

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

CRIMINAL APPEAL NO. 51 OF 2023

*(Arising from the decision of the District Court of Maswa at Maswa before
Hon. Missana E.S. SRM, dated 23rd December 2022 in Criminal Case No. 62
of 2022)*

BETWEEN

HASSAN PAMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

4th October & 10th November, 2023

MASSAM, J.

In the District Court of Maswa at Maswa (trial court), the appellant, one Hassan Pamba was charged and convicted of two offenses 1st count, Abduction c/s 134 of the penal code Cap 16 Cap 16, R.E 2019.(2) 2nd count, rape c/s 130(1),(2)(e) of the Penal Code Cap 16 R.E Upon conviction, the trial court sentenced him to 30 years imprisonment.

The prosecution alleged that, on 4th day of June, 2022 in the evening hours at Shanwa street within Maswa District, in Simiyu Region, the

accused person with intent to have sexual intercourse with the victim one NN (name withheld) a girl of 14 years old did take her away from Kumaliya street to Kapilima street without her parent's consent. Also it was alleged that on the same date at Kapilima street within Maswa District and Simiyu region the accused did rape the victim a girl of 14 years old.

A brief fact of the case was that, the victim on 4/6/2022 was sent by her mother to buy some vegetable, she met the accused person who told her to go with him to his house at Nyalikungu. On their arrival the accused person told her to put off her clothes, she denied but the accused person forcefully put off the victim's clothes and inserted his penis to her vagina. She felt pain as it was her first time. The victim did not return home as the accused person told her to stay. She stayed there from 4th June to 12th June at around 16.00hs when they were arrested at the accused working place. At the police station victim explained to them what happened and lead them to the accused's room where her shoes was found there. The victim was given PF3 and after examination, the result revealed out that she was penetrated. Accused was arrested, interrogated and taken to court and charge read over to him who denied the same.

On the other hand, the appellant entered his defence by denying committing the offence to the victim (PW1) but he admitted to be arrested by policemen on 12/6/2022 and taken to the police station and interrogated to be connected with the mentioned offences.

After the case heard on full trial, the appellant was found guilty, convicted and sentenced to thirty (30) years imprisonment.

Aggrieved by that decision, the Appellant preferred the instant appeal on six grounds which may be summarized as follows: **One**, it was wrong to enter conviction without prosecution side establishing its case beyond reasonable doubts. **Two**, the prosecution side did not prove the victim's age, **three**, it was wrong to convict the appellant with defective charge. , **four**, the trial court failed to scrutinize the evidence adduced by Pw3 Dr Nyamsha Makasi Nyamsha that his findings did not reveal any sign of rape. Also the court ignored this evidence and failed to give sufficient reasons on how he incriminated the appellant. **five**, the search and seizure to the appellant's home was illegal, as the search was never witnessed by any local leader and the appellant land lord was not called to justify about the matter in dispute. **sixth**, it was wrong to convict the appellant with the prosecution evidence which is contradictory, as the victim's mother and

Pw2 (the victim) said that she was examined on 12/6/2022 at Maswa District hospital while on the other hand the evidence adduced by Pw6, the investigator of this case and Pw3 justifies that the victim was examined on 14/6/2022 hence the said contradiction created doubts.

When this appeal was called for hearing, the appellant appeared in person, unrepresented and Mr. Leonard Kiwango, S/A the learned State Attorney appeared for the respondent. The hearing of this appeal was done orally.

Submitting in support of the appeal, the appellant argued all the grounds jointly. He stated that he pray this court to consider his grounds of appeal and left him free.

On his side, Mr Leonard did not support all grounds of appeal but he admitted part of the ground of appeal. He added that, the appellant was charged with two counts which are rape and abduction. Also he said that the evidence brought did not support the charge of abduction. Again the evidence of the victim was not recorded according to the requirement of law which requires the evidence of the victim who is of tender age his or her evidence must be recorded under section 127(2) of TEA.

He admitted that the same was procedural illegalities which the law directs that when the procedural defects happened the accused person required not to benefit in that defects, hence he prays for nullification of proceedings, and order retrial.

The reason of praying the same was that the prosecution side did prove the charge of abduction and rape but only the procedure was not followed. He said that PW1 the mother of the victim told the court that on 4/6/2022 she send her daughter to the market who did not came back until on 12/6/2022 when her daughter was arrested together with accused person at his working place, and when the search conducted in the house of accused person, the victim's shoes was found there. When the victim was arrested and interrogated she admitted to be living with the accused person as husband and wife. Again the evidence of PW3 the doctor proved that he examined the victim vagina and found her with bruises which proved that she was penetrated. Lastly he said that the victim's mother did prove the age of the victim.

