

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB - REGISTRY

AT SONGEA

DC. CRIMINAL APPEAL NO. 30 OF 2023

(Originating from Mbinga District Court in Criminal Case No. 55 of 2022)

TUNUEL BOSCO SANGANA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 03/08/2023

Date of Judgment: 28/08/2023

U. E. Madeha, J.

It is worth considering the fact that, this appeal is originating from the decision made by Mbinga District Court (hereinafter referred as the trial Court) in Criminal Case No. 55 of 2022, in which the above-named Appellant was charged, tried and convicted for an offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the *Penal Code* (Cap. 16, R. E. 2019). It was alleged by the prosecution that on 23rd day of October, 2022 at Mpepai Village within Mbinga District, the Appellant did have carnal

knowledge with a girl of ten years old. Upon conviction, the Appellant was sentenced to serve thirty (30) years imprisonment and he was ordered to pay Tanzanian shillings five hundred thousand (TZS. 500,000.00) as compensation to the victim.

The Appellant was dissatisfied with both conviction and sentence and he lodged this appeal on the following grounds of complaints:

- i. That, the trial Court erred in law and facts to convict and sentence the Appellant while the offence was not proved beyond reasonable doubt.*
- ii. That, the trial Court erred in law and facts by convicting the Appellant basing on the evidence adduced by the girl of ten years who never know God and duty to speak the truth.*
- iii. That, the trial Court erred in both law and facts by convicting and sentencing the Appellant without taking into consideration the defence given by the Appellant that he paid dowry to the family of the victim with intention of marrying the victim's sister but the family of the complainant decided to make fabricated case against him.*
- iv. That, the trial Court erred in law and facts by convicting and sentencing the Appellant while penetration as a key element for the offence of rape was not proved.*

In a nutshell, the evidence which led to the Appellant's conviction are to the effect that: PW1, who is the victim's mother, testified that on the incident date PW3 (the victim who is aged ten years old and she is a Primary School Pupil) complained that she had abdominal pain. As a concerned mother, she interrogated her and PW3 told her that the Appellant is the one who had caused the pain. PW3 told her further that the Appellant had carnal knowledge with her. PW1 examined PW3 and she was shocked to find PW3's vagina had bruises and she could not even walk properly. After that the matter was reported to the ten-cell leader. As a result, the Appellant was arrested and sent at the Village Government Office. Later on, they reported the matter at the Police Station where they were given the PF3 and went to the hospital.

Moreover, PW2 (Samwel Gwedu) the Clinical Officer who examined the victim testified that he found the labia majora and labia minora of the victim's vagina were swollen. In addition, he revealed that the vagina of the victim was penetrated by a blunt object. For more clarification, the report filled in the PF3 was tendered and received during trial as an exhibit PE1.

Basically, PW3 (victim) told the Trial Court that the Appellant had carnal knowledge with her when they were at the Appellant's home where she went after being promised to be given money. She added that, after the incident she experienced abdominal, vagina and thigh pains however she never told her mother nor her teacher until the third day when her mother noticed her to be not in a normal condition. In the same way, PW1 and PW3 told the Trial Court that the Appellant is their neighbour and they are living in the same locality.

When the appeal was called on for hearing, the Appellant appeared in person and fended for himself. The Respondent was represented by Ms. Montana, the learned State Attorney.

Arguing in support of the appeal, the Appellant submitted that the case against him was fabricated due to the conflict which he has with the victim's family. He stated that the conflict was on the bride price which he paid with the aim of marrying the victim's sister who was allowed to be married by another person. That conflict was reported to the Village Government but nothing was done. After three days he was surprised to be arrested and sent at the office of the Village Executive Officer.

The Appellant submitted further that the prosecution stated that the victim was found to be with bruises in her thighs but those bruises may be caused by different ways. He added that the doctor's findings do not prove that the victim was raped. He contended further that the victim's mother testified that she discovered that her daughter was raped after three days but her daughter who is the victim denied to be raped.

On the other hand, Ms. Montana resisted the appeal. She submitted that the offence of rape was proved beyond reasonable doubt. She added that the evidence shows that the victim (PW3) told the trial Court that she was raped by the Appellant. Ms. Montana stated further that the doctors evidence proved that the victim was raped and her labia majora and minora had bruises as it was indicated in the PF3 (Exhibit PE1).

On the second ground of appeal Ms. Montana submitted that section 127 (2) of the *Evidence Act* (Cap. 6, R. E. 2022) requires for the child of tender age to promise just to speak the truth and PW2 (the victim) promised to speak the truth.

On the third ground of appeal, Ms. Montana stated that the defence evidence was considered and at page eight of the judgment the defence of

alibi was discussed at length. She submitted further that, since this is the first appellate Court, it can step into shoes of the trial Court and re-evaluate the evidence and reach into its decision.

On the fourth ground of appeal, the learned State Attorney for the Respondent argued that in this case penetration as a key element in rape cases was proved. He stated that the doctor proved that there was penetration and bruises on the labia minora and majora and the vagina was swollen. She added that the victim also testified that she felt pain after having carnal knowledge with the Appellant.

Ms. Montano stated further that the allegations made by the Appellant that the doctor who examined the victim told the trial Court that he inserted his fingers on the victim's vagina and he was the one who penetrated the victim has no merit since the doctor was performing his duty of examining the victim. Lastly, she stated that the offence of rape against the Appellant was proved to the required standard and she prayed for this appeal to be dismissed.

