

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)
AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 101 OF 2022

(Originated from Criminal Case No. 118 of 2021 at Nkasi District Court)

ATHANAS^s/o EXEVERYAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

07th February, 2023

09th March, 2023

A.A. MRISHA, J.

Athanas Exervery, the appellant herein, was arraigned in the District Court of Nkasi at Namanyere on a charge of Rape contrary to section 130(1) and 2(e) and section 131(3) of the Penal Code [Cap 16 R.E. 2019]. The contention by the prosecution at trial was that on 11th and 12th September, 2021 at Soko Kuu

Majengo within Nkasi District in Rukwa Region the appellant did have sexual intercourse with a girl aged 7 years old. He was convicted as charged and sentenced to life imprisonment.

Being unsatisfied with the conviction and sentence of the trial court, the appellant came before this court armed with four grounds of appeal. I take the liberty to list his grounds of appeal thus:

1. That, the trial court erred in law and fact by convicting and sentencing the accused relying on evidence which was not proved on the required standard.
2. That the trial court erred in law and fact by convicting and sentencing the accused relying on evidence of the victim (PW3) who was not a credible and reliable witness.
3. That the trial court erred in law and fact by convicting and sentencing the accused basing on evidence that contain contradiction.
4. That the trial court erred in law and fact by recording different names on the accused in the Judgment and proceedings.

At the hearing of the appeal before this court, the appellant was represented by learned counsel Peter Kamyalile while the respondent was represented by Ms. Marietha Maguta, Learned State Attorney.

Mr. Peter Kamyalile basically adopted his ground of appeal and he prayed to argue grounds number 1, 2 and 3 of appeal cumulatively because those grounds deal with the same issue of evidence. The learned counsel submitted that, the

trial court based his conviction on the evidence of PW1 and PW3 which does not prove the offence beyond reasonable doubts. He referred the evidence of PW3 at the court proceedings who stated that "*penetration possibly was caused by a blunt object which possibly could be penis*". That evidence does not prove the offence of rape, to buttress his argument counsel for the appellant referred page 19 of court proceedings where the witness (PW3) stated that on 12/09/2021 during the medical examination there was no indication that victim was raped; the victim was in normal state, her body was normal. He further submitted that, where PW3 stated that he was not sure the victim was raped on 11/09/2021 and 12/09/2021.

He further argued that the credibility of evidence of PW2 is questionable and untruth, also her evidence is weak. PW2 stated very clear that she was raped by a person was riding a bike; this is stated at page 13 of trial court typed proceedings; also, at page 32 where PW2 states the offence of rape was committed in the uncompleted house; appellant was not mentioned in the complainant statement. He argued that the PW2 testified the improbable evidence. On the issue of improbable evidence counsel for appellant continued to submit that PW2 was raped in the shop and the shop was opened when the offence was committed. The environment shows that it is improbable happened.

In further supporting appeal the counsel for appellant strenuously argued that the fact that PW2 delayed to mention the appellant at the earliest possible time, renders the evidence of PW2 highly susceptible and unreliable. To strengthen his argument the counsel for appellant cited the case of **Marwa Wangiti Mwita and Others vs R**, [2002] TLR 39 at page 43, the Court of Appeal of Tanzania emphasized the ability of a witness to name a suspect at earliest opportunity is an important of assurance of his reliability.

Moreover, the counsel for appellant referred this court to page 36 of the typed proceedings where PW7 who alleged to have conducted examination out of hospital and found the vagina of the victim was open, while PW3 who is a medical doctor, examined the victim and stated that victim was at normal state and her body was normal.

Additionally, he referred this court to page 10 of court proceedings where PW1 stated that the victim mentioned two persons who committed the offence of rape; one person who was riding a bike and the second is the appellant; that shows PW2 was telling lie. The counsel for applicant argued that when the witness tells a lie on a material point, she should hardly be believed on other

points. He referred the case of **Jadili Muhimbi vs Republic**, Criminal Appeal No. 229 of 2021 (unreported) at page 8.

Lastly, he argued the fourth ground of appeal by referring at page 1 of the court proceedings and stated that the name has been referred differently, his name referred as Athanas Exavery while at first page of the judgment it has been referred as Athanas Exervery; also, at the sentence it appeared as Athanas Exevery, he argued that the name of the appellant should be appropriately appeared the same to the charge sheet.

