

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL 65 OF 2023

*(Arising from Criminal case No. 247 of 2021 before Hon. C.L. Chovenye (SRM)
of Kahama District Court dated 30th December, 2022)*

DIRECTOR OF PUBLIC PROSECUTION (DPP).....APPELLANT

VERSUS

BAHARIA S/O HASSAN MULENGA..... RESPONDENT

EX PARTE JUDGMENT

*Date of last order: 10th November, 2023
Date of Judgement: 17th November, 2023*

MIRINDO J.:

Sometimes in September 2021, a 12-year-old pupil (EP) of Kilima "A" Primary School in Kahama District was playing with her fellow pupils when she was hit by a ball near her sexual organ. She felt a lot of pain and called her friend Z who had hit her with the ball. She told her that their neighbor, used to have sex with her and give her some money. She refused to continue playing and another pupil called H came and was told the same incident. H went to inform one of their teachers, FJ, who inquired called EP to inquire about the incident. EP was shocked when FJ called her but FJ threatened to transfer her to another school if she did not tell the truth. EP narrated the same incident and she was told to bring her parent to school. When her father

eventually went to EP's School she was told about the incident. The incident was reported to a police station, EP underwent medical examination and the neighbor who was immediately identified as Baharia s/o Hassan Mulenga was arrested and charged before Kahama District Court with two counts under the Penal Code [Cap 16 RE 2019]. On the first count he was charged with rape contrary to subsections (1) and (2) (e) of section 130 and subsection (1) of section 131. On the second count he was charged with unnatural offence contrary to subsections ((1) (a) and (2) of section 154.

The prosecution case was built on the following set of primary facts. First, the testimony of EP that in the afternoon of 13th September 2021 she was returning home and met their neighbor Baharia, a tailor. Baharia told her that after eating she should return so that he could repair her torn skirt. She brought the skirt and entered inside Baharia's sitting room where there was a sewing machine. Baharia gave her 500/=Tzs, undressed her and then raped her. He allowed her to leave with a condition that she should not tell anyone what happened. At home she met her aunt but she did not tell her because Baharia had instructed her not to tell anyone.

Secondly, EP testified that on another date in the same month, Baharia invited her to his house after washing her school uniforms. She complied and went to Baharia's house, and Baharia raped her and had carnal knowledge of her against the order of nature. After that he gave her 500/= Tzs. When she



returned home, she found her aunt. Her aunt told her to eat but she refused and went to sleep. She was feeling a lot of pain.

The third set of facts relates to the revelation she made to her fellow students and triggered investigation and Baharia was arrested. Lastly, there was medical report indicating that EP was sodomized and her sexual organ was penetrated.

The learned trial magistrate held that the charges were not proved beyond reasonable doubt and acquitted Baharia. The learned magistrate doubted the credibility of the victim (EP) for not seizing the earliest opportunity to name the suspect. The magistrate doubted whether a child of twelve years could walk properly immediately after being raped and sodomized. It was incredible to the learned magistrate that nothing strange was noticed by EP's aunt, her moods remained normal, and there was no disturbance to her school attendance. Finally, the learned magistrate noted that the evidence that when EP was touched by men, she "softened" suggested she might have been raped and sodomised by someone else.

The Director of the Public Prosecutions (DPP) has appealed to this Court challenging the trial court's findings leading to the acquittal of Baharia. The hearing of this appeal proceeded *ex parte* after Baharia failed to appear. The DPP was represented by Mr Leonard Kiwango, learned State Attorney.



Mr. Kiwango argued that the trial court erred in disbelieving EP for not mentioning Baharia at the earliest opportunity because the victim could not do because she was threatened. The learned State Attorney pointed out that all elements of rape and unnatural offence were proved and in sexual offences the best evidence is that of the victim herself who appropriately identified Baharia as the perpetrator.

In **Mohamed Said Rais v Republic** (Criminal Appeal 167 of 2020) [2022] TZCA 479 (26 July 2022), the Court of Appeal held that two principles are at play in dealing with evidence of the victim of a sexual offence:

*We shall begin our discussion with the question whether the offence of statutory rape was proved. In doing so, we are alive to the principle that the best evidence in sexual offences must come from the victim. See: **Selemani Makumba v. R** [2006] TLR 379 reinforcing the spirit under section 127 (6) of the Evidence Act. That principle must be weighed in the light of another yet another important principle developed by Lord Chief Justice of the King's Bench Sir Mathew Hale, an English jurist that rape is an accusation which is easily made, hard to be proved and harder to be defended by the party accused, though never so innocent.*

There is no evidence to support the assertion that EP was threatened by Baharia. What comes consistently in her evidence is that Baharia gave her some money and told her not to tell anyone. Therefore, there is some reason to doubt the credibility of EP for not mentioning the incident at the earliest opportunity.



It is surprising that EP'S Aunt noticed nothing unusual from EP's behavior all those days she went and returned from Baharia's house. It is also unusual that no neighbor noticed any movement of EP to a tailor who operated in a public space.

The prosecution attempted to prove unusual association between EP and Baharia. As stated above, on the evening of the date in which the father of EP went to school, the father attempted to prove existing relationship between EP and Baharia. Of particular significance is that on evening of the date she went to school with her father, she was with her younger when she met Baharia who sitting on a septic tank. Baharia told her younger sister to go and call their aunt. After she left Baharia started touching her body parts. On the other hand, EP's father testified that on that evening they went to Baharia's house with his younger brother and EP. His younger brother and EP went inside leaving the father behind. When they were inside, Bahari started touching EP's body parts. The father saw what was taking place, rushed in and asked Baharia what was he doing. Bahari responded that EP was like her granddaughter, he was just joking. It was at this stage that the father reported the incident to the Police and Baharia was arrested. This evidence was contradictory and did not prove anything of substance.



Like the trial Magistrate, I am satisfied that the prosecution case relied on unreliable circumstantial evidence which could not ground conviction for rape and unnatural offence. I dismiss the appeal in its entirety.

Dated at Shinyanga this 16th day of November 2023.




F.M. MIRINDO
JUDGE
16/11/2023