

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

HC. CRIMINAL APPEAL NO. 165 OF 2021

(Arising from the Resident Magistrate Court of Geita at Geita Original Criminal Case No. 230/2021)

NICKSON NYALA @ BUJILIMA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

28th March & 26th May 2023

ITEMBA, J.

In the Resident Magistrate Court of Geita at Geita, the appellant, Nickson Nyalla was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) (3) of the Penal Code, [CAP 16 R.E 2019].

It was prosecution's case that on or about 4th August 2021 at 'Karifonia' area within the District and Region of Geita, the appellant had carnal knowledge of one YZ, a girl of 6 years, hereinafter, the victim. At the end of prosecution, the appellant was convicted and sentenced to life imprisonment.

Aggrieved with trial court's decision, the appellant filed the present appeal coupled with five (5) grounds of appeal as follows;

1. *That, the prosecution case failed to prove the case beyond reasonable doubt.*
2. *That, the learned court magistrate erred in law and facts as relied on bruises as the indicator of being raped while even the Doctors report did not state the presence of siemens or blood stains either to body, under parts or clothes of the victim as per age of the victim was unavoidable circumstances.*
3. *That, according to the age of the victims compared to my age I could expect occurrence of vagina rapture to the victims apart from only bruises of which could be the result of playing of any child.*
4. *That, there is a grave variation of testimony on the prosecution case as indicated on underlined phrases on page 2 in which the continuing paragraph from page 1 states ...the victim girl did not tell her (PW4) why she was "crying while on the next paragraph states"...she told her sister at a gate to their home that Nick (the accused) had raped her" this unconsidered variation of statement implies the fabrication of the case against me.*
5. *That, the trial court magistrate erred in law and fact as convicted me and set me to jail without sentencing me as the judgment of which is herein attached does not state my sentence term.*

When the appeal was scheduled for hearing, the appellant fended for himself while the respondent was represented by Ms. Rehema Mbuya learned Senior State Attorney. When given an opportunity to argue his

appeal, the appellant informed the court that he had already filed his grounds of appeal he has nothing more to submit and he prayed for the respondent to proceed with responding to the appeal. Ms. Mbuya SSA, supported the appeal. Her reasoning was briefly that the judgment issued by the trial court was too general and it does not state if the accused was convicted. That, there is neither sentence nor specific punishment issued to the appellant.

Upon being reinvited for submissions, the appellant, in more confidence, told the court that the case was not proved against him. That, his ten-cell leader was not called to testify while he lived nearby to the salon. That there was no police officer who testified. He argued that the victim claimed to have gone to his salon and when she left and reached her home she started crying, that the appellant asked her why did she started to cry at home and the victim stated that it is because she was taken out of a salon without her hair being cut. That, he asked the court to bring other witnesses who were at the salon and the court asked him to send them summons but he could not because he was in custody and he was not granted bail.

I have tangibly considered the grounds of appeal and both parties' submissions. Having so done, the central issue for determination by this court is ***whether this appeal is meritorious.***

I would start by pointing out that, it is true that the typed proceedings do not show if the appellant was sentenced, and that was the position by the state attorney in supporting the appeal. However, having gone through the typed proceedings, it shows that the appellant was properly convicted and further, the handwritten proceedings, indicate that the accused was properly convicted and sentenced to life imprisonment. The learned state attorney misled herself due to the errors and omissions appearing in the typed proceedings. This also answers the fifth ground of appeal.

That being the position, I will proceed to determine the appeal based on the grounds submitted. Having gone through the rest of the grounds, I will answer them jointly because they relate to the complain that the prosecution's case was not proved beyond reasonable doubts.

Sections 130 (1) (2) (e) and 131 (1) (3) of the Penal Code provides that;

130.- (1) *It is an offence for a male person to rape a girl or a woman.*

(2) *A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions;*

*(e) **with or without her consent when she is under eighteen years of age**, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

131.-(1) *Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.*

*(3) Subject the provisions of subsection (2), **a person who commits an offence of rape of a girl under the age of ten years shall on***

conviction be sentenced to life imprisonment.' (Emphasis supplied)

Based on the above cited provisions, it is clear that indulging in a prohibited sexual intercourse with a girl under the age of 18 years constitute key ingredients of the offence of rape. This position of the law was cemented in the celebrated case of ***Selemani Makumba v R***, [2006] TLR 379, in which the Court of Appeal of Tanzania held:

*'...true evidence of rape has to come from the victim, if an adult there was penetration and no consent and **in case of any other women where consent is immaterial that there was penetration.***' (Emphasis supplied.)

