

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB REGISTRY
AT SHINYANGA

CRIMINAL APPEAL NO. 59 OF 2023

(Appeal from the Judgment of the District Court of Kahama in Criminal Case No. 394 of 2022, dated 28th March 2023, Hon. C.L. Chovenye-SRM)

BETWEEN

GODFREY S/O NYESIGA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

5th December 2023 & 16th February 2024

MASSAM, J.

Before the District Court of Kahama at Kahama, the appellant herein above stood charged with the offence of Rape contrary to Sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap 16, R.E. 2019. The particulars of the offence as per the charge sheet were as such that, on the 14th day of December 2022, the appellant had carnal knowledge with "SR" a girl of fourteen (14) years old.

Brief facts of the case were that, on the 14th day of Dec, 2022 at noon, the victim was coming from Manzese to Nyamela with a basin of cassava, while on the way she met with the accused person who

stopped her for the purposes of buying cassava. The accused told the victim to put down the basin, he took the knife which was inside that basin and threatened the victim not to raise an alarm. The accused took the victim to the bush and directed her to lay down and undressed her, the appellant also undressed himself and forced the victim to have sexual intercourse with him.

Thereafter the accused put on his clothes and went away. The victim dressed and started to go, after she had reached to the road, she saw a motorcycle passing around and decided to stop it for assistance. The driver of the Motorcycle started to chase the accused while carrying the victim who also asked for assistance from other people.

He further informed the police who arrived at the scene and both were taken to the police station and given Pf3 for examination. The accused was arrested and after investigation the matter was taken to court and when the charge was read over to him, he denied to have committed the offence.

At the trial, the prosecution succeeded to prove their case beyond reasonable doubt and subsequently the appellant was convicted and sentenced to a term of thirty-(30) years imprisonment without fine.

Dissatisfied with both the judgment and sentence by the trial court, the appellant filed this appeal containing five grounds of appeal as depicted from the memorandum of appeal and prayed to this court that, this appeal be allowed, the judgment and sentence be set aside and the appellant be released from imprisonment.

During the hearing of this appeal, the appellant appeared in person, unrepresented while the respondent was represented by Mr. Leonard Kiwango learned State Attorney.

Arguing in support of his grounds of appeal, the appellant prayed for the court to consider his grounds of appeal and to do justice to him.

On his side, the learned State Attorney for the respondent strongly opposed the appeal and supported both conviction and sentence imposed by the trial court.

With regard to the grounds of appeal submitted by the respondent, he chooses to combine grounds 1 and 2 jointly, and argued other grounds separately, while disregarding ground number 6

On the first sets of grounds as complained by the appellant that, the case was not proved beyond reasonable doubt, he submitted that, the evidence produced by the prosecution was strong enough to prove that, the victim was under the age of 18, and she was raped and the

one who raped her was the appellant. He added that, though the trial court failed to comply with the requirement of Section 127 (2) of the Law of Evidence Act, Cap 6 R.E 2019 while taking the evidence of PW2 (victim), and if such evidence of Pw2 will be expunged from records, still the remaining evidence particularly that of PW4(policeman)was enough to convict the appellant as the appellant admitted before him to have committed this offence and when the said witness was testifying to the court appellant he never cross examined him to object what he testified. He referred this court at Pg 20-23 of the trial court proceedings, when the said exhibit was tendered to the court the appellant also did not object its tendering of the said caution statement (exhibit P1) which also shows that, the appellant admitted to this claim.

Further to that, he submitted that, exhibit P1 was supported by the evidence of PW5 (doctor) who examined the victim and discovered that, she has been penetrated and no longer virgin and as per Exhibit P3, the evidence of PW1 (social welfare officer) also shows that, the appellant after being interrogated, he admitted to rape the victim .So according to the all testimonies from all witnesses did prove that the victim was raped and the one who raped her was the appellant. Hence he prayed grounds number 1 and 2 to be dismissed for want of merit.

Responding to the 3rd ground of appeal where the appellant complained that the age of the victim was not proved, Mr Kiwango submitted that, as per the requirement of the law, age of the victim can be proved by relative, parents, victim or a doctor this supported by the case of **Isaya Renatus v Republic**, Criminal Appeal No. 542 of 2015, at Page 8, he submitted that; in this case the age of the victim was proved by the testimony of PW5 who was the doctor hence this ground too has no merit.

On the 4th ground which was complained by the appellant that his evidence was not considered, he submitted that, his evidence was considered as it was found at page 8 of the judgment, in his defence he said that at police station he admitted the offence after being beaten but the same after been evaluated by the trial court found the same to be afterthought.

Finally, on the 5th ground as complained by the appellant that, no exhibits were brought to prove that victim was selling cassava when she was raped, the respondent informed this court that, since the case before this court was rape, their duty was to prove age of the victim, penetration and if it is the appellant was the one who raped the victim and no one else hence, and the same was proved appeal is unmerited and should be dismissed.

In a brief rejoinder, the appellant stated that the police denied his right to call his lawyer during the interrogation and also the trial court denied the fact that he was beaten even after he shows the wounds which he suffered after being tortured by the police as his leg was swallowed.

