

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

DC CRIMINAL APPEAL NO. 63 OF 2022

*(Original Criminal Case No. 19/2022 of the District Court of
Wanging'ombe before Hon. J.E. Muhoni, SRM)*

JOSEPH MWAJOMBE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

10th July & 24th July, 2023

I.C MUGETA, J:

This case is founded on rape allegation. The victim is a girl aged 15 years. The appellant is her father who, allegedly, on 8/7/2022 raped her after hijacking her while on way from school. That he forced her off her friend's bicycle, mounted her on his motorcycle and drove her to the bush where he carnally knew her to fulfill the witch doctors condition for him to get rich. Upon conviction and sentence, he has appealed to this court on five grounds of appeal.

It is alleged that upon being arrested the appellant recorded a caution statement and an extra judicial statement before the Village Executive Officer (VEO), as a justice of peace, and a caution statement at the police station. The confession was tendered by PW3 while the caution



statement was tendered by PW5 as exhibits P1 and P3 respectively. Their admission as exhibits constitutes the complaints in the second and third grounds of appeal in that the same were illegally admitted.

Sophia Manjoti, learned State Attorney conceded that exhibit P1 and P3 were illegally admitted because the appellant objected their admission alleging they were involuntarily recorded and the trial court was supposed to hold a trial within a trial to establish if they were voluntary before admission but it did not. Due to this irregularity, she prayed the same to be expunged from record as I hereby do. The 2nd and 3rd grounds of appeal have merits.

Upon expunging exhibits P1 and P3 from record, the only evidence upon which rape can be proved is that of the victim (PW1). However, the appellant complains in the first ground of appeal that penetration as a necessary ingredient of rape was not proved. Sophia Manjoti hold a different view, she referred the court to page 5 of the proceedings where the victim testified:-

"The accused takes (sic) me to the bush he packed (sic) the motorcycle and pulled me into the bush, he undressed my clothes and had sexual intercourse with me".



She then submitted that this evidence proves penetration. I agree with her. In **Hashim Abdallah Issa V. R**, Criminal Appeal No. 131 of 2017, Court of Appeal – Mtwara (unreported), it was held that the use of the phrases like "*sexual intercourse*" refers to penetration. Therefore, if PW1 is believed, it means rape happened. The question for determination is whether it is, indeed, the appellant who penetrated into her vagina.

In his defence, the appellant denied to have raped her daughter on instructions of a witchdoctor in order become rich as alleged. He said the case is fabricated by his wife after discovering in his cell phone love massage from another woman where upon she promised to teach him a lesson. This defence is as serious as the rape allegation he faces. It features in his defence only though. It is settled that an accused defence's rhythm must be disclosed to the prosecution by cross examination. If this is not done, such a defence may be taken as an afterthought. [**Martin Misara v Republic**, Criminal Appeal No. 428 of 2016, Court of Appeal – Mbeya (unreported) page 8 – 9]. This allegation against a wife who testified as PW2 ought to have been disclosed on cross examination. However, it is not reflected in the proceedings.

This is what is recorded as PW2's evidence on cross examination:

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"It is not the first time, I do not know, I reported the same date". (page 6 of the proceedings).

It is my view that from the above quoted text, one cannot discern the nature of the questions by referring to the above recorded answers. The answers do not bring out a coherent meaning to help the appellate court to decide whether the appellant was questioning his wife about their matrimonial conflict or other matters. For sanity of the record, answers to questions during cross examination ought to be recorded in a manner reflecting as nearer as possible the questions asked which is not the case here.

As it is settled that ambiguities in evidence of the prosecution in criminal cases ought to be resolved in favour of the accused person, I hold that the appellant questioned his wife about their misunderstanding and her promise to mount a revenge. On that account, I find the accused's defence valid, therefore, I shall examine the evidence of the victim that she was raped by the appellant against the said defence and decide on the victim's credibility.

The victim testified that after the incident, she broke the news to her mother (PW2). However, the mother said she inquired from her what happened after seeing her crying. The mother (PW2) testified further that,

thereafter, she reported the incident to the VEO. While failure of one witness to state a fact said by another witness is not a contradiction, the gaps which relates to a material fact in their respective testimonies can create a doubt on their reliability and truthfulness. The victim and her mother are not expected to differ on how the mother got the shocking news. These gaps, if considered in the light of the appellant's defence on his conflict with the wife, creates a reasonable doubt in the prosecution's evidence. The mother's evidence that she saw bruises in the victim's vagina upon examination cannot be relied upon as corroborating the victim due to the alleged conflict between him and the appellant which makes her a witness with interests to serve.

Further, the investigator of the case (PW5) testified that the appellant and the victim showed him the incident area, each at his/her own time and he drew the sketch plan which he tendered as exhibit P4. However, the victim did not testify about showing PW5 the crime scene. This is another gap on the material evidence of the prosecution.

Having discounted the evidence of the mother, the other evidence to support that the victim's vagina was penetrated by a blunt object is that of the medical doctor. The medical doctor (PW4) testified that she examined

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the victim on 10/07/2022. In his evidence he said he "*saw bruises and blood stems*". This was two days from the incident time. The incident occurred on 8/7/2022 evening hours and the examination was on 10/7/2022 at undisclosed time. Besides my doubting presence of blood two days after the incident, it is not recorded in the PF3 (exhibit P2) that he saw blood too. On that account, I reject the evidence that he saw it. The appellant's complaint in the 4th ground of appeal is that the medical evidence is uncorroborated. I hold that medical evidence does not require corroboration.

On the bruises, I have no doubt that he saw them because they are recorded in the PF3. The question is whether, they are a result of the alleged encounter with the appellant on 8/7/2022 as it is not explained why the PF3 was issued on 10/07/2022, two days later, while the mother testified that they reported to the VEO and the police station, presumably, on the same or the next date. This unexplained delay to medically examine the victim creates another doubt.

The fifth complaint is that the offence was not proved. The trial court found that the victim's story was supported by the medical evidence, therefore, penetration was proved. I have no quarrel with this finding.

M. Jeta

Indeed, the victim had been penetrated. The trial court also found that the victim could not lie against her biological father. I do not agree with this finding were the appellant alleges there is matrimonial differences between him and the victim's mother. I understand, the trial court reached this finding after holding that the accused's defence was an afterthought as he did not cross examine the wife on their conflicts. I have already held that the record does not support the finding that the appellant did not cross examine PW2 on their matrimonial conflicts. His defence cannot validly be held to be an afterthought. In a conflict situation between parents, a child can take side.

It is my view that while it is true that the victim was carnally known, I am of the view that the fact that the medical examination was made two days later without explanation for the delay and the appellant alleging his wife instigated this case, creates a reasonable doubt in the prosecution's case as to whether it is the appellant who had sexual intercourse with the victim.

In the event, I find merits in the fifth ground of appeal that the offence was not proved beyond reasonable doubts. The trial court erred to

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convict the appellant. I quash his conviction and set aside the sentence. He is to be released from prison unless held for another cause.




I.C. MUGETA

JUDGE

24/7/2023

Court: Judgment delivered in chambers in the presence of the appellant and Herbert Ishengoma, State Attorney for the Respondent.

Sgd. I.C. MUGETA

JUDGE

24/7/2023