

IN THE HIGH COURT OF TANZANIA

AT TANGA

DC CRIMINAL APPEAL NO. 17 OF 2023

(Arising from Criminal Case No. 46 of 2022 from Korogwe District Court dated 15th November 2022)

ZUBERI MUSTAPHA HIZA APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

K. R. Mteule, J

02/04/2024 & 04/4/2024

In the District Court of Korogwe, the Appellant was charged with the offence of rape contrary to **Section 130 (1) (2)(e) and 131(1) of the Penal Code Cap. 16 R.E. 2022**. As per the charge sheet, the accused person was alleged that between 05th day of September 2022 and 8th September 2022 at Kilole Village within the District of Korogwe in Tanga Region, he did have carnal knowledge of a girl of six (06) years of age. The accused person denied the allegation and the matter went on full trial and prosecution called in witnesses to prove the case.

The prosecution evidence in the trial court narrated the following fact.

That between 05th September 2022 and 8th September 2022 at Kilole



Village within the District of Korogwe in Tanga Region, one Fatuma Zuberi Yahaya (PW1) saw her daughter (PW2) being unhappy and unable to eat. She inquired on what went wrong and the victim complained to her mother (PW1) about having stomach-ache. Upon further inquiry, the daughter revealed that the appellant called her to his house and undressed her and himself and laid her on the bed and inserted his penis in her vagina. That when PW1 inspected her, he discovered bruises and called her landlord to also look on her daughter's vagina and she also saw the bruises. PW1 thus went to report the matter to the police station where she obtained a PF3. She took the victim to Magunya Hospital where her daughter was examined by one Salehe Saidi Senkondo who was a clinical officer (PW3) who confirmed bruises in the victim's vagina. This led to the arrest of the accused person and the charge of rape.

The trial court found prosecution to have managed to prove the charge against the accused person. Consequently, the accused person was convicted and sentenced to serve life imprisonment and for payment of 500,000 as compensation to the victim. Being dissatisfied by both the conviction and the sentence, the appellant appealed to this court with 3 grounds of appeal revolving around the following:-



1. Challenging the reliability of the prosecution evidence alleging contradiction therein,
2. Trial court failure to consider the defence of the accused person
3. The trial court failure to notice that the charge against the appellant was not proved to the required standard.

The Appeal was argued by a way of written submissions, the appellant being unrepresented while the respondent was represented by Wilfred Mbilinyi, State Attorney.

Arguing the first ground of appeal, the appellant faulted the evidence of PW4 asserting doubt when the witness told the trial court that the appellant was not circumcised something which was not proved. He further questions how Pw4 knew that after having raped the victim, the appellant gave her (PW2) money to buy sweet. The Appellant further questioned the possibility of him being aged 28 years having carnal knowledge of a child of six (6) years without causing any screaming and bleeding.

In the second ground of appeal, the appellant argued that the learned trial magistrate erred in law and in fact by failing to consider the appellant's defense. According to the appellant, the trial court neglected

his defence which raised a possibility of fraud due to the delay to report the offence immediately on 05/09/2022 when the mother of the victim (PW1) discovered that her daughter was raped. The incident was reported on 08/09/2022.

In the **third ground** concerning the standard of proof, the appellant is asserting that the learned trial magistrate erred in law and in fact by failing to notice that the charge against the appellant was not proved to the required standard. He prayed for the court to step into the shoes of the trial court and make a proper evaluation of the entire evidence in order to satisfy itself as to whether or not the conviction of the appellant was justified. He referred to the case of **DR.PANDYA.V.R [1957] E.A 336** which contains the principle that the 1st appellate court can evaluate afresh the evidence of the trial court.

In the Respondent's submissions, Mr. Mbilinyi SA restated the prosecution evidence as given by PW1 the mother of the victim, PW2 who was the victim, PW3 who was the doctor who examined the victim and one Zuberi Said Hobwe (PW4) who was a child who witnessed the rape by eyes. In his view, all these witnesses deserve credence as per the position in the case of **GOODLUCK KYANDO VERSUS REPUBLIC [2006] TLR 363,**



Having restated the prosecution evidence, Mr. Mbilinyi submitted that neither of the prosecution witness was challenged on cross examination during he trial. He thus confronted the appellant's claims that the prosecution witnesses were unreliable. He called into application the principle that the best evidence in cases of rape is that of the victim as it was stated in the case of **SELEMANI MAKUMBA VERSUS REPUBLIC [2006] TLR 379**. He denied any contradiction in the testimony of PW2.

