

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

**CRIMINAL APPEAL CASE NO. 13614 OF 2024**

(Originating from the District Court of Njombe at Njombe  
In Criminal Case No. 16 of 2023)

**NOEL JOCTAM FUNGO .....APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 24/06/2024*  
*Date of Judgement: 28/06/2024*

**LALTAIKA, J.**

The Appellant herein **NOEL JOCTAM FUNGO** was arraigned in the District Court of Njombe at Njombe in Criminal Case No 16 of 2023. He was charged with two counts. 1. Rape c/s 130(1)(2)(e) and 131 (3) of the Penal Code Cap 16 RE 2022. 2nd count: Abduction c/s 133 of the Penal Code Cap 16 RE 2022. Upon completion of the trial, the District Court convicted the appellant as charged and sentenced the appellant to serve life imprisonment for the first count and seven years imprisonment for the second count. The

sentences were ordered to run concurrently. Dissatisfied, the appellant has appealed to this court on seven grounds. I take the liberty to reproduce them as hereunder:

- 1. That, the trial court erred in law when convict and sentenced the appellant without taking into account that the prosecution failed to proof its charges in both counts as per law.*
- 2. That, the trial court erred in law when convict and sentenced the appellant in first count without regarding that none of prosecution witness witnessed when the appellant raping the victim PW2.*
- 3. That, the trial court erred in law when convict and sentenced the appellant without evaluating deeply the credibility of the testimony of PW2 that why she failed to raised an alarm or escaping for all those days locked and being raped by the said culprit?*
- 4. That, the trial court erred in law when convict and sentenced the appellant without regarding that if PW1 was seen the sperm why PW4 was not seen the same? Vagina hymen perforation is not penetration as per law section 130(4) (a) of the Penal Code Cap 16 RE 2022.*
- 5. That, the trial court erred in law when convict and sentenced the appellant without evaluating deeply the prosecution evidence and the defence and convicted the appellant unlawful.*
- 6. That, the trial court erred in law when convict and sentenced the appellant relying on cautioned statement PE2 which lacks corroboration and was violated the law in record it.*
- 7. That, the defence of the appellant was not considered.*

When the appeal was called for hearing on the 24<sup>th</sup> day of June 2024, the Appellant appeared in person. The respondent Republic on the other hand, appeared through **Mr. Sauli Makori, learned State Attorney**. The Appellant, not being learned in law, opted to reserve his rights to a rejoinder while paving the way for the learned State Attorney to respond to the grounds hitherto filed.

Taking up the podium, Mr. Makori declared boldly that he was not in support of the appeal. He proceeded to submit as summarized in the next few paragraphs. He stated that he would argue the 1st, 2nd, 3rd, and 4th grounds conjointly, followed by the 5th and 7th grounds conjointly, and finalize with the 6th ground.

On the first group of grounds, Mr. Makori addressed the complaint that the evidence of PW2, the victim, was not corroborated by any other witness. He submitted that PW1, Lucia Msanga, whose testimony is recorded on pages 4-6, proved the age of the victim by stating that the victim was born in 2014. PW1 also testified about how the victim suddenly disappeared on 18/1/2023 and was later found in the appellant's room on 20/1/2023, despite

their efforts to search for her. Thus, PW1 was clear on the victim's age and the fact that she was missing.

PW3 corroborated this evidence by stating that he saw the victim in the appellant's room when looking for his notebook. He reported the sighting to the victim's mother, as recorded on page 15. PW3 also identified the appellant in court. The appellant, as recorded on page 20, confessed that the victim was seen in his room.

PW2, as per page 6 of the trial court's proceedings, narrated how she was taken from Kijiweni to the appellant's house, where the appellant removed her skirt and underpants, unzipped his trousers, and attempted to insert his penis into her vagina. She described the pain and how the appellant covered her mouth to prevent her from crying, locking her inside the room and later repeating the act. She was eventually seen by Mama Elia, who called Mama Besta (PW1), leading to village authorities ordering the appellant to be taken to the police.

PW4, a medical doctor, proved that the victim had been penetrated. Based on this, Mr. Makori argued that the victim was able to identify the appellant and clearly narrated the events. He asserted that even without

injuries, penetration could not be ruled out, referencing the cases of Frank Kinambo v. Republic, Crim. Appeal No. 47 of 2019, CAT, Mbeya, and Godi Kasenegala v. Republic, Crim. Appeal No. 10 of 2008, CAT, Iringa, which state that the victim's evidence in sexual offenses is the best and other witnesses simply corroborate it.

On the count of abduction, PW3 proved that the victim had been missing for almost two days and was found in the appellant's room. Therefore, he submitted that the 1st, 2nd, 3rd, and 4th grounds have no merit and should be dismissed.

Moving on to the 5th and 7th grounds, Mr. Makori addressed the complaint about the inability to consider the defense case evidence. He disagreed with this assertion, arguing that the trial court properly assessed both parties' evidence. The appellant's defense was recorded on page 20, and the appellant confessed to knowing the victim. The judgment on page 8 considered the defense case and found it meritless. He referenced the case of Wambura Kigingwa v. Republic, Crim. Appeal No. 301 of 2018, CAT Mwanza, p. 18, stating that the court can re-evaluate the evidence. Thus, he submitted that the 5th and 7th grounds should be dismissed.

