

**THE UNITED REPUBLIC OF TANZANIA**

**(JUDICIARY)**

**THE HIGH COURT**

**(MUSOMA SUB REGISTRY)**

**CRIMINAL APPEAL No. 23 OF 2022**

*(Arising the District Court of Serengeti at Mugumu in*

*Criminal Case No. 75 of 2021)*

**JOSEPH MORUMBE@ NYAMBURETH ..... APPELLANT**

***Versus***

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

06.03.2023 & 10.03.2023

Mtulya, J.:

The appellant, **Mr. Joseph Morumbe @ Nyambureth**, was convicted for two offences at the **District Court of Serengeti at Mugumu** (the district court) in **Criminal Case No. 75 of 2021** (the case) on 31<sup>st</sup> March 2022. The offences were cited in the charge sheet, as: first, rape contrary to section 130 (1) & (2) (a) and 131 (1) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code); and second, unnatural offence contrary to section 154 (1) (a) & (2) of the Code. After the conviction, the district court had sentenced the appellant to serve thirty (30) years imprisonment for each count, ordered to run concurrently.

The appellant was aggrieved by the decision of the district court hence approached this court on 25<sup>th</sup> April 2022 and lodged **Criminal Appeal No. 23 of 2022** complaining on seven (7) matters, in brief, *viz*: first, wrong evidence of PW2; second, key witness Chausiku Marongori was not summoned by the prosecution; third, PW1 did not testify on time taken during the commission of the alleged offences; fourth, PW4 did not raise alarm to call for help; fifth, PW3 did not prove sperms belonged to the appellant; sixth, long period of time taken by PW1 to access hospital facilities; and finally, PW1 did not testify on a distance from Chausiku home residence to the bush.

The appellant was summoned through teleconference to register relevant materials in favour of his grounds of appeal on 10<sup>th</sup> March 2023. In his brief submission in favour of the reasons of appeal, the appellant stated that: the first PW2 did not mention date and time when he witnessed the appellant committing the offences; second, Chausiku Marongori was present when the victim and appellant were drinking at her home residence, but the prosecution declined to call her; third, PW1 claimed the offence occurred at 15:00hours, but was silent on how long the offence was committed as it was noon hours; fourth, there was no such offences, and if there is any it was by consent, as the victim and

alleged witnesses did not shout for help; fifth, PW3 found sperms in PW1's private parts, but did not bring evidence to prove the sperms belong to the appellant as PW1 raised from her home residence and has a husband; sixth, there is a lapse of eight hours from 15:00 hours when PW1 claimed to have been raped to 22:00 hours when she was brought to hospital for medical examination; and finally, PW1 failed to testify on distance from Chausiku residence to the bushes as next to the residence there is toilet in two meters and PW1 did not explain why she escaped the normal toilet.

Replying the appellant's submission, **Mr. Felix Mshama**, learned State Attorney for the Republic, contended that all reasons of appeal as submitted by the appellant are based on facts and evidences registered by the prosecution at the district court, and will reply all grounds jointly. According to Mr. Mshama, the facts and evidences produced before the district court prove the case beyond reasonable doubt that the appellant committed the indicated offences.

In substantiating his claim, Mr. Mshama cited the Court of Appeal decision in **Selemani Makumba v. Republic** [2006] TLR 376 which held that the best evidence in sexual offences cases is that of the victim and that the law enacted in section 143 of the

**Evidence Act [Cap. 6 R.E. 2019]** (the Evidence Act), which does not require specific number of witnesses to be brought by the Republic in criminal cases. According to Mr. Mshama, PW1 stated all in the evidence that the appellant had raped her in a bush next to Chausiku House and the appellant did not cross-examine the victim on this important fact. To Mr. Mshama, there is a decision in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 210, which states that a party who fails to cross-examine on important matters is deemed to have admitted the facts.

According to Mr. Mshama, the evidence of PW1 was corroborated with the evidence of PW2 who saw the appellant raping PW1 and took steps to inform her parents and her father was summoned to testify as PW4. In his testimony, PW4 testified to have seen and took steps to pull the appellant from committing the offences and finally took PW1 to hospital for medical examination.

