

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

CRIMINAL APPEAL NO. 137 OF 2023
*(Arising from Criminal Case No. 22/2023 from Resident
Magistrate Court Shinyanga*

MASANJA S/O PAMBE @ SALI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23/04/2024 & 24/05/2024

Massam: J

The appellant Masanja Pambe Sali was charged and convicted by the Resident Magistrate Court of Shinyanga at Shinyanga with rape contrary to section 130 (2) (b) and 131(1) of the Penal Code, Cap 16 R.E 2022.

The particulars of the offence indicate that on 09th Day of August, 2023 at Bupigi village within Kishapu District, in Shinyanga Region, the appellant did unlawfully have sexual intercourse with a girl aged 9 years old, to conceal her identity she will be referred as A.R the victim who testified as PW2.

To prove its case, the prosecution summoned four (04) witnesses and tendered two (02) exhibits: Cautioned statement and the PF3 which

were admitted as exhibit P1 and P2 respectively. In his defence the appellant was sole witness against the allegation put against him.

At the trial, the prosecution evidence relied on for the conviction was that: PW2 the victim explained that on the material day her mother had left to family gathering leaving her and other kids with their father, while at home with her father he instructed her to sweep the floor at the sitting room, when finished he came with a mat and placed it on the floor asking her to lie down and inserted his penis into her vaginal. On the following day she explained the incidence to her mother (PW1) who reported the same to the village chairman and later the police were involved. PW2 was given the PF3 and went to hospital where she was attended by Doctor Charles Mnada (PW4) who observed the victim walking in difficult, sustain fluid on her pant and her genital had no hymen, PW4 filled the PF3 which was admitted as exhibit as P2. There after the appellant was arrested and PW3 WP 11848 DC Lucia recorded the appellant's cautioned statement which was admitted as exhibit P1.

In his defence, the appellant disassociated himself with the commission of the offence contending that he has been planted this case because he had grudges with his wife as he failed to contribute Tshs. 20,000/= for the construction of her family cemetery. Also he narrated how he was arrested on 10.08.2023 while at his work.

At the end, the trial court convicted the appellant based on the evidence of PW1, PW2 and PW4 which was corroborated by exhibits P1 and P2 thus, it sentenced the appellant to life imprisonment.

Dissatisfied, the appellant lodged this appeal to this court armed with five (05) grounds of appeal which I have summarized them to two grounds to wit:

- 1. The trial court erred in law and fact by relying on mere suspicious evidence which was not well evaluated and not collaborated to convict the appellant on the evidence which was not proved beyond reasonable doubt.*
- 2. That the trial court erred in law and fact for sentencing the appellant for life imprisonment which was harsh and excessive in the circumstances.*

At the hearing, the appellant appeared in person, unrepresented, while the respondent Republic was represented by Ms. Mboneke learned State Attorney.

When the appellant was called to amplify his grounds of appeal, he submitted that the trial court did not do him justice as he did not commit the offence charged with, he then prayed the court to let him free.

At the outset Ms. Mboneke prefaced her submission declaring that they were strongly resisting the appellant's appeal and support the conviction, she argued ground 1, 2, 3 and 5 jointly and ground 4 separately. On the ground that, the trial court relied on mere suspicious evidence, also the evidence given was not well evaluated and was not corroborative, hence convicting the appellant with the evidence which was not proving the case beyond reasonable doubt, she explained that the appellant was charged with the offence of rape contrary to section 130 (1) and (2) of the Penal Code which the prosecution was required to prove the age, penetration and if the appellant was the one who raped the victim.

She expounded that the issue of age was proved by the mother of the victim at page no 4 of the proceeding where she said that her daughter was 9 years old, as she was born on 2004. She cited the case of **Isaya Renatus V Republic**, Criminal Appeal No 52 of 2015 which elaborating who can prove the age of the victim.

On the issue of penetration she elaborated that the victim proved the same as she is the one who was penetrated and mentioned her step father to be the one who did it to her, this evidence was supported by PW1 the mother of the victim who testified that the victim mentioned him and when she examined her she found some blood stains into her

virginal, she further submitted that this evidence was supported by the doctor who found the victim without hymen, walking in difficult and when inserted her finger into her virginal it went straight which made him believe that she was penetrated. She cited the case of **Selemani Makumba** insisting that the best evidence comes from the victim hence ground No. 1, 2, 3 and 5 has no merit.

