

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
ARUSHA SUB REGISTRY  
AT ARUSHA**

**CRIMINAL APPEAL NO. 98 OF 2022**

(Originating from Simanjiro District Court Criminal Case No. 10 of 2021)

**WARIEL EMMANUEL NGIRA .....APPELLANT**

**VERSUS**

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

**JUDGMENT**

15/02/2023 & 29/03/2023

**KAMUZORA, J**

The Appellant herein is challenging the conviction and sentence of 30 years imprisonment imposed to him by the District Court of Simanjiro at Orkesumet (the trial Court). The Appellant stood charged for the offence of Rape Contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2019. The incident took place on 7<sup>th</sup> January 2021 at Light in Africa Centre Mererani Area within Simanjiro District, Manyara Region. The Appellant was arrested following an allegation that he had sexual intercourse with three girls aged 18, 27 and 30 years with

unsound mind without their consents. For purpose of covering their identities they will be referred to as LK, ML and JE.

The trial court found the Appellant guilty of the offence and convicted him as above stated. Being aggrieved, the Appellant brought the present appeal raising four grounds which are rephrased and summarised into two grounds as follows: -

- 1. That, the trial court erred in law and fact to convict the Appellant without the evidence of the victims who were claimed to be of unsound mind.*
- 2. That, the trial court erred in law and fact to rely on unclear the evidence of PW3 (a doctor).*
- 3. That the trial court erred in law and facts to rely on hearsay and contradictory evidence of PW1 and for not considering that there was misunderstanding between the Appellant and two prosecution witnesses; PW1 and PW2.*

During hearing of the appeal which proceeded by way of written submission the Appellant appeared in person with no legal representation, while Ms. Riziki Mahanyu, senior State Attorney appeared for the Respondent, Republic. Both parties filed their submissions as scheduled, save for the rejoinder submission.

Arguing in support of the 1<sup>st</sup> ground of Appeal the Appellant submitted that the Respondent erred for not submitting any evidence showing that the victims were of unsound mind hence could not adduce

their evidence in court. He added that it was important for the prosecution side to submit all the relevant evidence concerning the case. He supported his submission with the case of **Nassoro Salum @ White Vs. Republic**, Case No. 349 of 2017 (Unreported).

On the 2<sup>nd</sup> ground the Appellant submitted that, the evidence by PW3 was tainted with lots of doubt hence it was not proper for the court to rely on such evidence. Referring page 16 to 19 of the typed trial court proceedings, the Appellant argued that PW3 stated that the victims were of unsound mind and at the same time he did not conduct a DNA test so as to clear the doubt as to who exactly raped the victims. The Appellant supported his submission with the case of **Cristopher Kandidius @ Albino Vs. the Republic**, Criminal Appeal No 394 of 2015 (Unreported)

On the 3<sup>rd</sup> ground of appeal, it was the Appellants' submission that there existed a dispute between him and two prosecution witnesses; PW1 and PW2. According to the Appellant, he was claiming salary arrears and the two witnesses decided to fabricate the case against him. The Appellant further submitted that the trial court erred by relying on the evidence by PW1 which was hearsay evidence that the victims were of unsound mind. He cited the case of **Vumi Liapenda Mushi Vs.**

**Republic,** Case No. 327/2016 (Unreported) and prayed that the evidence of PW1 be expunged from the court record and the court sets him free.

Responding to the 1<sup>st</sup> ground of appeal, Ms. Riziki agreed that the victims were not paraded to testify before the court. She however explained that the reasons for not being called was because the victims were impotent for being of unsound mind. She insisted that, the evidence by PW1, PW2 and PW3 proves that the victims are not physically fit and they are of unsound mind. That, PW1 and PW2 who are workers at Light in Africa Centre stated that, they are the caretakers of the victims and they wash and dress the victims as they are disabled. That, the evidence by PW3 who is a doctor also proved that only one victim was able to talk few words and hear. Referring page 21 of the proceedings of the trial court Ms. Riziki submitted that the victims were paraded before the court and the court saw them but they could not testify as they could not speak due to their condition. It was the Respondent's prayer that the 1<sup>st</sup> ground of appeal be dismissed for lack of merit.

