

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 85 OF 2022

(Arising from the Criminal Case No. 168 of 2019 of the District Court of Musoma at Musoma)

THE REPUBLIC APPELLANT

VERSUS

JOSEPH S/O JACKSON @ MANYAKI RESPONDENT

JUDGEMENT

09th & 11th August, 2023

L. M. KOMBA, J.:

This is the decision against an appeal by the Republic who was dissatisfied by the decision of the District Court of Musoma (the trial court) where the trial Magistrate acquitted the respondent from both two counts fronted on him. Respondent was faced the charge of rape contrary to section 130(1) (2)(e) and 131(1) both of the Penal Code, [Cap 16 R.E 2002, now R.E. 2022] and impregnating a primary school girl contrary to section 60 (A) of the Education Act as amended in 2016.

It was alleged by the prosecution that on various dates of the year 2018 and 2019 respondent raped the victim/ PW1 and cause her to be pregnant the status which was confirmed by the PW3 a clinical officer who tendered

Exh P1 which proved that victim was 7 month and two weeks pregnancy. Victim mentioned the respondent to be responsible of the pregnancy but respondent denied the facts by plead not guilty. Following the plea, prosecution had 4 witnesses and one exhibit to prove their case. As hinted earlier, the Trial Magistrate acquitted the accused hence this appeal by Republic with two grounds that;

1. That, the learned Trial Magistrate grossly erred in law and fact to state that failure by the victim to state date and month on which was raped raise doubt to her evidence.
2. That, the learned trial magistrate grossly erred in law and fact to hold that the charge of rape was not proved by the prosecution while the same was proved beyond reasonable doubt.

On 09th August, 2023 when the matter was scheduled for hearing, Republic was represented by Ms. Beatrice Mgimba, Mr. Isihaka Ibrahim and Mr. Abdulher Sadik all being State Attorneys and the respondent had legal service of Mr. John Manyama.

When given the floor Mr. Abdulher (SA) express their grievances over the decision claiming that prosecution managed to prove their case beyond reasonable doubt. He disputed the acquittal basing on shortfalls as during trial prosecution side had the duty to prove the offence of rape which was proved. He said in rape offence only what was need was to prove penetration and the age of the victim as the offence was statutory rape.

He submitted that the victim informed the trial court her age that was 17 years and it was collaborated by PW2 whom informed the trial court that

his daughter was born in 2003 (page 12 and 15 of the trial court proceedings). It was his submission that it settled the age of the victim can be proved by victim herself, parents or birth certificate. In the case at hand the age was mentioned by the victim and was collaborated by PW2.

On the second ground it was his submission that victim explained during trial that he was invited to respondent house in the year 2018 and they had sexual intercourse and that they practice between 2018 and 2019 when she noted to be pregnant. He relied **in the case of Selamani Makumba** that in rape cases the evidence of the victim is the best and submitted that date and month is immaterial on statutory rape. I refer the S. 234 (3) of Cap 20 (CPA) explain circumstance when there is variance there is remedy that if the charge was not amended and the evidence was not far away the section covers variation and pray this court to find the trial Magistrate errored and convict the respondent.

Mr. Manyama agree with the submission that the age can be proved by the victim but in this era where birth certificates are issued almost everywhere, prosecution was supposed to prove the birth of the victim and not mere words. He said, failure to tender any exhibit to prove the date of birth creates doubts. It was further submission that there is possibility the victim can met with another man as what make the secret to be revealed is the pregnancy of the victim and therefore relying on the mere words of the appellant adduced in evidence will create danger in the society. This counsel was in support of the findings of the trial Magistrate as he agrees that penetration was proved but who penetrated the victim was the question which was not answered by the prosecution. Failure to collaborate

what was testified by the victim makes the offence not to be proved. Who saw the victim going in or coming out from the house of respondent?. He said testimony of the PW2 is not enough as he was informed by his daughter.

On the second ground Mr. Manyama had a very short submission that why didn't the prosecution summon a teacher from the school which she was attending the victim or tender registration of the victim. He said there is huge doubt in prosecution and prayed the appeal to be dismissed.

