

THE UNITED REUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB – REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 5902 OF 2024

(Originating from Criminal Case No. 36 of 2023 of the district court of Mbeya at Mbeya)

FARAJA MWALYEGOAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of hearing: 22/4/2024

Date of judgment: 10/6/2024

NONGWA, J.

The appellant, Faraja Mwalyego was arraigned in the district court of Mbeya at Mbeya with the offence of rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap. 16 R: E 2022]. Particulars of the offence was that on diverse dates between January 2023 and February 2023 at Iyawala village within the district and region of Mbeya the appellant did have carnal knowledge of XX, a girl of fourteen years old. XX is acronym name given by the trial court to protect her modesty, herein to be referred as PW1 or victim. The appellant denied

the charge. After full trial he was convicted and sentenced to thirty years imprisonment.

To prove the case, the prosecution paraded three witnesses, victim (PW1), Paskal Mponzi (PW2) and Dr. Moyo Bakari (PW3) together with one documentary evidence, PF3 exhibit P1. Substance of the prosecution evidence by PW1 was that in January 2023 the appellant proposed to have love affair but the victim refused, later on he took the victim by force to his home and had sexual intercourse. That she was locked in the room and threatened not to go out for three days. She was released and went home, when asked she did not reply. On other occasion PW1 had sexual intercourse with the appellant in the maize farm and in February she was again taken by the appellant to his home where she stayed for six days, they were doing sexual intercourse. PW1 added that she was found by his father with the appellant and sent to police.

PW2 evidence was that in January the victim disappeared for three days, when asked where she was, did not reply. Again on 28/1/2023 PW1 disappeared home for six days, he searched her and learnt that she was with the appellant. He reported to office of Iyawala village and given a guard to arrest them. The appellant was arrested and sent to police. At the police PW1 was issued with PF3. PW3 narrated that on 1/3/2023 examined PW1 and found her hymen perforated, he filed the result in PF3 which was admitted and marked as exhibit P1.

In defence the appellant testified that he was called by police, went there, arrested and connected with the offence. He complained that the victim did not raise alarm when he took her by force and it is far for about six kilometres, the victim did not report the ordeal and weapon used to force was not mention. The appellant added that there was misunderstanding between him and victim's father it is why the case was fabricated against him.

Upon a full trial, the magistrate was satisfied that the case of the prosecution was proved beyond reasonable doubts. Thus, the appellant convicted and sentenced to thirty years imprisonment. The decision aggrieved the appellant, through the service of advocate filed petition of appeal on four grounds of appeal; **one**, that the trial court erred in fact and law by convicting the appellant while the prosecution did not prove the case beyond reasonable doubt; **two**, that the trial court erred in law and facts by convicting the appellant without considering his defence; **three**, that the trial court erred in law and facts as there was no evidence on record showing how and for what reason the appellant was arrested; and **four**, that the trial court erred in law and fact by convicting the appellant based on evidence adduced by PW3.

When the appeal came on for hearing, the appellant was represented by Mr. Ntegwa Mpinyagwa, learned advocate whereas the

respondent Republic was represented by Mr. Emmanuel Bashome, State Attorney.

When counsel for the appellant took the floor, adopted grounds of appeal and submitted that the prosecution case had many contradictions. He stated it was prosecution evidence that the victim disappeared for six days on 28/2/2023, six day was to end on 5/3/2023 but the victim was examined by PW3 on 1/3/2023. Counsel argued, if the victim was not found on 1/3/2023, how did the doctor examine the victim who was yet to be found. The case of case of **Tumaini Frank Abrahamu vs Republic** Criminal Case No. 40 of 2020, CAT Moshi, page 13 (TanzLII) was cited to support the argument. Counsel contended, evidence by the victim and other witnesses contradicts each other. That the case was not proved beyond reasonable doubt, the prosecution evidence was not supposed to be believed at all.

On proof of rape counsel for the appellant submitted that PW3 examined the victim and found had no hymen but evidence was silent whether it was a penis or not which penetrated her, blunt object could be anything. He added that, the victim testified to be raped for six days continuously but the doctor did not say if he saw any sperms, or swelling of the vagina. This, counsel for appellant was adamant that it created doubt on part of the prosecution and the case was fabricated against the appellant.