He considered the appellant's attempt in the first ground of appeal to contradict PW4's evidence that the appellant was uncircumcised while he is indeed circumcised. In the view of Mr. Mbilinyi, this matter does not go to the root of the case and therefore it does not prejudice the fact that the appellant raped the victim. He referred to the case of **DICKSON ELIA SAMBA & ANOTHER VERSUS REPUBLIC, CRIMINAL APPEAL NO. 92 OF 2007**(unreported) where it was stated that,

"Contractions by any particular witness cannot be escaped or avoided in any particular case and that minor contradictions, inconsistencies or discrepancies which do not affect the case of prosecution should not be made as a



ground on which the evidence can be rejected to its entirety."

He referred also to the case of **HEZRON NDONE VERSUS REPUBLIC, CRIMINAL APPEAL NO. 263 OF 2021** at page 18.

Arguing the second ground of appeal that, the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence, Mr Mbilinyi was of the view that the appellant did not have strong defence. He argued that late reporting of the rape was due to immaturity and fear of reprisal from the appellant and the society around the victim. He added that the appellant was given an opportunity to defend himself and the court found his defence to be baseless.

On the third ground concerning failure to prove the charge beyond reasonable doubt, Mr. Mbilinyi SA is of the view that the respondent's case is watertight and all the witnesses are to be believed. He reiterated the best evidence principle in **SELEMANI MAKUMBA VERSUS REPUBLIC, (Supra)** that "true evidence of rape has to come from the victim.". In his view, the evidence of the victim was corroborated by other witnesses such as PW3 and PW4 which link the appellant to the case.



Having gone through the grounds of appeal, the submissions of the parties and the lower court record, the issue for determination is **whether the appeal has merits**. In responding to this issue, all the three grounds of appeal will be considered.

Starting with the **first** ground that the trial court relied on unreliable evidence from prosecution witnesses, the argument of the appellant is faulting the evidence of PW4 who said that the appellant was not circumcised while indeed he is circumcised. Mr. Mbilinyi treats this assertion as a minor issue which do not go to the roots of the case. I agree with him. The main issue in the trial court was not the status of the circumcision of the Appellant but whether the victim was actually raped. Whether the Appellant was circumcised or not, was not the substance which was required from the prosecution evidence. From the evidence of PW4, what went to the roots of the matter is that PW4 watched through the window and saw the appellant undressing the victim and himself and laying on the victim and inserting his penis in the victim's vagina. Since this evidence was not contradicted during cross examination, it remains to be reliable evidence. (See D.P.P vs Ngusa Keleja @ Mtangi and Another, Criminal Appeal No.276 of 2017, CAT



(Mbeya Registry) The court did not have any duty to ascertain the circumcision of the appellant.

The appellant further questioned how PW4 knew that the money he stated to have been given to the victim was for buying sweets. I had a glance to the evidence of PW4. According to his evidence, the appellant told him to call the victim and he called her and the victim went to the room of the appellant. That the appellant closed the door and PW4 and his fellow kid watched through the window to see what was happening and they saw the appellant undressing the victim and himself and laying on top of the victim and inserting his penis in the vagina of the victim and thereafter giving money to the victim to buy sweets. It means PW4 saw what was happening and it is apparent in his evidence that he knew the money was for buying sweets because it was the appellant who said so while giving it to the victim. I don't see the contradiction suggested by the appellant on this evidence by PW4.

The appellant challenged the reliability of the evidence of the victim (PW2) by questioning the possibility of a girl aged 6 years old being raped by a man aged 28 years without having screams and bleeding. There is no hard and fast rule that every pain must be responded by screams. In my view, lack of screams does not disprove the act of rape

so long as the necessary ingredients constituting rape are proved. The trial magistrate was satisfied with the evidence of the victim who testified to have been raped by the accused and she stated to have felt pain. The Trial Magistrate also relied on the evidence of PW4 who was the eye witness who watched the act of rape from the beginning to the end and the evidence of PW3 who was the clinical officer who examined the victim and noted bruises indicating the victim to have been raped. Whether the victim was supposed to bleed as contended by the appellant, depends on the nature of the penetration. However slight it may be, any forceful penetration of a male organ to a female vagina constitute rape. (See **Section 130(4) (a) of the Penal Code Cap. 16 R.E.2019**). It reads;-

"For the purposes of proving the offense of rape;-

"a. Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."