In brief rejoinder, the appellant reiterated what he submitted in his submission in chief.

I have entirely gone through earnestly all the parties' submissions, authorities supplied and the available records. The issue for determination is **whether the appellant's appeal is meritorious.**

This court finds that it will be wise before attending to the appellants grounds of appeal which the appellant complained about failure of the prosecution side to prove its case. This court is aware of provisions **Under Section 110 and 111 of The Evidence Act, Cap. 6 R.E 2019** which provides that,

110.-(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. On whom burden of proof lies,

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.

Also it is common criminal jurisprudence that in criminal matters the burden of proof always lies on the prosecution and it should be beyond reasonable doubt, the said principle is clearly found in Section 3(2) of the Evidence Act Cap 6 R.E 2002.

Again the meaning of the reasonable doubt was well elaborated in the case of **Samson Matiga vs Republic** in Criminal Appeal No. 205 of 2007 which define it as follows that *"a prosecution case as the law provides must be proved beyond reasonable doubt what means to put it simply is that the prosecution evidence must be strong as to leave no and doubt to the criminal liability of an accused person and not any other as the one who committed the offence"*.

This court is aware that this was a rape case and in cases like this the best evidence comes from the victim as elaborated in the case of **Selemani Makumba vs. Republic, Criminal Appeal No. 94 of 1994 CAT**, this case insist that the victim of the offence is the one who is in a position to tell actually what happened at the scene of crime. In our case, the victim of this case who testified as PW2 was aged 14 years so she was a child of tender age and her evidence was required to be recorded as **per section 127(2) of TEA** thus, the court was required to conduct an inquiry

to establish whether the witness was promising to say the truth before testifying or she knows the meaning of oath in order to be sworn or affirm before testifying as per the requirement of Section 127(2) of Evidence Act that;

"A child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence promise to tell the truth to the court and not to tell any lies."

This court perused at page 10 of the court proceedings when PW2 testified and the record does not reflect if the court conducted inquiry to establish if the child promised to tell the truth or if she knows the meaning of oath or not, the records shows that she was sworn and proceed to testify as an adult. In the circumstances therefore, it is the firm view of this court that the procedure used to take PW2's evidence contravened the provisions of **Section 127 (2)** of the Evidence Act.

Consequently, the evidence of PW2 which was received in violation of the provisions of **Section 127(2)** of the Evidence Act is hereby expunged from the record.

Having expunged the evidence of PW2 this court will not determine the remaining evidence if it suffices to prove the charge of rape and abduction against the appellant or not as the remaining evidence all of it will be the hear say as the victim was the best witness to tell the court who committed the said offenses. Starting with the evidence of PW1 who was the mother of the victim, she told the court that on 4/6/2022 she sent the victim to the market and she did not come back until on 12/6/2022 when she caught the victim with the appellant at saloon where appellant works, they went to search the house of the appellant and found her shoes, and PW4 a police officer and OCS of Maswa told this court that they went to search the house of appellant and found the victim's shoes which were identified by PW1 and PW2 (victim) and ,PW5 who is a police woman, as that works at Maswa police station her testimony was same of PW4. Their evidence were purely hearsay and regarding the hearsay evidence Section 62 (1) (a) of the Evidence Act, Cap 6 R.E 2019 provides that:

"1. Oral evidence must, in all cases whatever, be direct; that is to say—

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it".

See also the case of **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 (CAT-Unreported). As it was clearly stated in the cited provision that oral evidence must in all cases be direct. Whatever that is not direct is hearsay and therefore the same is not admissible since direct evidence is the best evidence.

Therefore, the evidence of PW1, PW4, and PW5 is indirect evidence, the same is required to be supported by other evidence particularly the evidence of PW2 (the victim) and the same has already been expunged from the records. The same goes to the evidence of PW3 (the doctor) who only proved that the victim was penetrated but he was not aware as to who raped the victim. For these reasons, I allow the 1st ground of appeal.

So according to that, this court supports the appellant's submission that prosecution side failed to prove its case beyond reasonable doubt as the evidence adduced by the prosecution was not rooted on the offence which the appellant was charged.

For those reasons, this court is of the firm view that there is nothing on record from the prosecution side that it has established a case


sufficiently enough to require this court to ground conviction upon the appellant herein. Thus, I feel not obliged to test the rest of the grounds of appeal since the 1st ground suffices to dispose of the entire appeal.

In the event, on account of what I have explored to discuss herein above, this court allows the appeal, quash the conviction, and set aside the sentence. It is ordered that, the appellant be released from prison unless he is being held for some other lawful cause.

It is so ordered.

DATED and **DELIVERED** at **SHINYANGA** this 10th November, 2023.




R.B. Massam
JUDGE
10/11/2023