

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

AT MWANZA

CRIMINAL APPEAL NO 52 OF 2023

*(Arising from criminal case No. 137/2022 of the Resident Magistrate's court of
Geita at Geita)*

WILSON S/O MAJALIWA APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

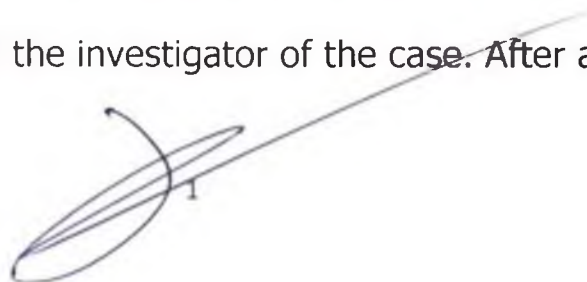
14th & 14th May, 2024

A. MATUMA, J.

In the resident Magistrate Court of Geita Region, the appellant stood charged of Rape contrary to **section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap.16 R.E 2019.**

He was alleged to have on the 4th February, 2022 raped a victim girl of fourteen (14) years old at Nyamalembo area within the District and Region of Geita.

During trial, the prosecution arraigned five witnesses; Christopher Yohana (Pw1) who is a medical doctor, the victim (Pw2), Pendo Mabula (Pw3) who is the victim's mother, Enos Mhangwa (Pw4) a member of people's militia and D/CPL Costansia Pw5 the investigator of the case. After a full trial, the



trial Magistrate was satisfied that the prosecution case was proved beyond any reasonable doubts. It thus convicted the appellant and sentenced him to suffer thirty (30) years custodial term.

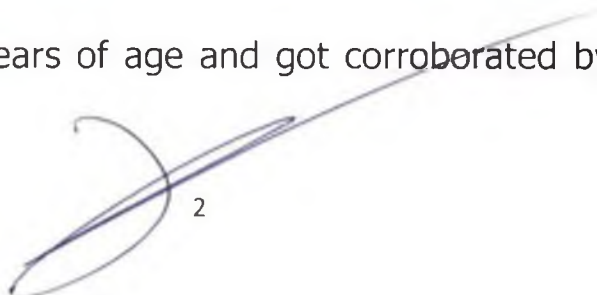
The appellant was aggrieved with both the conviction and sentence hence this appeal with a total of seven grounds but whose major complaint is that the prosecution case was not proved beyond any reasonable doubts.

Such major ground suggests in the sub-grounds that there was no proper identification of the accused, the prosecution evidence is not credible and there is contradiction in the prosecution's case.

At the hearing of this appeal, the appellant was present in person while the respondent had the service of M/S Tabitha Zakayo learned State Attorney. The appellant a lay person did not have much to argue. He merely invited this court to determine his grounds of appeal and set him free as he did not commit the offence.

Responding against this appeal, the learned State Attorney argued that the appellant was charged of a statutory rape whose elements are only penetration and age of the victim since consent is immaterial.

She pointed out that the age was proved by the victim herself who testified that she was fourteen years of age and got corroborated by her mother



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who again testified to that effect. To that effect, the learned State Attorney cited the case of **Leonard Sakata versus the DPP**, criminal Appeal No. 235 of 2019 in which the court of appeal held that the victim's age can be proved by the victim herself, her parents, a relative or certificate of birth.

About penetration, the learned State Attorney argued that the best evidence was that of the victim in which she explained how the appellant grabbed her, pulling her to the bush, undress her, putting her legs apart and inserting his penis into her vagina. The learned State Attorney cited the case of **Selemani Makumba Versus the Republic** (2006) TLR 379 to the effect that the best evidence in rape cases comes from the victim herself.

About identification the learned State Attorney argued that despite the fact that the evidence shows that the appellant covered the victim's face with a cloth, the victim had two points of time to observe the appellant. One, it was when the appellant walked behind the victim. The victim turned back and saw him before she was grabbed and pulled to the bush. Two, it is after the rape. At this point, the appellant having finished the crime went away but later came back introducing himself to the victim as Michael. From the two moments, the victim was able to identify the appellant and when she

came to court, she positively identified him. The learned State Attorney stressed.

The appellant in rejoinder repeated his call to be set free on the strength of his grounds of appeal.

Having heard the parties for and against this appeal, I find that only one ground relating to identification suffices to dispose of this appeal.

The learned State Attorney admitted in her submission that the facts of the case indicates that the appellant was stranger to the victim on the crime date as they saw each other for the first time.

The victim also in her evidence did not claim to have known the appellant prior to the crime date. She made it clear that the appellant identified himself to her as Michael in the meaning that they did not know each other.

In the circumstances, apart from proving penetration and age, the prosecution ought to have proved the identity of the crime doer. Statutory rape does not ignore proof of identity of the rapist.

The evidence on record clearly shows that the victim did not identify her assailant. That can be seen even in the PF3 exhibit P1 in which the doctor wrote at the place of medical practitioner's remarks that;

"Being involved in virginal penetration by a person not known to her"

Such record is a clear indicator that the victim had time to talk with the doctor and informed him that she did not know the person who raped her.

Under the circumstances the arguments of the learned State Attorney that the victim had time to see the assailant twice does not in itself establish the identity of the appellant.

The law is now settled as far as identification of a stranger accused is concerned. In the case of **Ambwene Lusajo Versus the Director of Public prosecutions**, criminal appeal No. 461 of 2018 which had Similar facts to the instant case whereas the rape was committed by a stranger accused, the court of appeal at page 9 held;

"In the record before us, it is glaring that the victim was not familiar to the appellant. In this regard, it is trite law in order to act on the evidence of identification of a stranger, the witness must have first given the description of that person".

In the instant case none of the prosecution witnesses testified on whether there was prior description of the appellant by the victim so that when the appellant is finally arrested the descriptions are confirmed through identification parade. In the same case of **Ambwene (supra)**, the court of

appeal further held that when it is already known that the person who raped the victim was a stranger, it is incumbent on the police to interrogate the victim about the description and terms of the description of the assailant before proceeding to arrest the appellant.

The court of appeal having found that there was no prior description of the assailant by the identifying witness just like in the instant case held in the manner I do in the instant case that;

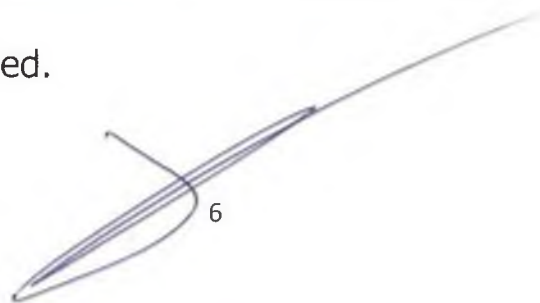
"Although we sympathise with the victim who was sexually abused, the evidence on record before us does not connect the appellant with the offence charged because he was not properly identified by the identifying witness".

In the same way, I sympathise with the victim in this case but unfortunately courts of law have always been guided by law and not sympathy.

I find that the appellant was not properly identified and that alone is enough to allow this appeal.

Consequently, this appeal is allowed. The appellant's conviction is hereby quashed, the sentence of thirty years meted against him is set aside.

I order his immediate release unless otherwise lawfully held. Right of further appeal is explained.



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It is so ordered.



A handwritten signature in blue ink is written over the typed name "A. Matuma". The signature is stylized and extends diagonally across the page.

A. Matuma

Judge

14.05.2024