On the 4th ground that the sentence was excessive and harsh, she submitted that this ground has no merit because the victim was 9 years and according to section 131(3) of the penal Code the sentence given was according to law, therefore the ground is unmerited. She prayed for dismissal of the appeal and sentence given be upheld.

On his rejoinder, the appellant had no much to say but insisted the court to consider his grounds of appeal as no one saw him committing the said offence and he was planted this offence because of the misunderstanding he had with his wife.

I have considered the record, grounds of appeal, submissions by the learned State Attorney for the respondent and the law. In my settled view is that, appellant is challenging the conviction against him on the reason that the prosecution did not prove the case against him beyond reasonable doubts as I have pointed out earlier. Therefore, the main

issue is as ***to whether the prosecution proved the case against the appellant beyond reasonable doubt.***

It is clear that the Appellant was charged for the offence of rape before the Resident Magistrate Court of Shinyanga at Shinyanga and was convicted by the trial Court for the offence of rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code, Cap. 16. For clarity and quick reference, I wish to reproduce the sections thus 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 failing 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."

For this offence of rape to be established, the following ingredients should be proved beyond reasonable doubt:

That, the accused had carnal knowledge of the victim without consent, if a girl was below the age of 18 years, it is immaterial whether the girl gave consent or otherwise. If a woman was above the age of majority, that is, above 18 years old, then such penetrations should be without her consent to constitute rape. In this particular case the victim was a girl of 9 years old girl and the prosecution had to prove the age of the victim, penetration and if it was the appellant who raped the victim. From the appellant's grounds of appeal, he contended that the trial court erred in law and fact by relying on mere suspicious evidence which was not well evaluated and not collaborative to convict the appellant on the evidence which was not proved beyond reasonable doubt.

This ground in whole is based whole in the evidence brought by the prosecution to prove their case and the evaluation done by the trial court, therefore in my determination I will be evaluating the evidence brought before the trial court to ascertain as to whether the prosecution's evidence was strong enough to prove the case beyond reasonable doubt.

To start with the issue of age, to prove the offence of rape under to section 130 (1), (2) (e) of the Penal Code where the victim is under eighteen years old, so proof of age is mandatory, as section 130(2) (e) of the Penal Code requires presence of tangible proof that the age of

victim was under eighteen years at the time of the commission of the alleged offence. See the case of **Leonard Sakata V D.P.P Criminal Application No, 35 OF 2019 Court of Appeal of Tanzania Mbeya (unreported)** at page 8 paragraph 3 where it was held that age must be proved to the offence of statutory rape. This proof is necessary because, once the age is established to be below eighteen years, it negates consent of the victim, if any.

It is settled law that proof of age can be done by the victim himself/himself relative, parent or any person who knew well the victim, a medical practitioner leading evidence on that or else by production as evidence of a birth certificate, See the case of **Victory Mgenzi @ Mlowe v Republic, Criminal Appeal, No 354 of 2019 at page 16.** Also in **Shani Chamwela Suleiman V. Republic (Criminal Appeal 481 of 2021) [2022] TZ CA 592 (28 September 2022).**

If I refer to the evidence of PW1 the mother of the victim testified at page 4 of the typed proceedings that, by the time of commission of that offence the victim was 9 years old as she was born in the year 2014. From this piece of evidence, I find the information of the victim's age from her own mother more reliable, and therefore find that the victim was born in 2014, She was therefore 09 years in 2023 when the appellant had sexual intercourse with her.

Regarding the issue of penetration, the testimony of PW2 the victim at page 8 of the typed proceedings is very clear that the appellant did insert his penis into her vaginal and she felt pain to the extent that in the following day when she was asked to wash utensil she could not. This evidence was corroborated by the evidence of PW1 at page 4, who explained the steps she took when the victim told her that her step father raped her, she explained that she examined her and found some blood clot in the victims vaginal.

Moreover, this evidence was corroborated with the evidence of PW4 the doctor whom testified in the court that he examined PW2 and the results showed that she that she was penetrated as the victim's pant had stain fluids, there was no hymen and she was in serious pain. This evidence is witnessed by exhibit P2 (PF3). The evidence of PW4 was recorded to Exhibit P1 and appellant did not object its admission. See the case of **Bayo Paschal @ Banga @ Bayo Sambiye V. Republic (Criminal Appeal No. 113 of 2020) [2021] TZ HC 7061 (03 November 2021)**; therefore this evidence is credential.

