

UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUB REGISTRY OF MBEYA
AT MBEYA
CRIMINAL APPEAL NO 73 OF 2023

*(Originated from the decision of the District Court of Rungwe at Tukuyu in Criminal
Case No. 110 of 2022)*

NWAKA AMULIKE MWAKALEJA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last of hearing: 29/08/2023

Date of Judgment: 24/10/2023

NONGWA, J.:

The appellant was charged at Rungwe District court with offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 Revised Edition 2022. It was the particulars of offence that appellant on 29th day of November 2022 at night time at Masakulu Village within Rungwe District in Mbeya Region unlawfully had sexual intercourse to a girl of 15 years old, herein after to be referred to as "*the victim*" for the purpose of protecting her identity. From the records, the appellant is the biological father of the victim and they were living together. The

appellant and the victim's mother divorced and the victim was left under custody of the appellant.

It is evidenced from prosecution side that respondent, on the night of 29th day of November 2022, the victim was raped by the appellant, on the next day while at school she informed discipline teacher, then victim was taken by social welfare officer to police station then to hospital, at hospital the victim was examined and found that her hymen had been perforated. The appellant denied allegation claiming that he had a long conflict with victim's mother so the case was fabricated against him. However, it is also on record that the victim attempted to report the previous incident by letter to her teachers but were not acted upon until the last event she immediately reported and steps were taken. At the end of hearing trial court found that case was proved to the required standard, the appellant was convicted and sentenced to serve 30 years' imprisonment.

Aggrieved with decision of trial court, appellant filed appeal at hand which contained six grounds;

1. That, the trial magistrate erroneously convicted under wrong provision of law.

2. That, the trial Magistrate erred in law and fact by putting into consideration the evidence of PW2 (Victim) only because the laws states that "the proof of rape come from the victim or prosecutrix herself" without considering the real situation of alleged incident.
3. The trial magistrate erred in law and fact by putting into consideration the evidence of PW5 (the Doctor) who alleged to examine victim and observed penetration in her virgin without examining the suspect to realize whether it was him or not who committed the said offence.
4. That, the appellant convicted and sentenced on expense of weak (defective) charge.
5. It is stated by law that proof of rape comes from the victim but in order to strengthen the allegation there should be other witnesses to corroborate the same to avoid fabrication of that offence. In this case at hand all prosecution witnesses failed to oust doubt of the incident.
6. That, the trial Magistrate therefore erred in law and facts when convicted and sentenced appellant basing on prosecution evidence which was doubtful.

During hearing of appeal, appellant appeared in person while respondent was represented by Mr. Rajabu Msemu, State Attorney.

Appellant on the first ground submitted that he was convicted on fabricated case. On second ground he submitted that evidence PW2 was believed because law recognize victim evidence but did not look other circumstances. That if he committed such crime the street leader would have appeared in court to testify. It was only victim and her mother and he had conflict with victim's mother, he referred page 23 of proceedings that he explained to the court about that conflict.

On 3rd ground he submitted that PW5 stated that he examined victim and found that she was raped but he was not examined to see if he was the one who raped the victim.

As to 4th ground he argued that he was convicted on weak evidence and illegal evidence. It was fabricated case against him, while on 5th ground he said that there was no other evidence to support the evidence of the victim and none from the local leaders ever come to testify in support of the complainant.

With regard to 6th ground, the appellant submitted the prosecution evidence was very doubtful and that if at all the offence was committed

the street leader could have been involved. He prayed his grounds of appeal to be accepted.

Replying, respondent objected appeal, on 1st ground he referred at page six where the court analyzed evidence tendered by the Republic and found that the evidence was watertight to enter conviction.

As to 2nd ground, it was respondent's submission that under section 143 of TEA there is no requirement that a certain number of witnesses is required to prove an offence. The offence is done in secrecy so the good evidence is that which comes from the victim. He referred the case of **Selemani Makumba vs Republic** 2006 TLR 379, he stated that looking at the proceedings the victim explained how his father, the appellant used to rape her on different times, the victim evidence was not questioned in any way and she was straight that she was raped by appellant. He referred the case of **Marwa Wangita Mwita and Another vs Republic** (2002) TLR at page 39 on the ability of witness mentioning suspect at the earliest opportunity.

On 3rd ground, he argued that, it is not legal requirement for the suspect to be examined too. The medial evidence was only to determine if there was penetration a thing which was found because her hymen was discovered to have been perforated.

