

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 29 OF 2023

(Originating from Mtwara District Court at Mtwara in Criminal Case No.
49 of 2022)

ISMAIL YUSUPH MTULENI APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

17th & 31st of July 2023

LALTAIKA, J.

The appellant herein, **ISMAIL YUSUPH MTULENI**, was arraigned in the District Court of Mtwara at Mtwara charged with the offence of Rape c/s 130(1) (2)(e) and section 131(3) of the Penal Code Cap 16 RE 2022. It was alleged by the prosecution that on 22/6/2022 at Kitele Area, Mtwara District and Region, the appellant raped a girlchild called XXM (name withheld for purposes of protecting her privacy) a girlchild aged 9 and a pupil at Kitele Primary School.

When the charge was read out and explained to the appellant (then accused) he pleaded not guilty. The trial court conducted a full trial. The court was convinced that the case was proved beyond doubt and sentenced the appellant **to life imprisonment**.

Dissatisfied, the appellant has appealed to this court on 6 grounds. I take the liberty of reproducing them hereunder

1. *That the trial court erred in both law and facts by convicting the appellant while the defense of the appellant was not properly considered.*
2. *That the trial magistrate erred both in law and fact by convicting the appellant and admitting the exhibit which is PF3 which was objected by the appellant without giving proper reason.*
3. *That the trial magistrate erred in law and fact by convicting the appellant while the prosecution witnesses, they (sic!) contradicted at large (sic!) among themselves especially the evidence adduced by PW1 and PW2.*
4. *That the trial magistrate erred in law and fact by convicting the appellant while the evidence by the prosecution side was uncorroborated.*
5. *That the trial magistrate erred in law and fact by convicting the appellant while the prosecution side failed to call material witnesses.*
6. *That the trial magistrate erred in law and fact by convicting the appellant while the prosecution side failed to prove the offence beyond reasonable doubt.*

When the appeal was called on for hearing on the 17th of July 2023, the appellant who looked too weak due to advanced age, appeared in person unrepresented. The respondent Republic, on the other hand, enjoyed skillful services of Mr. Melchior Hurubano, learned State Attorney. Obviously, the appellant had nothing substantial to add to his grounds of appeal. He requested the learned State Attorney to proceed with his counterarguments. Nevertheless, the appellant reserved his right to add a word or two after the learned State Attorney.

Taking up the floor, Mr. Hurubano declared the respondent's interest in supporting the decision of the lower court. He then proceeded to argue against each of the six grounds of appeal as summarized in the next paragraphs.

The learned State Attorney stated that on the first ground that the appellant complained that he was not accorded the chance to call his witnesses. Mr. Hurubano expressed his view that the ground of appeal had no merit, as the appellant was indeed given the opportunity to call witnesses. According to him, during the lower court's proceedings, the appellant was asked if he had any witnesses, and he replied in the negative. However, on **page 23 of the lower court's proceedings**, after the ruling on the case to answer, the accused stated that he would make his statement under oath and call witnesses.

Mr. Hurubano further mentioned that on 14/2/2023, the case was adjourned to allow the appellant to bring a witness. On 7/3/2023, the appellant informed the court that he had no witness. Consequently, the trial court scheduled a date of judgment. In Mr. Hurubano's opinion, this allegation had no merit, and he prayed that the ground be dismissed.

Mr. Hurubano proceeded to address the **second ground of the appeal**, wherein the appellant raised concerns about irregularities in admitting the PF3. He asserted that this ground had no merit. According to Mr. Hurubano, during the proceedings on page 19, when PW3 intended to submit the exhibit, the appellant objected, but the objection "I don't know

what he said" was not considered a legal objection. The exhibit was ultimately admitted and read out loud.

Mr. Hurubano further pointed out that on page 7 of the proceedings, after the Preliminary Proceedings, the appellant had agreed to certain facts, including the victim being taken to Ligula Hospital, where she was examined, and it was established that she had been raped. Therefore, he believed that the second ground of appeal also lacked merit, and he prayed for its dismissal.