In our criminal jurisprudence, the best evidence of rape always comes from the victim. See, the cases of **Selemani Makumba v Republic [2006] TLR 379, Shani Chamwela Suleiman vs Republic (Criminal Appeal 481 No. of 2021) [2022] TZ CA 592 (28**

September 2022, **Edson Simon Mwombeki Vs Republic**, Criminal Appeal No. 94 of 2016 (unreported) and In **Mohamed Said v. The Republic**, Criminal Appeal No, 145 of 2017, CAT at Iringa (unreported) therefore no doubt that the prosecution proved the issue of penetration.

The last issue is whether it is the appellant who rape the victim. This issue will not consume much of my time because the victim testified at page 7 that it was her father (the appellant) who raped her, at page 7 of the proceedings the victim testified:

“....my father did me wrong, he instructed me to sweep the floor, he then went out and came back with a mat, he placed it on the floor and asked me to undress and lie on the bed, he also undressed and slept over me, inserted his penis into my vagina....”

Also, when she was asked by her mother on the next day she mentioned the appellant without hesitation. This record proves the fact that the victim had mentioned her perpetrator at the earliest opportunity, thus, he was arrested earlier, Refer to the case of **Patrick Sanga vs The Republic, Criminal Appeal No. 213 of 2008. CA (unreported)** also in **Marwa Wangiti Mwita and Another vs. Republic (2002) TLR 39** where it was held that,

".....the ability of a witness to mention a suspect at the earliest opportunity is an all-important assurance of his reliability "

With that observation, the appellant was well identified that he was the one who had sexual intercourse with the victim.

More to that, In the exhibit P1 the appellant admitted to PW3 that he is the one who raped the victim following his grudge to his wife for denying him conjugal rights thus decided to rape his child. I quote from the cautioned statement:

".....tangu mke wangu arudi nyumbani aliacha kunipa unyumba hivyo sikua na mtu wa kufanya nae mapenzi hivyo nikaamua kufanya mapenzi na mtoto wangu AR....."

This exhibit was tendered in the court and the appellant did not object to its admission, therefore I am bold to say that it was the appellant who raped the victim.

It is the principle of the law that the prosecution bears the burden of proving the case against an accused and the required standard of proof is beyond reasonable doubts; see section 3(2) (a) of The Law of Evidence Act, Cap. 6, R.E 2022 that;

(2) 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;

In **Woodmington v. DPP (1935) AC 462**, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused.

The term beyond reasonable doubt is not statutorily defined but case laws have defined it, Rerefer to the case of **Magendo Paul & Another v. Republic (1993) TLR 219** where the Court held that:

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favor which can easily be dismissed."

In this case the appellant's grounds of appeal are based on the evidence used to convict him, he also lamented that the trial magistrate did not evaluate the evidence adduced to reach her decision, I have scanned the trial court judgment, I am of the keen view that the trial magistrate did evaluate the evidence, she went further by considering the defence of the appellant to reach her decision thus this 1st ground has no merit at all.

The last ground the appellant suggested that, the trial court erred in law and fact for sentencing the appellant for life imprisonment which was harsh and excessive in the circumstances. In this case the appellant was charged with the offence of rape contrary to Section 130(2) (b) and 131(1) of the Penal Code, Cap 16 R.E 2022 meanwhile Section 131(3) provides for that:

*"(3) Subject the provisions of subsection (2), a person who commits an offence **of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment.**"(Emphasis is mine)*

This provision gives the punishment for a person who has committed statutory rape similar to this one at hand, the appellant raped a girl of 9 years old girl. So it is punishment is life imprisonment, therefore the trial magistrate sentenced the appellant in accordance to the law, that makes this ground unmerited.

That being said, it is my considered view that, the appellant on his part failed to discharge his duty of shading doubts on the prosecution case. I find and hold that the case against the appellant was proved beyond reasonable doubt and the trial court findings was justified to convict and sentence the appellant. Consequently, I dismiss this appeal

for being unfounded in its entirety. The decision of trial court remains undisturbed. It is so ordered.

DATED at **SHINYANGA** this 24th day of May, 2024



A handwritten signature in blue ink, appearing to read "R.B. Massam".

R.B. Massam
JUDGE
24/05/2024

Right of appeal explained



A handwritten signature in blue ink, appearing to read "R.B. Massam".

R.B. Massam
JUDGE
24/05/2024