

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANAYARA
AT BABATI

CRIMINAL APPEAL NO. 1 OF 2023

(Originating from the Criminal Case No. 97 of 2021 of the District Court of Kiteto at Kibaya)

EMMANUEL MASSAWE APPELLANT

Versus

THE REPUBLIC RESPONDENT

JUDGMENT

15th May & 1st June 2023

Kahyoza, J.:

Kiteto district court convicted **Emmanuel Massawe** (the appellant) for raping a girl below the age of 18 years and sentenced him to serve 30 years in prison. He appealed alleging that the prosecution did not prove him guilty beyond reasonable doubt.

The appellant raised six ground of appeal of appeal which climaxed to the following issues-

1. was it proper to rely on unsworn evidence of (**Pw1**) to convict the appellant?
2. are the proceedings tainted with illegality?
3. did the prosecution prove its case beyond reasonable doubt?
4. did the trial court rely on the contradictory evidence of a doctor?
5. was the appellant denied a right to be heard?

A brief background is that; the prosecution alleged that XX, a girl of 15 years was a house maid babysitting Joyce Makongoro (**Pw2**)'s child. While the victim was performing her duties on 23.4.2021, the appellant entered

the house, took outside a child, the victim was babysitting, locked the door and raped the victim. As the child had no one to care of her, she disappeared. The child was recovered at Mwanahamisi Abdallah (**Pw3**)'s place. The victim and Mwanahamisi Abdallah (**Pw3**) gave a different account on how the child was recovered.

Joyce Makongoro (**Pw2**) got information that her child had disappeared. She sent Mary Wilson Urio (**Pw5**) to trace her child. Mary Wilson Urio (**Pw5**) went to Joyce Makongoro (**Pw2**) found the victim with the child. She asked her where was she until the child disappeared. She hesitated to explain at first and later stated that the child disappeared after the appellant entered the house and locked the child out and raped her.

Joyce Makongoro (**Pw2**) went home and listened to the victim's account and took her to police and later to the hospital. Julius Dishon (**Pw6**) examined the victim. Julius Dishon (**Pw6**)'s physical examination of the victim did not suggest that she was raped. He filled and tender a PF.3 as exhibit P. E.1. No. G8604 Yusuph arrested the appellant and WP 5621 Cpl Elizabeth investigated the offence.

The victim's act of the event was that after the appellant entered the house and locked the child outside the house, took his private organ and inserted hers. So, he raped her. During cross-examination, the victim deposed that the appellant had raped her prior to the fateful day.

The appellant story was that on 23.4.2021 on his way to town passed at Bibi Yu [(Mwanahamisi Abdallah (**Pw3**))]'s house. Mwanahamisi Abdallah (**Pw3**) asked him if he knew the parents of the child who was with her. The appellant identified that child as Madam Joyce's child. Madam Joyce [Joyce Makongoro (**Pw2**)] was his neighbour. He assisted to look for Joyce

Makongoro (**Pw2**)'s maid. The appellant and Mwanahamisi Abdallah (**Pw3**) went to Joyce Makongoro (**Pw2**) where they found the house closed. They managed to trace the victim. The appellant told the victim that he will report her to Ino. The victim went for the child at Mwanahamisi Abdallah (**Pw3**)'s place. The appellant denied to rape the victim.

The appellant raised as shown above, general and specific grounds of appeal. It is settled that once an appellant raised general and specific grounds of appeal, the appellate court may entertain the general ground of appeal only. The Court of Appeal pronounced that position of the law in **Rutoyo Richard vs R.**, (Cr. Appeal No.114 of 2017), published on the website, www.tanzlii.org [2020] TZCA 298, where it stated that: -

*"Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, **it should be considered and taken to have embraced several other grounds of grievance.**"*

The above being the position of the law, I will address the general ground of appeal that is whether the prosecution proved its case beyond reasonable doubt.

Did the prosecution prove the appellant guilty beyond reasonable doubt?

The appellant's advocate, Mr Pastory, sought to discredit the victim's evidence by contending that she did not testify on oath. He submitted that the trial court indicated the judgment that the victim promised to tell the truth. He argued that the victim was 15 years old, hence not a child of tender

age as provided by section 127(4) of the **Evidence Act**, [Cap. 6 R.E. 2022] (the TEA).

Ms. Blandina, the learned state attorney opposed the contention that the victim did not take oath. She referred the Court to the proceedings, she submitted that the victim affirmed as she was a Muslim.

Indeed, this ground of complaint is baseless and misconceived. As the proceedings bear testimony. The victim was affirmed. I therefore dismiss the first ground of appeal as baseless.

