

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

CRIMINAL APPEAL NO. 89 OF 2022

(Originating from Nkasi District Court in Criminal Case No. 178 of 2020)

DAVID MWANALYELA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

08/02/2024 & 26/02/2024

MWENEMPAZI, J.

The appellant herein was arraigned before the Nkasi District Court of (Trial Court) for the offence of rape contrary to Section 130(1), (2)(e) and 131(1) of the Penal Code [Cap. 16 R. E. 2019].

It was the prosecution side's case that, on the 22nd day of November, 2020, Kantawa village within Nkasi District and Rukwa Region did have sexual intercourse with one A.S (name withheld) a girl aged 14 years old.

On the 27th day of November, 2020, he was marched to the trial court where the charge was read before him and, he pleaded not guilty.

However, at the end of a full trial, he was found guilty and, he was convicted of the offence he was charged with, and thus sentenced to serve a term of thirty (30) years imprisonment.

Aggrieved by that decision, the appellant filed this appeal which consists of five grounds, in which they all suggest that he has been convicted over the charge which was not proved beyond the required standards of the law.

On the 08th day of February, 2024 when this appeal was scheduled for hearing, the appellant had not entered appearance as the result of his own request not to be present during the hearing of his appeal through his letter dated the 02nd day of March, 2023, meanwhile, the respondent, Republic enjoyed the legal services of Mr. Jackson Komba and Ms. Godliver Shiyo, both learned State Attorneys.

As the appellant was not present to make his submissions in support of his grounds of appeal, Mr. Komba for the respondent was then invited to submit against the grounds of appeal, he however started off by stating that his side supports this appeal as at the trial the offence that the appellant was charged with was not proved beyond any reasonable doubt.

Mr. Komba proceeded that, in order to prove the offence of rape, there are three elements that are needed to be considered especially for a victim who is under 18 years old. He clarified that, **first** the age of the victim must be proved, whereas in the case at hand age of the victim was proved by PW5 who was the victim's mother, and therefore there is no doubt on the age of the victim, as the law also provides that age of a victim of sexual offences may be proved either a parent, doctor, any other relative or guardian. Mr. Komba referred this court to the case of **Isaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015 CAT at Tabora at page 8-9, where it was held that: -

"It is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or where available, the production of a birth certificate."

He further added that, **second** element to be proved is penetration. That, in this case at the trial court, the prosecution side failed to prove penetration. He insisted that, in sexual offences the best evidence comes from the victim of the offence. He again referred this court to the case of **Mawazo Anyandwile Mwaikaha vs DPP**, Criminal Appeal No. 455 of 2017, CAT at Mbeya at page 20 where the Court referred the case of **Seleman Makumba vs Republic** in which it was held that: -

"The 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 relation to the case at hand, Mr. Komba submitted that the evidence of the victim (PW1) did not explain how she was raped. That, the victim did not explain if there was penetration as seen at page 10 of the typed proceedings of trial court, where the victim testified that she was sleeping and woke up to find a person on top of her and that she had semen on her private parts without explaining if there was any penetration. Similarly, the learned trial Magistrate at page 5 of the judgment observed failure to explain if there was indeed penetration, in which under those circumstances, Mr. Komba stresses that they find and opine that the ingredient of penetration was not proved and thus supporting this appeal. In support of his argument, Mr. Komba referred this Court to the case of **Masanyiwa Masolwa vs Republic**, Criminal Appeal No. 280 of 2018, CAT at Shinyanga at page 16 where it was held that: -

".....the prosecution or whoever is seeking the trial court to believe his or her versions of the facts on trial must positively

prove that a sexual organ of a male human being penetrated that of a female victim of the sexual offence....”

For the above reasons, Mr. Komba insisted that his side supports this appeal as the prosecution side at the trial failed to prove the offence charged to the appellant beyond any reasonable doubt and he prayed to rest their case.

~~Again, as the appellant was not present, therefore there was no any rejoinder made.~~

Reading between the lines the trial court's proceedings and the judgment thereto, it appears that the main determinant issue is **whether there was penetration to prove that the victim was raped by the appellant.**

In my perusal, I noticed how the trial court relied on the evidence of the witnesses summoned to establish the guilt of the appellant, whereas PW1 gave her account of what transpired. Her testimony was supported by the testimony of PW2 testified to have seen semen at the victim's vagina and also witnessed the appellant being inside the victim's room. Both witnesses clearly identified the appellant being present in court.

PW4 was the medical practitioner who examined the victim and tendered in evidence the PF3 which was marked as **Exhibit P1 CC 178/2020**. He too testified that he found whitish substance in the victim's vagina in which he later discovered to be male semen after a laboratory test. He also testified to have seen slight bruise on the victim's vagina and blood clots. PW3 testified to have witnessed the appellant being in the room of the victim, whereas PW5 did testify on the age of the victim.

Nevertheless, Section 130(4) as amended by the Sexual Offences Special Provisions Act 1998 provides as hereunder, that: -

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

See **Omari Kijuu vs Republic**, CAT, Criminal Appeal No. 178 of 2004 and **Daniel Nguru & Others vs Republic**, CAT, Criminal Appeal No. 39 of 2005 (both unreported).

In the case of **Ryoba Mariba @ Mungare vs Republic**, Criminal Appeal No. 74 of 2003 (unreported), the Court of Appeal held that: -

"It was essential for the Republic to lead evidence showing that the complainant was raped."

It is important to note that, an act of rape is not at any stage a relaxing act as it involves force. In her testimony, the victim testified that she woke up at the middle of the night at around 0100 hours and found the appellant being on top of her, and she ran out naked and got help from PW2. To my understanding of how rape is hurtful as it is forceful, I don't believe the story of the victim that she was penetrated forcefully in her sleep, it is not possible at all, and given that for a man to ejaculate there should be a minimal time of five minutes, I insist it is not possible for a person to be raped in her sleep. In insisting further, the victim did not testify that it was the thrusting that made her woke up, but she just woke up and found the appellant on top of her.

To add up to my observation, in the testimony of PW2 who testified that as she was told by the victim that there was a man in her room, she then asked the victim if she was raped and she answered that she does not know as she was asleep. See **Page 14** of the trial court's typed proceedings. It is impractical for penis to enter a vagina, and friction until ejaculation while the female person is asleep.

Having analysed all the records of appeal before me, I do concur with Mr. Komba and their decision of supporting this appeal with the reason that at the trial court, the prosecution side did not prove the offence of rape.

to the required standard of the law. I am fortified that the testimony of PW1 was not sufficient to prove the appellant's guilt as it was not unveiled as to how was there semen inside the victim's vagina. In that, I do agree with the appellant that his conviction was based on the case which was not proved beyond the required standards of the law.

Consequently, I proceed to quash the appellant's conviction. The sentence earlier imposed upon him is hereby set aside. I then order the appellant's immediate release from custody unless he is held therein for other lawful cause.

It is so ordered.

Dated at Sumbawanga this 26th day of February, 2024.


T. M. MWENEMPAZI
JUDGE

Judgment delivered this 26th day of February, 2024 in the presence of Appellant and Ms. Godliver Shiyo, State Attorney for the respondent.




T. M. MWENEMPAZI
JUDGE
26/02/2026