

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

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**DC. CRIMINAL APPEAL NO. 17 OF 2022**

*(Originating from the District Court of Sumbawanga at Sumbawanga in Criminal Case No. 68/2021)*

**EDWIN SAUSAND @ SIKAZWE.....APPLICANT**

**VERSUS**

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

**JUDGMENT**

*30/01/2022 & 16/03/2023*

**MWENEMPAZI, J.**

The above-named appellant was charged at the District Court of Sumbawanga at Sumbawanga (Trial Court) for the offence of rape contrary to Section 130 (1) and (2)(e) and Section 131 (1) of the Penal Code Cap 16, R.E. 2019.

It was the prosecution's case that, between March 2019 and May 2020 at Kaengesa village within Sumbawanga District in Rukwa Region, the appellant herein did unlawfully have sexual intercourse with a girl aged 17 years old (Victim, her name has been concealed).

Despite his efforts of protesting for his innocence as the charge was read before him and pleaded not guilty, at the end of full trial, he was found guilty and thereafter he was convicted and sentenced to serve thirty (30) years

imprisonment.

Aggrieved by that decision, the appellant had filed his appeal to this court which consists of six grounds of appeal in which they entirely suggest that the appellant was convicted over the offence which was not proved beyond the required standards of the law.

At the hearing of this appeal, the appellant enjoyed the legal services of Reverend Charles Kasuku, learned Advocate, while the respondent was in the service of Ms. Marietha Maguta, learned State Attorney.

It was Reverend Kasuku who submitted first that, in this appeal they filed six (6) grounds whereas, they opted to drop the third ground of appeal, and right away argued for the first ground, that they fault conviction as it bases on a case which was not proved beyond any reasonable doubt. He argued so because, in the manner the victim recognized the accused to be the culprit is so doubtful, as in the records, learned counsel added that, the victim claimed she has never known the accused person but she pointed to the dock when asked as if she knows who raped her.

Furthermore, Reverend Kasuku argued that, the trial Magistrate in his judgement described that the victim was raped in the forest, but in the proceedings, there is no such explanation. He added, if one reads the proceedings particularly Godfrey Sikazwe's testimony, he stated that on 18/05/2022 the victim was sick while the same in the judgment it is recorded

that he received the information of the victim being sick on 22/07/2020. On top of that, the date that the victim is said to be discharged in the proceedings is said to be on the 19/05/2022 while in the judgment it is said it to be on 23/07/2020.

He argued further that, concerning the time the event occurred, Reverend Kasuku submitted that it was alleged the appellant raped the victim while she was in Standard VII while, the trial court's judgement states the same happened while the victim had graduated Standard VII. He added that, the perpetrator's name is also contradictory whereas in the typed proceedings it shows that the perpetrator is EDWIN SAUSAND but in the hand written proceedings it is Frelevant Sikazwe. He also submitted that in reviewing the proceedings at page 9, PW5 told the trial court that he was called in the morning and was informed to attend the victim, meanwhile in the judgment (page 6) it is recorded that he was called in the night to attend the victim.

Reverend Kasuku submitted even further that, in the proceedings the pregnancy is said to be three months old, but the trial magistrate in his judgement said that the doctor testified that the pregnancy was two months old. He proceeded that, PW5 also stated that he cleaned the victim and she was fit, while in the judgment the magistrate stated that the pregnancy was procured to save the mother (procured abortion). And therefore, Reverend Kasuku believes that these contradictions raise doubts on the authentic of this

case

Coming to the second ground, Reverend Kasuku submitted that the trial Court erred in law to rely on evidence adduced by victim who was not reliable and credible witness. He clarified that, the witness is not reliable because the incidence was reported late, and that even the prosecution side are not sure. He submitted that; they say between March, 2019 – May 2020,

The learned counsel added that, the source of information is the event at the hospital which also is contradictory as the judgment states that the pregnancy was two months old while, the proceedings state the age to be four months old. He insisted that it is not clear on whether it was an abortion or miscarriage. He believes that, the proceedings and the judgment of the trial court are in conflict as to the reasons annihilation of the pregnancy, and he referred this court to the case of **Elisha Edward Vs. Republic**, Criminal Appeal No. 38/2018 at page 13 – 14 where it was stated that;

*"Lapse of time between the alleged rape and time when the appellant was mentioned raises doubt credibility of PW1..."*

Submitting on the fourth ground of appeal, Reverend Kasuku stated that the trial court erred in law and fact by adding extraneous matters which were not affected in the proceedings. He submitted that extraneous matters are as explained in the first ground of appeal. That if one goes through the testimonies of PW4 and PW5 and also read about the actual place the incidence

happened and the date when the victim was discharged and the time when the doctor was called to attend the victim and the age of the pregnancy. Reverend Kasuku referred this court to the case of **Ijumaa Issa Vs. Republic**, Criminal Appeal No. 53 of 2021 at page 11 – 12, which stated that;

*"Importing extraneous matter vitiates the proceedings"*;

The learned counsel however stated that the fourth ground which concerns conviction based on evidence full of contradictions, has been demonstrated.