The appellant's advocate complained that the trial was marred with illegalities. He pointed out that the appellant did not cross-examine Pw6 but the trial court gave the prosecution an opportunity to re-examine the witness. He argued that the trial court violated the provisions of section 147 of the TEA. He concluded that since the trial court committed that illegality it was possible that it committed more other illegalities not obvious on the proceedings. He submitted that the trial court may have excluded evidence given or included evidence not given. Hence, justice was not done to the appellant, he submitted.

He also submitted that the appellant was not given the statement of the complainant. He argued that this was breach of the appellant's right to a fair trial.

The state attorney for the respondent conceded that the trial court erred to give the prosecution a right to re-examine Pw6 in the circumstance where the accused person did not cross-examine the witness. She was quick to submit that the irregularity was curable under section 388 of the CPA as it did not cause any injustice to the accused person.

It is true that the right to re-examine arise when the witness was cross-examined and it is limited to the explanation of matters referred to in cross-examination. See section 147(3) of TEA, which states that-

"(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

It was a misdirection for the trial court to allow Pw6 to be re-examined when Pw6 was not cross-examined. Having considered the position of the law and scanned through the proceedings, there is no doubt the re-examination was a breach of the law of evidence. However, I do not find any strong reason to expunge the whole evidence of Pw6. However, I will expunge the evidence of Pw6 given during re-examination. Pw6's evidence in chief were received without breach of the law it will remain in the record. It is clear that after Pw6 testified the trial court gave the appellant an opportunity to cross-examine he exercised his right not to cross-examine the witness.

As to the contention that the appellant was not given a copy of the complainant's statement, justice was not done to him, I find no merit. Indeed, it is vital and it is one of the elements of fair trial, but the prosecution's failure to give the complaint's statement in the case is shows that an accused understood the nature of the offence and prepared his defence, that irregularity is curable. It is curable under section 388 of the CPA.

Lastly, the appellant's advocate complained that there may be unrecorded illegality or that the trial may have included extraneous matters

in the proceedings. I wish to state at the outset, that the Court record cannot be impeached easily as it is taken to be authentic until the contrary is proved. See the holding of the Court of Appeal in **Selemanijuma Masala v. Sylivester Paul Mosha and Japhet Matiku Ryoba**, Civil Refer. 13/ 2018 CAT (unreported). The appellant was required to provide evidence to impeach the trial court record. In the absence of such evidence I find that the record or trial court is authentic and reflects what transpired. I dismiss the complaint.

I find that the second ground appeal has partly succeeded, Pw6's evidence given during the re-examination is expunged, but the evidence in-chief remains in the record. As shown, the appellant contained that prosecution's evidence was contradictory and that he was denied a right to be heard. I will consider the complaint while reviewing the evidence on record.

The appellant's advocate submitted that the victim did not testify that she had been raped twice but during cross-examination she stated that she was raped twice. He also added that the victim did not explain why the accused took to her a kitenge and skintight. She may have been aggrieved by a fact that the accused did not give her the gifts and decided to fabricate the evidence against him.

He submitted further that, Pw6 examined the victim who had not taken bath and found no indication that she was raped. He submitted that the victim of rape may lie. To support his position, he cited the case of **Mohamed Said v. R.**, Cr. Appeal No. 145/2017 where the Court of Appeal held that the victim's evidence should not be taken as a biblical truth.

The respondent's state attorney submitted that the prosecution is required to prove penetration and that it is the victim whose evidence can prove penetration. She anchored her contention in the decision of the Court of Appeal in **Emmanuel Joseph v. R.**, Cr. Appeal No. 323/2016 where the Court referred to its earlier decision of **Seleman Mkumba v. R., Selemani Mkumba v. R.** [2006] T.L.R. 23 to hold that it is the victim of rape who can prove the offence of rape. She submitted that the trial court who had an opportunity to assess credibility found the victim credible and convicted the appellant.

I now consider the third, fourth and five grounds of appeal which raised the issue whether the prosecution proved the evidence beyond reasonable doubt.

In criminal case the prosecution has a duty to prove an accused person guilty and do so beyond reasonable doubt. The appellant was charged of raping a girl below 18 years of age. He was charged with the offence of rape under section 130 (1), (2)(e) and 131(1) of The Penal Code, [Cap. 16 RE. 2019, Now R.E. 2022]. The appellant was charged with statutory rape. In such a case, the offence of rape is proved by proving penetration and the age of the victim. It is immaterial if the victim consented or not. Section 130 (1) and 2(e) stipulates 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:

(a); (b); (c)(d).....;

(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".