In his short rejoinder, the Appellant submitted that the doctor was the one who penetrated into the vagina of the victim by inserting his

fingers, since he told the trial Court that he did so. He added that he never committed the offence of rape and his case was due to the conflicts which he had with the victim's family on payment of bride price. Lastly, he prayed for this appeal to be allowed.

From the grounds of appeal, submissions made by both parties and the original records of the trial Court, I find there are four issues which needs to be determined in this appeal. The *first* issue is whether penetration was proved? *Second*, is whether the testimony given by the victim does not qualify to be evidence? The *third* issue is whether the defence evidence was not considered by the trial Court in composing its judgment and *fourth* is whether the offence of rape was proved beyond reasonable doubt.

To begin with, on the issue of whether penetration was proved, according to the testimony given by PW1 and PW2, after examining the vagina of PW3, they found bruises and it was swollen. In fact, PW2 revealed that PW3's vagina was penetrated by a blunt object. The PF3 (exhibit PE1) which was filed by PW2 shows that the hymen of PW3's vagina was perforated. Additionally, PW3 also testified that she felt pain

after having carnal knowledge with the Appellant. As far as I am concerned, I find penetration was proved to the required standard.

Considering the issue of the testimony given by the victim who is a child of tender age, this Court is of the view that, since PW3 promised to tell the truth it was enough to be considered as evidence in law. The provision of section 127 (2) of the *Evidence Act* (Cap. 6, R. E. 2022), requires a child of tender age just to make a promise, to speak the truth, and not to know God as alleged by the Appellant. For easy of reference, I will reproduce the wordings of section 127 (2) of the *Evidence Act* (supra), which reads:

"any child of tender age may give evidence without taking oath or affirmation, but before giving evidence, must promises to tell the truth to the Court and not to tell lies".

Principally, in the above cited provision provides two (02) conditions; *one* the child of tender age is allowed to give evidence without an oath or an affirmation and *two*, before giving evidence such child is mandatorily required to promise to tell the truth to the Court. This stance was stated by the Court of Appeal of Tanzania in the case of **Msiba Leonard Mchere**

Kumwaga v. Republic, Criminal Appeal No 550 of 2015 (unreported). It was observed as follows:

"... Before dealing with the matter before us we have deemed it crucial to point out that in 2016 section 127 was amended vide Written Laws Miscellaneous Amendment Act No 4 of 2016 (Amendment Act) Currently, a child of tender age may give evidence without taking oath or affirmation provided he promises to tell the truth and not lies."

Also, in the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018, the Court put more emphasize on this stance.

It is worth considering that, in the above cited cases the Court stated that witnesses of tender age can be asked simplified questions which may not be exhaustive depending on the circumstances of each case such as; the age, the religion which the child professes and whether he/she understand the nature of an oath. After that the child must promises to tell the truth and not to tell lies as stated in the case of **Msiba Leonard Mchere Kumwaga v. Republic** (supra).

Therefore, when the promise is made, the same must be recorded before recording the evidence. In this appeal, PW3 (the victim), promised

to tell the truth. I am of the view that all the requirements laid in the above cases were met.

On the third issue of whether the defence evidence was considered, the Appellant's complaints are on the bride price which he paid to the victim's family. It is important to note that in statutory rape, as it is in this appeal, payment of dowry/bride price is not a defence. Also, the Appellant contended that the case against him was fabricated but the available evidence proves that he committed the offence he was charged as a result he was convicted.

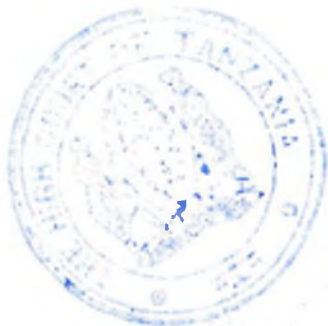
Furthermore, on the issue of whether the offence was proved to the required standard, having gone through the available evidence, it is crystal clear that PW3 told the Trial Court that the Appellant has carnal knowledge with her. She further told the trial Court that she experienced vagina, thigh and abdominal pains after that act. Moreover, PW1 and PW2 examined the vagina of PW3 and testified that they found her vagina to be swollen (both labia minora and majora) and the hymen was perforated suggesting that it was penetrated by a blunt object.

As much as I am concerned, I find penetration which is an essential element for the offence of statutory rape was proved by the testimony given by PW1, PW2 and PW3. The prosecution evidence proved all the ingredients of the offence of rape to the required standard.

The remaining issue is whether the Appellant was the one who committed the offence of rape against the victim. It is a legal principle that in rape cases, the best evidence is that of the victim. See the case of **Seleman Makumba v. Republic** (2006) TLR 379 and **Akwino Malata v. Republic**, Criminal Appeal No. 438 of 2019. In this appeal, the victim told the trial Court that the Appellant had carnal knowledge with her and thereafter she felt abdominal, vaginal and thigh pains. Therefore, I am of the opinion that the offence of rape against the Appellant was proved to the required standard of proving beyond reasonable doubt.

In light of the above, this Court finds the appeal to have no merit and proceeds to dismiss it. The conviction and sentences of the trial Court are hereby upheld. It is so ordered.

DATED and DELIVERED at **SONGEA** this 28th day of August, 2023.



A handwritten signature in blue ink, appearing to read "Madeha", with a long horizontal stroke extending to the right.

U. E. MADEHA

JUDGE

28/08/2023

COURT: Judgment is read over in the presence of the Appellant and Mr. Madundo Mhina, the learned State Attorney representing the Respondent. Right of appeal is explained.



A handwritten signature in blue ink, appearing to read "Madeha", with a long horizontal stroke extending to the right.

U. E. MADEHA

JUDGE

28/08/2023