The learned State Attorney addressed **the 3rd ground of appeal** stating that the appellant complained about a contradiction in the evidence of PW1 and PW2. He explained that PW1 (victim) claimed to have narrated the incident to PW2 after going home, while PW2 asserted that PW1 returned home bleeding, remained silent, and only spoke when taken to school and the hospital. Mr. Hurubano considered this contradiction to be minor and urged the court to refer to the decision of the Court of Appeal of Tanzania's case of **ISSA HASSAN UKI v. R** Criminal Appeal No 129 of 2017. He concluded that the ground had no merit and prayed for its dismissal.

Moving on to **the fourth ground of appeal**, Mr. Hurubano stated that the complaint was about the lack of corroboration of PW1's evidence. Referring to section 127(6) of the Evidence Act Cap 6 RE 2022 and various decisions of the Court of Appeal of Tanzania, including **SELEMANI MAKUMBA v. REPUBLIC [2006]TLR 379**, he argued that in sexual offences, independent evidence from a child of 14 years old and the victim was sufficient for conviction. As the victim in this case was a child of tender

age, Mr. Hurubano believed that the evidence adduced was enough to convict the appellant. He also **combined grounds of appeal No. 4 and 6, which pertained to proof beyond reasonable doubt**, and asserted that the offence had been proved. Thus, he prayed for the dismissal of the 4th and 6th grounds of appeal.

Addressing the 5th ground, Mr. Hurubano acknowledged the complaint about the failure to call a material witness on the prosecution's side, specifically **the doctor at Chekereni Health Center**. However, he argued that the failure to call this witness did not result in the failure to prove any of the elements of the case. Mr. Hurubano stated that the witness was not material, and according to section 143 of the Evidence Act Cap 6 R.E. 2022, there was no particular requirement for a specific number of witnesses. Therefore, he concluded that the 5th ground had no merit. In conclusion, Mr. Hurubano prayed for the entire appeal to be dismissed.

The appellant, on his part, stated that he had never been to court since he was born. He pointed out that the magistrate did not mention that the child claimed it was 11 AM when she came from school, and her grandmother stated that she found the grandchild in the water well. The appellant noted that the lawyer had not addressed this contradiction.

He further mentioned that he was paralyzed since 2020 and had not experienced an erection since then. The appellant stated that his wife could testify to this fact. He revealed that there had been quarrels with the victim's family over a cashewnuts farm. The appellant expressed surprise that he was arrested for this allegation.

I have dispassionately considered the submission by the learned counsel in the light of the grounds of appeal. I must admit that this has been a very difficult case to think about. I have many doubts. The appellant looks too old and too weak. He is partly paralyzed. He has claimed that the case has been cooked by the victim's family because of the cashewnuts farm conflict. The *Mzee* has been lamenting that as a result of his partial paralysis, he had developed erectile dysfunction since the year 2000. Looking at him, I see a cloud of doubts. I buy his idea.

In the case of **NATHANIEL ALPHONCE MAPUNDA AND BENJAMIN MAPUNDA V. R.** [2006] TLR 395 the Court of Appeal of Tanzania stated:

"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her testimony should pass the test of truthfulness."

The learned trial Magistrate upon learning that the event allegedly took place far from home, shouldn't have ruled out the possibility of mistaken identity. Premised on the foregoing, I allow the appeal. I order that **ISMAIL YUSUF MTULENI** be released from prison forthwith unless he is being held for any other lawful cause.

It is so ordered.





E.H. LALTAIKA
JUDGE
31.07.2023

Court

Judgement delivered under my hand and the seal of this Court this 31st day of July 2023 in the presence of Ms. Atuganile Nsajigwa, learned State Attorney and the appellant who has appeared in person, unrepresented.

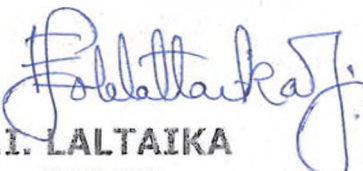



E.I. LALTAIKA
JUDGE
31.07.2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.




E.I. LALTAIKA
JUDGE
31.07.2023