Replying on 4th ground, the respondent submitted that, looking at the offence, appellant is charged with, that is rape contrary to section 130 (1) (2) (a) and 131 (1) of the Penal Code Cap 16, the victim is 15 years old, instead of (a) it was supposed to be (e), however the omission has not prejudiced the appellant in any way. Looking at particulars of offence, they were very clear. It is a principle that defective charge is curable by evidence as per section 338 of CPA. He referred case of **Jamali Ally @ Salum vs Republic**, Criminal Appeal No 52 of 2017 at page 18.

On 5th and 6th grounds, he submitted that victim evidence is the best but the same has to be analyzed and as per prosecution evidence on record the case was proved beyond reasonable doubt. He insisted that all the grounds lack merit.

I have gone through court records, grounds of appeal and submission made by parties. I will deliberate ground 1 and 4 collectively.

The appellant alleged to have been convicted and sentenced on defective charge and improper law. Going through court records (charge sheet) I find that appellant was charged with the offence of rape (statutory rape) c/s section 130 (1) (2) (e) and 130 (1) of the penal code

Cap 16 R.E 2022. It was alleged on particulars of offence that appellant on 29th day of November 2022 at night time at Masakulu Village within Rungwe District in Mbeya Region unlawfully had sexual intercourse to the victim, a girl of 15 years old, I see the charge was proper, charge sheet provides relevant information to enable the appellant to understand his offence and he was convicted under the same offence he was charged with, as such ground 1 and 4 lack merit.

Grounds No. 2, 3, 5 and 6 will be deliberated under one issue of whether the offence was proved by prosecution side beyond the reasonable doubt at the trial court.

It is a statutory duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials.

The term beyond reasonable doubt is not statutorily defined but case laws have defined it. In the case of **Magendo Paul & Another v. Republic** (1993) TLR 219 the Court held that:

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his Favor which can easily be dismissed."

In this case, appellant was charged with the offence of rape (statutory rape). There was no doubt as to who was the culprit. The necessary ingredient to be prove were penetration and age of the victim as provided in the case of **George Claud Kasanda v. Republic**, Criminal Appeal No. 376 of 2017 (unreported), in an endeavor to describe the statutory rape, that;

*"In essence that provision (section 130 (2) e of penal code) creates an offence now famously referred to as statutory rape. **It is termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent.** In that sense age is of great essence in proving such offence."*

To prove the case, victim narrated that on 29/11/2022 appellant returned home at night, after he finished dining, he closed the door and started romancing and undressing the victim, then he raped her by inserting his penis into her vagina, in the morning while at school, she told her teacher, then she was taken to police and later to hospital for examination. This case, being the case of rape, the best evidence always come from the victim, this was provided in case of **Seleman Makumba (supra)**. Victim explained clearly on how she was raped by appellant and her evidence was also corroborated with evidence of PW5 a medical Dr. working at Rungwe District hospital @ Makandana, he examined the

victim on 30/11/2023 and after examination he noted that victim's hymen had been perforated, the vagina was swollen and she was in pain. He tendered exhibit which was received during hearing, Exhibit P4. Going through findings of exhibit P4, the Doctor found that victim hymen was perforated. Also, age of victim was proved by PW4, mother of victim that she was born on 30/6/2008, she tendered birth certificate to prove that facts.

On ground 2,5 and 6, appellant submitted that street leader was not called to testify, it is a settled law that no number of witnesses is required to prove the existence of the particular fact. This is provided under section under section 143 of The Law of Evidence Act [Cap 6 R. E 2022], a party is obliged to call witness if such witness is material witness, in this case street leader was not material witness because nothing was expected from street leader in respect of the case at hand. Also, on ground 3 appellant stated that he was no examined to see if he was the one who raped the victim but this is not a requirement under the law. The victim who was residing with his father, the appellant, properly identified the perpetrator who had raped her to be the appellant.

I find that this case was proved beyond reasonable doubt, at the trial court prosecution evidence proved that victim was penetrated, she

was under 18 years and victim named appellant to be responsible for that act.


In those circumstances, I find no need to interfere with trial court findings, appeal lacks merit and is hereby dismissed. I confirm both conviction and sentence of the trial court.




V. M. NONGWA
JUDGE
24/10/2023

DATED and ~~DELIVERED~~ at MBEYA this 24th October, 2023 in presence of Respondent and the Appellant.

Right of appeal explained.


V. M. NONGWA
JUDGE
24/10/2023