See also the case of **Masalu Kayeye vs Republic, Criminal Appeal No. 120 of 2017 CAT** (Mwanza Registry)



From the aforesaid, I see no merit in the first ground of appeal as there was no contradiction in the prosecution evidence as asserted by the Appellant.

Concerning the second ground of appeal, the Appellant has claimed that the trial court did not consider his defence. I have gone through the trial court judgment and noted that in pages 14 to 19, the trial court has a lengthy discussion about the defence of the appellant. The Magistrate found the appellant's evidence unable to shake the credibility and raise doubt against the evidence of the prosecution.

The appellant complained that the trial court failed to consider the defence of late reporting to the police station concerning the rape incident. In my view, the late reporting cannot amount to a defence so long as the other aspects of rape were proved. The trial Magistrates focused on finding as to whether the ingredients of rape were proved by the prosecution beyond any reasonable doubt. The magistrate was convinced by the evidence of the victim who gave what the law considers to be the best evidence by narrating how the appellant raped her. The Magistrate took note of the corroboration given to the evidence of the victim by the evidence of PW4, the boy who watched the act of rape from the beginning to the end. The evidence was further




corroborated by that of the clinical officer (PW3) who found bruises in the vagina of the victim as well as the mother of the victim who saw the bruises told by the victims to have been caused the appellant's act of raping her.

The magistrate was satisfied that the extent to which the victim's vagina was penetrated sufficiently proved rape. The trial court was guided by the case of **Masalu Kayeye Vs Republic, Criminal Appeal No. 120 of 2017 CAT (Mwanza Registry)** dated 12th & 17th June, 2020 where the Court of Appeal of Tanzania held thus;-

"It is trite law, in terms of section 130 (4) of the Penal Code, in proving rape, evidence establishing penetration of the male organ into the female organ is necessary and such penetration, however slight, is sufficient to constitute sexual intercourse."

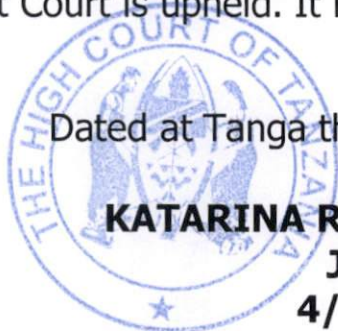
Since the Magistrate was guided by the law and authorities in concluding that the defence evidence could not shake the credulity of the evidence on the record, I see no reason to interfere with the trial court findings.

Concerning the third ground of appeal on prosecution failure to prove the charge to the required standard, the appellant's view is that the




prosecution evidence in the trial court was full of doubts. I have already found that the appellant could not raise doubt against the prosecution evidence in the trial court and that the evidence of prosecution sufficiently established that PW2 was raped and that it was the appellant who raped her. I don't see a different issue in the third ground of appeal as what is found in the 1st and the 2nd ground is sufficient to answer the third ground that the prosecution managed to prove the case to the required standard of proof.

From the above discussion, I find all the grounds of appeal to have no merit. This negatively answers the main issue as to whether the appeal has merit. This being the case, the Appeal is dismissed, and the decision of the District Court is upheld. It is so ordered.

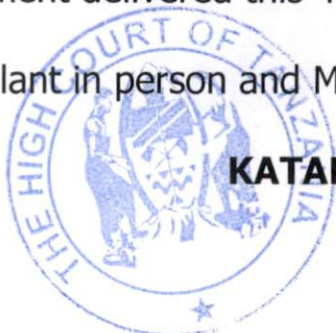



Dated at Tanga this 4th Day of April 2024


KATARINA REVOCATI MTEULE
JUDGE
4/4/2024

Court

Judgment delivered this 4th Day of April 2024 in the presence of the Appellant in person and Mr. Wilfred Mbilinyi SA for the Respondent.




KATARINA REVOCATI MTEULE
JUDGE
4/4/2024