

**IN THE HIGH COURT OF TANZANIA  
(TABORA DISTRICT REGISTRY)**

**AT TABORA**

**DC CRIMINAL APPEAL NO. 59 OF 2023**

**(Appeal from the District Court of Tabora at Tabora, Criminal  
Case No. 63 of 2021)**

**YOHANA DAUDI ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Date of Judgment: 10/05/2024*

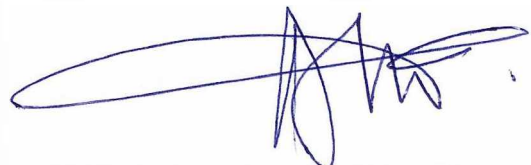
*Date of last order: 22/04/2024*

**A.J. Mambi, J**

In the District Court of Tabora at Tabora the appellant was charged with one count namely rape c/s 130(1)(2) (e) and 131(1) of the Penal Code Cap 16 [R.E 2019]. The appellant was found guilty and convicted. Upon being convicted, the appellant was sentenced to serve 30 years' imprisonment and ordered to pay fine of Tshs 50,000/=, three strokes of a cane after completion of jail term and compensation to the tune of 50,000/=.

Being dissatisfied with both conviction and sentence the appellant appealed to this court. Basing on the following grounds:

1. That, the case for the prosecution was not proved against the appellant beyond as required by law.



2. That, PW1-cum-the victim of the offence, being a child of tender age, did not make prior promise of telling the truth to the trial court as required by section 127(2) of the Evidence Act (Cap 6 R.E 2019) as amended by Act No 2/2016.
3. That, penetration as required by section 130(4) of the Penal Code (Cap 16 R.E 2019) was not cogently established by PW1 being the victim of the offence of rape allegedly committed to her by the appellant.
4. That, Exhibit P2, the caution statement allegedly made by the appellant before police who did not testify, was wrongly admitted into evidence.
5. That, Exhibit P2, was made after expiry of the time prescribed by section 50 and 51 of the Criminal Procedure Act (Cap 20 R.E 2019)
6. That, the learned trial magistrate erred in law and in fact for failure to address his mind to the issue of whether sexual assault as testified by PW4 (the medical doctor who examined PW1) and contained in exhibit P1 (the PF3) is one and the same thing as rape.

What transpired at the scene of crime it is alleged that on 6<sup>th</sup> August 2021 the victim went to school there after she went to the mosque (madrassa). On the way back home, she met an accused (one Yohana s/o Daudi) whom she asked for lift. He accepted her request and carried her to the hill where he had canal knowledge with her. The records show that after the incident the victim shouted and the accused was caught by the villagers. On the way from mosque PW3 who is a village chairman met the crowd of villagers. During the interrogations an accused person told him that he raped the victim. PW3 reported the incident to the victims' parents and to the Village executive officer who called the police who

arrested the accused and the victim was given PF3 for medical purposes. On 7<sup>th</sup> August 2021 PW4 (the doctor) examined the victim thoroughly and diagnosed that the victim was sexually assaulted. When given an opportunity to defend himself an accused pleaded not guilty to the offence of rape.

During hearing of this appeal, the appellant appeared in person and opted to adopt his grounds for appeal as they are. On the other hand, the respondent (republic) was represented by Mr. Kumwembe, State Attorney who addressed the court that the prosecution proved the charges against the accused beyond reasonable doubts. The Learned State Attorney for respondent referred this court to page 15 of trial court typed proceedings where the victim stated clearly the way she was raped. He further submitted that the age of the victim was proved by the father of the victim one Ally Shaban (PW2) at pages 16-17 of the trial court proceedings. Furthermore, they submitted that the accused in his defence he admitted as per page 30 of the trial court proceedings. He also referred the testimony of the accused who said that he gave the victim tzs 500/=. As far as the second ground is concerned, it was submitted that the Evidence Act has now been amended where there is no mandatory requirement for the child to promise to tell the truth. The learned state attorney argued that he is aware that the victim did not promise but the amendment applies retrospectively. With regard to ground number 3 the learned state attorney argued that it has no merit as the victim (PW1) clearly proved penetration. He was of the view that even if the doctor (PW4) did not clearly differentiate between sexual assault and rape we still believe that in rape cases, evidence of the victim is the best evidence so the court should rely on to uphold the conviction.