Reverend Kasuku's submissions on the fifth and the sixth grounds of appeal, he was of the general view that his client was convicted for charges which were not proved beyond any reasonable doubt as far as the case of rape is concern, in which he prays that this Court allows the appeal and release the appellant.

In response to the submission made by Reverend Kasuku, Ms. Maguta submitted that they do not support the appeal whereas she will respond to the first, second, fourth and fifth grounds of appeal jointly.

She started off that, the Counsel for the appellant has raised deficiencies in the judgment and proceedings, whereas she stated that the deficiencies has been made by the Court and not witnesses who have testified in Court. That, the Counsel has not faulted any witness's evidence but what the Court did. That, due to the deficiencies in composing a judgment, Ms. Maguta stated that

they ought to be directed the way forward, and that PW1 & W5 were consistent with their testimonies.

Ms. Maguta proceeded to argue against the fourth ground that, the victim has explained how they met and how they had sexual inter course with the appellant. She said, this witness insisted that the perpetrator is Edwin Sikazwe and no other person, and that in most cases, sexual offences are committed in hidden environment. However, the learned State Attorney reminded us that, the best evidence comes from the victim and at page 20 – 22, that is what the victim has testified on. Ms. Maguta furtherly referred this court to the famous case of **Seleman Makumba Vs. Republic [2006] TLR 370**, in insisting her point.

Arguing further, Ms. Maguta submitted that, the victim was taken to the hospital, and once the victim returned home the appellant escaped and returned after six months. That, the evidence of the victim is supported by the testimony of her father. In addition to that, Ms. Maguta told this court that, the doctor testified that, the victim was taken to the hospital for cleaning. By referring to the case of **Eliza Jakob Vs. Republic (supra)**, the learned State Attorney insisted that after the victim was discovered that she was pregnant, it is when she realized about the fact of being raped by the appellant.

To that fact, Ms. Maguta insisted that PW4 is a credible witness and that is why the trial Court found her testimony was credible, Ms. Maguta referred

this court to the case of **Goodluck Kyando Vs. Republic [2006] TLR 365**, and added that grounds 1, 2, 4 and 5 are supported and re-finalized, and that the case has been proved beyond any reasonable doubt.

Submitting against the sixth ground, the learned State Attorney submitted that, the Court erred to alter dates without legal justification. That, there is no law which prohibit the magistrate to erase any record and that, the trial magistrate is a custodian of the record.

Ms. Maguta insisted that all witness testified that the event of took place in the year 2020, and therefore, that ground is an afterthought coached to allow amendment.

Ms. Maguta thus concluded that, as the result of her submissions, she prays for this Court to upheld the decision of the trial Court, and that alteration be made only to the dates to ensure justice and that faults of the Court should not be taken to affect the Government/Republic.

In rejoinder, Reverend Kasuku argued that, the victim had reported the incidence as early as possible, she stayed quiet for so long, in that her credibility raises doubts. He added that, all other witness are just hearsay witnesses, they all testified that they did not see. However, he mostly reiterated what he had submitted in chief.

Going through the records it is revealed that the appellant's grounds of appeal center on one issue; ***whether the prosecution proved their case***

***to the standard required; that is beyond reasonable doubt***, as I hinted earlier. As the charged offence against the appellant was rape, whereas, it was discovered so after the victim (PW4) was taken to a hospital after complaints of her stomached endlessly and it was revealed that she was pregnant and had a miscarriage. Therefore, it is undisputed from the records that the victim (PW4) was impregnated, and that evidence was gathered from the testimony of the victim herself, PW1, PW2, PW3 and PW5.

In this circumstance, it crossed my mind to consider that does pregnancy prove rape, and if it does, did the appellant indeed rape the victim. Whereas, the trial court did find the appellant responsible and in convicting him, the trial Magistrate relied on the evidence of the victim (PW4) who pointed at the appellant as the one who raped and impregnated her.