Responding to the 2<sup>nd</sup> ground of appeal, Ms. Riziki submitted that, PW3 examined all victims and found them with sperms in their vagina as

well as bruises. That, the sample were sent in the laboratory and it was confirmed that it was sperms and the PF3 for each victims were admitted in court as exhibit P1. That, there was no need of conducting DNA test as the Appellant was mentioned by one of the victims as the person who raped her.

On the 3<sup>rd</sup> ground counsel for the Respondent submitted that, during cross examination the Appellant did not pose any question to PW1 and PW2 regarding the issue of misunderstanding hence, bringing that issue at this stage is an afterthought. To cement on this the Respondent's counsel cited the case of **Nyerere Nyague Vs. The Republic**, Criminal Appeal No 67 of 2010 CAT (Unreported). Ms. Riziki further submitted that it was the evidence by PW1 that on the faithful date around 07:00 hrs in the morning she went together with PW2 to change the clothes of the victims. That, they found one the victim LK crying and while changing her clothes they discovered that she was bleeding. They examined other victims and found with sperms on their private parts. That, one of the victims mentioned that the guard was the one who raped them. That, the evidence by PW1 was collaborated by PW2. The Respondent's counsel prayed that the appeal be dismissed.

I have considered the trial court record, grounds of appeal and the submissions by the parties. Based on the grounds raised by the Appellant it entails the second scrutiny of the evidence to see if the trial court was correct to conclude that the offence of rape was proved beyond reasonable doubt.

On the 1<sup>st</sup> ground of appeal the Appellant faults the trial court's decision that it was made without considering that there was no evidence from the victims. There is no dispute that the victims were not paraded before the court to adduce their evidence concerning the alleged rape. The reason put forward was that, the victims were lunatics and could not testify in court. The prosecution side managed to call four witnesses to testify in court. PW1 and PW2 were caretakers of people with unsound mind at Light in Africa Centre located at Mererani in Simanjiro District. In their evidence they alluded that on the material date of incident they went to change clothes for the children/people with disability at the centre and they found LK crying. On attending her they discovered that she was bleeding and had bruises and sperms in her private parts. They decided to examine ML and JE and discovered sperms in their private parts. As ML could somehow talk, they asked her if anyone had entered their room and she told them that the 'linzi'

meaning the guard had entered their room. They asked her as to what he did and she showed them by gestures nodding the head down. PW2 claimed also that the victims were also penetrated against order of nature. They reported the matter to their leaders and then to the police station. They were issued PF3 and sent the victims to Mererani Health Centre.

The victims were attended by PW3 who is clinical officer who confirmed that the victims had disabilities and could not speak except ML who can hear but cannot produce sound. Upon examining them he discovered both victims with sperms in their private parts and LK had bruises on her back and vagina and another one had minor bruises. He filled in PF3 that were admitted in court as exhibits. Going through the contents of the PF3, they reveal that the victims were penetrated meaning that they were raped.

PW4 one DCPL No. E725 Wito is the investigator who in course of investigation met the victims. He confirmed that the victims had disability and could not speak except one of them who could somehow understand. He also informed the court that one victim named LK passed away after the incident.

In his defence the Appellant denied being responsible for the victims' rape. He admitted that he was watchman on duty on the night of the alleged incident and he left at morning at 06:00am on 07/01/2021 leaving the keys to PW2. He was arrested in the afternoon on allegation that he raped the victims. The Appellant insisted that he is not the only male employee at the centre thus, he could not be blamed for the rape.