Regarding evidence of clinical officer PW3, Mr. Mshama submitted that medical reports in sexual offences do not prove cases against accused persons, but are registered to assist court in showing there were unconsented sexual intercourse. According to Mr. Mshama, in any case courts of law are not bound by medical reports, if there are good reasons to do so. In order to

back his statement Mr. Mshama cited the authorities in **Selemani Makumba v. Republic** (supra) and **Agnes Doris Liundi v. Republic** [1980] TLR 46. Mr. Mshana submitted further that during cross-examination PW1 testified that the offence took half of an hour or an hour. Finally, Mr. Mshama prayed this court to decide the appeal based on totality of the evidences presented in the district court, rather than checking minor discrepancies which do not move into the merit of the offence rape and unnatural offence committed against PW1 by the appellant.

In rejoining the submission of Mr. Mshama, the appellant stated that the alleged offences occurred in a day broad light in peoples' residences at the village and there were no bushes at all, but the district court declined to note that crucial fact. To the appellant, the case against him was fabricated that is why the prosecution had declined to summon the owner of the house, Chausiku, and that it is impossible for a person to be raped in a broad day light in thirty (30) minutes in the village without uproars and arrest of the assailant.

I have perused the record of the present case to learn the facts and evidences produced during the hearing of the case. The proceeding of the district court shows that the appellant was alleged to have committed the two indicated offences on 23<sup>rd</sup> April

2021 at **Robanda Village** within **Serengeti District** in **Mara Region**.

Three days later, on 27<sup>th</sup> May 2021 the charge against him was drafted by the prosecution and on 9<sup>th</sup> November 2021, the appellant was summoned by the district court for plea taking. During the plea taking, the appellant had denied commission of the offences and the district had scheduled preliminary hearing on 17<sup>th</sup> November 2021 and hearing on 15<sup>th</sup> December 2021. In order to prove its case, the prosecution had summoned a total of five (5) witnesses. In brief, their testimonies shows that:

PW1: *I know the accused. He is called Morumbe Nyambureti. I remember on 23/04/2021 at 11:00 hours. I was at the home of Chausiku Marongori...I sat and we continued to drink alcohol...when it arrived at 15:00 hours, I went out for short call, when the accused followed me. He found me while having short call and held my hand, pulled me in the bush, he then raped me. Before he could raped me, he undressed my clothes... he started to insert his penis in my vagina. Later he started to insert his penis in my anus, I raised alarm, but he continued to rape me. When I was raising alarm, he used his hand to cover my mouth, I lost my consciousness, later on I gained my consciousness...I got pain because I did not prepare myself for the act. I found bruises in my private parts...I lost my consciousness because you subjected me to misery. You*

*spent 30 minutes while rapturing me in my anus...also you did it in my vagina for about 30 minutes to one hour.*

PW2: *I know the accused before the court. His name is Joseph Morumbe...I remember on 23/04/2021 at 14:00 hours, I was at school, I came back from school at 15:00 hours, when I arrived home I found my parents and Mama Robert (the victim). The accused was also there. They were drinking alcohol. Later on, the victim went out for a short call. Then the accused followed her at back. Later on I saw the accused is holding the victim hand towards the bush...he pulled the victim to the bush about 30 laps...the victim was crying for help. I saw the accused undressing his trouser down and he started to rape the victim...I called my mother and father...My mother is called Chausiku Myambe. My father is called Shakani Kishiba....they found the accused raping the victim and chased him.*

PW3: *...I remember on 23/04/2021 at 22:15 hours, I was on duty at DDH-Hospital. On that date one woman came. She was called (the victim's name)...she was brought by their relatives. She was unconscious...They came with PF.3. I examined the victim body. She had muds on her legs, thighs and on her clothes. After that I examined her on private parts and found bruises in her vagina and anus. She had tumor in her vagina as*



*well as in anus...the result came out that she had semens in her vagina. If penis is forced in the vagina without consent it can cause bruises. I have testified on what I saw when I examined the victim. [PW3 finally tendered the PF. 3 and was admitted as P.1]*