Further argument from the counsel was that the guard who arrested the appellant, chairman to who the matter was reported and the police who received the appellant were not called as witnesses. He submitted that, the failure raise doubt if really the appellant was sent to police by the victim's father or the guard. He referred to the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 on failure to call material witnesses. Counsel for the appellant was content that the police could have testified that the appellant was not detained for long time as complained in defence.

Counsel for the appellant went on to submit that the defence evidence was not considered by the trial court, referring to the case of **Abel Masikiti vs Republic**, Criminal Appeal No. 24 of 2015, CAT Mbeya, page 9 (TanzLII) in which the court stated that failure to consider the defence is fatal and vitiates the conviction. He implored this court by virtue of being first appellate court to step on the shoes of the trial court and determine afresh the evidence tendered.

Responding to the appellant's counsel submission, the state attorney submitted that the prosecution had to prove the case beyond reasonable doubt and not any shadow of doubt. On the alleged contradiction it was submitted that it was minor which did not go to the root of the case adding that the contradiction was on PW2 only who said the victim disappeared on 28/2/2023. The state attorney forcefully

submitted that evidence of the victim was that she stayed with the appellant for three days, later she came back and in February she was abducted again and stayed for six days. That evidence of PW1 and PW3 did not contradict each other.

On whether penetration was proved, state attorney submitted that penetration is proved by the victim, doctor's evidence is just to corroborate what has been stated by the victim. He was confident that the victim explained in detail how she was raped by the appellant.

Regarding failure to summon, chairman, guard and police as witnesses, the state attorney was adamant that during preliminary hearing, arrest of the appellant was not at issue. He added that in terms of section 143 of the Evidence Act prosecution is not tied with number of witnesses but the weight of evidence. He added that the said witnesses were not necessary to prove offence of rape.

On why the victim did not shout for help, it was replied that the appellant did not cross examine the victim. The court was referred to the case of **Martin Misara vs Republic**, Criminal Appeal No. 428 of 2016, COA Mbeya where the court held that failure to cross examine a witness is as good as admitting to what has been stated by the witness. On delay to arraign the appellant it was submitted that he was not prejudiced.

In rejoinder it was just the reiteration of submission in chief of which has been summarised above.

Having considered the record, grounds of appeal and rival submissions, the appeal was generally argued by the appellant's counsel as submission did not refer to a specific ground. But all in all, two complaints are eminent for my determination; one, whether defence evidence was considered (ground two) and two, whether the prosecution proved the case beyond reasonable doubts (grounds one, three and four).

Starting with the most raised complaint that defence evidence was not considered. Consideration and evaluation of evidence entails weighing the prosecution evidence visa viz the accused defence. This was emphasized in the case of **Mkulima Mbagala v Republic**, Criminal Appeal No. 267 of 2006 (unreported) the court stated;

'For a judgment of any Court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case is more cogent. In short, such an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at.'

My perusal of the appellant's evidence it raised five points to be resolved by the court; one, that the victim did not raise alarm; two, failure of the victim to name the appellant; three, whether there was threat; four, failure of prosecution to call material witness and five, frame up case due to misunderstanding between the appellant and victim's father. But none of the above issues were considered in the trial court judgment. I therefore agree that defence evidence was not considered. However, I will not nullify the judgment as submitted by counsel for the appellant but I will step into the shoes of the trial and as the first appellate court, objectively deal with entire evidence by re-apprising, re-considering and re-evaluating it afresh.

On whether the prosecution proved the case beyond reasonable doubt. Under scrutiny is the sexual offence of rape committed to a girl who was aged 14 years. In order to prove the offence of rape the prosecution had a duty to lead evidence that the victim was under the age of eighteen, penetration and that the accused is the one who did the act. From the evidence in record, age of the victim was not in dispute and there is no complaint by the appellant. Indeed, it was sufficiently proved by PW2 who said the victim was born on 11/3/2008, the same is corroborated by the age indicted in exhibit P1.

