

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 109 OF 2022

EMMANUEL LUCAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Kahama at Kahama.]

(Hon. J.A. Donasian SRM)

dated the 21th day of October, 2022

in

Criminal Case No. 223 of 2022

JUDGMENT

5th July & 15th September, 2023.

S.M. KULITA, J.

This is an appeal from Kahama District Court. The appellant herein was charged for Rape, contrary to the provisions of sections 130 (1)(2)(e) and 131(1) of the Penal Code [Cap 16 RE 2022]. It is alleged that, on the 21st day of June, 2022 during the evening hours, at Isagehe village within

Kahama District in Shinyanga Region, the appellant had sexual intercourse with N.E. (Not her real name), a girl of 17 years.

In a nut shell, the prosecution case as was unfolded by three witnesses reveals that, on the material date which is 21st June, 2022, while coming from fetching fire woods, the victim met with the appellant who was from church. He pulled her into the bush and started raping her. That, the victim made an alarm noise which was heard by her brother who testified before the trial court as PW3. That, the victim's brother responded to it, only to find the appellant raping the victim. It was a red handed incident. That, the said PW3 took the victim for home, reported the incident to their mother and later on to their father who was in safari. When their father (PW2) came back on 23rd June, 2022 he reported the incident to militiamen and police. That, at the Police Station they were issued with a PF3 and went to Hospital for medical examination. That, the appellant was arrested. Though he denied to have committed the offence, contending that he was framed, the appellant was convicted and sentenced to serve 30 (thirty) years imprisonment for Rape.

That decision aggrieved the appellant, hence this appeal with three grounds which can be summarized as follows, **one**, the case was not proved at the required standard, **two**, the trial court wrongly relied on

the evidence of PW1 while the PF3 was not tendered, thus penetration was not proved, **three**, the trial court erred to rely on the evidence of PW1 (victim) while she was not a reliable witness, who failed even to know the attire that the appellant had on the fateful day.

On 19th April, 2023 which was scheduled for hearing the appeal, Mr. Moses Masame, Advocate represented the Appellant whereas the Respondent, Republic had the service of Ms. Caroline Mushi, Learned State Attorney who resisted the appeal.

Submitting in support of appeal, Mr. Moses Masame consolidated the first and second grounds of appeal, then stated that the evidence of the prosecution witnesses contradicts themselves. He added that, PW2 testified hearsay evidence save for the date that the victim was born and the fact that he took her to hospital for medical examination.

He went ahead contending that, the PF3 was not tendered to court as exhibit to prove penetration. He added that, though penetration is not only proved through PF3, yet he submitted that the testimonies of PW1 and PW3 did not prove penetration. The act of telling the court that, the victim was medically examined and the PF3 proved that the victim was raped, without tendering the said PF3 to court, Mr. Moses Masame, Advocate termed it a doubtful situation. Again, the said Advocate attacked

the situation in which PW3 alleged to have met the victim (PW1) with the appellant. He contended that, there are contradictions on it, in the sense that, as PW1 never stated that PW3 met the appellant raping her.

The counsel attacked again the evidence of PW1 that she contradicts herself when she said that, the appellant pulled her into the bush and started *seducing her*, but later on she stated that, she was pulled into the bush by the appellant, fallen down and *raped her*. The Counsel averred that for these doubts, there is no proof of penetration.

Mr. Moses Masame went further attacking the prosecution's case saying that, male sexual organ was not proved to have penetrated the victim's sexual organ. To bolster his assertion that under such circumstance there is no rape, the counsel cited the case of **Kayoka Charles vs. Republic, Criminal Appeal No. 325 of 2007, CAT at Tabora** which insisted that the victim must specifically state that, there was penetration of a male sexual organ into her sexual organ.

On the third ground of appeal the Appellant's counsel contended that, as the rape was alleged to have been done during the night at about 1900 hours, the fact that led the victim failing to identify the appellant's clothes, it means even the identification of the attacker was not proper as well. He again wondered on the victim's contradictions that, one time she

stated that, it was her first time to meet the appellant, but later on she contended to have been knowing him before.

In the reply thereto, Ms. Caroline Mushi, State Attorney stated that, penetration was proved by the victim who had stated that, she was raped by the Appellant after he had pulled her down. Ms. Mushi however agreed that, there is the word "seduce" in the PW1's testimony, to her, she stated that, it was just a typing error. She insisted that, the meaning of the term "Rape" involves penetration of the male's sexual organ into that of the female without her consent. She added that, the victim is young and our traditions prohibits mentioning the name of the sexual organs openly. On that point, she cited the case of **Masalu Kayeye V. R, Criminal Appeal No. 120 of 2017, CAT at Mwanza**. She added that, act of the victim not to mention specifically that the appellant's penis penetrated into her vagina does not mean that the act was not conducted. Ms. Mushi further contending that, the act of the victim describing the size of the appellant's male organ and the testimony of PW3 that he found the appellant on top of the victim, also prove that rape was actually committed.

Concerning age of the victim, Ms. Mushi stated that, the same was proved by PW3. She prayed for this court to make reference to page 13 of the typed proceedings of the District Court.

Replying the second ground of appeal, Ms. Mushi stated that, in Rape cases PF3 is not a must to be tendered to court. She stated that, the victim's evidence is all what is needed. She added that, it was successfully proved by the victim herself that penetration was there. Therefore, that was a sufficient proof on penetration even in the absence of the PF3 to corroborate it.

