

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
TABORA SUB- REGISTRY
AT TABORA**

DC CRIMINAL APPEAL NO. 77 OF 2023

*(Arising from the decision of the district Court of Uyui at Tabora in Criminal
Case No. 40 of 2022)*

HAMIS S/O JOSEPH..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

*Last order: 18/03/2024
Judgement date: 10/06/2024*

MANGO, J

The Appellant stood charged in the District Court of Tabora at Tabora for the offence of rape contrary to sections 130(1) (2)(e) and 131(1) of the Penal Code, [Cap 16 R.E 2019]. Before the trial Court, it was alleged that on 27th July 2022 at or about 03:00 hours at Sawewe Village within Uyui District, the Appellant did have carnal knowledge of a 14-years-old girl whose name in this judgement is concealed to protect her dignity. She will be generally referred to as the victim child. After full trial, he was convicted and sentenced to serve a statutory sentence of 30 years imprisonment.

Aggrieved by conviction and sentence, the Appellant lodged the appeal at hand by filing a petition of appeal containing five grounds of appeal which read as follows:

1. That the case was not proved beyond reasonable doubt as required by law.
2. That Hon. trial Magistrate erred in law and fact to convict the Appellant as penetration was not proved
3. That the cautioned statement was recorded out of time.
4. That Hon. trial magistrate erred in law and fact to convict the appellant basing on PF3 which was bad in law as was filled by incompetent person.
5. The learned trial magistrate erred in law and fact to convict the appellant basing on PW3 who testified on the contents of PF3 which was not filed by him nor did he examine the victim

During hearing of this appeal, the Appellant appeared in person and Ms Wivina Rwebangira, learned State Attorney appeared for the Republic, Respondent.

The Appellant prayed to adopt the contents of his petition of appeal. On her part, the learned State Attorney submitted collectively on the first and second ground of appeal, fourth and fifth grounds of appeal while the third ground was argued separately.

Arguing on the first and second grounds of appeal, the learned state attorney submitted that, the Appellant was charged of rape contrary to section 130 and 131 (3) of the Penal Code. She highlighted the ingredients of the offence that need to be proved by the prosecution. In this she submitted that, for offence of rape to be proved, two ingredients must be proved. First, a male person should have sexual intercourse with a woman.

Second, lack of consent on the part of the woman. She pointed out that, in the case at hand the girl was below 18 years thus, consent is irrelevant. In such circumstances, the prosecution was duty bound to prove that the victim child and the Appellant had sexual intercourse, the act which is mainly established by proof of penetration of a male organ into female genitals.

The learned counsel is of the view that the prosecution managed to prove penetration via testimony of the victim child who testified as PW4. She referred the Court to page 28 of the typed proceedings in which the PW4 narrated what transpired on the fateful night. She bolded PW4's statement that, the Appellant threatened her with a knife and forced her to have sexual intercourse with him. He then left the scene of crime after he has raped her.

Ms Rwebangira also referred the Court to the testimony of PW3 Haruna Said Malema, a doctor who filled the PF3, by copying the contents of a PF3 previously filled by a clinical officer who examined the victim child. She argued that the contents of the PF3 establishes that the victim was raped because, it indicates that, the victim had bruises and sperms in her vagina. She concluded that, with such evidence, the prosecution managed to prove penetration which is the basic element in proving the offence of rape. She added that, even if the Court will find the doctor's testimony to be unreliable as alleged by the Appellant via his fifth ground of appeal, testimony of the victim child is enough to prove rape. The learned State Attorney referred this Court to the case of **Selem ani Makumba vs Republic (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006)** in which the Court of Appeal of Tanzania held that, in sexual

offences, the testimony of the victim is enough in proving the case against an accused person.

On the 4th and 5th grounds of appeal, Ms Rwebangira noted the existence of two PF3s. She submitted that, the first PF3 was filled by a clinical officer who examined the victim which was admitted as exhibit P1 and the second PF3 which was filled by Haruna Malema (PW3), a medical Doctor at Uyui hospital which was admitted as exhibit P2. As to why two PF3s were filled, she submitted that PW3 explained well what transpired. According to PW3, he had to fill another PF3 because the clinical officer was not a proper person to fill the PF3. He stated further that, he copied the contents of exhibit P1. She of the view that, the clinical officer was a competent officer to fill the PF3 and existence of the two PF3s has not affected prosecution's case.