From the assessment of evidence from both parties, it is clear that the victims were people with disability. According to PW1 and PW2 who are caretakers of the victims only ML could be understood as she could produce few words and use gestures but others have full disability and cannot speak or use gestures. The law recognises a person of unsound mind as a competent witness to testify unless the court considers that he/she was incapable of understanding question put to him/her or incapable of giving rational answers. This is so provided under section 127(1) and (5) of the Tanzania Evidence Act Cap 6 R.E 2019 reproduced hereunder: -

*"127(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of*



*tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*

*(5) A person of unsound mind shall, unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them, be competent to testify."*

The evidence by prosecution witnesses; PW1, PW2, PW3 and PW4 reveals that all victims have disabilities in their bodies and have audial problems and could not produce sound except ML who can somehow be understood by few words and gestures. With such observation, I agree that the victims could not be paraded to testify as their condition reveals that they were incapable of giving rational answer and or respond to the questions imposed to them. Thus, I find the first ground of appeal baseless hence dismissed.

On the 2<sup>nd</sup> and 3<sup>rd</sup> ground, the evidence of all prosecution witnesses is clear showing that the victims were penetrated. The doctor also confirmed that fact as he examined the victims. The question is whether the Appellant is responsible for the victims' rape. In his defence the Appellant claimed that he was not the only male person at the centre thus, it is necessary to assess if the prosecution evidence eliminated all doubts that it is only the Appellant who could have been responsible for the victims' rape.

It was contended by the Appellant that the trial court relied on unclear evidence of PW3 who was a doctor and considered hearsay and contradictory evidence of PW1. The Appellant also claimed that the trial court failed to consider his evidence that there was misunderstanding/conflict between him and two prosecution witnesses; PW1 and PW2.

I will start with the Appellant's argument that the trial court did not consider that he had conflict with the prosecution witnesses; PW1 and PW2 thus they framed a case against him. It is unfortunate that when he had chance to cross examine those witnesses the Appellant never examined on the misunderstanding or conflict. I agree with the counsel for the Respondent and the cited authority **Nyerere Nyague** (supra) that, failure to cross examine a witness on certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said.

Again, issue of conflict with PW1 and PW2 was not raised during defence but during cross examination. The Appellant claimed that he had conflict with PW2 and the reason put forward was that, the Appellant refused to have relationship with PW2. In my view, the argument that the Appellant had conflict with PW1 and PW2 and was

framed for the case because he was claiming his unpaid salary is an afterthought. The same was raised during submission on appeal and he did not explain if the two witnesses were responsible officers to pay his salary.

On the argument that the evidence by PW1 was hearsay it is my observation that such argument is weak. The circumstance in this case is distinguishable from the case of **Vumi Liapenda Mushi** (supra) cited by the Appellant. In that case, the witnesses never witnessed the incident or saw anything in relation to the alleged crime. They were only told by the victim that he was sodomised. Their evidence was not collaborated as the doctor's report revealed no penetration on the victim's anus. The court made a conclusion that the evidence of witnesses who were informed of the crime cannot be relied upon to convict the accused. In the case at hand, PW1 and PW2 did not witness rape but they claimed that they saw the bruises and blood in the victims' private part. Their evidence was collaborated by the doctor who confirmed that the victims were penetrated. Thus, their evidence as to the penetration of the victims was direct on what they saw.

Reverting to the Appellant's argument the doctor failed to explain the steps taken in examining the victim, I find this argument unfounded.

Going through the Doctor's evidence it is clear that the doctor explained that he examined the victims in their private parts and saw bruises on LK's back and vagina and in other victims' vagina. He also conducted laboratory tests to fluids found in the victims' vagina and confirmed that they were sperms. The argument that the doctor was supposed to conduct DNA test to the sperms to determine the person responsible for rape is also baseless. I say so because offence of rape is not necessarily proved by DNA test. The case of **Cristopher Kandidius @ Albino (supra)** cited by the Appellant it was put clear that DNA test is important to fill evidential gape. The court did not state that DNA must be conducted for proving sexual offence.

