

**IN THE HIGH COURT OF TANZANIA  
MUSOMA DISTRICT REGISTRY  
AT MUSOMA  
CRIMINAL APPEAL NO. 34 OF 2022**

*(Originating from Criminal Case No. 231 of 2021 of the District Court of Tarime at  
Tarime)*

**MANDASHI MARWA S/O MWITA @ MARWA ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

26<sup>th</sup> & 28<sup>th</sup> July, 2023

**M. L. KOMBA, J.:**

The Appellant **MANDASHI MARWA S/O MWITA @ MARWA** was charged and convicted by the District Court of Tarime at Tarime for an offence of rape contrary to section 130 (1) (2) (e) and 131(3) of the Penal Code, [Cap. 16 R. E. 2019]. It was alleged that on unknown dates between June, 2021 and 11<sup>th</sup> August, 2021 at Rembirwi street within Tarime District in Mara Region appellant did unlawfully have carnal knowledge of a girl aged 8 years old. After hearing of the case, the Appellant was convicted for the rape offence and was sentence by the trial Court to serve thirty years (30) imprisonment.

It was alleged that in one of the days when the victim/PW1 (names will be used interchangeably) was raped, her aunt whom she used to stay

with, went to the wedding ceremony and the accused instructed the victim to sleep on the bed where accused and his wife used to sleep. She agreed and at night when the victim was asleep, he entered the accused, undressed the victim, ordered her to spread her legs and put his penis into her vagina. He then told the victim not to tell any person. It was the testimony of victim that he continues to do so in other days.

After the said crime, the victim was walking in difficult and was producing bad smell from her private part. It was her class teacher PW2 who noticed the smell from the victim, upon interrogating, she first resists to tell teacher anything but later on she said her aunt beat her. Due to bad smell from her private part, class teacher reported the matter to social welfare teacher whom examined a child. After satisfied that she was not normal social welfare teacher took the victim to police to report the incident and were given PF3. Victim was taken to hospital where she was attended by PW3 who discover the victim had no hymen and the private part was producing bad smell. All his finding was recorded to Exh P1.

In his defence, the accused generally denied to commit such an offence in a very short defence. The trial court essentially formulated three issues which was answered in affirmative upon satisfied with the

testimony of PW1, PW2 and PW3 as well as exh P1 showing accused was penetrated into her vagina. Basing on the principle annunciated in the case of **Selemani Makumba vs. Republic** [2006] T. L. R. 379 the trial court proved that it was the appellant who raped the victim and proceed to convict the appellant and sentenced him to 30 years imprisonment.

The appellant was aggrieved by the decision of the District Court and he filed the present appeal against the said decision. In his petition of appeal, the appellant has raised seven (7) grounds of appeal to wit: -

1. That, the trial magistrate misdirected himself in his finding to hold that the appellant was committed the alleged matter in issue while the same was cooked one.
2. That, the trial magistrate failed to discover that all the duration when PW 1 stayed with her teachers and at Masanga center the said house for rescuing the victim of gender violence the teachers assisted the said victim in issue to formulate false evidence against the appellant before the court of law and therefore managed to store in her head those words taught for many days she staid with adults hence the said victim was a liar and she knew how to change words as it was seen before her teachers when she produced different statement relating to her.
3. That, the trial magistrate failed to discover that the said matter in issue was implicated against the appellant by the PW2 who forced PW1 to produce false statement that she was raped by her

uncle and the statement first introduced PW2 who had not witnessed the alleged act and other witnesses followed and relied on that false testimony of the said PW2.

4. That, the trial magistrate erred in law and fact to convict the appellant by basing on cooked and taught evidence of incredible witnesses of PW1, PW2 and PW3 for their own interest without reasonable cause.
5. That, the trial magistrate failed to discover that it is trite in law to proceed convicting the innocent appellant basing on hear say evidence that the said victim was raped by the appellant who is uncle of the alleged victim in issue while said act was not done by the innocent appellant and there were several material contradictions in the prosecution's evidence alleged to have been said by PW1 before PW1.
6. That, the trial court failed to evaluate the entire evidence and facts before him and such failure lead him to reach in wrong and unclear judgment.
7. That, the trial magistrate failed to consider the weight of the defense adduced by the appellant who had watertight.
8. That, the prosecution side failed to prove its case beyond all reasonable doubts.