I have thoroughly gone through the petition of appeal, the parties' submissions and the appellant's complaint in this appeal. It's the duty of this court to determine whether the appeal is meritorious. At the outset, let it be known that in criminal cases, it is upon the prosecution to prove its case against an accused person beyond reasonable doubt. See **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 CAT at Mbeya. I will analyse both grounds of appeal jointly starting with the first ground on failure to mention the date and month when the crime took place.

Charge are creature of law under the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA). The and law and section provides;

'132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.'

In the case at hand, the particulars of the offence do not indicate the date(s) the alleged rape were committed. The charge sheet should always indicate the date(s) on which the alleged offence was committed. The need to do so is not far to get- it will enable the accused know the case he is going to face and prepare himself for his defence. See **Mayala Njigailele vs. Republic, Criminal Appeal** No. 490 of 2015 CAT at Tabora.

The same court in another case of **Anania Turian vs. Republic**, Criminal Appeal No. 195 of 2009 (unreported) made the following observation, as I quote;

'When a specific date of the commission of the offence is mentioned in the charge sheet, the defence case is prepared and built on the basis of that specified date.'

I find failure to indicate the time, date and month of the incident in the charge sheet goes contrary to S. 132 of the CPA and render the charge defective. On the defective charge, the offence cannot be said to be proved.

As I said earlier it is the duty of the prosecution to prove the offence beyond reasonable doubt, prosecution was supposed to prove that the victim was a school going girl not by mere words. Circumstances of the case at hand requires more prove that the victim was school girl to amount an offence under section 60(A) of the Education Act as she used to be in love affairs for two years, what type of pupils was that. Am not doubting rape of the girl of the age below 18 years but am doubting whether the victim was a school going girl. It was the prosecution to clear this not by

mere mentioning the school, rather as the trial Magistrate found, more proof was needed in order to prove beyond reasonable doubts.

The crucial issue in this appeal is whether prosecution managed to prove the offence to the required standard. Reading prosecution witness and testimony I find the following on the age and status of the victim;

PW1...*'on 2018 I was going to school I was standard VI **pupil at Kambarage "A" Primary** school. In 2019 I was in standard VII and 16 years old....'*(Page 12 of the proceedings).

PW3 who prepare Exh P1 on 25/11/2019 record *'...being having sexual relationship with old man of same street for almost 2yrs despite of **being a sec school student** a situation that was resulted...'*

I find the following on the who penetrated the victim;

PW2; *'...my daughter told me, it was true and the one who impregnated her was baba Sabato'*(page 15 of the proceedings).

PW1; *'...my father asked me, are you pregnant? I replied yes. He further asked to whom the same belong? I replied to Mr. Joseph Manyaki'*(page 13 of the proceedings).

I find I need not to dwell much on whether prosecution managed to prove the charge as the above excerpt express everything. It is the settled position that contradiction can be considered as fatal if it is material going to the root of the case. See. **Sebastian Michael & Another vs. The Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018, CAT

at Mbeya. It is also settled that doubts should benefit appellants. See **Chacha Ng'era vs. The Republic**, Criminal Appeal No. 87 of 2010 (July 2013) CAT at Mwanza and **Marwa Joseph @ Muhere & Another vs. Republic**, Criminal Appeal Case No. 96 of 2021.

By the time of trial the victim was already gave birth to her baby, as the dispute was who impregnated the victim then prosecution could use scientific method (DNA test) to know the father of the baby and could confirm whom raped the victim but decided to sleep on that option.

I find no need to fault the trial Magistrate on his findings and I will not disturb the verdict. In mean time the appeal has non meritorious and I hereby dismiss it.

DATED in MUSOMA this 11th Day of August, 2023.




M. L. KOMBA

Judge

Judgement delivered while this court was connected from Tarime District Court and in the presence of Mr. Lusako Mwaiseke State Attorney from Tarime NPS Offices and counsel for Respondent connected from his chamber.


M. L. KOMBA

Judge

11 August, 2023