

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 84 OF 2021

(Originating from Criminal Case No. 81 of 2020 from Nkasi District Court)

ISMAIL S/O BENJAMINI APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

18/07/2023 & 11/08/2023

MWENEMPAZI J.

The appellant was charged with and convicted of the offence of rape contrary to section 130(1) and (2) (c) read together with section 131(1) of the Penal Code, [Cap 16 R.E 2019]. He was sentenced to serve a term of thirty (30) years in jail. He is aggrieved with conviction and sentence hence he has filed a petition of appeal with eight grounds of appeal, namely:

1. That the case was not proved beyond reasonable doubt by the prosecution hence unlawful conviction and sentence.

2. That, the magistrate erred in law and fact for conviction and sentencing an appellant basing on the evidence of PW1 who does not clarify if she found her daughter to an appellant.
3. That, the trial magistrate erred in law and fact for convicting and sentencing and appellant without considering the evidence adduced by a doctor.
4. That, a trial magistrate erred in law and fact for convicting and sentencing an appellant basing on the evidence adduced by PW2 without considering the reality given by her.
5. That, a trial magistrate erred in law and fact for convicting an appellant basing on evidence given by PW3 because a witness knew nothing about relationship between the appellant and the victim.
6. That the trial magistrate erred in law and fact for convicting and sentencing the appellant basing on the ambiguous statement given by PW4 who does not clearly state where did he arrest the appellant, whether in street where he saw him or at house of Sindano Ramadhani.
7. That, a trial magistrate erred in law and fact for convicting an appellant without considering the statement given by an appellant during his defence.

8. That, a trial magistrate erred in law and fact for convicting an appellant basing only on an corroborated evidence adduced by PW2.

The appellant prays that the appeal be allowed and conviction be quashed and sentence set aside, so that he is released from prison.

According to the facts of the case the victim is a student aged 15 years old. In the testimony of Rosa Ramadhan, PW1, PW2 was born on the 17th day of July, 2003. She went missing on the 1st June, 2020 during the night time. Efforts to look for her were not fruitful and on the 3rd day of June, 2020, her mother PW1 went to inform the teacher that her daughter is missing. On the 5th day of June, 2020 PW1 went at Damasi Village where she found her daughter in the fenced house. Upon inquiry, the victim explained her missing that on the date she went missing she was abducted by the accused (appellant) while on her way from her uncle. She admitted that they had an affair and they were engaged in sexual intercourse at her consent.

According to PW2 Datus Bada, PW2, the victim was registered as a pupil at Lupata Primary School with admission number 41 of 2015. The admission register was admitted as exhibit P1.

PW4 Hamid Sadock Malala is the chairperson of Chele Hamlet. He received a call on 4/6/2020 from the chairperson of Mkinga Hamlet, known by the name of Bawili. The latter informed PW4 that the accused has committed the offence; to wit to marry a school girl. He searched for the accused found him and arrested him. He testified that he interrogated him and the accused admitted.

In the process, the victim's mother took the girl to the hospital, Namansi Dispensary apparently after obtaining the PF3 from the police, because the Clinical Officer, PW5 Gidahuland Juwal testified he is the one who examined the girl and filled it. In the examination of the girl, he made the finding that there was no penetration. Pregnancy test was negative. That PF3 was admitted as exhibit P3.

At the hearing of an appeal, the accused denied that he committed the offence and prayed this court allows the appeal. The respondent was represented by Ms. Ashura Ally, learned State Attorney. In her submissions, she stated that they are supporting the appeal. She argued that the offence with which the appellant was charged with is a statutory rape. The elements to be proved are age of the victim which was proved by PW1, penetration and if the accused is linked to the commission of the offence.

Though the victim testified that they had sexual intercourse with the accused, but penetration was not affirmed by the clinical officer upon examination. She thus argued that the offence was not proved to the standard. She cited the case of **Mohamed Said Vs. Republic**, Criminal Appeal No. 145 of 2017, Court of Appeal Tanzania at Iringa that:

"Evidence of victim should not be taken as a gospel.

There must be truth in it".

She prayed that the appeal be allowed as prayed.

I have read the record as summarized herein above, there was no penetration hence, the offence was not proved as was alleged in the charge sheet. There was no penetration and that has been confirmed by the clinical officer PW5. Even if we assume that the accused was the one who took the girl, the evidence is not clear and straight forward that the accused was found with the victim. It is only testified by PW1 that she found her daughter in a fenced house and the owner is unknown.

Therefore, the case against the accused person was not proved to the required standard and the doubt is resolved in favour of the accused person. The appeal is allowed, judgment of trial Court quashed, sentence

set aside. The accused be released forthwith unless otherwise he is lawfully being held for another cause.

It is ordered accordingly.

Dated and delivered at Sumbawanga this 11th day of August, 2023.




T.M. MWENEMPAZI
JUDGE