On the competence of PW3 to tender the PF3 she submitted that he was a competent witness because he had knowledge of its contents. She referred their Court to the case of **Juma Idd @ Dude V R** Crim. Appeal No 558 of 2020 CAT at Dodoma at pg. 9 and the case of **Pantaleo Teresphory V R** Crim. Appeal No. 515 of 2019, in addition she prayed exhibit P2 be expunged from record because it has no evidential value.

On the third ground of appeal, the State Attorney conceded that the cautioned statement was recorded beyond the prescribed time limit. She submitted that, the Appellant was arrested on 28th July 2022, he was taken to Ugowale police station. In the evening he was moved to Uyui Police station. The statement was recorded at Uyui police station around 15:00 pm.

She therefore prayed the cautioned statement to be expunged from record and the appeal be dismissed.

In his brief rejoinder, the Appellant submitted that, his parents had a land dispute with Mbizo, the victim's grandfather. He was merely arrested for that and this case was fabricated against him. The doctor who examined the victim was not called to testify. According to him, he demanded the doctor to be summoned as a witness but he was told that he is not competent to testify before the Court. He prayed the Court to allow his appeal.

Having heard the rival arguments of the parties, I wish to start with the 3rd ground of appeal as to the authenticity of the cautioned statement. The prosecution has conceded that the cautioned statement was recorded out of time. After examining the contents of the cautioned statement particularly at page 1 and 2 it is not clear on the exact dates in which the cautioned statement was recorded. This is evident from the manner the dates appear in the cautioned statement. The dates seem to have been altered by rubbing and or forcing to change numbers by writing a new number over the other the act which makes its contents and reliability questionable. In that regard, the caution statement is hereby expunged from court record.

Coming to the first and second ground of appeal, I find that prosecution's case was not proved beyond reasonable doubts on three reasons, the manner identification of the Appellant at the scene of crime was done, reliability of the victim child and failure to establish the age of the victim child. Evidence of the victim shows that the incident occurred at night in the room that the victim child slept together with her cousin whose name was

not mentioned. The room had no light. This is evident from the testimony of the victim child who stated that she identified the Appellant by using torch light. Unfortunately, the witness was not lead to establish intensity of the torch light so as to clear possibility of mistaken identification. Source and intensity of the light that enabled the victim to identify the culprit is among the factors set out to be necessary for proper identification by the Court of appeal in several cases including the case of **Waziri Amani versus Republic** (1980) TLR 250 and that of **Shabani Bakari versus The Republic**, Criminal Appeal No. 118 of 2015.

Reliability of the victim child is also questionable. Court record establishes that, when cross examined by the Appellant, the victim claimed to have been sleeping with her cousin in a single room. Despite having another person in the room, she failed to state as to why she did not inform her cousin about the incident but she opted to inform his uncle who was in a different room. The victim stated also that, her cousin did not witness the alleged rape. She did not explain why the said victim could not hear the alleged breaking of the door by the Appellant. All these raises doubts as whether the Appellant did rape the victim child on the particular night and reliability of the victim child's testimony.

I have noted also that, the age of the victim child was not proved. No witness testified as to the age of the victim child except herself. She stated that, she was 14 when the incident occurred and 15 when testifying before the Court. She did not explain as to how she got to know her age. It is well established that the age of the child may be established by the documentary evidence such as a birth certificate and testimony of the parents or medical doctor.

Neither of the two was produced by the prosecution to prove the age of the victim child. For rape under section 130(1) and (2) to be established, proof of the age of the victim is very necessary. Failure to prove the age of the victim renders the case not proved beyond reasonable doubt as required by the law. See the case of **Cosmas Herman vs Republic** (Criminal Appeal No. 211 of 2020) [2024] TZCA 393 (3 June 2024)

For the reasons stated above, I allow the appellant's appeal, quash his conviction and set aside the sentence of thirty (30) years meted against him. I order his immediate release from custody unless otherwise held for some other lawful cause.

Dated at Tabora this 10th day of June 2024



A handwritten signature in blue ink, appearing to read "Z. D. Mango", written over a faint circular stamp.

Z. D. MANGO
JUDGE

Right of Appeal explained