Ms. Marietha Maguta, learned State Attorney addressed the Court and she began by supporting the appeal. She also chose to combine the 1st, 2nd and 3rd ground of appeal and submit cumulatively. She started her submission by referring the principle of the law that the prosecution should prove its case beyond reasonable doubt. She referred this Court to the landmark case of **Goodluck Kyando vs Republic**, [2006] TLR 363 and she also referred the case of **Suleiman Makumba vs Republic** [2006] TLR 373 which state that the best evidence in rape is from the victim. To support his point, she referred page 13 to 14 of the court proceedings where PW2 mentioned two persons who raped her; one a rider of a bike and appellant and she mentioned the date of rape was 11/09/2021 and 12/09/2021. The appellant was mentioned by PW2 late on

13/09/2021 that led the credibility of PW2 unreliable. To buttress his argument the learned State Attorney cited the case of **Elisha Edward vs Republic**, Criminal Appeal No. 33 of 2018, the Court of Appeal (unreported) at page 12, the Court of Appeal while referring the case of **Festo Mawata vs Republic**, Criminal Appeal No. 299 of 2007 in which the court emphasized the importance of culprit being mentioned at the earliest possible time.

Moreover, the learned State Attorney referred to page 14 of the court proceedings where victim was told not to tell any person or she would be killed, where victim was raped from 11th, 12th and 13th September, 2021 without telling her parents who would protect her. The learned State Attorney argued that failure to tell her parents for those days led the evidence of victim doubtful and unreliable and her credibility cannot be relied upon because the name of the appellant was mentioned by her father; she referred paragraph 14 of typed proceedings, last paragraph. At page 31 of the proceedings PW6 when cross examined she responded that *"Aisha did not say that she was told by the accused to mention the other man"*. Mentioning the rider of a bike is the belief that the victim was raped by a rider.

The learned State Attorney contended by referring at page 10 of the proceedings where PW1 inspected the victim private parts and discovered that she was raped

and found sperms then again allowed PW2 the next day to attend tuition without reporting the incidence to the police station, that evidence raises many doubts. She added although the person called Ziada was mentioned as the one who interrogated and examined victim, but prosecution decided not to call her as witness and testifies; that omission raised a serious doubt, she referred the case of **Samwel Japhet Kaaya vs Republic**, Criminal Appeal No. 40 of 2007 specifically at page 16. She urged this to draw an adverse inference to the prosecution who opted not to summon a very important witness at the trial court proceedings. She further submitted that the evidence of prosecution at the trial court was weak and raises doubt and that doubt goes to the root of the case and she prayed this court to allow appeal.

Lastly, the learned State Attorney argued the fourth ground of appeal very shortly by stating that spelling mistakes of the name of the appellant do not go to the root of the case and prayed to the court not to consider the said ground.

It is a cherished of evidence and criminal law, that the finding of guilty of the accused must be preceded by proof that the accused has played a culpable role in the commission of the offence with which he is charged. The crucial question for determination revolves around the evidence of the prosecution did that prove a case of rape beyond reasonable doubt?

It is settled law that the best for the quality evidence is based on the credibility of a witness, see **Richard Mtengule and Another v. Republic** (1992) and **Anangisye Masendo Ngwangwa v. Republic** (1993) TLR 202. It is a peremptory principle of law that the best evidence of sexual offence comes from the victim herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence. See, for instance, **Selemani Makumba v. Republic**, (supra), **Alfeo Valentino v. Republic**, Criminal Appeal No. 92 of 2006 and **Shirimirimana Isaya and Another v. Republic**, Criminal Appeal No. 459 of 2002 (unreported).

Guided by the above settled principle, I intend to consider the evidence laid at the trial court and submission made by both learned counsel in relation to the conviction and sentence of the appellant in connection with the offence charged.

Under our Penal Code the offence of rape can be committed by a male having sexual intercourse with a girl or a woman without her consent; or having sexual intercourse with a girl of below eighteen years with or without her consent (statutory rape). The essential ingredient of the offence of rape must be proved beyond reasonable doubt i.e., penetration; however slight it is, is sufficient to constitute the offence, if proved.

I have read the entire evidence of PW1. I have failed to collect any piece of evidence to prove penetration. The same applies to the evidence of PW3 who is a medical doctor who conducted medical examination of the victim, where PW3 testified that there was no indication that the said victim was raped on 12/9/2021 since she was at normal states and her body was normal. That contradicts the evidence of PW7 who is a nurse and who testified that she had examined victim in the first place and discovered the vagina of the victim is open meaning, according to her, that she was raped. PW7 does not fall under the authorized categories of officers who can duly conduct examination; thus, she is not qualified to conduct examination. Equally the opinion of evidence of PW7 is not valid and does not prove penetration. See: **Mariko Thomas v. Republic**, Criminal Appeal No. 225 of 2017 (CAT) at Shinyanga, unreported) and **Sospeter Ramadhani v. The Director of Public Prosecutions (D.P.P)** Criminal Appeal No. 239 of 2019 (CAT at Mbeya, unreported).

