

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB-REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO. 10298 OF 2023

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

JONAS S/O LUFIMBILO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 19/06/2024
Date of Judgement: 28/06/2024

LALTAIKA, J.

The Appellant herein **JONAS S/O LUFIMBILO** was arraigned in the District Court of Njombe at Njombe charged with the offence of Rape c/s 130(1) and (2) (e) and 131 of the Penal Code Cap 16 RE 2022. Upon completion of the trial, he was convicted as charged and sentenced to serve 30 years in prison.

Dissatisfied, he has appealed to this court on four grounds. Irrespective of a few grammatical and typographical errors, I take the liberty to reproduce them as hereunder:

1. *That, the trial court erred in law and facts, when convicted the appellant relying into insufficient evidence of the prosecution side, which fail to point out the essential elements of the offence of rape.*
2. *That, the trial court erred in law and facts, when convicted the appellant to the charged which had not proved beyond reasonable doubts.*
3. *That, the trial court erred in law and facts, when refused to consider the defence of ALBHAI, which adduced by appellant for the question that, the appellant did not comply into requirement of section 194(4) of the Criminal Procedure Act, CAP, 20 R.E. 2022 meanwhile the duty of proving the offence of albai, (sic!) it is not the obligation of appellant and the burden always remains on the prosecution side to prove their case beyond reasonable doubts.*
4. *That, the trial court erred in law and facts, when convicted the appellant to the offence of rape, into the absence of sufficient explanation, why the offence was not reported immediately after the offence has been committed to sufficient explanation for the dela adduced.*
5. *That, the trial court erred in law and facts, when convicted the appellant relying into the evidence of PW3 (Doctor) which point out that the notion was penetrated by somebody, meanwhile, to prove that the offence of rape committed is the obligation of the court and not the duty of medicine doctor.*

When the appeal was called for hearing on the 19th day of June 2024, the Appellant appeared in person, unrepresented. The respondent Republic on the other hand, appeared through **Ms. Sophia Manjoti**, learned State Attorney.

The appellant had the following to add to his grounds of appeal hitherto filed in Court. The appellant, in supporting his appeal, stated that he was convicted for the offence of rape at the District Court of Njombe and jailed on 10/10/2023. He expressed dissatisfaction with the 30-year sentence and the conviction, presenting four grounds of appeal as follows:

The appellant argued that the learned magistrate relied on insufficient evidence, which did not adequately expound on the ingredients of the offence of rape. He contended that the magistrate erred in law by sentencing him for an offence that was not proved beyond reasonable doubt.

The appellant claimed that the magistrate erred in law by failing to consider his defence of alibi. He explained that he was at Lupembe, engaged in timber making. An instrument got damaged, and upon informing their boss, they were instructed to take money to repair it. He went to repair the seesaw called French, returned to his workplace after spending the night

there ("kukeshu") at 22:00, and the next day, a Sunday, went to greet his neighbor. He attended a "kikundi" and returned at 21:00.

On Monday, he stayed home with his wife, and on Tuesday, he went to Kijiweni and spent time with friends. Suddenly, on 16/5/2023, he was arrested by Mgambo and taken to the police station, where he was told he had raped Harriet Nyato, a girl child. He denied the offence and was taken to Njombe, where he spent almost a month. On 9/6/2023, he was arraigned in court, and on 10/10/2023, he was sentenced. The appellant highlighted a variation in the date of the event and the date that appears in the PF3.

Ms. Manjoti, the learned State Attorney, responded to the appellant's submission by acknowledging his five grounds of appeal and emphasizing the objection to the appeal. She argued the first and second grounds together, which related to the complaint against proof beyond reasonable doubt.

Ms. Manjoti explained that the appellant, who was previously the accused, had been arraigned in the District Court of Njombe, charged with the offence of rape contrary to sections 130(1) and (2)(e) and 131 of the Penal Code Cap 16 RE 2022. She stated that the prosecution needed to prove

several elements. Firstly, the age of the victim, as indicated in the charge sheet, was 12 years. According to the law, the age of the victim is supposed to be proved by witnesses, which was done by PW2, the victim's mother, whose testimony is recorded on pages 4-6 of the trial court proceedings.

