

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 67 OF 2023

(Arising from Criminal Case No. 6 of 2022 in the District Court of Temeke)

BETWEEN

JACKSON SAID @ OMARY MGAYA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 06/05/2024

Date of Judgment: 14/06/2024

A.A. MBAGWA J.

This is an appeal against the judgment of Temeke District Court in Criminal Case No. 6 of 2022. The appellant was charged, prosecuted, and convicted of rape contrary to section s 130(1) (2) (e) and 131 (1) of the Penal Code. In consequence thereof, he was sentenced to a statutory minimum sentence of a thirty-year imprisonment.

Aggrieved with both conviction and sentence, the appellant appealed to this Court. In the petition of appeal, he fronted two grounds as follows;



1. That the trial Court erred in law and facts by failing to analyse the prosecution evidence thereby arriving at the wrong conclusion.
2. That the trial Court erred in law and facts by convicting the appellant whereas the prosecution case was not proved beyond a reasonable doubt.

Briefly, the prosecution case in the trial court was as follows; It was alleged that Jackson Said Omary Mgaya, the appellant on the 12th day of November 2021 at Temeke Mikoroshini area within Temeke District in Dar es Salaam Region did have carnal knowledge of one (LH), a girl of eleven (11) years old.

Upon arraignment, the appellant denied the allegations. Consequently, the prosecution marshaled four witnesses and one documentary exhibit namely, PF3 of the victim dated the 12th day of November 2021.

It was the victim's evidence (PW1) that on the 11th day of November 2021 on her way from school met the appellant. The appellant gave her a letter to deliver it to her sister Rehema. PW1 delivered the letter to Rehema but on reading it Rehema scratched it.

On the following day, that is on the 12th day of November 2021 on her way to school, the victim met the appellant again. He asked her about the letter and the victim told him what happened. The appellant told the victim to follow him to his home. According to the victim, she heeded his request and upon entering the appellant's room, the appellant undressed her and proceeded to have sexual intercourse with her. Thereafter, the appellant told the victim to wipe the wet substance on her vagina and the victim complied. Finally, the victim was allowed to go to school.

The victim proceeded to school while crying. On arrival at the school, her teacher Rehema Justine (PW2) called her to find out why she was crying. The victim narrated her ordeal. It was the testimony of PW2 that the victim mentioned to have been raped by one Mgaya. PW2 briefed the Headteacher on the incident and thereafter escorted the victim to report the matter to Chang'ombe Police Station. At the police station, the victim was issued with a PF3 (exhibit P1) thus they went to Temeke Hospital for a medical examination. It was the testimony of Dr. Sabath George Ongaya (PW4) that upon diagnosing the victim found that she had been penetrated. PW4 thus filled in the PF3. Mr. Ongaya testified that the victim was still a virgin and tested HIV-negative.



WP 6046 D/CPL Nuru (PW3) who was assigned to investigate the case went to the crime scene (at the appellant's home) at Temeke Mikoroshini but did not find him. She recounted that the appellant was arrested on the 9th day of December 2021 and brought to Chang'ombe Police Station for another offence. The victim was called and identified the appellant as her assailant.

In defence, the appellant stood as a sole defence witness. He did not call a witness to support his case nor did he adduce any exhibit. The accused maintained his denial. He testified that the allegations against him were concocted. He lamented that he was arrested in respect of stealing allegations but surprisingly he was fixed on the rape case.

Upon conclusion of the hearing, the trial Magistrate was satisfied that the accusations were proved to the hilt. As such, he convicted and sentenced the appellant accordingly. Dissatisfied with the verdict and sentence, the appellant brought this appeal as herein above hinted.

At the hearing of this appeal, the appellant fended for himself whilst the Republic was represented by Mr. Clement Masua, learned State Attorney. Upon the appellant's request, this Court ordered the appeal be argued by way of written submission. I am grateful to both sides for their submissions.



Suffice it to say that I have read and considered the rival submissions in this judgment.

Having strenuously canvassed the grounds of appeal, the record, and rival submissions, the germane issue for determination is whether the appeal is merited, that is to say, whether the allegations against the appellant were proved beyond reasonable doubt.

The appellant forcefully faulted the trial Magistrate for convicting him despite the contradictions in the prosecution evidence. He lamented that PW1 and PW2 testified that they went to the police and were issued with a PF3 on 12/11/2021. Thereafter the victim was taken to Temeke District Hospital where she was examined by Dr. Sabath George Ongaya (PW4) However, PW3, in her testimony, stated that she issued a PF3 on 13/11/2021. In the appellant's view, this was a material contradiction that ought to be resolved in favour of the appellant. I have keenly considered the evidence on record and the rival submissions. It is true as rightly submitted by the appellant that PW3 testified that she issued PF3 to the victim on 13/11/2021 contrary to what was stated by PW1 and PW2. It is also clear that the PF3 was issued and filled by the medical doctor on 12/11/2021. Nonetheless, having considered the evidence as a whole, I was convinced that the inconsistency

brought in by PW3 was out of a human frailty and did not go to the root of the matter. This is because the evidence of PW1 and PW2 was in consonance with that of PW4 and PF3 (exhibit P1). It is to the effect that the PF3 was issued on 12/11/2021 and the victim was examined on the same day.

With regard to the allegations that the case was framed against the appellant, I painstakingly assessed the evidence of PW2 and PW3. In their testimonies, they unambiguously stated that the victim mentioned the accused shortly after the incident. I further scanned the defence evidence but I was unable to figure out a reason why would the victim and the prosecution witnesses concoct the case against him.

There is proof from the victim (PW1) supported by PW4 that the victim's vagina was penetrated. It is the settled law that the best evidence in sexual offences comes from the victim. See **Selemani Makumba v. Republic [2006] T.L.R. 379** and **Paul Dioniz vs the Republic**, Criminal Appeal No. 171 of 2018, CAT at Dar es Salaam. I revisited the victim's testimony and, like the trial Magistrate, I was convinced that she was a credible witness. Her evidence was very clear and was corroborated by PW2, the medical findings, and PW4.



Further, it is clear from PW1 that at the material time, the victim was 10 years old as she was born on 10/10/2010. This evidence was not controverted as such, the issue of whether the consent was obtained was irrelevant in this case.

All the above considered, I am of the unfeigned findings that the prosecution case was proved beyond a reasonable doubt hence the appellant's appeal is without merits. I consequently dismiss it in its entirety.

It is so ordered.

The right to appeal is explained.



A handwritten signature in blue ink, appearing to read "A.A. Mbagwa", with a horizontal line underneath.

A.A. Mbagwa

JUDGE

13/06/2024