In the submission, counsel for the appellant had problem with proof of penetration, according to him PW1 stated to have been raped for six

days continuously while locked in the room, when PW3 examined her did not say it was penis which penetrated the victim and sperm was to be found. The state attorney had a different view, he submitted that the victim explained how she was raped and the medical evidence is just to corroborate what was stated by the victim.

On my part, after perusal of evidence in record, I find merits in argument of the state attorney, there is no law that requires a doctor to examine and comment that what penetrated the vagina is penis, in essence penis falls under blunt objects. Regarding sperm not being observed by PW3, what matter is penetration and not presence of sperm in the vagina. By the way it is not the law that whenever there is sexual intercourse sperm has to be found, for a simple reason that not always sexual intercourse is associated with ejaculation of sperm, had it been the law then almost all rape cases would go unproved. In the case of **Manyinyi Gabriel @ Gerisa vs Republic**, Criminal Appeal No. 594 of 2017 [2021] TZCA 742 (2 December 2021; TanzLII) the court held;

'Crucial in cases of this nature is penetration however slight it may be and the person better placed to tell is the one on whom it is practiced which is in line with the Swahili saying "maumivu ya kukanyagwa anayajua aliyekanyagwa". That said, in cases like the instant one, the word of the victim, if believed, suffices.

In this case PW1 sufficiently proved that had sexual intercourse, the evidence which was corroborated by PW3 who stated that the victim had no hymen as also explained in exhibit P1. On available evidence, penetration was proved in this case.

The lingering question is whether the accused is the one who penetrated the victim. Sexual offence accusation in most cases there may be no other witness apart from the victim and the perpetrator. The court, is tasked to choose which one between the two is telling the truth, it is so because offence related to sexual offences is very easy to allege and is hard to prove and much harder, for the accused to defend himself. In **Mohamed Said vs Republic**, Criminal Appeal No. 145 of 2017 [2019] TZCA 252 (23 August 2019; TanzLII) the Court of Appeal cited with approval a passage of a Supreme Court of Philippines in the case of **People of The Philippines vs Benjamin A. Elmancil**, G. R. No. 234951, dated March, 2019 in which the Court held;

'In reviewing rape cases, this Court has constantly been guided by three principles, to wit: (1) on accusation of rape can be made with facility; difficult to prove but more difficult for the person accused though innocent to disprove; (2) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength

from the weakness of the evidence for the defence. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of things the accused may be convicted solely on the basis thereof.

In this jurisdiction it is settled that the victim's evidence is the best in sexual offence. See **Selemani Makumba vs Republic** [2006] TLR 379. However, with time the court has cautioned evidence of the victim of sexual offence not to be treated as truth of the biblical verses. In **Mohamed Said** (supra) the court held that;

'... such evidence should not be taken as a biblical version to be believed wholesome, rather credibility of the victim must be tested and proved. The court must be satisfied that, what the victim testified in court is nothing but only the truth of what happened to her.'

[see also: **Malimi Peter vs Republic**, Criminal Appeal No. 480 of 2020 [2024] TZCA 65 (20 February 2024; TanzLII) and **Method Leodiga Komba @ Todi & Another vs Republic**, Criminal Appeal No. 150 of 2021 [2024] TZCA 117 (21 February 2024; TanzLII).]

For evidence of the victim to be believed, it must be credible and probable. In assessing whether the victim is telling the truth or not, the court is guided by two test one, when assessing the coherence of the

testimony of that witness, and two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused. In the case of **Swed Ismail Msangi vs Republic**, Criminal Appeal No. 576 of 2019 [2023] TZCA 17681 (2 October 2023; TanzLII) the court stated;

'The test involved in determining such a question is "whether his or her testimony is probable or improbable when judged by the common experience of mankind. The probity or otherwise of a testimony, it is equally the law, cannot be judged by having a glance over one piece of evidence in isolation of the other. Quite apart, the evidence has to be weighed in line with other pieces of evidence inclusive that of the defence.'

I will be guided by these principles in the determination of this appeal.