Undoubtedly, the court may convict the accused based on uncorroborated evidence of the victim. That position of the law has been stated in a number of cases, including the case of **Godi Kasenegala vs Republic**, Criminal Appeal No. 10/2008, CAT at Iringa (unreported) where it was stated that;

*"It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident\ such as doctors, may give collaborative evidence."*



See also the case of **Selemani Makumba vs Republic**, Criminal Appeal No. 94 of 1994, **Alfeo Valentino vs Republic**, Criminal Appeal No. 92 of 2006 and **Shimirimana Isaya and Another vs Republic**, Criminal Appeal No. 459 of 2002 (all unreported).

As it stands, the question before this court is whether evidence of the victim (PW4) alone was sufficient to prove the prosecution case beyond reasonable doubt in the circumstances of this case.

In her testimony the victim (PW4) stated that it was in March, 2019 that she had slept with the appellant and by that time she was of the age of 17 years old and so consent was immaterial. That, on that very day, she was called the appellant and he convinced her to have sex with him that night. She added that on May, 2020 she was at home and shocked that she was pregnant after being taken to the hospital for a medical check-up, and upon being examined she was found to have a two months old pregnancy, whereas she did testify to have had sex with the appellant for several times, at the market and her uncle's house. (See pages 20 and 21 of the trial court's proceedings).

However, it was not safe to rely on the evidence of the victim alone having in mind the testimony of another witness (PW5) which entirely raised my eye brows as I was reading the trial court's records. PW5, a clinical expert testified that on the 22/07/2020 he was called by his in-charge and instructed to attend a patient, who turned out to be PW4. He did attend her, and he

realised that, she was pregnant and she had a problem with a pregnancy as blood was flowing out and she did experience pain. PW5 told the trial court that the pregnancy was 4 months old. (See page 26 of the typed proceedings of the trial court). However, the clinical did not exactly prove that the victim was raped, but only proved that indeed she was pregnant.

My concern is, when did the victim conceive? And did she go the medical check-up? I am caught in a dilemma because, considering the best evidence of a rape incidence comes from the victim, she said that, she was convinced by the appellant to have sex on March, 2019 and that she later still had several moments of sexual intercourse with the appellant. But, on May 2020 she was shocked that she was pregnant of two months old as she was taken for a medical check-up after facing severe stomach pains.

Now, the expert himself testified to have examined the victim on the 22/07/2020 and not May, 2020. In addition to that, he realised that the victim had a pregnancy of four months old and not two months old as the victim herself testified. This contradiction goes to the root of the case as it is considered as to who has impregnated the victim. Never to mention that, in all these moments, the victim never uttered a word to anyone on the scalp of being threatened by the appellant. This facts to me does create doubts on the victim's credibility.

Furthermore, the appellant raised in his defence, the defence of alibi,

that was so easily brushed away by the trial court just because the notice was not provided for the desire to rely on the same, it is only through certainty of the dates upon which the incident allegedly occurred that would enable clear consideration of such defence on the part of the appellant or at least calculation on the possibilities. In circumstances of this case, where a person is accused of impregnating the victim, specifying the month which the incident took place is very crucial in order to ascertain whether in fact the victim was impregnated on that incident or not. Whereas, even the charge sheet itself was not certain of the month the incidence occurred, as it reads that between March 2019 and May 2020, whereas there is a contradiction of the age of the pregnancy in which the victim said she was told that it was two months and the expert clinical officer testified to be four months old.

Another thing that creates doubt is the lapse of time between the alleged rape and the time when the appellant was mentioned by PW4. It appears from records that the incident occurred between March, 2019 and May, 2020 (as stated from the charge sheet) but the incident was reported on 22/07/2020, after PW4 was taken to the hospital as she complained of severe stomach aches, thereafter PW4 was allegedly asked by her parents. In similar circumstance, the Court of Appeal of Tanzania in the case of **Yust Lala vs Republic, Criminal Appeal No. 337/2015, CAT** at Arusha (unreported) encountered the same circumstance where the victim mentioned the appellant

as responsible for her pregnancy after lapse of four months and after she was found to be pregnant. The Court found that evidence to be doubtful especially in such serious offence of rape. It is my considered view that, the scenario of this case at hand is also very doubtful as it violates the principle of naming the suspect at the earliest opportunity possible and not on afterthought, keeping in mind that the victim testified that she had sexual intercourse with the appellant several times.

