

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 29 OF 2023**

(Originating from Criminal Case No. 120/2021, Temeke District Court)

**JUMA ABRAHAM ISSA.....APPELLANT**

***VERSUS***

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

**JUDGMENT**

22/08/2023 to 18/09/2023

**E.B. LUVANDA, J**

Juma Abraham Issa the Appellant herein is a traditional healer and the victim was his client who was experiencing a challenge of cessation of menstruation at the age of twenty three years old. The victim was introduced to the Appellant by her parents, the former promised to attend her problem. On the fateful day, the Appellant lured the victim that he will inject some herbal into her vagina by way of insertion through penis where the Appellant took his penis then committed sexual intercourse with the complainant. The trial court believed the evidence of the victim (PW1), sustained conviction and sentenced the Appellant

to thirty years imprisonment. In the petition of appeal, the Appellant raised one ground of appeal, later added four supplementary grounds of appeal.

One, the prosecution failed to prove its case beyond reasonable doubt, Two, the Appellant's defence was not considered; Three, the trial court did not comply with the provision of section 192(3) of the Criminal Procedure Code, Cap 20 R.E 2022; Four, the doctor who examined the victim did not testify; Five, the evidence of PW1 and PW2 was contradictory.

Ground number one, the Appellant faulted the trial court that it grossly erred in law and fact to convict and sentence the Appellant in a case which prosecution failed to prove its case beyond reasonable doubt.

In reply, the learned State Attorney submitted that the nature of sexual offences involve two persons, arguing the testimony of the complainant is most crucial and must be examined and judged contiously, citing **Seleman Makumba vs. Republic**, Criminal Appeal No. 94/1999. She submitted that in this case prosecution proved the charge beyond reasonable doubt, by the complainant citing pages 6, 7, and 8 of the trial court proceedings.

In this case the Appellant had admitted a fact that on 11/02/2022 he was at the house of Halima Ally Said (PW2) and was assigned to attend the victim (PW1). PW1 explained that on the fateful day, the Appellant asked her to take some water to the washroom, where the Appellant also visited there with some medicine in water. PW1 explained that the Appellant ordered her to undress

clothes so that to take bath of those herbal medicine. Thereafter PW1 saw the Appellant laying a paper on the ground inside the washroom and said he will fuckher in order for menses to discharge. Then the Appellant fucked her while the Appellant pushing her on the chest and after completing, he asked the complainant to take bath, where the victim was taking bath while crying. Contextually crying immediately after sex, connote serious concern from the victim with an indication that she did not consent, also expressing pain, with generalized unpleasant bodily sensations with severe emotional distress on her mind, for having sex with a traditional healer. This can be indicated by the time PW1 (victim) appeared in court to testify, upon seeing the Appellant, and immediately after narrating the ordeal, she embarked into crying and the trial magistrate was smart enough, responded quickly by recording her demeanor being emotional, crying throughout when testifying.

At this juncture, it is pertent for me to reproduce the reasoning of the learned resident magistrate before making a shrp u -turn to a verdict of guilty, as reflect almost the whole of page five of his judgment save for the first line on the top and the last two lines at the bottom. I reproduce it.

*Apart from her there is no any other evidence from prosecution which proves that accused had sexual intercourse with the victim. Besides the victim stated that since she was not happy about that she cried and his parents discovered the ordeal. They decided to report to the police*

*station. She added that at police station she was given a PF3 and went to hospital where she was examined by a doctor who gave her HIV preventive medicine. Unfortunately, in this court there is no any report showing that she was checked and proved that she had sexual intercourse on that date. She also never stated which hospital was she examined. The doctor who examined her never testified in this court. The victim further stated in cross examination that she agreed to have sex with accused simply because he said it was treatment of her problem. Despite her mother saying that they went to hospital but never stated even the name of that hospital. Unfortunately, PW4 who said that she is an investigator of this case, never tendered the PF3 in court nor stated it whereabouts due to the fact that she made follow up of it at Mbagala Zakheem hospital”.*