It is my duty to find out whether the prosecution did establish the victim's age and that she was penetrated. The last issue to find out will be whether it is the appellant who penetrated the victim. It is the duty the prosecution to prove the issues raised and not for the accused prove his innocence. In the case of **Hussein Said Nampanga V. R, Criminal Appeal No. 117 of 2011 (CAT, DSM, unreported)** it was insisted that:

"We wish to re- state the principle that the burden of proof in criminal cases lies on the prosecution side, the standard of which is proof beyond all reasonable doubt, meaning the proof that leaves no thread of doubt"

The prosecution's witness to prove penetration is the victim. It is trite law that **the evidence of sexual offence has to come from the victim**. The Court of Appeal of Tanzania in **Akwino Malata v. R.**, CR. Appeal NO, 438 OF 2019. (CAT-Unreported), had this to say;

*"This is a principle of law to the effect that the evidence of sexual offence has to come from the victim **and if the court is satisfied that the victim is telling the truth it can convict without requiring any corroborative evidence.**"*

XX, the victim is a girl alleged to be 15 years old. She narrated how the appellant entered the house, took the child outside the house and penetrated her. The trial court believed her. I considered the evidence to find out if the victim was a witness of truth. The Court of Appeal of Tanzania cautioned itself in the case of **Mohamed Said V. R.**, CR. Appeal No. 145 OF 2017 (CAT-Unreported) when it quoted with approval the caution statement of Lord Chief Justice Mathew Hale in **People v. Benson**, 6 Cal221 (1856), that rape:

"Is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent."

It is vital to test the victim's evidence to find out if she is trustworthy. The victim deposed during cross-examination that the appellant had raped twice. He had raped her before the fateful date. She did not tell anyone. There is evidence of Mary Wilson Urrio (**Pw4**) that they asked the victim why did the child disappear. The victim did not reply. They asked her for the second time she told her that the child disappeared at the time the appellant was raping her. The victim was not ready to report immediately what had happened to her.

The evidence raised doubt if she was raped. I wonder why did the victim failed to report when the appellant raped her for the first time. Her evidence need corroboration. There is circumstantial evidence from Mwanahamisi Abdallah (**Pw3**) that after the appellant told her that the lost child was a daughter of Joyce Makongoro (**Pw2**) he did not let her take the child to Joyce Makongoro (**Pw2**)'s place. He asked her to accompany her.

Mwanahamisi Abdallah (**Pw3**) resolved to ask him to go for the Joyce Makongoro (**Pw2**)'s maid the appellant refused saying he may be accused of raping the victim.

Mwanahamisi Abdallah (**Pw3**) added that, when they finally got the victim and the victim wanted to disclose something to her, the appellant was hostile to the victim. He threatened to report her to her employer or take action against her if she lied. The trial court asked itself three questions as follows-

"There are questions for this court that asked itself, was there need for the accused person to follow Pw3 when she wanted to go to find the victim after being told who the child was instead of him going after the victim? or was he trying to hide something by making sure that the victim doesn't speak anything of what had happened? Why did he claim that they have to go to see the victim so she may not say that he raped her? Why did he brought rape issues before even the victim had talked about it?"

Without proving the answers to the questions, the trial court concluded that the victim's evidence was straight forward that it was the appellant who raped her. It is likely that the appellant raped her, but also it is very likely that the appellant did not rape her.

The trial court was required to treat the victim's evidence with care. The victim alleged to have been raped before by the appellant but she did not report anywhere. The victim's account how the lost child was recovered was different with that of Mwanahamisi Abdallah (**Pw3**). Mwanahamisi Abdallah (**Pw3**) deposed that she went with the appellant to Joyce

Makongoro (**Pw2**)'s place with the appellant and they found the door open and no one was inside the house. They went looking for the victim and found her standing in the neighbour's field. Thus, she was not looking for the missing child. Mwanahamisi Abdallah (**Pw3**) deposed-

"We went to the teacher's house and found the door was open, there was no one in the house.

I told him to look at the back of the house to see if there was other door.

He said there is no other door they use only this on door.

He saw kids playing in a neighbour house, he asked them where the girl was. One child showed us where the girl was.

*We **went and found the girl just standing in the neighbour's field.***

The accused on the dock started to ask her, where is the child. Show me where you took the child." (Emphasis provided)

The victim's account was that narrated that after the nasty incident she dressed up and went to look for the child. She went to Mama Paulo where she did not find the child. She then found the child with one old woman whom she did not know her name. She testified that-

"He then put on his clothes and ran away. I dressed up and went to look for the child who was no where to be seen.

*I went to mama Paulo but the child wasn't there, **I went to a certain grandmother where I found the child and took her.***

I don't remember the grandmother's name, but she lives a little bit for.

