

**IN THE HIGH COURT OF TANZANIA**

**AT TANGA**

**CRIMINAL APPEAL NO. 55 OF 2023**

*(Arising from Criminal Case No 11 of 2022 of Korogwe District Court)*

**MOHAMED SAID BAKARI@ HOGO TAMU.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....THE RESPONDENT**

**JUDGMENT**

**K. R. Mteule, J**

**21/11/2023 & 12/12/2023**

The Appellant herein is aggrieved by the decision of the District Court of Korogwe hereinafter referred to as the trial Court, in **Criminal Case No. 11 of 2022**. In the trial Court, the Appellant was charged with rape contrary to **Section 130 (1) (2) (e) and 131(1) of the Penal Code [Cap 16 RE 2019]** hereinafter referred to as Penal Code.

According to the charge sheet, it is alleged that on 25<sup>th</sup> day of February 2022 at Kilole Area within the District of Korogwe in Tanga Region, the Appellant had carnal knowledge of one given the name with letters AF to hide her identity, who is a girl of 4 years old.

The facts leading to this Appeal as stated in the Trial Court can be derived from the five prosecution witnesses and the two defence



witnesses including the accused. On 25/02/2022, PW1 who was the victim's mother noticed the victim crying while urinating and as she lifted her legs up, she saw some discharges. She then called her mother and a ten- cell leader to witness and the ten-cell leader directed them to bath the child and send her to hospital. They did so and at the hospital (Magunga Hospital), they were directed to go to be issued with a Police Form No. 3 (PF3) at the police station. They went to Police station where they got the PF3 and went back to the hospital for medical examination which was done by a Clinical Officer working at Makunga Hospital (PW3) and the said PF3 filled and returned to the police station. The said PF3 was admitted in the trial court as exhibit P1. According to Pw3, upon examination, some bruises were observed in the victim's genital parts and when PW1 asked her child about what happened, the victim told her that she was hurt by one hogo tamu. The exact word recorded from the victim was " hogo tamu alintonesha".


The accused person was then arrested from his residence and sent to Police station where he was charged with rape.

In the District Court the victim testified that the accused inserted his dudu into her private part and told her that he would buy her a jackfruit. It was on this evidence the accused person was convicted and sentenced to serve life imprisonment.



It was the defence of the accused person that on the date of incident, he was working as a casual labourer at the farm belonging to one "Mama Regina" where he worked for three or four days and that when he returned home at around 7pm, police officers went at his house and told him to report at the police station and upon reporting thereto, he was told that he raped the child. He denied having committed such crime. The person named by DW1 as Mama Regina, testified as DW2, and she confirmed to have been employed the accused person who was working in her farm for five days and upon completion of the work, she did not see him anymore. This defence did not convince the trial court and it went on to convict and sentence him basing on the prosecution evidence that bruises were identified in the victim's vagina who said that it was hogo chungu who inserted what she called "dudu" in her vagina.

In this matter, the Appellant was unrepresented whereas the Respondent was represented by Ms. Maria Kaluse, Ms. Jesca Thomas and Ms. Farida Kaswela, State Attorneys.

The Appellant preferred for his grounds of appeal to be adopted and considered in disposing the appeal and he had nothing to add thereon whereas the Respondent filed written submissions in response to the grounds of appeal. The said submissions were drawn and filed by Ms. Maria Kaluse. The grounds of appeal were as follows; 



1. *That, the learned trial court erred in law and in fact by acting upon weak and contradictory evidence of the prosecution witnesses.*
2. *That, the learned trial magistrate erred in law and in fact by relying upon hearsay evidence of PW1, PW3, PW4 and PW5.*
3. *That, the learned trial magistrate failed to note that the mandatory requirements in proving sexual offences were not met.*
4. *That the prosecution case against the appellant was not proved beyond reasonable doubt.*

What I construe from the grounds of appeal is that they all challenge the adequacy of evidence to prove sexual offence against the accused person beyond reasonable doubt. In this regard, I will address all the grounds together to answer one issue as to **whether prosecution proved the offence of rape against the accused person in the District Court beyond a reasonable doubt.**

As it has been the practice, the first appellate court is required to revisit the proceedings of the trial Court and reach to its own findings. See **Kaimu Said vs The Republic, Criminal Appeal No. 391 of 2019, CAT** at Mtwara where it was held;

*".... a High Court, being a first appellate court has powers to step into the trial court's shoes and reconsider the evidence of both sides and come up with its own finding of fact."*

From the above guidance, I will revisit the evidence adduced by both sides at the trial Court in determining the issue before me.