My take is that apart from PW1 being emotional and expressing sorry, vindicating non consensual sex, however the prosecuting officer seemingly he overlooked a fact that a case before the trial court was not rape in a context of non consenting, rather rape committed in the circumstances of someone who is a traditional healer taking advantage of his position and committing rape on a woman who is his client for healing purpose. Herein, PW1 was evacuated from the sitting room where her aunt and brother in law were sitting and led to the

wash room, which is a private place, where PW1 was recorded to had uttered the following statement, I quote in verbatim,

*"...akatandika karatasi chini akaniambania nataka nikutombe ili damu zako za hedhi zitoke".*

*Then akanitomba while pushing me at my chest. When he completed he asked me to take bath and go out. So I was taking bath while crying"*

PW1 said nothing inference of a traditional healer committing rape for healing purposes. The evidence on the element to the effect that the Appellant committed rape to PW1 for healing purpose, was introduced by PW3 who is PW1's in law. According to PW3 alleged he was was told by PW1 that the Appellant smeared some powdery medicine on his member then inserted into PW1's vagina. This fact was not forthcoming even to PW2 who is PW1's mother who was the first to hear from PW1 immediately after the act. PW2 only stated that PW1 informed her that the Appellant fucked her (PW1).

It is the law that in sexual offences the best evidence must come from the victim herself. In the case of **Godi Kasenegala vs. Republic**, Criminal Appeal No. 10/2008, CAT at Iringa, at page 13 the apex court ruled, I quote,

*"It was stated with sufficient lucidity by this Court in the case of **Seleman Makumba vs. Republic**, Criminal Appeal No. 94 of 1999 (unreported) that:-*

***"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant that there was penetration"** bold added.*

Apart from this important element to have been missing from the mouth of PW1, the evidence of PW2 and PW3 was marred with contradictions. While PW2 stated that after the Appellant had asked PW1 to take water to the bathroom, thereafter the Appellant followed PW1 thereat, PW2 stated that meanwhile she went to sit with her husband (PW3) at the sitting room. This differ with PW3 who stated that at that moment, when PW1 and Appellant were proceeding to bathroom, he (PW3) remained at the sitting room, while PW2 proceeded to make follow up of her child (PW1). PW2 stated that while at the sitting room, she heard a child who was playing outside saying PW1 is crying, where PW2 went outside and found PW1 crying who narrated to her that she was fucked. This version differ with PW3, who was silent regarding a child playing outside being the first to alert that PW1 was crying, rather PW3 portrayed that after PW2 had proceeded along

with PW1 and Appellant for purpose of trailing them, she never come back until when over suddenly comeback and informed PW3 that PW1 was fucked.

In view of the reasoning of the learned resident magistrate above which I have quoted with approval, being a correct approach, and in view of the essential elements showing that the rape was committing in furtherance of healing purposes, which is wanting, and the discrepancies depicted above, it cannot be said a charge of rape was proved beyond reasonable doubt.

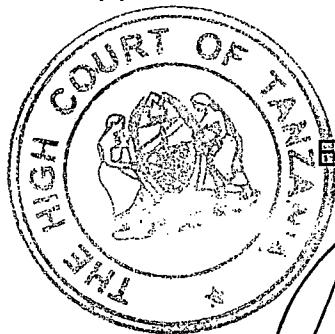
In the upshot, conviction is quashed and sentence of thirty years set aside. The Appellant to be released forthwith unless held for other lawful cause.

Appeal allowed.



E.B. LUVANDA  
**JUDGE**  
18/09/2023

Judgment delivered in the presence of Ms. Agness Mtunguja learned State Attorney and the Appellant in person.



E.B. LUVANDA  
**JUDGE**  
18/09/2023

**COURT:** Appellant's Physical Address: Ruvuma Namtumbo, Nambendwa Ward Village.