On the 6th ground, regarding the cautioned statement, the appellant claimed it was recorded in violation of the law. Mr. Makori stated that PW5, Sgt. Christopher, recorded the statement after informing the appellant of his rights, and it was admitted as Exhibit P2. The judgment on page 8 found it was properly recorded. He invited the court to examine whether it was properly admitted or, if expunged, whether it would affect other evidence. In conclusion, Mr. Makori prayed that the appeal be dismissed entirely, and the trial court's decision be upheld.

The appellant, in his rejoinder submission, stated that he remembered on January 18, 2023, a girl went missing in Idyadya Village. At that time, he was living in the same village at his brother Riziki Sanga's place, where he worked as a casual laborer. In the household, there were three children: Elia Sanga, Eliza Sanga, and Elisha Sanga, and their mother, Faines Swallo. Although they all lived in the same house, he had his own room.

He recalled that the residents were searching for a girl named Suzimarry Msanga, who had been missing since January 18, 2023. When they came to his place to ask if he had seen her, he responded that he had not. Shortly afterward, another group came with the same question, to which

he also responded negatively. Soon, a crowd gathered at his home, and he was forced to sit down and was interrogated. Elia then stated that he had seen the victim in the appellant's room. Upon entering the room, they found her. They interrogated her, and she claimed the appellant had asked her to come into his room so he could rape her. He denied committing the offense.

The appellant explained that he was tied up and interrogated, but he continued to deny the accusations. He was taken to the village office, where he also denied the allegations, and was then taken to the police station while the victim was taken to the hospital. He was interrogated the same night and denied the accusations three times. Subsequently, they took electric wires and began beating him. They also took a club and threatened to beat him further, so he decided to agree, stating he did it once to avoid more beatings. He was then taken to Njombe Central Police Station, where he spent one month.

On February 26, 2023, he was taken to court before Hon. Mlowe, RM, where he denied the allegations, arguing that if he had committed the offense, he would have run away. He noted that the magistrate thought the

victim couldn't tell lies, even though the medical doctor indicated that the victim had not been penetrated.

He concluded by stating that he believed everything the lawyer had said was untrue, questioning the logic of the victim remaining in the room if she was being raped.

**I have dispassionately considered the rival submissions and thoroughly examined the court records.** I must state clearly that the initial investigation appears to have been rushed and focused solely on the appellant without exploring other possible explanations or suspects. The police relied heavily on the coerced confession and the victim's statement without considering the possibility of fabrication or influence by other parties.

On the first count, the evidence presented by the prosecution showed inconsistencies. The appellant noted that the victim's presence in his room was first reported by Elia Sanga, raising questions about the accuracy and reliability of the statements given by other witnesses. Additionally, no other witnesses directly corroborated the victim's account of the appellant's alleged actions. But let me be critical here, how can a person who lives in the same room be said to have abducted the victim who also lives in the



same family house? I think the prosecution exaggerated the whole story which is basically a family conflict. There is no *utekaji*, in the real sense of the word.

On the second count, the medical doctor indicated that there were no signs of penetration, which directly contradicts the victim's account of being raped. This crucial piece of evidence undermines the prosecution's case and supports the appellant's argument of innocence. The lower courts may have placed undue weight on the victim's testimony without adequately considering the medical evidence and the circumstances under which the appellant's confession was obtained. The appellant's claim that the magistrate assumed the victim couldn't lie suggests lack of impartiality in evaluating the evidence.

In my opinion, the appellant provided a plausible motive for the false accusation, explaining a prior conflict with the complainant's family (mother). This background information was not sufficiently considered by the lower courts, which could have influenced the victim or her family to fabricate the charges.

Based on the above points, it is clear that the appellant's conviction is marred by serious procedural and substantive issues. The coerced confession, inconsistent testimonies, lack of corroborative evidence, medical findings, and possible motivations for false accusations all point to significant doubts about the appellant's guilt.

In the upshot, I allow the appeal. I hereby quash conviction and set aside the sentence. I order that the Appellant **NOEL JOCTAM FUNGO** be released from prison forthwith unless he is being withheld for any other lawful purpose.

It is so ordered.



*E.I. Laltaika*

**E.I. LALTAIKA**  
**JUDGE**  
**28.06.2024**

**Court**

This judgement is delivered under my hand and the seal of this court this 28<sup>th</sup> day of June 2024 in the presence of Mr. Sauli Makori, learned State Attorney for the Respondent and the Appellant who has appeared in person, unrepresented.



*E.I. Laltaika*

**E.I. LALTAIKA  
JUDGE  
28.06.2024**

**Court**

The right to appeal to the Court of Appeal of Tanzania is fully explained.



*E.I. Laltaika*

**E.I. LALTAIKA  
JUDGE  
28.06.2024**

HIGH COURT OF TANZANIA - IRINGA