Ms. Kaluse submitted that in sexual offences, the best evidence is that of the victim and that in the instance matter the victim managed to mention the accused person as the person who raped her. She cited the case of **Selemani Makumba vs Republic [2006] TLR 379**. She denied the assertion that the evidence of PW1, PW3, PW4 and PW5 was hearsay. According to her, PW3 is the expert witness and PW1 is the mother of the victim and they both witnessed the victim's abnormalities in her genitals. She added that even PW4 is the one who received the victim and her mother at the police station and issued a PF3 after inspecting her, as well PW5 inspected the victim and they both saw the bruises. In Ms. Kaluse's view, all these testimonies cannot be hearsay evidence while all the witnesses saw the bruises in the victim's vagina. She urged the court to afford credence to these witnesses as per the case of **Goodluck Kyando versus Republic [2006] TLR 363** which held that witnesses are entitled to credence.

Having gone through the evidence adduced in the trial court, I agree with Ms Kaluse that PW1, PW3, PW4 and PW5 testified on what they saw which included having seen the victim with bruises in her genitals. It is obvious that according to the evidence of PW1, PW3, PW4 and PW5

something happened to the victim to cause bruises and such bruises if proved to have been caused by a sexual activity then it will constitute rape under **Section 130 (1) (2) (e) of the Penal Code** which provides:

*"130. (1). It is an offence for a male person to rape a girl or a woman.*

*(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*

*(a) N/A*

*(b) N/A*

*(c) N/A*

*(d) N/A*

*(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

From the above provision, carnal knowledge with a girl under 18 years constitute rape regardless of consent. Since it is not disputed that the victim in this matter was a girl under 18 years, it only needs to be proved that the bruises she was found with was caused by a sexual act for it to be concluded as a rape and that it was the accused person who did it for him to have been convicted with rape.





In addressing the question as to whether what caused the bruises constituted an act of rape done by the accused person is the question which was answered by the trial court affirmatively. The appellant is challenging the conviction for having been based on evidence which did not prove the offence against the accused person beyond reasonable doubts. The trial magistrate was convinced by the evidence of the victim who was the child of 4 years old who named the accused person (hogo tamu) as the person who inserted his penis in the victim's genitals.

I have considered the lower court record to see if the evidence of prosecution cleared all the doubts concerning the accused person's involvement in raping the victim. It is apparent in the lower court record and in this appeal that, the only evidence which implicated the accused person with the alleged rape was that of the 4 years old victim. How the victim managed to identify the accused to the extent of clearing mistaken identity left a lot to be desired due to her tender age. No where has the victim described the accused person apart from mentioning his nick name hogo tamu to her parents and the dock identification. I could not see anywhere where PW2 gave the descriptions of the accused neither by morphology nor by dressing to clear doubt of mistaken identity. If at all she was raped, whether the person who raped her was that hogo tamu without mistaken identity

was not so clearly explained in the trial court. This left serious doubt which needed to be cleared by the prosecution. In **R v. Mohamed Bin Allui** (1947) 9 EACA72 (also cited in **Njamba Kula Miwa vs Republic Criminal Appeal No. 460 OF 2007 CAT at Tabora**) the then Court of Appeal for Eastern Africa had the following to state:

*"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given, first of all, of course by the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given. "*

Since the accused person testified to have been not at the scene of the crime on that fateful date and time, the issue of identification needed to be addressed by the trial court and there should have been description which should have indicated that the victim met the accused on the fateful date and not someone else which she may have confused with hogotamu. The Trial Magistrate ignored the evidence of the accused who stated that during the alleged time of the offence he was working as a casual labourer in the farm of Mama Regina. His evidence was supported by the evidence of the owner of the farm who gave him that work. However, the Magistrate did not see this as evidence which should have been analysed as it could intensify doubt on the part of



prosecution evidence rather, the trial court ignored the entire defence evidence.

From the above discussion, it is my finding that the issue of identification was not discussed in the trial court to ensure no mistaken identity of the accused person especially when dealing with the offence which attract such a capital punishment.

From the above discussion, I see merits in the appeal and answer the issue affirmatively. I find that prosecution could not prove its case beyond reasonable doubt and therefore the conviction of the appellant cannot be sustained. As such the appeal is allowed. Both conviction and sentence in **Criminal Case No 11 of 2022** of Korogwe District Court are quashed and set aside. The appellant is released forthwith unless held for another offence.

Dated at Tanga this 12<sup>th</sup> Day of December 2023



  
**KATARINA REVOCATI MTEULE**

**JUDGE**

**12<sup>TH</sup> DECEMBER 2023**

**Court:**

Judgment delivered this 12<sup>th</sup> Day of December 2023 in the presence of the Appellant and Mr. Wilfred Mbilinyi State Attorney for the Respondent. Right to further appeal is explained.



A handwritten signature in blue ink, appearing to be "Katarina Revocati Mteule".

**KATARINA REVOCATI MTEULE**

**JUDGE**

**12<sup>TH</sup> DECEMBER 2023**