

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA SUB-REGISTRY
AT MWANZA**

CRIMINAL APPEAL NO. 87 OF 2023

(Original Criminal Case No. 63 of 2022 of Ilemela District Court)

JUMA MUGULUS-----APPELLANT

VERSUS

THE REPUBLIC -----RESPONDENT

JUDGEMENT

4th & 29th September, 2023

ITEMBA, J.

The appellant, **JUMA MUGULUS** was arraigned before the District Court of Ilemela at Mwanza for the offence of Rape contrary to sections 130(1), (2)(e), and 131(3) of the Penal Code Cap. 16 RE: 2019 (now RE: 2022). It was alleged that on the unknown date of March 2022, at Bwiru area within the Ilemela District and Mwanza region, the appellant had unlawful sexual intercourse with a girl aged eight (8) years who, for purposes of concealing her identity will be referred to, in this judgment, as the victim. From the facts at the trial court, the victim, lived with the family of PW3 and PW4 who were her guardians whom she considers as her parents. She also knew the appellant since he used to live with them and assist in some household chores and grazing animals. On the fateful night, the victim's parents had travelled and the victim was sleeping with

her 8 years old sister who is also a primary school student named 'AZ' and who testified as PW2. In the room, there was also a boy younger than PW1 and PW2 named Emma. The sleeping arrangement was that the victim shared a small bed with PW2 and the appellant was on his own big bed. Then, the appellant took the victim from her bed to his and raped her. After the act, he warned her not to tell anyone otherwise , he will kill her, and he then disappeared. There was solar light in the room and PW2 witnessed what happened. Upon PW3 returning home from safari, PW2 told him that the victim was in pain and could not walk properly. PW3 took the victim to Sekou Toure Hospital. She was examined by Dr. Mhoja Samson (PW6) who also produced a PF3 (Exhibit P1) showing that she had signs of being raped recurrently. In his defence, the appellant denied having committed the offence and raised the defence of alibi that he was at Ukerewe Island between January and March 2022.

After the conduct of the full trial, the appellant was found guilty of the offence of rape and he was sentenced to life imprisonment. Aggrieved, he is before this court appealing against the conviction and sentence and fronted the following grounds of appeal thus:-

- 1. THAT, the victim evidence was received c/s 127 (2) of the Evidence Act, (Cap 6, RE:2022). Therefore, the entire testimony is null and void and ought to be expunged from the court records.*

2. *THAT, the presiding magistrate failed to comply with S. 210 of CPA, (Cap 20, RE: 2022) and hence did not append his signature soon after been recorded the evidence of the witness (es).*
3. *THAT, the identifying witness (es) were/was failed to explain the light intensity and the record are quite as to which kind of source of light propelled the identifying witness (es) to recognize the]culprit.*
4. *THAT, the penetration and age as are crucial ingredients in SOSPA were not positively established.*
5. *THAT, the prosecution side failed to prove the offence beyond all reasonable doubt considering the appellant is mentally disturbed.*

The appellant engaged the service of Emmanuel Paul Mng'arwe who also filed a petition of appeal with one ground to wit: -

1. *That the trial court erred in law and in fact by convicting and sentencing the appellant while the prosecution failed to prove the case beyond reasonable doubt.*

When the appeal was scheduled for hearing, the appellant was present and represented by Mr. Emanuel Mng'arwe learned advocate while the respondent was represented by Mr. Evance Kaiza learned State Attorney.

Mr. Mng'arwe was the first to submit and he opted to rely on the petition of appeal which he filed and abandoned the grounds of appeal on the appellants' petition. He started by stating that the prosecution failed to

prove the case beyond doubt. He referred the court to pages 11 and 18 of the typed proceedings that there is a contradiction on where exactly was the victim raped, was it on the appellant's or the victim's bed? He also commented on the different versions of who informed PW3 about the victim being raped, because the victim said she did not inform PW3 but PW3 claims that he was informed by PW2 and not the victim. Referring to the testimony of the medical doctor that the victim was raped about a month earlier and had a recurrent rape, he questioned whether, under those circumstances, the appellant could be a perpetrator. He also claimed that if the victim had Urinary Tract Infection (UTI), then a test would have been done on the appellant as well. To support his argument, he cited the case of **Elipidius Rwezahula vs Republic** Criminal appeal No. 107 of 2020, which provides that, a rape case is the easiest to frame.