In his rejoinder the appellant submitted briefly that he does not agree with the submission of the prosecution. He thus prayed for this court to release him from jail.

Having gone through the submissions from both parties in addressing the grounds of appeal I wish to conjoin the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> grounds of appeal: Basing on these grounds of appeal the main issue in my view is whether the prosecution proved the charges against the accused person to the required standard that warrant his conviction or not.

Before addressing the issue as to whether the prosecution proved the charge beyond reasonable doubts or not, i wish to first address the issue as to whether the provision of section 127(2) of the Evidence Act Cap 6 [R.E 2019] was not complied with. The appellant in his second ground of appeal claimed the same to have been violated. Section 127(2) states 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".*

Re-emphasize this, section 127(2) of the Evidence Act Cap 6 [R.E 2019] has been amended. I have gone through the evidence by the victim it is true that the child did not promise to tell the truth but rather she was affirmed. In my considered view and based on the current legal position, failure for the child to promise to tell the truth is not fatal. I wish to refer **The Legal Sector Laws (Miscellaneous Amendments) Act, No 11 of 2023 under the** provision of section 32. Which reads;

*"The principal Act is amended in section 127, by- (a) adding immediately after subsection (6) the following: "(7) Notwithstanding any other law to the contrary, **failure by a child of tender age to meet the provisions of subsection (2) shall not render the evidence of such child inadmissible.**"*

The word "**shall**" under the above provision under the interpretation of the laws Cap 1 implies mandatory reading between the line on the above provision, it is now settled position of the law that, the witness child in rape case, is not obliged to promise to tell the truth. In this regard the claim by the appellant has no merit.

The appellant in his ground of appeal appears to raise doubt that the prosecution did not prove the charges against him beyond reasonable doubt. It is on the records that the appellant in this court has claimed that the victim did not establish penetration as required by section 130(4) of the Penal Code Cap 16 [R.E 2019]. Indeed, that section referred by the appellant reads as follows;

*"4) For the purposes of proving the offence of rape- (a) **penetration however slight** is sufficient to constitute the sexual intercourse necessary to the offence; and (b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent."*

The question is; did the prosecution prove beyond reasonable doubt the charges on rape alleged to have been committed by the appellant? The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. The state or prosecution has the burden of proof in criminal cases, and it includes the burden to prove facts which justify the drawing of the inference from the facts proved to the exclusion of any reasonable hypothesis of innocence. Since the burden is proof beyond reasonable doubt, the guilt of the accused must be established beyond reasonable doubt. In my firm view, the prosecution had to establish beyond any reasonable doubt that it was the Appellant who raped the victim. This is in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case

beyond all reasonable doubt (See **ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.**

**It should be noted that** among the important elements to prove the offence of rape by prosecution beyond reasonable doubt is penetration of the male organ. Additionally, in sexual offences such as rape the best evidence of rape comes from the victim. This was highlighted in one of the most celebrated case that is **SELEMANI MAKUMBA VS REPUBLIC [2006] TLR 384**) in which the court at page 379 held that:

*"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent; and in case of any other woman where consent is irrelevant, that there was penetration."*

In the case at hand there is no doubt that the victim (PW1) testified she was raped by the appellant. During examination in-chief the victim clearly stated how she was raped. I wish to quote page 15 of the proceedings as follows;

*STATE ATTORNEY: Kubaka ndiyo kufanyaje?*

*PW1: "NDIYO kulaliana" aliniingizia lile dude lake kwenye uchi wangu then I was bleeding (alinitoa damu)- "ndiyo akavaa chupi akakamatwa, mi nilipiga kelele, akakamatwa".*

Indeed, the penetration was further proved by the doctor (PW4) who testified that there was penetration and sexual intercourse as the private part of the victim indicated that there were bruises. PW4 at page 4 of the proceedings from the trial court further testified that the vagina of the victim had blood smell indicated she was raped. Indeed, it is the position of the law that the victim in Rape case is required to prove penetration apart from informing the court that the accused raped her. Penetration

may also be corroborated by the Doctor though his evidence as just an expert opinion which does not bind the Court. It is on the record that the evidence of the victim was corroborated by PW4 (the doctor) who examined PW1 @ the victim and found the signs of sexual assault.