The star witness is the victim of the alleged offence and her evidence is reproduced here;

'XD by Mr. Stephen, State Attorney:

On unknow dates of January, 2023. I met with the accused and enticed me to have love relationship with him but I was refused the prayer. On the second day I met with him when went to the market on January, 2023, he asks to reply on his prayer and I was refused to answer or accept his prayer, then he took me by force and go to his home. Then we entered in his house and locked the door and entered in his room, he removed my clothes by force and then entered his make organ and "akanitomba"

then, he left in his room and disappear and I left in his room for three days. He threatening me not to go out that once go out he will kill me having two rooms, living room and sleeping room, after three days, he allows to go home. When at home and asked by father that where I was, I did not reply anything. I was afraid to narrate to my father because he was threatened me. On February, 2023 when went the river to fetch water while in the river, the accused found me and he took me and send to the maize, He was removed my clothes and "akanitomba tena kwenye mahindi". He threatened and then send back to his home. I was stayed for six (6) days in the room while was locking the door. On each day he was doing "(alikuwa ananitomba kila siku)" on the six days my father came with security guard and then was arrested the accused and send to police station. identify the accused person before the court.

XXD by Accused: *When met with you there was no any people the neighbours were afraid you and I know that at the first time when with you for three days. I know your home having two rooms and all the surrounding area knowing. It was evening when meet at the river while alone. The second day when took and stay six (6) days no anyone help me.'*

From the above evidence, the appellant's counsel has submitted that the victim did not raise alarm. According to the appellant it is far from the victim's home to the appellant and it was supported by PW2 that they allocated in different villages and transport is needed to reach the other. But scrutinising evidence of PW1 reproduced above, there is nothing

suggesting that he raised alarm when being taken or there was no passerby who could have assisted her. If it is so far as per DW1 and PW2 to reach the appellant, did they not meet any person on the ways, which transport or means was used to reach the appellant home, was the victim held on threat at all that long distance. Importance of indicating efforts taken by the victim to rescue herself in danger of rape by raising alarm was discussed in the case of **Mapinduzi Mgalla vs Republic**, Criminal Appeal No. 406 of 2020 [2024] TZCA 21 (6 February 2024; TanzLII) and the court stated;

'Also, the prosecution evidence did not state if she tried to raise alarm or that there were no houses nearby even if she could raise alarm no one could hear her and come to her rescue.'

The state attorney submitted that the appellant did not cross examine. I reject the argument of the state attorney because evidence of PW1 reproduced above, presents that the appellant intensively cross examined the victim on that area. Answers like there was no people, the neighbors were afraid of you, no one help me, suggests PW1 was answering questions why did she not raise alarm and seek help.

Regarding threat to be killed if PW1 spoiled the beans. I have considered nature of evidence and in my view such threat was in regard to get out of the room. There is no any suggestion that the victim was threatened not to make noise or raise alarm when being taken by the

appellant in all occasions. Also, there is no any indication that the appellant had any dangerous weapon which frightened the victim.

As to seeking help, there is no evidence showing that there were no neighbours or passerby to whom PW1 could have shouted for help, considering that she testified that she was left in the room alone and there is long distance to reach the appellant. In **Athumani Mussa Zoazoa vs Republic**, Criminal Appeal No. 151 of 2023 [2024] TZCA 347 (9 May 2024; TanzLII) the court stated;

'She was not detailed at all. She did not say, for instance, whether she was hurt, whether she wailed for help or raised an alarm. This conduct of the victim increasingly puts her credibility to question. This is even more so considering the fact that there is no evidence to show that she was threatened to be killed or beaten or anything falling in that basket, if she divulged the incident to anyone. In the absence of any threats, we are even more doubtful if the star witness was one of truth.'

Assuming that the victim was threatened, in her evidence testified that for the first-time appellant took her and they stayed for three days, they had sexual intercourse on those days, she returned home and upon being asked she did not reply. Was the appellant there threatening the victim not to tell her father, certainly no. The second time, was taken to maize farm and raped, still she did not reveal, third time was taken and

stayed with the appellant for six days but there is no evidence telling the court efforts taken by her to rescue from the appellant.