I found the accused on the dock at that grandmother's house also." (Emphasis provided)

The two versions differ. The victim did not state that she was found in neighbour's field standing and that it was Mwanahamisi Abdallah (**Pw3**) who told her that the child was at her place. The victim's evidence as to how the child got lost, raised my eyebrows if she was the witness of truth. Not only that but also that evidence raised reasonable doubt if she was raped. If she was raped why was she not perplexed or troubled by that nasty act and report to neighbours? If the child disappeared when she was raped why did she not seriously look for the child immediately after the appellant left. Mwanahamisi Abdallah (**Pw3**)'s evidence was that they found her standing in the neighbour's field. Mwanahamisi Abdallah (**Pw3**) had no reason to lie. Had she found the victim looking for the lost child, she would certainly said so.

I said there is doubt if the victim was raped. It is on record that Julius Dishon (**Pw6**) who examined the victim saw no signs that she was raped. Exhibit P E.1 showed that there was no indication that the victim was raped. The trial court noted that Julius Dishon (**Pw6**) was trembling while giving evidence and he could not look the prosecutor or the court in the face. Those are signs of witness who tells lies. However, given the fact that the victim was not worried to look for the child allegedly disappeared when the

appellant was raping her and the fact that she did not report the nasty incident, support the evidence of Julius Dishon (**Pw6**).

I am of the firm view that there is doubts if the victim was raped. Even if, there was evidence that the victim was raped, one would ask a question if at all there was evidence to prove the victim's age. I have stated that for statutory rape, the prosecution must prove penetration and the victim's age. There prosecution gave no evidence to prove the victim's age. The only reference to the victim's age was her statement before she affirmed that she was 15 years old.

Age of the victim can be proved by the victim, victim's parent, or guardian or even the teacher who may produce evidence from school register or by production of birth certificate. I am alive of the fact that the victim's age was not an issue before the trial court and the appellant did not cross-examine the victim. In **Ismail Ally V. Republic**, Criminal Appeal No. 212 of 2016 (unreported) the Court of Appeal considered a complaint as to the victim's age raised by the appellant convicted of rape during his appeal and observed-

*"the complainant's age was not raised during trial. It is also glaringly clear that the appellant did not cross examine PW1, PW2 and PW3 on that point. Therefore, raising it at the level of appeal is an afterthought - See the cases of **Edward Joseph v. Republic**, Criminal Appeal No. 272 of 2009, **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007, **Nyerere Nyegue v. Republic**, Criminal Appeal No. 67 of 2010, and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013, CAT (all unreported)".*

I find the facts of the present case distinguishable from the present case. In that case, the victim gave evidence as to her age. The appellant did not cross-examine him. in the case under consideration, the prosecution did not lead evidence to prove the victim's age. The Court of Appeal in **George Claud Kasanda Vs. Dpp**, Cr. Appeal No. 376 OF 2017 (CAT-unreported), reiterated the duty of the prosecution to lead evidence proving the age of the victim in offenses of rape that fall under section 130 (1) (2) (e) and 131 (1) of the Penal Code. It held-

*"The prosecution is duty-bound to establish among other ingredients, that **the victim is under the age of eighteen to secure a conviction.**" (emphasis added)*

The prosecution has a duty to establish the victim's age. The age of the victim of statutory rape must be proved and it is not for the court to speculate that the age of the victim. The Court of Appeal reaffirmed its position that age of may be proved by the victim or her relative, parent, medical practitioner, or by producing a birth certificate, in **Issaya Renatus Vs. R.**, Cr. Appeal No. 542 OF 2015. There is no evidence to prove the victim's age. The victim did not testify as to her age after she affirmed. She mentioned that her age was 15 years before she affirmed.

She was not asked to deposed as to her age. She would have stated when she was born. Such evidence would have proved her age. In the circumstance of this case, where the victim alleged to have been raped more than once and she was not complaining of rape; Not only that but the fact

the medical doctor, Julius Dishon (**Pw6**) found no signs of being raped; It was vital for the prosecution to establish the victim's age.

Having considered the evidence on record, a conclusion that the prosecution did not establish the appellant guilty beyond reasonable doubt is inescapable. Consequently, I allow the appeal, find that the appellant was convicted in the want of evidence. I quash the appellant's conviction and set aside the sentence. I order the appellant be set at liberty unless he is held for some other lawful cause.

It is ordered accordingly.

Dated at Babati this 1st day of June, 2023.



John R. Kahyoza.

Judge

Court: Judgment delivered in the presence of the appellant and Mr. Bizimungu State Attorney assisted by Ms. Ester Malima for the Republic. Ms Fatina (RMA) is present.

John R. Kahyoza, J.

1/06/2023