The evidence of the victim (PW1) is also corroborated by the evidence of the Appellant who admitted to have raped the victim. This can be reflected from the trial court proceedings at page 30 where the appellant in his admission stated as follows;

*XD*

*"your honour it is true, I did it. It is not false. I am through".*

*XXD*

- *I raped Mwadawa Ally*
- *I raped her over the hill.*
- *Nilimpa jero "I gave her Tshs. 500/="*
- *I did it only once.*
- *I was then arrested; the alarm was heard then people gathered.*
- *She needed a bicycle ride and she asked for Tzs. 500/= to buy tomatoes.*
- *She led me to the jungle".*

Reference can be made to the case of **TWAHA ALLY and PAULO MADUKA & OTHERS VS REPUBLIC (CRIMINAL APPEAL 110 OF 2007) [2009] TZCA 69 (28 OCTOBER 2009)** where both held that the very best of witnesses in any criminal trial is an accused person who confesses. The above testimony of the appellant who seems to admit his charges show that the victim was raped by the appellant. It is also on the

record that the village chairman (PW3) testified that on his way he found the crowd of people arrested the appellant with the victim. PW3 in his testimony testified that he met the crowd with accused and the victim shortly after the incident.

It should be noted that, it is a cardinal principle as alluded above in rape cases as also rightly submitted by the learned state attorney the best evidence is that of the victim as clearly underscored by the Court of **EMMANUEL MAWANGA VERSUS THE REPUBLIC, CRIMINAL APPEAL NO. 519 OF 2017** where the Court insisted that the best evidence in rape cases is that of the victim. Referring the case of **GOD KASENEGALA VS REPUBLIC, CRIMINAL APPEAL NO 10 OF 2002 (UNREPORTED** the Court of Appeal in **SAID MAJALIWA VS REPUBLIC (CRIMINAL APPEAL NO 2 OF 20202** observed that:

*"It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors may give corroborative evidence".*

In our case at hand the charges against the appellant at the trial court was proved beyond reasonable doubt through the evidence of the victim (PW1), PW2, PW3 and PW4 including the evidence of the appellant.

In this regard the court finds the circumstance of the case very favourable to uphold the decision of the trial court. It is on the record that the Accused now appellant was arraigned in a proper charge, where he pleaded guilty after the prosecution closed their case.

As stated above an accused person/appellant raised 6 grounds of appeal all centred on the duty of the prosecution to prove the charges against him beyond reasonable doubt. However, apart from the prosecution



witnesses, the appellant also at the trial court admitted to the charges against him. This show that the prosecution through their witnesses including the appellant's admission proved the case beyond reasonable doubts.

With regard to ground 4 and 5 which mainly deal with caution statement, I do not need to detain myself on those grounds since at the trial court exhibits P2 caution statement and extrajudicial statement were not admitted as the prosecution prayed such document (Exhibit 2) to be expunged.

With regard to the 6<sup>th</sup> ground of appeal, the appellant faulted the contents of PF3 which he alleged to have been written the words "**sexual assault**" while the charge sheet was written **rape**. The appellant in his appeal contended that the trial magistrate failed to address himself to what was written in PF3 by PW4 and what was testified by the victim/PW1. It is on the records that PW1 testified that she was raped by the appellant while PW4 on PF3 on nature of complaints he wrote "**sexual assault**". I will first address the meaning of "**rape**" and "**sexual assault**". **In this regard** the word **Rape** in law can be explained as forced sexual intercourse, including vaginal, anal, or oral penetration. In this regard, penetration in rape cases may be by a body part or an object. In other words, rape involves "penetration, no matter how slight, on the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. The term "rape" is often used as a legal definition to specifically include sexual penetration without consent.

