

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA SUB REGISTRY)
AT IRINGA**

DC CRIMINAL APPEAL NO. 04 OF 2023

*(Original Criminal Case No. 84 of 2021 of the District Court of Iringa at Iringa before
Hon. S.A. Mkasiwa, PRM.)*

JOHN UMBO **APPELLANT**

VERSUS

REPUBLIC **RESPONDENT**

JUDGMENT

8th May & 22nd May, 2023

I.C MUGETA, J:

The appellant was convicted of rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code. The victim was aged ten (10) years at the time of the incident and she was unfamiliar with the assailant before the encounter. She reported the incident to her mother (PW1) who took her to hospital and reported the occurrence to the police. The appellant has appealed to this court challenging the conviction and life imprisonment sentence imposed on him marshalling six grounds of appeal. However, those grounds boils down to two major complaints, namely:

i). That the offence was not proved.

ii). That the appellant was not properly identified as the rapist.



The appellant appeared unrepresented at the hearing. The respondent was represented by Miss. Jackline Nungu, Miss. Prisca Kipagile and Mr. Majid Matitu, learned State Attorneys.

On the first ground, the appellant submitted that the trial court misapplied the best evidence rule in rape cases because the victim was not a credible witness. He, asserted that the offence of rape was not proved because the victim is unreliable. He, however, assigned no reason for claiming the victim is unreliable. In his view the evidence of the victim's mother and the medical doctor cannot corroborate the victim on her allegation of being carnally known because her mother (PW1) testified that the incident took place on 1/9/2021 while by then he had already been arraigned in court and the doctor who testified as PW3 did not see sperms in the vagina. That what he saw was mere bruises which might have been caused by her own fingers or bathing body scrubber like clothes.

Miss Nungu replied that the typed evidence of PW1, indeed, show that the incident occurred on 1/9/2021. However, that is a typing error because the handwritten evidence shows she said it was on 1/5/2021. On credibility of the victim she submitted that the victim is credible in her statements that she was raped and her evidence is well corroborated by the medical

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doctor. That in rape cases sperms in the vagina is a corroborator and their absence do not rule out penetration per the holding in **Daniel Nguru & Others V. R.** Cr. App. No. 178/2004, Court of Appeal – Mwanza (unreported).

I agree with the learned State Attorney that rape was proved. The victim, despite her tender age, was thorough in her evidence. She narrated the incident and the fact that she was unfamiliar with the rapist but due the time they spent together and his scar face, she could identify him if she meets him. I see nothing on record to doubt the evidence of the victim that she was raped. As it was held in **Selemani Makumba V. R.** [2006] TLR 379 the best evidence on rape is that of the victim as long as she is a credible witness. Medical evidence, as argued by Miss. Nungu is merely corroborative. The victim stated categorically that the rapist inserted his penis into her vagina and she felt pain. This means there was penetration which is what rape is all about. Considering her tender age, consent is immaterial. The medical evidence supported the allegation because the medical doctor found the vagina bruised.

Further, while I agree with the appellant in his argument that a fingure can bruise a vagina, in circumstances of this case, the victim's vagina was

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bruised by a penis and this is rape. I also agreed with the appellant in relation to challenging the evidence of PW1 that by 1/9/2021 he had already been arraigned in court. He was arraigned on 18/6/2021. However, the statement in the evidence of PW1 that the incident occurred on 1/9/2021 is, indeed, as argued by Miss Nungu, a typing error. According to the hand written proceedings, PW1 referred to 1/5/2021. The first complaint has no merits.

I move to the question of identification in the second complaint.

The appellant has complained about the manner in which the identification parade was conducted. Firstly, that he was not given a chance to change his clothes, secondly, that those who participated in the parade were not similar in body physique and that since the victim had identified him prior to the parade leading to his arrest, then the identification parade was unnecessary.

On the propriety of the identification parade Miss Nungu replied that Inspector Elizabeth Swai (PW4) testified on how the procedures relating to conducting the identification parade were complied with.

In my view, the issue whether the identification parade was properly done is immaterial where there is no evidence from the prosecution on how the

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appellant was arrested and what led to him being linked with the offence in this case.

According to the fact of this case it is the victim who could tell who the rapist is. Throughout the prosecution evidence, no witness testified on how the victim's description of the culprit led to his arrest. The victim's evidence jumps from describing how the incident occurred to how she was taken to the police station where she identified the appellant in the parade. Her mother (PW1) did not testify on how her description of the assailant helped to arrest the appellant. The investigator, PW6 stated clearly that she did not arrest the appellant. Both PW6 (the investigator) and PW4 (the identification parade master) found him in the lockup.

The learned trial magistrate found that the victim named the rapist to her mother. This finding is not supported by evidence. She did not name rapist. She just described his physique as short and black. It is my view that under the circumstances where the victim and the appellant were not familiar with each other and the appellant was not arrested at the scene of crime, it is not enough to say that the appellant was identified at the parade. The prosecution must first lead evidence to show how the description of the culprit by the victim helped to suspect the appellant was

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the culprit or how the victim helped to identify the culprit leading to his arrest. Otherwise, the holding of the identification parade would lack probative value and remains an exercise in futility due to the possibility of the witness being coached. In situations like this, the parade can have probative value only if the reasons for linking the suspect with the incident are disclosed. In this case, such disclosure is missing.

Miss Nungu learned State Attorney, submitted that the identification parade was necessary in this case with view of removing possibility of a mistaken identity. I agree with her as far as the importance of the parade is concerned. However, this is subject to pre-existing conditions including explanation on how the suspect was arrested in connection with the offence charged. As I have already stated, such evidence is completely missing in this case. This creates a reasonable doubt in the prosecution's case.

I also agree with the submission by Miss Nungu that the victim and the appellant spent a lot of time together at day time hours from when they met to the time the crime was committed. Besides this truth, there is no evidence on how the description of the rapist by the victim helped to arrest the appellant. Further, one of the mark which the victim identified on the

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suspect was the scar on the face. Unfortunately, no evidence was led to show that the appellant is scar faced and that the victim at the parade or in court identified him by that mark. Under the circumstances, it cannot be said with certainty that the victim's identification was unmistakable.

In the event, I hold that the appellant was not properly identified. There is merit in the second complaint. There are reasonable doubts in the prosecution's case. The trial court erred to convict the appellant. The appeal is allowed. The conviction and sentence of the appellant are set aside and quashed accordingly. He should be released from custody unless otherwise lawfully held for another offence.



Court: Judgment delivered in chambers in the presence of the appellant in person and Muzna Mfinanga, State Attorney for the respondent.

Sgd. I.C. MUGETA

JUDGE

22/05/2023