He insisted that the two elements of statutory rape which are the age of the victim and penetration were not proven. That, the age of the victim was stated by his father but there were no supporting documents. He relied on the case of **Athuman Abdalah vs Republic** Criminal Appeal No. 29 of 2022 insisting that the medical doctor was supposed to prove penetration. He also cited the case of **Athuman Juma vs Republic** Criminal Appeal No. 02 of 2022 that the court must be warned of the

danger of convicting innocent people considering the contradictions among witnesses. He therefore prays for the appeal to be allowed.

In reply, Mr. Kaiza learned state attorney for the respondent, opposed the appeal. He supported both the conviction and sentence. Submitting on the claim that the age of the victim and penetration was not proved, he avers that both PW3 and PW4 testified that the victim was 8 years old and was born on 13.08.2014. Referring to the case of **Japhari Musa vs DPP** Criminal Appeal No. 234 of 2019 he maintained that proof of the age of the victim can either be proved by documents, parents, relatives or a teacher and it is not mandatory to bring documents. On the issue of penetration, he submitted that the victim proved that it was the appellant who raped her. He refers to the case of **Seleman Makumba vs Republic** 2006 TLR 379 which creates the principle that, in rape cases, the best evidence is from the victim. He went on that, PW2 corroborated the evidence of the victim. On the issue that the victim was found with UTI so the appellant ought to have undergone a UTI test, referring to the case of **Seleman Moses Sotel @White vs Republic** Criminal appeal No. 385 of 2018, he submitted that there was no need for a test because UTI can be caused by many reasons including poor hygiene.

On the issue of contradictions, he insisted that they are minor and do not go to the roots of the case.

Rejoining, Mr Mng'arwe insisted that the contradictions go to the roots of the case and, therefore, have to be taken into account. When the court probed the appellant on his relation to the victim and her family, he admitted to have known the victim. That, the victim's family stayed with him following his uncle deserting him and after 3 years, he started fishing and moved out from the said family house. He insisted on not being at the scene as alleged by the prosecution.

After the rival submissions by parties, the central issue to be determined is whether the prosecution managed to prove the case beyond a reasonable doubt.

The law is clear under section 3(2)(a) of the Evidence Act Cap. RE: 2019, that in criminal matters, a fact is said to be proved where the court is satisfied that the prosecution, beyond a reasonable doubt, managed to prove that the fact exists. While the prosecution has a burden to prove the case beyond reasonable doubt the accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence. See **Mwita and Others vs Republic** [1977] TLR 54 the **Woolmington vs Director of Public Prosecutions** [1935] AC 462; **Mohamed Haruna @Mtupeni & Another vs Republic**, Criminal Appeal No. 25 of 2007.

The offence of rape is created under sections 130 and 131 of the Penal Code to wit; -

130.-(1) *It is an offence for a male person to rape a girl or a woman.*

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a) N/A;

(b) N/A;

(c) N/A

(d) N/A

*(e) with or without her consent when **she is under eighteen years of age**, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

(4) For the purposes of proving the offence of rape-

*(a) **penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;***

131.-(1) *Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.*

*(3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be **sentenced to life imprisonment.***

The appellant's learned counsel claims that there were contradictions on the prosecution evidence and the elements of the offence of rape such as age and penetration were not proved.

Essentially, age is of the essence in establishing the offence of statutory rape under section 130(1)(2)(e) of the Penal Code, Cap 16 RE: 2019. Moreso, under the provision, for a statutory rape to be established, it is a requirement that the victim must be under the age of eighteen years. See the case of **Robert Andondile Komba vs DPP**, Criminal Appeal No. 465 of 2017. As I perused the records on pages 17 and 32 of typed proceedings, both PW3 and PW6 who are the victims' guardians and medical doctor stated that the victim was of the age of 8 years old. As stated in the cited case of **Japhari Musa vs DPP** Criminal Appeal No. 234 of 2019 the victim's age can be proved by the parent, guardian or the victims themselves. See also: **Wambura Kigingwa vs Republic**, Criminal Appeal No. 301 of 2018. Based on the deliberations, I therefore find that the age of the victim was properly proved.