*PW4: I know the accused. He is called Joseph Morumbe. I remember on 23/04/2021 at 13:00 hours, I went back home from my daily routine. On arrival, I found my wife and others, who were Joseph Morumbe, (victim), and Chausiku Myambe... I found them while drinking alcohol...later PW1 went out for short call and accused also went out. They stayed outside for long. Later PW2 heard the victim crying and told us that the accused is raping the victim. We went outside together with my wife to the scene of the incident. On arrival, we found accused on top of the victim while having sexual intercourse with her. It was about 20mts from the house to the area of incident...we pulled him off the victim. The victim fell unconscious...we took the victim to her home and later to the police station...when we were saving the victim, you went away...*

*PW5: I remember on 27/04/2021, I received a case file with No. MUG/IR/987/2021, which written the offence of rape...the accused was in Police Lock-up at Mugumu Police Station...he*



*recanted everything levelled against him... I prepared case file to take to District Prosecution Office to prepare a case...*

DW1: *I did not rape or sodomized PW1. PW2 evidence said that he do not know the date of the incident and he do not know the meaning of rape. PW3 evidence did not prove of the semens were mine...the victim was raped in a broad light, but they did not say further what prompted the complaint to consent to be raped. The prosecution witnesses did not tell the court the steps they had taken to protect the complainant from being raped because there is evidence that the complainant raise alarm. PW4 evidence is made up. I pray this court to dismiss the prosecution evidence...I had grudges with PW1. I had quarrels with PW4. He was having affairs with my wife...I have no witness to call.*

From the record, the evidences produced by PW1 corroborated with the evidence of PW2 and PW4 point fingers at the appellant to have committed the indicated offences. The appellant in reply of the fingers of the witness PW1, PW2 and PW4 testified to have grudges with PW1 and PW4. Regarding PW2 the appellant claimed that he failed to mention the date of the incident. The question before this court therefore is whether

in totality of the evidence produced at the district court, the appellant had raped and sodomised the victim

I understand during her submission, Mr. Mshama cited the precedent of the Court of Appeal in **Selemani Makumba v. Republic** (supra) which had resolved that the best evidence in rape cases is that of the victim. The practice has already been established and currently there is a large bundle of precedents on the subject (see: **Mawazo Anyonyile Makwaja v. Director of Public Prosecutions**, Criminal Appeal No. 455 of 2017; **Bashiri John v. The Republic**, Criminal Appeal No. 486 of 2016; **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015; **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013; **Yohana Msigwa v. Republic** [1990] TLR 148 **Abasi Ramadhani v. Republic** (1969) HCD 226).

In the present case, the victim (PW1) testified to have known the appellant and that on 23/04/2021 morning hours they were together at Chausiku Marongori residence enjoying their local alcohol and sometimes at 15:00 hours, she left for a short call in the near bush. It from this move, which had invited the appellant to follow and pull the victim to the bushes and started to rape and sodomize her. The victim tried to shout for help, but the appellant had covered her mouth to cause unconsciousness to the victim who gained the same at the hospital.

I am aware of the qualification clause put by the same Court of Appeal on the subject which shows that: *the words of victims of sexual offences cannot be taken as gospel truth, but their testimonies should pass the test of truthfulness* (see: **Mohamedi Saidi v. Republic**, Criminal Appeal No. 145 of 2017). The qualification was considered by this court in the precedents of **Alex Rwebugiza v. The Republic**, Criminal Appeal No. 85 of 2020 and **Marwa Daniel @ Omary Daniel @ Omi v. Republic**, Criminal Appeal Case No. 136 of 2021. In the present appeal, I think, in my opinion, the evidence produced by the victim PW1 have passed the test of truthfulness.

It is unfortunate that the appellant did not reply specific narrations of the victim produced in court, but claimed that it is not true and the case was fabricated against him. In his defence evidence, the appellant had just shown that rape cannot be committed in a day broad light and without a call for help or noises, and escaped important specific evidences of the victim on rape and sodomy.