Therefore, what the prosecution has to prove was that the victim was a girl of under the age 18 years and that had sexual intercourse with the appellant. Considering the evidence at hand, PW1, a girl of 6 years, through unsworn evidence, told the court that on the fateful day, her sister named Salome (PW4) took her to the appellant's salon to cut her hair. She left her at the salon and went to market. That, the appellant took her to his house and raped her. PW2, the victim's mother explained that she had

asked Salome to take the victim to the appellant's salon where they usually go. That, later Salome called PW2 to ask if the victim is back at home and the answer was in the negative. Later the appellant showed up with the victim and the victim was crying stating that the appellant took her into his home and raped her. PW2 examined the victim and found her with bruises. She went to the salon and it was closed, she reported the matter to police. PW3 who is the appellant's neighbour told the court that on the fateful day he was at home with another neighbour named Bahati, talking. That, he saw the appellant coming home with a young girl, PW3, asked the appellant as to who the child was and he said it was his niece. That, he entered inside his house with the girl. That, after sometime the appellant came out and the girl was crying. They questioned the appellant as to why the girl was crying, he said he wanted to give her some money for ice cream but the money is missing. The said **Salome Damas** testified as **PW4**, she told the court that on the fateful day she left the victim with the appellant at his salon and went to the market. She could not find the potatoes in time she had to wait for like half an hour. Upon going back to the salon she did not find anyone. She called home and they said the victim was not there. While she was still on the phone, she saw the

appellant coming back to the salon, carrying the victim on his shoulders. The victim was crying and her hair was not cut. The appellant explained that he could not cut the victim's hair because the machine was not working and that he went with the victim at his home. That, the victim did not mention anything to PW4 about who raped her. The last witness was the **Kabula Kipote (PW5)** a clinical officer who examined the victim and found that she had bruises in her private parts and her hymen was ruptured. That, she felt pain when she was touched. PW5 produced a PF3 to support her testimony and it was admitted as **exhibit P1**.

It is noted that, the key witness in this case is a child of tender years, however at page 5 of typed proceedings, the trial magistrate has recorded in terms of section **127(6) of The Evidence Act**, that he is satisfied that the victims is telling nothing but the truth.

I have gone through the appellants' defence, he does not dispute to know the victim and even her mother. He claims that on the fateful day, a little girl was left at his salon with an older girl for a haircut. That, he had to finish serving the other customers. That, after a while the big girl came and complained as to why the little girl's hair is not yet cut and she took

the little girl home. That later that night, he was surprised to be alleged to have raped the little girl. He was arrested and taken to Katoro Police station.

Based on the appellant's grounds of appeal, it is not a necessary ingredient for the victim to be found with blood stain, semen or vagina rapture. The key issue is whether there was penetration. It is trite law penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; See section 130(4)(a) of the Penal Code.

The appellant's defence does not shake the prosecution case in the fact that it was the appellant who raped the victim. Although he admits to have 2 girls in his salon on the fateful day, he simply denies to have raped the victim. However, he does not talk about the evidence from his neighbour PW3 who saw him entering his room with the girl and the same girl came out while crying. Also timing of the crying of the victim is immaterial when proving the offence of rape.

Based on this evidence, there is no dispute that on the fateful day, the victim was carnally known. This is based on the victims' evidence herself that she was laid d on the appellant's bed, her clothes taken off and

had sexual intercourse with her. The victim's mother (PW2) who examined her and from the clinical officer (PW5) who medically examined her.

There is also no dispute that at the material time, the victim was left in the hands of the appellant so that the appellant could cut his hair and the appellant took the victim to his house. This is based on the evidence of the victim herself, corroborated by that of the appellants' neighbour PW3 and victims' sister (PW4) showing that the appellant took the victim at his home and raped her. The chain of events from the moment the victim was left with the appellant to the time he returned her at the salon points to no one else other than the accused.

At this stage, it suffices to state that the elements of offence of rape have been established in terms of section **130 (1) (2) (e)** of the Penal Code.

At the trial the victim's mother told the court that the victim has turned 7 years but at the time of commission of offence she was 6 years. Therefore, the sentence issued to the appellant as well, is lawful.

In the upshot, I hold that the prosecution's case was proved beyond reasonable doubt against the appellant. I find the appeal barren of fruits

and, as such, I dismiss it. I uphold the conviction and sentence passed by the trial court.

It is so ordered.

Right of appeal duly explained.

DATED at **MWANZA** this 26th day of May 2023.




L. J. ITEMBA
JUDGE