We are, therefore, left with the evidence of PW2, the alleged victim. It is important to have in our mind that the best evidence in rape cases is the evidence of prosecutrix. This position was stated in the case of **Julius Dilie v. Republic** [1981] TLR 333; also see **Alfeo Valentino v, Republic**, Criminal

Secondly, what prevented PW2 to report the incident of rape to her parents since the incident happened on 11/09/2021? The fact that PW2 failed to do so, a factor was not considered at all by the trial court, renders her evidence against the appellant highly suspect and unreliable.

I concur with the submission of the learned State Attorney that to mention persons and later mentioning the appellant that renders her evidence unreliable and suspect. This position was underlined in the case of **Venance Nuba nad Tegemeo Paulo v. Republic**, Criminal Appeal No. 425 of 2013 (unreported), where the court said:

"...this Court has persistently held that failure on the part of the witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable".

See also, **Edward Nzaboga v. Republic**, Criminal Appeal No. 136 of 2008 (CAT) at Mbeya, **John Balagumwa and Two others v. Republic**, Criminal Appeal No. 5 of 2013 (all unreported), among many others.

Appeal No. 92 of 2006 and **Shimirimana Isaya & Sabimana Fokas v. Republic**, Criminal Appeal No. 459 & 494 of 2002 (all unreported).

PW2 in her evidence alleged that on 11/09/2021 and 12/09/2021 she was called by the appellant in his shop, the appellant undressed his trouser and inserted his penis in her female sexual organ, she felt pain and cried due to pain. Nonetheless, she never told any person, PW2 was threatened by the appellant. On 12/9/2021 when PW2 approached home she met her mother, PW2 was asked why she was late? She went on to say:-

"I was with the ride of the bike, but the true was that I was late because I was taken by the accused and raped." [Emphasis is mine]

Still, when PW2 cross examined by Counsel for accused/appellant she stated that she was told about the name of the appellant; before that she did not know exact the name of the appellant. Additionally, on 13/09/2021 PW2 told her mother she was raped by appellant, while on 12/09/2021 she told her mother that she was raped by the rider man to show how to spread her perfume. What prevented PW2 to mention the appellant to her mother, rather she lied to her by mentioning the rider man who raped her?

There is yet another reason which was not considered by the trial court, which compels this court to doubt the credibility of PW2. I have already shown earlier that there was an open lie aimed at incriminating the appellant for reasons best known to the witness. This real lie should have put the trial court to a reasonable inquiry on the credibility of PW2.

In **Mathias Timothy v. Republic**, [1984] TLR 86; the Court of Appeal made it clear in **MT.38350 PTE Ledman Maregesi v. Republic**, Criminal Appeal No. 93 of 1988 (unreported): -

"...where a witness is shown to have positively told a lie on a material point in the case, his evidence ought to be approached with great caution and generally the court should not act on the evidence of such a witness unless it is supported by some other evidence".

It goes without saying, therefore, that the evidence of PW2 needed to be corroborated. I have failed to trace such corroborative evidence in the evidence of PW1, PW3, and PW7. I totally concur with both learned Counsel for appellant and learned State Attorney, for the respondent Republic that the evidence of prosecution contradicts each other and the credibility of the victim is questionable; her evidence is supective and unreliable. Therefore, it was improper for the trial court to rely of that evidence.

The law is to the effect that the accused is not to be convicted on the weakness of his defence, but on the strength of the prosecution case (see **Aburaham Daniel v. Republic**, Criminal Appeal No. 6 of 2007). I find that the prosecution to have failed to prove their case beyond reasonable doubt that the appellant raped the victim. The offence of rape was not established; therefore, I allow the appeal; I will not discuss the fourth ground of appeal because the grounds which were discussed above conclude the appeal.

I quash the conviction and set aside the sentence meted against the appellant, and I order that he be set free unless he is held for some other lawful cause.

It is so ordered.


A.A. MRISHA
JUDGE
09/03/2023

Dated at Sumbawanga this 9th day of March, 2023.




A.A. MRISHA
JUDGE
09/03/2023