Having heard the submissions from both parties, I will now make a determination on the merit of this appeal, and the issue before this court for determination is **whether this offence has been proved beyond reasonable doubt.**

To commence with, it is well stated under Section 3(2)(a) of The Evidence Act that, ***"A fact is said to be proved when - (a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;"***

Again, ***Section 110 (1) provides that, "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*** The said position was also held in the case of **Jonas Nkinze v Republic** {1992} TLR 213 held that *"the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is*

a part of our law and forgetting or ignoring it is unforgivable and is a peril not worth taking"

To be satisfied if the case at hand was proved to the required standard, this court will direct its mind to sections 130 (1) (2) (e) of the Penal Code Cap 16, R:E 2022, which provides for the basic components of the offence of rape.

For clarification, ***Section 130 (1) provides that "it is an offence for a male person to rape a girl or a woman. (2) 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: - (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."***

Consequently, for the offence of rape to be established, ***first***, male penis should penetrate to a girl reproductive organ, and that act should be properly proved, ***second***, if a girl was below the age of 18 years, it is immaterial whether the girl gave consent or otherwise, ***third***, it was the accused who raped that girl.

As well, in the case of **Festo Lucas @Baba Faraja @ Baba Kulwa V. R**, Criminal Appeal No. 27 of 2022, the court made clarification on the above sections by saying at Pg 5 that,

"The trial was based on sections 130 (1) (2) (e) whereby basic ingredients of the offence of rape is provided for, while punishment thereon is under in section 131 (1). For clarity, the section is quoted hereunder:-

Section 130(1) "it is an offence for a male person to rape a girl or a woman.(2) 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)-(d) N/A

(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,....."

Guided by the above provisions and cited cases, it is likewise, important to prove penetration by obtaining a medical opinion from a qualified Medical Doctor, who examined the victim soon after the incidence. This was clearly done by PW5 who examined the victim's

vaginal and discovered that it was not intact, meaning that she had been penetrated.

Further to that, the victim herself (PW2) explained how the appellant took her to the bush, undress her and put his penis into her vagina while threatening her with a knife. The said evidence was collaborated with the evidence of PW4 (policeman) who interrogated the appellant and admitted to have committed the offence. Again, the caution statement was tendered and admitted without any objection from the appellant as exhibit P1, where by the appellant admitted to have committed this offence. This also makes, this court to believe that, as a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said.

This was argued in the case of **CYPRIAN A. KIBOGOYO v R Criminal Appeal No. 88 of 1992, PAUL YUSUF NCHIA v NATIONAL EXECUTIVE SECRETARY, CHAMA CHA MAPINDUZI AND ANOTHER Civil Appeal No. 85 of 2005 (both Unreported)**.

Similarly, the same evidence was supported by PW1 (Social Welfare Officer) who said that she got a call from the Supervisor of gender desk to go to the police station and when she arrived there, she found the victim and interrogate her, she admitted to have been raped

by the appellant. Besides, the accused was also interrogated and admitted to have raped the victim. For those reasons, it is clearly that the prosecution successfully proved the contents of grounds number one and two.

With regard to the issue of age, it was from the appellant that, the age of the Victim was not proved as the prosecution failed to bring birth certificate or any certificate, the allegation which was strongly opposed by the respondent that, the age was properly proved as per the case of **Isaya Renatus** (supra) the medical is among the persons who qualified to mention the age of the victim, and in this case medical doctor (PW5) did.

With the above complain, the prosecution had duty to prove that the victim was below the age of 18 years when the alleged offence was committed.

I have thoroughly made analysis to the cited case by the respondent, that is, the case of **Isaya Renatus V. R. Criminal Appeal No. 54 of 2015**, the court held that,

"the age of the victim can be proved by either parent, relative, medical practitioner or birth certificate if available"

The above position was also emphasized in the case of **Festo Lucas @Baba Faraja @ Baba Kulwa V. R, (supra)** that,

As per the evidence of PW5 at Pg 24 of the court proceedings she pointed out that, the victim was around 14 years, since this is among the people who are required to prove the age of the victim, this court is agreeing with the respondent that, the age was properly proved as the victim was pointed out to be under 18 years old.

Under such scenario, I may say that, bringing birth certificate or any other documents to prove the age of the victim as complained by the appellant in this case was immaterial since the evidence tendered by itself supported what is in the charge sheet.

Once more, there is another complain by the appellant that, his evidence was not considered. From the Judgment of the trial court preferably at Pg. 8, the trial Magistrate had this to note,

"..... in his defence the accused denying the involvement in the commission of the crime and only alleged that the charge was framed against him". Similarly, the court proceedings at Pg. 27 and 28 display that, what have been summarized at Pg 8 of the judgment is what testified by the appellant in his defence.

From that, examination, this court is of the view that, the evidence of the appellant was properly considered by the trial magistrate, and therefore this ground is baseless.

As well, the appellant made a complaint that, no exhibit was brought before the trial Court like, knife, basin or cassava to show that the victim was selling cassava, it was from the respondent that, this is a rape case and what is required to be proved are the ingredients of rape. Accordingly, this court is in accord with the respondent that, what was disputed in this case was rape and its ingredients where by the same have been proved as per the analysis of the 1st, 2nd and 3rd grounds of appeal.

In the upshot, I find and hold that this appeal is wanting in merit. It is consequently dismissed entirely. The decision of the trial court is left undisturbed.

It is so ordered.

DATED at SHINYANGA this 16th day of February, 2024.




R.B. Massam
JUDGE
16/2/2024.