The word "rape" under section 130 (2) of Penal Code, Cap 17 [R.E 2019] is explained as follows;

*"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) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse; (b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention; (c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two; (d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married; (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".*

On the other hand, "**sexual assault** is an act in which one intentionally sexually touches another person without that person's consent, or coerces or physically forces a person to engage in a sexual act against their will. It is a form of sexual violence that includes child sexual abuse, groping, rape (forced sexual penetration, no matter how slight), drug facilitated sexual assault, and the torture of the person in a sexual manner". In literary meaning, **Sexual assault** can be regarded as unwanted sexual contact. Indeed "**rape**" is a type of sexual assault involving sexual intercourse or other forms of sexual penetration carried out against a person without their consent. In this regard, in most cases rape is associated with sexual assault. In my view the words "rape" and "sexual assault" have some similar effect in law so long as all acts share the

ingredient of lack of consent. In my view where the victim of rape case as witness and other witnesses proves an offence of rape basing on what is written on the charge sheet, that can suffice evidence to prove an offence of rape and it thus does not matter if PF3 was written the words "**sexual assault**".

Indeed, the trial court records clearly show that PW4 clearly wrote the word "rape" under PF3 while the victim in her evidence was very specific as to what transpired. The most important thing in criminal cases such as rape is the prosecution to prove beyond reasonable doubts the charge against the accused.

I am aware that the burden of proof according to the law rests throughout with the prosecution, usually the state (See ***Ali Ahmed Saleh Amgara v R [1959] EA 654***). This in law means that the Republic owes the primary duty of proving that the accused committed the *actus reus* elements of the offence charged, with the *mens rea* required for that offence proved. This is also reflected and founded on the Latin maxim that "*he who alleges must prove*" and since it is the Republic who makes allegations on charges against the accused it must prove beyond reasonable doubts as required by the law. In my view as viewed by others that this in the eyes of law means that the principal burden is on the accuser and in criminal cases the accuser is the prosecution, usually the state or Republic. It is trite law that in criminal cases the burden of proof has always remained on the state throughout, to establish the case against the accused beyond reasonable doubt. The rationale for this principle and legal position is that since the burden lies throughout on the state (the Republic), the accused has no burden or onus of proof except in a few cases where he would be under the burden to prove certain

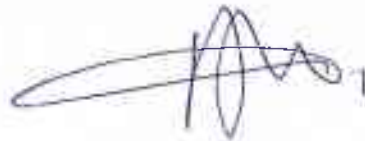
matters. This position was clearly clarified and underscored by the court in ***Milburn v Regina [1954] TLR 27*** where the court noted that:

*"it is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".*

However, from the evidence produced by the prosecution at the trial court, I agree with the prosecution submissions and find no merit in the complaint by the accused person that the prosecution failed to prove the case beyond reasonable doubt. Looking from the sequence of events (from the day the appellant forcibly took the victim to the scene) to the time he was arrested by the crowd of people that involved the village chairman, and his admission on the offence he was charged, there is clear conclusion that the prosecution has proved their case beyond reasonable. Inference on the sequence of evidence, facts and events that led to the victim to be raped can be traced and drawn from the way the key witness the victim (PW1), PW2, PW3 and PW4 including the admission testimony of the appellant.

Basing on above explanation I do not see any justifiable reasons to depart from trial court findings. I therefore, on the evidence on record convinced and satisfied that the trial magistrate was entitled to reach a finding that the case against the Appellant was conclusively proved beyond reasonable doubt. In this regard, I have no reason to fault the finding of trial magistrate. In the event, and for the reasons stated, I am satisfied that the appeal has no merit. I dismiss the appeal in its entirety.

Appeal dismissed accordingly. Order accordingly.

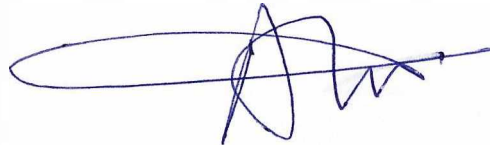


**A.J. MAMBI**

**JUDGE**

**10/05/2023**

Judgment delivered in Chambers this 10<sup>th</sup> day of May, 2024 in presence of both parties.



**A.J. MAMBI**

**JUDGE**

**10/05/2024**

Right of Appeal explained.



**A.J. MAMBI**

**JUDGE**

**10/05/2024**