On the issue of penetration, it is trite law, in terms of section 130 (4) (a) of the Penal Code, that in proving rape, evidence establishing

penetration of the male organ into the female organ is necessary and such penetration, however slight is sufficient to constitute sexual intercourse. See the cases of **Hassan Bakari @Mamajicho vs Republic** Criminal Appeal No. 103 of 2002, and **Paulo John vs The Republic**, Criminal Appeal No. 420 of 2017.

The appellant's learned counsel claimed that penetration was not proved. As I go through the records, the victim described how she was raped by the appellant that he inserted his penis into her female organ. PW2 who was sleeping in the same room with both the appellant and the victim testified that, with the aid of solar light, she saw the appellant undressing the victim and raped her. The medical doctor who examined the victim testified that the victim's female organs were penetrated and that she had experienced 'recurrent rape'. The prosecution also tendered the PF3 (exhibit P1) in support of medical examination. I, therefore, hold that, from the evidence of (PW1) the victim which was also corroborated by that of PW2, PW6, and the PF3 (exhibit P1) penetration was proved by the prosecution for the offence of rape to stand.

In respect of the contradiction raised by the appellant's counsel, the law is settled that in evaluating contradictions, the court has to decide whether the contradictions are only minor or whether they go to the root of the matter before deciding on the fate of the appellant. See **Mohamed**

Haji Ali v. Director of Public Prosecutions, Criminal Appeal No. 225 of 2018 - [2018] TZCA 332.

The issue of contradictions in evidence has been discussed in the book of **Sarkar, The Law of Evidence 16th edition, 2007**, on page 48 has this to say: -

*"Normal discrepancies in evidence are those which are due to normal errors of observation; **normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be.** Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."*

Therefore, it is not every discrepancy in the prosecution's witnesses that will cause the prosecution's case to flop. It is only when the heart of the evidence is contradictory then the prosecution's case will be torn into pieces. I have noted the contradiction made by PW3, the victim's guardian on who informed him that the victim was raped, was it the victim or PW2? I consider them minor and the type of contradiction which does not reach the root of the prosecution case. I say this because, with or without the testimony of PW3, there is still consistency in the victim's story which is

corroborated by PW2 that it was PW2 who told PW3 about rape. Considering that PW3 was not at the scene, his testimony does not affect the key evidence of PW1 and PW2 who are the victim and the eye witness respectively. Their key evidence shows that the appellant raped the victim whom they slept in one room. After the incident, the victim was scared to inform her father, PW3, but PW2 did. Considering the age of PW1 and the shock of what happened to her, it is likely not to disclose it to anyone. In addition, what incriminated the appellant was the unlawful sexual acts and not the manner of reporting the act. Likewise, in respect of the medical examination report, I find it immaterial whether the victim was raped several times or not because the unlawful act of rape which led the appellant to stand at the dock is the one which happened in March 2022, in the victim's bedroom and witnessed by PW2. As for the UTI test to the appellant, indeed that was not necessary. As rightly stated by the respondent's counsel, UTI can be caused by many factors including poor hygiene. Further, the appellant was not accused of infecting the victim with UTI but raping her. And; the victim could even have caught the UTI after being raped because we are told, the medical test was not done immediately. Therefore, the contradictions fronted by the appellant's learned counsel are minor and do not go to the root of the case.

The appellant relied on the defence of alibi, he once stated that he would have three witnesses in his defence but he could not bring any witness or any document in support of his defence. Under the circumstances, the prosecution case stands intact.

Based on the evidence on record, I find that the prosecution managed to prove their case beyond reasonable doubt. Accordingly, I find the appeal is devoid of merit and it is hereby dismissed in its entirety. I proceed to uphold the conviction and sentence of life imprisonment imposed on the appellant **Juma s/o Mugulus**.

It is so ordered.

The Right of Appeal is explained to the parties.

Dated at Mwanza this 29th day of September 2023.




L. J. ITEMBA
JUDGE

Judgement delivered today 29th day of September 2023, in the presence of the Appellant and Mr. Japhet Ngusa State Attorney for the respondent and Ms. Josephine Mhina RMA.


L. J. ITEMBA
JUDGE
29.09.2023