

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL REVISION NO. 33 OF 2023

(Originating from the District Court of Gairo at Gairo, Criminal Case No. 37 of 2023)

JUMA YAHAYA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Ruling date on 26/07/2023

NGWEMBE, J:

This is a ruling originating from revision exercised suo motu by this court. The offence faced the applicant involved an offence of rape alleged to have committed on unprecedentedly long duration of exactly 2 ½ hours on the maize farm, it would have continued at the victim's house if it wasn't for intervention by the victim's son. Following routine visitation of Morogoro Prisons, to be exact at Wami prison, an inmate serving imprisonment term of thirty (30) years, therein lodged an oral complaint. This court called the trial court's record of Criminal Case No. 37 of 2023, from the District Court of Gairo District for inspection. The mission for this court in taking that course was to examine the record of such case for purposes of satisfying itself as to the correctness, legality or propriety of the findings, sentence and orders passed therein. This

court invoked revisional powers under **section 372 (1) of the Criminal Procedure Act, Cap. 20 RE 2022 (Henceforth the CPA) and Section 30 (1) of The Magistrates' Courts Act, Cap 11 R.E 2019.**

Upon the inspection of the record of the original case, it was revealed vividly that, before the trial court, one Juma Yahaya was charged with a single count of rape contrary to section 130 (1)(2)(a) and 131 (1) of the **Penal Code [CAP 16 R.E 202.** Juma Yahaya pleaded not guilty before the trial court. Nonetheless, upon a full trial, he was, on 15th June, 2023 convicted and sentenced to serve 30 years imprisonment. The calling of the record of the original case was resorted while aware that, the applicant was ready lodged notice of appeal for purposes of appealing to this court against the impugned judgment.

The aim for this step was to give room for this court to examine the nature of his complaint. The issue for this court's determination is whether the accused person herein is the one who raped the victim, thus proper identification of the accused.

From the records, it is clear that the prosecution lined up four (4) witnesses including the victim herself. PW1 testified that, on the fateful date at about 1800hrs while going to the farm the convict found her on the way, attacked her and take her to the maize farm where he pushed her down and inserted his penis into her anus three times, further he removed completely her under pant and raped her from 1830hours to 2000hours. PW1 testified that she was unable to make alarm because the convict prohibited her by inserting his finger into her mouth, while squeezing her neck, victim said she suggested to the convict around 2000hrs that they should go to her house, but she said that it was her

trick so that she can report the matter because she feared to be killed in the bush. The convict accepted the invitation while on the way to victim's house, they went to a local bar where the convict asked her to wait outside while he was taking something near that bar. Moreover, she testified that, she used that opportunity to enter into that bar and found her son inside and tell him the unfortunate tale, there after she prepared a trap with his son to catch the convict, on his way back to the convict saw the victim's son behind PW1 and that is when the convict ran away. She then reported the matter to the village chairperson whereby on the following day the convict was arrested.

Malogo s/o Wellos Muli PW2 who is a son to PW1, testified that, on 27/2/2023, while he was at a bar, PW1 found him there and informed him what happened and told him that, he doesn't know the victim as it was the first time that he met him, they went to the direction where the convict went, when approached the place, PW1 called the victim several times, in third time the convict responded unfortunately PW2 testified that the convict saw him as he was behind of PW1, and he asked PW1 who is with her, PW1 replied nobody, then the convict decide to run, but PW2 told the trial court that he identified the convict, he together with PW1 reported the matter and the convict was arrested on the following day, took him to police and PW1 was given PF3 for medical checkup.

PW3 WP 7716 DC Mamkwe testified that, she is working at Gairo Police station and that she was assigned the case to investigate, she recorded DW1 statement on which he refused any involvement on the allegations against him.

Paul s/o Boniface Kilonga PW4, the last prosecution witness testified that, he knew the convict and that on 28/2/2023 he was told by

the village chairperson to go to Kitaita as there is an incident where he came to know that, a woman was raped. Militia men were sent to arrest the accused. Suddenly, Militiamen came with the accused where together with the chairperson called and lined up more than ten boys including the convict and asked PW1 to point who raped her, she pointed the convict. From there they called police and handed the convict to them for further actions. Police also took the victim to the station for interrogation. He also testified that, the condition of PW1 was worse.