In support of the evidence, the Republic had invited eye witness PW2 and PW4, who had witnessed the appellant committing the offence and accordingly corroborated the evidence of the victim. In reply of the eye witnesses brought before the

district court, the appellant complained of the evidence of PW2 that he did not know the meaning of rape and failed to cite the date when the offences were committed, and that PW1 and PW4 had quarrels with him. However, the record shows that PW2 cited the date and day and he was at his home residence after return from school and witnessed the appellant pulling the victim into the bushes. This is displayed at page 14 of the proceedings of the district court conducted on 11<sup>th</sup> February 2022. In any case, PW2 testified to have called Chausiku and PW4 to witness the incidence. I am aware of the display at page 15 of the proceedings on the subject, but with totality of evidence on record, I think, that is a minor fault. In my considered opinion, I see no any faults in date and complaint of summons to Chausiku.

The law enacted in section 143 of the **Evidence Act** does not require a particular number of witnesses in proof of any fact in criminal cases. The section has already received interpretation in the precedents of **Selemani Makumba v. Republic** (supra) and **Yohana Msigwa v. Republic** [1990] TLR 148. What is important is the weight of materials tendered in court by witnesses to substantiate the prosecution case. However, in the circumstances where the evidence of PW1 passes the test of truthfulness and corroborated by evidences of PW2 and PW4, it is difficult to hold

that the prosecution had failed to prove its case beyond reasonable doubt at the district court.

I am well aware that the evidence of expert witness clinical officer, PW3 as displayed at page 17 of the proceedings is persuasive in cases like the present one. There is a bunch of decisions in favour of the position (see: **Marwa Daniel @ Omary Daniel @ Omi v. Republic** (supra); **Edward Nzabuga v. Republic**, Criminal Appeal No. 136 of 2008; and **Agnes Doris Liundi v. Republic** (supra). Mr. Mshama during the hearing submitted that PW3 was summoned to show that there is unconsented sexual intercourse.

The appellant thinks that there should be an examination of the proof of sperms to identify specific person who had been involved in the indicated offences. In my considered opinion, the argument may have merit if the evidence of the victim was not corroborated by independent witnesses PW2 and PW4. There is multiple decision in favour of the thinking, both in this court and the Court of Appeal (see: **Robert Kalibara v. Republic**, Criminal Appeal No. 38 of 2020; **Yusta Lala v. The Republic**, Criminal Appeal No. 337 of 2015; and **Mohamed Said v. Republic** (supra).

I conversant that in the present appeal, the appellant during the hearing at the district court had declined to cross-examine the

victim on important materials regarding the crime of rape and unnatural offence. The appellant's silence entitled the district court to draw inferences that he admitted to what was said by witnesses PW1, PW2 and PW4 in relation to the cited offences. There is a dozen of decisions on the subject (see: **Hatari Masharubu @ Babu Ayubu v. Republic**, Criminal Appeal No. 590 of 2017, **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2009; **Cyprian Athanas Kibogo v. Republic**, Criminal Appeal No. 88 of 1992; **Sebatian Michael & Another v. the Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018; **Masatu Webiro @ Nyamtenge Kitongoti v. Republic**, Criminal Appeal No. 123 of 2021; and **Mateso Juma v. Republic**, Criminal Appeal No. 12 of 2021).

I understand that when an accusation of rape is raised, it is difficult to prove. However, it is more difficult for the person accused, though innocent, to disapprove. In scrutinizing the evidence of PW1 corroborated with PW2 and PW4 in the present case, it is plain that the appellant committed the indicated offences against PW1.

Having said so, I think, the present appeal was brought in this court without good reasons to dispute the judgment of the

district court. I have therefore decided to uphold the judgment of the district court in the case

It is so ordered.

Right of appeal explained.



  
F.H. Mtulya

**Judge**

10.03.2023

This judgment was delivered in Chambers under the Seal of this court in the presence of **Mr. Ibrahim Isihaka**, learned State Attorney for the Republic and in the presence of the appellant, **Mr. Joseph Morumbe Nyambureth** through teleconference placed at this court, Serengeti Prison and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

  
F.H. Mtulya

**Judge**

10.03.2023