The fact that the victims were of unsound mind in itself does not raise the need for DNA test. Rape to people of such nature can still be proved by other evidence including oral evidence. What need be proved is that the victims were penetrated and there is evidence linking the accused with the offence.

There is no direct evidence pointing at the Appellant except circumstantial evidence. I say so because, among the prosecution witnesses, no one witnessed the incident. It was the evidence by PW1 and PW2 that the Appellant was responsible for the victims' rape. For

them, one of the victims pointed at him as she could only mention 'linzi' to meaning mlinzi (the guard) as the person who had entered their room and raped them. She was also had disability but according to the caretakers and the doctor, she could narrowly understand and give signs and sometime utter few words. She could not be called to testify as she cannot be consistent to testify in court. The circumstances reveal that the Appellant was the watchman/guard (mlinzi) who was on duty at night and in the morning, it was discovered that the victims were raped. However, there is no explanation if the Appellant is the only guard or the only man at the centre and mostly, the only person who had access to the centre. Before the trial court the Appellant during cross examination admitted that, he was the only guard at night but he claimed that at the centre there are other boys aged 16 and 17 years. The trial court did not assess the prosecution evidence to see if all possibilities that any other man could have entered the victim's room were eliminated. There is no evidence eliminating the doubt raised by the Appellant in his defence over boys at the centre and if in any way they entered the victim's room. The evidence of PW1 and PW2 shows that at the centre, they maintain boys and girls but their age and health condition was not clearly explained to eliminate the doubt raised by the

Appellant that those boys could be responsible. In fact, the surrounding environment of the centre, who enters and leave the centre and at what time were not cleared thus, the circumstantial evidence relied upon by the prosecution could not form unbroken chain of event connecting only the accused with the offence of rape.

It was alleged that the victim who was able to at least understand and utter few words pointed at Appellant as the person responsible for rape and the witnesses acted on that information to immediately report the matter. The circumstance in this matter in my view does not proves that the Appellant was responsible for rape of the victims. There is no explanation as to how the witnesses believed that the victim was referring the Appellant and no one else. The evidence reveals that the victims were suffering from mental disorder and there is no explanation as to victim's mental capacity and if she could not be mistaken in identifying the rapist. There is no where shown if the Appellant was paraded for identification. What the witness relied upon is the fact that the victim mentioned the word 'linzi' to mean the guard and they believed that she was referring the Appellant as he was the guard of the night. In my view, that evidence leave a lot of doubts which the law directs that it ought to be resolved in favour of the accused. Thus, apart

from any other issues deliberated above, it is my conclusion that the circumstance of this case did not directly connect the Appellant with the offence. I therefore find merit in the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal.

In the final analysis, it is my settled mind that the prosecution side was unable to prove the offence of rape against the Appellant beyond all reasonable doubts as required by the law. I therefore find merit in this appeal. I proceed to quash the conviction and set aside the sentence passed against the Appellant. The Appellant shall be released from custody unless held for any other lawful cause.

**DATED** at **ARUSHA** this 29<sup>th</sup> day of March, 2023



A handwritten signature in blue ink, appearing to read "D. C. Kamuzora".

**D. C. KAMUZORA**

**JUDGE**

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry should be supported by a valid receipt or invoice. This ensures transparency and allows for easy verification of the data.

In the second section, the author details the various methods used to collect and analyze the data. This includes both manual data entry and the use of specialized software tools. The goal is to ensure that the data is both accurate and easy to interpret.

The third part of the document focuses on the results of the analysis. It shows that there is a clear trend in the data, which is consistent with the initial hypothesis. This finding is significant as it provides strong evidence for the proposed model.

Finally, the document concludes with a summary of the key findings and a list of recommendations for future research. It suggests that further studies should be conducted to explore the underlying causes of the observed trends.

Year	Q1	Q2	Q3	Q4
2018	120	150	180	200
2019	130	160	190	210
2020	140	170	200	220
2021	150	180	210	230
2022	160	190	220	240