The victim herself stated on page 6 that she was twelve years old, and PW3, medical personnel, confirmed this on page 13. Ms. Manjoti cited the case of **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015, CAT Tabora, page 8, which states that proof of age can be given by the victim, a relative, a parent, a medical practitioner, or by producing a birth certificate. She asserted that this requirement was met.

The second element was penetration. The victim testified on page 6 that the appellant had undressed her and inserted his penis into her vagina. Ms. Manjoti emphasized that the best evidence in sexual offences is that of the victim, citing **Godi Kasengenegala v. Republic**, Criminal Appeal No. 10 of 2018, CAT Iringa, page 11, and the case of Selemani Makumba. She noted that the victim's testimony was corroborated by PW2 (the mother) and PW3 (the medical doctor).

The third element was the identification of the appellant. The victim named the appellant as the perpetrator, and her mother confirmed that the victim had identified the appellant. Given that these elements were proven, Ms. Manjoti concluded that the case was proved beyond reasonable doubt and requested that the first and second grounds of appeal be dismissed.

Addressing the third ground of appeal, which concerned the trial court's failure to consider the appellant's defense of alibi, Ms. Manjoti argued that this ground lacked merit. She referenced page 6 of the impugned judgment, where the trial magistrate stated that the defense of alibi did not meet the required standards as per section 194(4) of the CPA. The magistrate explained that the alibi should have been notified before the preliminary hearing. Ms. Manjoti added that ignorance of the law is not an excuse and that while courts may be lenient, the burden of proof lies with the accused. She noted that the appellant claimed to be at Kidengembye while the incident occurred at Kidegembye, a proximity that did not support his alibi. She suggested that the appellant could have called witnesses to support his claim. Therefore, she requested that the third ground be dismissed.

On the fourth ground, which concerned the delay in reporting the incident, Ms. Manjoti acknowledged the delay but provided an explanation. She stated that the victim was young and threatened, which justified the delay in reporting the incident from 13/05/2023 to 15/05/2023. She cited the case of Godson Dan Kimaro v. Republic, Criminal Appeal No. 54 of 2019, CAT Moshi, page 12, which stated that delaying in reporting a sexual offence due to fear of reprisal or shame does not affect the credibility of the victim. Thus, she requested that the fourth ground be dismissed for lack of merit.

Finally, addressing the last ground, which concerned the reliance on the evidence of PW3 (the medical doctor), Ms. Manjoti disagreed with the appellant's assertion. She argued that the judgment did not show that the court relied solely on the medical doctor's evidence. Instead, the trial magistrate evaluated the evidence of all witnesses and the accused, concluding based on the victim's testimony corroborated by the medical doctor. Therefore, she requested that this ground of appeal also be dismissed.

I have dispassionately considered the rival submissions in the light of the grounds of appeal. I entertain no doubts in making a finding

that the appellant's defense of alibi was not properly considered by the trial court. The appellant provided a detailed account of his whereabouts during the time the alleged offence took place, which included being at his workplace and other verifiable activities.

The trial court's dismissal of this defense without thorough examination and consideration of the supporting evidence and witnesses constitutes a legal error. According to the procedure obtained in our country, the burden of disproving an alibi rests with the prosecution, which was not sufficiently done in this case.

Although the above finding is capable of disposing the entire appeal for failure to prove the case beyond reasonable doubt on the side of the prosecution as required by law, I am inclined to pen down a few more paragraphs to set the records clear.

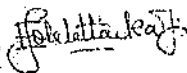
The appellant argued that the victim's testimony was not credible, especially given the claim that she remained in the appellant's room if she was being raped. This scenario appears illogical, and casts doubt on the reliability of her testimony. The Court of Appeal of Tanzania in the now

famous case of **NATHANIEL ALPHONCE MAPUNDA AND BENJAMIN MAPUNDA V. R.** TLR 395 2006 stated:

"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her testimony should pass the test of truthfulness."

In the upshot, I hereby quash conviction and set aside the sentence. I order that the Appellant **JONAS S/O LUFIMBILO** be released from prison forthwith unless he is being withheld for any other lawful purpose.

It is so ordered.

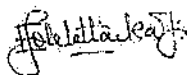


E.I. Laltaika

E.I. LALTAIKA
JUDGE
28.06.2024

Court

This judgement is delivered under my hand and the seal of this court this 28th day of June 2024 in the presence of Mr. Sauli Makori, learned State Attorney for the Respondent and the Appellant who have 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