The trial court find the applicant to have a case to answer, and he was afforded right to be heard. Juma s/o Yahaya Athumani DW1 in his brief defence, he stated that on 8/2/2023 around 800hours was at his work place, he was arrested by two militia and told him that he is needed to the village executive office. On arrival, he was informed that he is accused with the offence of rape, he denied, nonetheless he was handed to police where he also denied the allegations, however he was arraigned in court for the offence of rape.

Rape is among serious offences attracting long sentence imprisonment; therefore, to prove that offence requires unshakable evidences. The question for determination in this revision is whether the applicant was properly identified on the scene of crime?

In the whole trial, three prosecution witnesses testified on what they heard from the victim (PW1), in fact, it is only the victim who experienced the alleged rape and had firsthand information of what real happened to her. Unfortunately, one may wonder why the victim was not taken for medical check-up on very day and soon after the event? Even in her testimonies she said none about it, only PW4 testified that she was taken to the dispensary and they refused to treat her and told her

that she should be taken to a Government Hospital at Gairo. Such evidence was never testified by the victim with no reason at all.

Much as I am aware of principle of best evidence on rape cases comes from the victim, however same requires extra consideration on reliability, credibility and truthfulness of the respective witness. This position is not new in our jurisdiction rather is a continuous process of screening reliabilities of witnesses on rape cases which always is very easy to alleged but equally very difficult to the accused to defend. I have witnesses even educated ones when they are caught on such accusations, they turn unable to speak and defend, others end up crying and hopelessly leaving it to Almighty God to defend them. Thus, to do justice, this court must always be under alert on possibilities of victimizations. Possibilities of victimization cannot be undermined in a society which speaking truth is becoming a foreign vocabulary. The same eye was seen by the Court of Appeal in the case of **Mohamed Said Vs. R, Criminal Appeal No. 145 of 2017** when held: -

"We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with the rules of evidence in general, and s. 127 (7) of Cap 6 in particular, and that such compliance will lead to punish offenders only in deserving cases."

Likewise in the case of **Juma Antoni Vs. R, (Criminal Appeal 571 of 2020) [2022] TZCA 250**, the Court of Appeal took the above precedent among others of its previous decisions and insisted that: -

"In the premises, although the best evidence of rape is that which comes from the victim, however, that is not a waiver on the court assessing the credibility in order to satisfy itself that the witness is telling nothing but the truth"

Taking into consideration the above precedents, in the whole trial, the only direct evidence was of the victim. Therefore, it is necessary for the ends of justice to screen her credibility and truthfulness before relying on her evidence.

It is clear that, the trial magistrate in convicting the applicant solely relied on the provision of section **127 (6) of the Evidence Act** and the famous case of **Selamani Makumba**, but the victim's truthfulness and credibility was not tested at all.

To recap with critical eye, the victim's testimony, the ordeal began from 1830hours to 2000hours. In more than two hours continuously, the victim was being raped by the applicant at maize farm. She also testified that the convict inserting his finger into her mouth while squeezing her neck to avoid her from raising alarm, was she kept in that position for all those hours? The victim also testified that after those hours of rehearsal she asked the rapist to go to her house to continue with their activities of sexual intercourse, thus the applicant accepted the invitation and, on their way, they stopped at one local bar, where the victim asked the applicant to wait him outside, while she was going nearby to take her chicken. The whole stories related to rape and invitation to the house of the victim and together were happily moving toward the victim's house does not convince any reasonable person leave alone this house of justice that there was rape.

Under the circumstance of this matter, undoubtedly, if at all there was rape, which is highly doubtful, then same was not established and proved to the required standard which is beyond reasonable doubt.

In totality, I proceed to quash the conviction and set aside the sentence of 30 years imprisonment meted by the trial court. I further order applicant be released forthwith unless otherwise held for any other lawful cause.

Order accordingly.

Dated at Morogoro in chambers this 26th July 2023.




P. J. NGWEMBE

JUDGE

26/07/2023


Court: Judgement delivered at Morogoro in Chambers this 26th day of July, 2023 in the presence of both sides.


Sgd: A.W. Mmbando, DR

26/07/2023

Court: Right to appeal fully explained.




Sgd: A.W. Mmbando, DR

26/07/2023