

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA SUB REGISTRY)**

AT IRINGA

CRIMINAL APPEAL NO. 38 OF 2023

*(Original Criminal Case No. 138/2021 of the District Court of Iringa
before Hon. R. Mayagilo, SRM.)*

HASSANI ISSA	APPELLANT
	VERSUS	
REPUBLIC	RESPONDENT

JUDGMENT

27th Nov. & 29th Dec. 2023

I.C. MUGETA, J:

The appellant was charged before the District Court of Iringa and convicted on a single count of rape contrary to section 130(1), 2 (e) and 131(3) of the Penal Code (Cap. 16 R.E 2019). He was sentenced to life imprisonment. According to the prosecution, the appellant committed the offence on 29th day of September 2021 at Mshindo area within the district and region of Iringa. The victim at that time was aged 3 years, who for the purpose of concealing her identity, I will refer to her as the victim.

The appellant's main complaint is that the charge against him was not proved beyond reasonable doubts. The ground is twofold. **First**, the victim's testimony was weak and unreliable. **Second**, no any independent witness testified for the prosecution.

In the hearing of the appeal, the appellant appeared in person and unrepresented whereas Nashon Simon, learned State Attorney appeared for the Republic. The appellant being a lay person opted not to elaborate his grounds of appeal, instead, he allowed the learned State Attorney to submit first and reserved his right of rejoinder.

The learned State Attorney resisted the appeal. He submitted that the charge against the appellant was proved. The victim was a credible witness and was familiar with the appellant hence there was no possibility of mistaken identity. The victim's testimony was corroborated by the evidence of PW3 who proved that the victim's vagina was bruised and PW1 proved the age of the victim.

The learned State Attorney contended that the victim's phrase "*alinifanyia matusi huku*" meant that the appellant penetrated his penis in her vagina. He cited the case of **Joseph Leko v. Republic**, Criminal Appeal No. 124/2013, Court of Appeal – Arusha (unreported) where the Court held that the victim does not have to graphically describe how the male organ was inserted into her female organ considering the cultural background, age of the witness and religious beliefs.

On the failure to call independent material witness, the learned State Attorney argued that there is no evidence that the incident occurred in a

public place, therefore, no any other witness apart from the victim was present.

In rejoinder, the appellant insisted that the victim's evidence was weak and failed to prove penetration. In his view the phrase "*Issa alinifanyia matusi*" does not prove penetration. He added that the incident occurred during day time but no independent witness was summoned to support the charge.

In disposing the appeal, I will discuss whether the prosecution proved the charge against the appellant beyond reasonable doubts. The appellant was charged with rape of a 3 years old victim. In proving the charge, the prosecution only had to prove penetration. Considering the age of the victim, consent is irrelevant.

The learned trial magistrate elaborately dealt with the ingredients of rape in the circumstances of this case and concluded that age of the victim and penetration were proved. I agree with her. She also concluded that it is the appellant who committed the offence. I do not agree with her. Here are the reasons.

The victim is the only witness of the rape. In her evidence she referred to the appellant as Hassan Mkubwa. The appellant is called Hassan Issa. In her finding the learned trial magistrate held:

"... named the accused person (while in court) who on the other hand did not object that he is known by that name at home and AM (the victim) knows her (sic) and she usually go (sic) to his house to play".

With respect, it was not upon the appellant to disprove that he is also known as Hassan Mkubwa. That amounts to shifting the burden of proof to him. Since the victim testified that she was raped by Hassan Mkubwa, it was upon the prosecution to prove that the appellant is also known as Hassan Mkubwa. That evidence is missing.

Further, it was a misdirection on part of the learned trial magistrate to hold that the victim was familiar with the appellant before the incident date. To support my finding, I shall reproduce the evidence of the victim in full as the same is brief:

"My young sibling is Nasri siku ile nilienda kucheza kwa kina Edward. Nilipoenda kwa akina Edward Hassan Mkubwa alinichukua akanipeleka kitandani akanifanya matusi huku (mtoto ameonyesha kwa mkono sehemu ya uke). Wakati ananifanya matusi

alinivua nguo, alinivua chupi. Baada ya kumaliza aliniambia nitoke nje. Hakunipa kitu. Hassan Mkubwa yupo humu ndani ni yule (mtoto amemuonyeshea kidole mshtakiwa). Niliporudi nyumbani nilisema kwa mama. That is all".

There is no statement in that evidence which suggests that the victim was familiar with the appellant. The dock identification she made does not necessarily mean so. The learned trial magistrate, I hold, misapprehended the evidence.

While the victim testified that she reported the incident to the mother immediately, the mother (PW1) testified that she discovered it the next day when she bathed the victim. The two contradictions are irreconcilable. Notwithstanding, the issue is whether the victim properly identified her assailant.

In his submissions, the learned State Attorney argued that since the incident took place at day time the question of mistaken identity is eliminated. However, this is true with familiar people. As I have held, there is no evidence that the victim was familiar with the appellant.

Further, the prosecution did not lead evidence as to how the appellant was traced and arrested. This was important in order to prove that Hassan Mkubwa whom the victim referred to is, indeed, the appellant

as no identification parade was held. In my view, this was a fit case where the identification parade was necessary. In the event, I find that the appellant was not properly identified.

For the foregoing, I hold that the charge was not proved. The appellant was improperly convicted. I accordingly quash his conviction and set aside the sentence. I order his immediate release from prison unless otherwise lawfully held for another cause.

 *Mugeta*
J.C. MUGETA
JUDGE
29/12/2023

Court: Judgment delivered in chambers in the presence of the appellant in person and in the absence of respondent.

Sgd. M.A. MALEWO

DEPUTY REGISTRAR

29/12/2023