Appeal was scheduled for hearing on 26/07/2023, as the hearing was conducted through teleconference court services of the Judiciary of Tanzania, the appellants' appearance was remote; at Musoma prison, unrepresented, whereas the respondent Republic was represented by

Mr. Isihaka Ibrahim, Mr. Abdulher Sadiki and Ms. Natujwa Bakari, all learned State Attorneys.

When given a fortuitous to make his case, appellant prayed this court to adopt his petition of appeal and prayed his appeal to succeed. Petition adopted.

In protest of the appeal, the learned State Attorney, Ms. Natujwa opted to join 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> ground jointly. The grounds are about framed case and ground no. 7 was argued separately. She started by explaining that the appellant was convicted on rape and that the evidence of PW1 at page 11 is clear on that offence.

It was her submission that PW1 explained she was leaving in the same house with the appellant, they were sharing a room with accused and his wife. Accused took advantage as his wife was not around. In offence like the one at hand she said prosecution needed to prove the age of the victim and to prove rape. Evidence of PW1 was collaborated by PW2 who was the teacher and the accused was mentioned by the victim.

She further submitted that the age of the victim was proved by victim herself and that the best evidence is of the victim as the offence was convicted at night in the room. She prayed this court to find the offence has been proved. In respect of the appellant complaint of a framed

case, it was her submission that the defence is afterthought as during trial the accused did not ask the doubtful questions to his offence. Relying on the case of **Godson Dan Kimaro vs. Republic**, Criminal Appeal No. 54 of 2019 CAT at Moshi page 12 she prayed this court to find the issue of grudges as an afterthought as it was not cross examined.

With regard to appellant defence, State Attorney submitted that the appellant defence was considered at page 6 to 7 of the judgment where there is general denial and the trial court weight the defence and decided on what is in judgment. She prayed this court to visit the testimony of all witnesses during trial and see how the prosecution managed to prove their case.

During rejoinder the appellant complained of contradiction on the date is charge sheet is recorded the offence to happen on 11/08/2021 but victim in her testimony explained she was raped June 2021. He denied the offence to take place on account that grandfather was around could hear. On repeatedly action he complained of not to be true as he was arrested in the following day, he wonders how did he repeated the said action while he was in custody. It was his submission that the victim was taken by police and kept her for a long time and they were

coaching her what to do in court and court has to ignore the testimony of the victim.

Appellant further complained of the testimony of PW2, being a male teacher how PW2 inspected a girl and find her private party, specifically vagina to emit bad smell, he complained how dare he did that and his testimony is believed while he is not a doctor. He informed this court that some important witnesses were not summoned like social welfare teacher, investigator, Street leader and Ward Executive Officer to prove that something happened in street; and the underwear which was said to be found with discharge was not among the exhibits and his conclusion is that the case was staged against him. When asked by this court how the case was staged and by whom he failed to explain and even failed to mention whom they have grudges.

Following long and elaborative rejoinder by the appellant, I asked the appellant why he did not make such submission on the first place and he replied that he know there is another chance and he was prepared for another chance. For the interest of justice, I allowed the appellant to submit all he has and gave the respondent, Republic time to reply on new issues as raised by the appellant.

Ms. Natujwa submitted that the charge sheet shows the offence was committed on unknown date between June 2021 to 11/08/2021. She admitted the victim referred June 2021 as the date her aunt went to the ceremony and it was the first time she was raped. It was her explanation that the victim was discovered with bad smell on August 2021 and therefore all the dates which was adduced by prosecution has been picked up in charge sheet.

In respect of the inspection conducted by the male teacher it was her submission that at page 14 of typed proceedings PW2 asked victim when the victim replied she were beaten then the victim was taken to social welfare teachers who is a female. State Attorney submitted that the doctor (PW3) confirmed bruises, dirty in the vagina and bad smell. Doctor examined the victim in the same day when the matter was reported.

After the incident, Republic submitted that the victim was taken to safe house as the accused was the head of the family and it was not safe for the victim to remain in the same house. This was proved by DW2 in her testimony that the victim was living at Masanga, she was there for her safe custody and not otherwise. She said the issue of PW2 to have grudges with appellant is afterthought as he did not cross examine PW2



on those issues while in court and he did not dispute. It was her further submission that appellant did not dispute to be with victim in his room that night, when cross examined appellant confirms to live with victim. Ms. Natujwa finally submitted that the evidence adduced was suffice to convict the appellant.