In the case of **Jaribu Abdalah vs Republic (2003) 271**, the principle of naming the accused in the earliest opportunity was well discussed. The Court of Appeal held that;

*"In matters of identification, it is not enough merely to look at factors favouring identification, equally important is the credibility of the witness. The ability of the witness to name the accused/offender at the earliest possible moment is reassuring, though not decisive factor."*

Based on the doubts which I have created from the evidence of PW4 and PW5, my well esteemed findings are that, it was unsafe for the trial Magistrate to convict the appellant based on that marred evidence consisting of discrepancies, inconsistencies and contradictions without dealing with them before convicting the appellant.

However, the law on contradictions or discrepancies is that it is not every

discrepancy in the prosecution that will lead to the prosecution case to flop - see **Said Ally Ismail vs Republic**, Criminal Appeal No. 242 of 2010 (unreported). Moreover, it has been the position of the Court of Appeal that contradictions by witness or between witnesses is something which cannot be avoided in any particular case. See **Dickson Elia Nsamba Shapwata vs Republic**, Criminal Appeal No.92 of 2007 (unreported). This position was also taken in the case of **Issa Hassani Uki vs Republic**, Criminal Appeal No. 129 of 2017 (unreported) while citing with approval the High Court's decision in **Evarist Kachembeho and Others vs Republic** [1978] LRT 70 where it was stated as follows:-

*"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

In the same case of **Issa Hassan Uki** (supra) the Court also referred to the case of **John Gilikola v. Republic**, Criminal Appeal No.31 of 1999 (unreported) where it was stated that due to frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies:

Nevertheless, as it is considered in various decisions, that whenever the prosecution evidence is marred with inconsistency and contradictions, the same has to go to the root of the matter. In the case of **Mohamed Said Matula vs Republic** (1995) TLR 3, the Court of Appeal provided the following guidance. It was stated thus:-

*"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the Court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

As I hinted earlier, the inconsistency and contradictions among the two key witnesses in this case, do go to the root of the matter. It was not quite clear, whether the pregnancy that the victim had was four or two months old, the actual age of the pregnancy would determine the actual date the victim had conceived, and considering that the appellant had claimed that he was not present, time calculation would have been vital in proving that the appellant indeed had carnal knowledge of the victim as she was under the age of eighteen (18) years.

It is the duty of the 1<sup>st</sup> appellate court to re-evaluate the evidence and draw its own inferences of fact or conclusions subject to the usual deference to the trial court's findings based on credibility of witnesses - See also **D.R.Pandya v. R.** [1957] E.A 336 and **Juma Kilimo v. Republic**, Criminal Appeal No. 70 of 2012 (unreported).

I have done so by thoroughly perusing the evidence on record, in fact, I find there is no evidence to corroborate the evidence of PW1 because there is no other person who witnessed the appellant raping the victim. And in that,

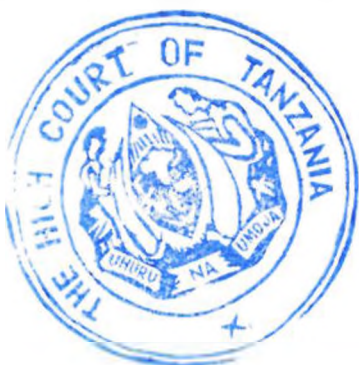
her inconsistency has me question her credibility, given she was silent until when she had severe stomach aches that revealed her pregnancy and was forced to mention the person responsible. In addition to that, PW5 testimony and Exhibit P1 only shows that PW1 was pregnant, it doesn't prove that it is the appellant who raped and impregnated the victim.

Considering that among the grounds of appeal as raised by the appellant, being convicted over the charges which were not proved beyond reasonable doubts is one of the grounds, I do confine to it that the prosecution side had not proved their case against the appellant beyond the required standard of the law. There is a plethora of authorities in this aspect, See - **Woolmington vs Director of Public Prosecutions** (1935) AC 462. To this fact, I am satisfied that given the contradictory nature of the prosecution witnesses, the prosecution has failed to discharge that burden.

This court being the first appellate court as illustrated earlier, basing on the above reasons, I therefore allow this appeal, quash the conviction and set aside the sentence. I further order the appellant to be released from custody immediately unless he is otherwise lawfully held.

It is ordered accordingly.

Dated at Sumbawanga this 16<sup>th</sup> day of March, 2023.



  
**T. M. MWENEMPAZI**  
**JUDGE**