I agree that the victim was of the tender age, but logic and common-sense dictates that at her age was intelligent enough to know bad and good things and to overcome the situations. I have profound respect to quote the wisdom the Court of Appeal in the case of **Mwarami s/o Jumanne Lukasa vs Republic**, Criminal Appeal No. 293 of 2021 [2024] TZCA 364 (15 May 2024; TanzLII) where the court stated;

'It is our considered view that, although she was under the age of majority but at the age of 16, she knows good and bad things and how to overcome the situations like what is alleged to befallen her in this case. It is surprising that on her willing she can follow a man heading to the bush expecting to be shown something. Also, being at the bush the appellant managed to undress her the first to the last clothes and finally her aggressor put on a condom. All that happening she was still there waiting to see something.'

What is gauged from the use of words in PW1 evidence tell it all that she was intelligent enough to know what was happening to her and to be able to deal with the situation. The victim had all ample time to reveal what was happening to her but kept quiet until she was testifying in court, the delay to name the appellant in all three occasions dents the credibility of PW1. I am forced to invoke the ancient words of wisdom which goes

'once is accident, twice is coincidence and thrice is deliberate.' Failure to lead evidence on efforts taken by the victim to seek help and rescue from force taking and detention from the appellant for first three days and later six days, casts doubts on her evidence that she was not telling truth.

There is another area in handling the present case which flop the prosecution case, failure to call some material witness. As submitted by the state attorney under section 143 of the Evidence Act, it is not number but weight of evidence which count, but when a witness who is so connected and can provide good link to the alleged offence and is not called to testify, the court is entitled to draw adverse inference. See **Azizi Abdallah vs Republic** [1991] TLR 71.

In this case, PW2 said he reported the matter to the office of Iyawala village, given a security guard and went to arrest the appellant, after the arrest, PW2, victim and the appellant we taken to police. What a coincidence, a person to who whereabouts of PW1 was reported, guard and police were not summoned in this case. If I have to agree with the state attorney was the missing of PW1 for six days not reported anywhere, who issued PF3 a police document, was the case not investigated.

All these questions could be answered by the named persons who would provide a link, one, that missing of PW1 was reported by PW2 and that was with the appellant, two, guard could have assisted to tell the

court that he found the appellant with the victim and arrested them and three, police would have cleared doubts as to when the matter was reported to them and that they issued PF3 which is only obtained at police. These persons would have cleared doubts which was raised by the appellant in his defence.

Connected with the above, is contradiction in prosecution evidence, according to the appellant's counsel per evidence of PW2 the victim disappeared on 28/2/2023 for six days but was examined by PW3 on 1/3/2023 which is one day after disappearance of the victim. In reply the state attorney said it was minor contradiction and was in relation to only one witness, PW2. The law is that when the court finds there is contradiction and inconsistencies it has a duty to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter. In this case what was pointed as contradiction is not because PW2 did not contradict with any prosecution witness what is seen is credibility of witness.

After going through evidence, I have found the victim was too economical with her words, she did not attempt to mention dates in her evidence but was clear that in February was taken by the appellant and stayed for six days. A precise date was given by PW2 who said;

'I do recall on 28/2/2023 the victim disappeared for unknown places and she was stayed for six (6) days and I was investigating as the result find that she was with relationship with the accused, then i went to report to the office of Iyawala village where give security guard and went to house of the accused'

The above tell that it is the sixth day when PW2 discovered that PW1 was with the appellant. But evidence of PW3 is that he examined the victim on 1/3/2023 and exhibit P1 shows it was issued on 28/2/2023. I wonder if PW1 disappeared on 28/2/2023 and stayed six days, how possible PF3 was issued on 28/2/2023 and PW1 examined on 1/3/2023. Per exhibit P1, it was obtained on a day the victim disappeared, and not on sixth day when she was found, this erodes credibility of prosecution witnesses and I find it not minor as the prosecution would wish.

From the discussion above, there is more questions than answers to what was alleged by the prosecution, it is my finding that the prosecution case was not proved beyond reasonable doubt and doubts raised should be resolved in favour of the appellant.

In the event, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. I hereby order immediate released of the appellant from prison forthwith unless he is lawfully held.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA
JUDGE
10/6/2024

Right of Appeal explained.

DATED and DELIVERED at MBEYA this 10th day of June 2024 in presence of the appellant in person and Ms. Imelda Aliko State Attorney for Respondent.

A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA
JUDGE