In handling this appeal I had time to peruse the record of the previous court over the subject matter, petition of appeal and submission by both parties. In considering directives of the Court in **Firmon Mlowe vs. The Republic**, Criminal Appeal No. 504 of 2020 Court of Appeal at Iringa (Unreported) that the court and this court is at liberty to address the grounds separately or generally or the decisive one only, it must specifically indicate so in the judgment. In the appeal at hand, I will generalize ground of appeal which has similar root. These are 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> ground. Ground number 7 will be responded separately.

In 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> grounds of appeal, the appellant is complaining of staged case that he did not commit any wrong. In his defence during trial he did not shake the prosecution to show that it was staged neither did he explain why he believe the case was staged. It is only during appeal when the issue of fabrication arises. Appellant did not

explain who fabricate the case and whose benefit as the witnesses were teacher and the doctor. I concur with State Attorney that failure to cross examine witness on issues which the appellant think was staged make his argument baseless. See **Godson Dan Kimaro vs. Republic** (supra).

I find all prosecution witnesses were credible and managed to prove the offence bearing in mind that the victim, although she is a child, she managed to explain what happened and he know the appellant as they share the house let alone the room so there is no likelihood of mistake on identity nor recognition. The evidence of the victim in rape cases is the best as was in **Selemani Makumba vs. Republic** Criminal Appeal No. 94 of 1999 CAT at Mbeya.

In respect of appellant defence which is ground number 7, as submitted by Miss Natujwa, it was a general denial therefore there was nothing on substance to consider which is easily picked up as appellant said in his defence he did not rape and he was not seen while committing an offence (page 20 of the typed proceedings). What was adduced in court was analyzed by the trial Magistrate and concluded that appellant and the victim used to share a room, fact which was not disputed. I find the combined grounds lacks merit.

Appellant complained of the date that charge sheet was written August 2021 while the victim said June 2021 hence contradiction. I read charge sheet which form the base of the trial of the appellant here is what was written;

***'PARTICULARS OF OFFENCE***

*MWANDASHI S/O MWITA MARWA on unknown dates between June, 2021 and 11st day of August, 2021 at Rembirwi Street within Tarime District in Mara Region had canal knowledge of the victim (name withheld) a girl of 8 years old.'*

It is crystal clear that all the dates were included in the charge sheet and therefore there is no inconsistency neither contradiction. The victim testified that appellant repeatedly commit the offence and the appellant denied that he was under custody on the following day and was unable to commit any offence. I read the court file and record shows that victim narrated what happened in the month of June, and she was found in that situation in August. That means, and it is the finding of this court that between June and August appellant was committing the offence that's why victim said it was repeatedly and the charge indicate so. Victim was taken to Masanga, a house of rescuing the victim of gender violence. Victim herself during cross examination by appellant denied to be coached. Record show that PW2, a class teacher inspected the victim

but latter on he reported to social welfare teacher and it was PW3 whose testimony was recorded in court. PW3 being a professional I find no need to doubt his professionalism. I find the grounds are less of merit.

On the number of witnesses to be paraded to prove the offence, appellant submitted that street leader VEO and social welfare teacher were not paraded as prosecution witnesses. It is settled law under section 143 of the Evidence Act. Cap 6 R. E. 2019 that there is no specific number of witnesses are needed to prove commission of an offence. The section reads;

*'143. Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.'*

What is important is what has been submitted by the witnesses who testify in court and this court only need to be satisfied if the offence has been prove to the required standard, this being a criminal case, then, the standard is beyond reasonable doubt. I am satisfied that the prosecution managed to prove the case to the required standard.

It is apparent from the above discussion that all grounds of appeal fronted by the appellant and the additional grounds have failed for want

of merits. In the end result, this appeal also fails and it stand dismissed entirely.

Dated in **MUSOMA** this 28<sup>th</sup> day of July, 2023.



  
**M. L. KOMBA**

**Judge**

Judgment delivered in the presence of appellant who was connected from Musoma in the absence of representatives of the Republic.

Right of appeal explained.

  
**M. L. KOMBA**

**Judge**

**28 Juy, 2023**