On the third ground Ms. Mushi stated that, failure to mention the attire that the appellant had worn on the material date, does not vitiate the prosecution case because it is not among the elements for Rape offences. Ms. Mushi added that, for what she had testified the victim is a reliable witness. She went further explaining that, the victim had been knowing the Appellant before, though it was her first time to have sexual intercourse with him.

Concerning visual identification, Ms. Mushi stated that, the offence was committed not exactly at 1900 hours but around that time. She insisted that, Shinyanga, which is at the western part of the country, is unlike the Coastal parts of the country where at that time it is dark. She said that in Shnyanga region that time is less dark. It was still illuminous.

In rejoinder, Mr. Masame, Advocate just reiterated his submissions in chief, and that was the end of both parties' submissions to the case.

I have taken into consideration both parties' submissions, cited authorities and the available records as well. Upon reading between the lines, I have noticed that all grounds of appeal revolve into one, which is, whether the prosecution managed to prove its case beyond all reasonable doubts. I am going to determine this appeal relying on this issue alone.

In criminal cases, the prosecution side is required to prove the case against the accused person beyond all reasonable doubts. See, **Horombo Elikaria vs. Republic, Criminal Appeal No. 50 of 2005, CAT at Mtwara** (unreported) in which it was held;

"in criminal cases the prosecution is required to prove the case against the accused person beyond reasonable doubt"

I am also aware that, whenever the prosecution case raises doubts, the same should be resolved in favour of the Accused. See, **Hassan Singano @ Kang'ombe v. Republic, Criminal Appeal No. 57 of 2022, CAT at Tanga** (unreported).

It is a principle of law that, the best evidence in rape cases comes from the victim. See, **Selemani Makumba vs. Republic [2006] TLR 376** in which it was held;

*"it is now well settled that in proof of sexual offenses,
the best evidence comes from the victim in line with
the principle in the case"*

In the matter at hand, the appellant contended during trial while defending his case that, he was framed to have committed the alleged rape offence, meaning thereby he had not committed the crime. The issue is whether the prosecution case was proved at the required standard or it consists some doubts which can lead the matter to be resolved in favor of the appellant.

In determining this issue I had to keenly go through the entire record of the lower court. In it, I have noticed that the testimony of the victim, who testified as PW1 shows that, the appellant pulled her to the bush and "*raped*" her. Secondly the same PW1 stated that, the appellant pulled her, threw her down and started "*seducing*" her, nothing was stated in respect of penetration. Those were the victim's own words.

Be it noted that the offence that the appellant was charged with is among the serious ones which attract very severe punishments. As such we expect prosecution's evidence not to have some doubts howsoever. In this situation where PW1 contradicts herself for not testifying specifically as to what actually took place after she was pulled by the appellant,

creates a doubt on the prosecution case. Taking into consideration that, when the alleged act purported to have been done, the victim was about to attain the age of majority, I expected her to have been able to express herself on what actually took place on that material date and time.

Another peculiar situation that I have noticed is that, PW1 and PW3 showed that, the victim's cry (alarm) is what made PW3 to run towards the scene and found the appellant raping the victim, but this testimony raises doubt. Firstly, the prosecution never testified before the trial court on the distance between the scene of crime and the premise (home) where PW3 was. Secondly, the testimony shows that, the victim's cry was able to be heard by only one person who was her brother (PW3). On this situation, one may wonder as to why only the victim's brother was able to hear and respond to the victim's alarm. This is a doubtful situation.

Page 12 of the lower court's typed proceedings transpires that, when the victim was asked for clarifications by the trial court as to whether she knows the appellant, she replied as I hereby quote "it was my first time to meet with him" which means that she had never known him before, but later on, the same victim stated that, she knows the appellant since long time back. These contradictions too, from the same person (victim) strengthen doubts on the prosecution case.

Further, the record transpires that, the victim was medically examined and accordingly the PF3 filled. The elements of doubts that can be noticed on it is that, the said medical examination was conducted after the lapse of three days. How sure is it that within those three lapsed days the victim did not have sexual intercourse with another person? This is a serious doubt on the prosecution case. In that sense the matter should be decided on favor of the Accused person, the Appellant herein, as it was so held in **Hassan Singano @ Kang'ombe** (supra).

Further, if the said PF3 showed that the victim was actually raped, why it was not tendered in court as exhibit? Possibly the doubts that this court has observed as so narrated above, is the cause for the said document not to be tendered to court. That, there is either no proof of penetration in the victim's sexual organ or no sexual intercourse was actually done.

I can agree with the State Attorney that the PF3 is not the only proof for penetration but the prevailing doubtful situations shown above which include, purposeful non-tendering of PF3 while it was alleged to be present according to PW2 and the circumstances that the victim was hesitant to mention whether the appellant's penis penetrated her vagina,

are great doubts that go to the root of the case. They actually create a doubt whether the Rape offence was committed or not.

As alluded earlier that, whenever the prosecution case raises doubts the matter should be resolved on favor of the Accused (appellant). From what I have endeavored to discuss above, I am firm that the prosecution case at the trial court, was not proved at the required standard.

Hence, I proceed to declare the appeal meritorious. It is thus allowed. The appellant should be set free unless he is held for any other lawful cause.



S.M. KULITA
JUDGE
15/09/2023

DATED at SHINYANGA this 15th day of September, 2023.



S.M. KULITA
JUDGE
15/09/2023

