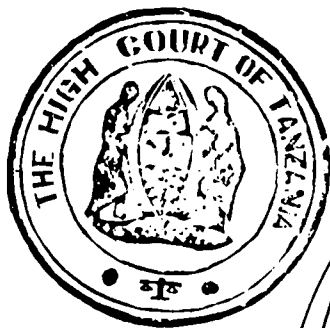
It is common knowledge that matters of spiritual healing or practices cannot form the basis of convicting the accused for a normal physical and

tangible cause of action in human life. I wonder if at all spiritual enlightenment are admissible. I tend to agree with the learned Senior State Attorney that it is inadmissible in Court.

Therefore it was an error on the part of the trial court to rule that the prosecution evidence was worthy of belief while it was marred by prognostication.

The conviction is quashed and sentence of thirty years set aside. The Appellant is to be released unless lawfully held for other cause.

Appeal allowed.



E.B. LUVANDA

JUDGE

07/03/2023