

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**SUB-REGISTRY OF GEITA**

**AT GEITA**

**CRIMINAL APPEAL NO. 6827 OF 2024**

*(Originating from Criminal Case No. 260 of 2022 of the District Court of Bukombe)*

**ELIA S/O MAKALA.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Date of last order:05/04/2024*

*Date of Judgment:16/04/2024*

**MWAKAPEJE, J.:**

In the District Court of Bukombe in Criminal Case No. 260 of 2022, the Appellant was charged, convicted and sentenced to 30 years imprisonment for the offence of Rape contrary to sections **130(1),(2)(e) and 131(1)** of the **Penal Code, Cap. 16 R.E. 2022**.

The background of the present appeal is thus: It is alleged that sometime on 18 October 2022 at Shinyanga "B" village, in Bukombe District, the appellant did have carnal knowledge of a girl named DM (for decency, name and identity are concealed), aged fourteen (14) years old.

It is stated that on the material date, DM referred to as PW.1, visited her best friend, PW.2 Elpendo Elia, the Appellant's biological daughter and

neighbour. Upon arrival, PW.1 found the Appellant with his friend outside the house. After greeting them, PW.1 went inside to talk to her friend. After a while, the Appellant's friend left. The Appellant then entered the house and confronted PW.1, accusing her of trespassing despite warnings of her coming into his house. He then assaulted PW.1 with a stick, which broke during the altercation. He then asked PW.2 to get another stick from nearby.

While PW.2 was away, the Appellant allegedly closed the door, undressed PW.1, and sexually assaulted her. The assault stopped when PW.2 returned and knocked on the door. PW.1 left the Appellant's residence visibly distressed and physically traumatised. PW.3 Monica Ella, the mother of PW1, took her daughter to Masumbwe Police Station, where they filed a report and were provided with a PF3 and sought medical attention. PW.4 Dr. Casmir Lubango confirmed vaginal penetration, hymenal perforation, and bruising consistent with assault.

The Appellant was apprehended the same day and allegedly confessed to the crimes in the presence of PW.5 (WP 5982) and later to a Justice of the Peace, PW.6 Onesome Kayombo, on 19/10/2022. Both the cautioned statement and extrajudicial statement were admitted as exhibits in the trial court. It is from this evidence that the appellant was convicted and sentenced accordingly.

Dissatisfied with the decision of the District Court, he has lodged his appeal loaded with five (5) grounds of appeal to wit:

- (1) That the trial Magistrate erred in law and fact to convict the Appellant while he denied to commit the offence of rape contrary to sections 130(1)(2)(e) and 131(1) and Common assault contrary to section 249 of the Penal code (Cap.16 R.E 2022). In this way, the trial court failed to follow in detail why the Appellant pleaded not guilty to commit these offences.*
- (2) That the trial Magistrate erred in law to convict the Appellant by using poor hearsay evidence brought by the Prosecution side. The age of the victim was not proved in the trial court by any document. Also, the sticks used to assault the victim were not shown in Court.*
- (3) That the trial Magistrate court erred in law and facts to convict the Appellant by using poor evidence given by prosecution side. Thus, witnesses brought in this case were created and taught by the Prosecution side to speak untrue statements in the trial court. In fact, no witnesses saw the appellant committing the offences alleged to Him.*
- (4) That the learned trial Magistrate erred in law and facts to convict the Appellant without basing the defence given by the*

*Appellant and that the Appellant was sentenced to an excessive sentence of 30 years imprisonment without committing the offence alleged to him.*

*(5) That the learned trial Magistrate erred in law and facts to convict the Appellant by using incomplete judgment, which didn't show the statements given by witnesses in the trial Court.*

This appeal was argued orally. The appellant appeared and argued his appeal in person while the Republic was represented by Ms Deodatha Dotto, a learned State Attorney. When invited to elucidate upon the grounds of his appeal, the appellant had no additional points to state beyond those articulated in his written grounds of appeal. However, he did highlight that he was initially charged with the offence of assault yet subsequently faced an additional fabricated charge of rape.

In response to the appellant's statement, Ms Dotto addressed the court by arguing against the appeal. Firstly, she noted the appellant's assertion that the rape charge against him was fabricated, highlighting its lack of factual support. Ms Dotto pointed out that the trial court's records indicated the appellant faced two counts, not solely the assault charge he claimed. Therefore, she respectfully requested the court to dismiss these baseless contentions.

Ms Dotto opted to address the second and third grounds collectively, followed by the fourth ground. Subsequently, she proceeded to address the fifth ground before concluding with the first ground of appeal. Regarding the second and third grounds of appeal, Ms Dotto emphasised that the evidence presented, including eyewitness accounts and victim testimony, was not fabricated. She highlighted the detailed testimony of the victim (PW1) and corroborated accounts from witnesses PW2 and PW3, as well as medical evidence from PW4. She referred to the case of **Galus Kitaya vs Republic (Criminal Appeal 196 of 2015) [2016] TZCA 301 (13 April 2016)**, Crim Appeal 196/20 - CAT while citing the case of **Selemani Mkumba us Republic 2006 TLR 379** to underscore the standing of the victim's testimony in cases of rape.

She further addressed the appellant's challenge to the victim's age, providing evidence from trial proceedings to support the victim's credibility. She firstly estopped the appellant with regard to the age of the victim that he did not cross-examine, implying that he was in line with what was established to be the age of the victim. To bolster her argument, she referred to the case of **Nyerere Nyague vs Republic (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (21 May 2012)**. Moreover, she contended that proof of age may be obtained from the

victim, parent, relative, or medical doctor, which was proved in the appeal at hand. On this, she referred to the case of **Rutoyo Richard vs Republic** (Criminal Appeal 114 of 2017) [2020] TZCA 298 (16 June 2020) to cement her point. Ms Dotto stated that the grounds lacked merit and requested their dismissal.

Addressing the fourth ground of appeal, she referred to the trial court's judgment, stating that the court thoroughly assessed the appellant's defence and found it unsubstantiated. She justified the court's decision to convict the appellant and impose a sentence based on the charges outlined in the Penal Code. Regarding the fifth ground, Ms. Dotto clarified that the issues raised were found within the trial proceedings, not the judgment itself.

Concerning the first ground of appeal, she emphasised that a plea of not guilty did not absolve the appellant of the alleged offence. Ms. Dotto referred to the case **Galus** (*supra*), where it cited the case of **John Makolobela and Erick Juma alias Tanganyika** (2002) TLR 296 to support her argument and noted the prosecution's responsibility to establish guilt beyond a reasonable doubt. She respectfully prayed for the dismissal of the grounds of appeal and the appeal itself, upholding the trial court's decision.

In his rejoinder, the Appellant added nothing substantial to what was elucidated by Ms Dotto.

Before delving into the grounds of appeal, it is imperative to address the assertion that the appellant was initially charged with assault, followed by an additional charge of rape fabricated at a subsequent date. It is crucial to underscore that this constitutes a new ground of appeal not previously contested and determined within the confines of the trial court. This is trite law established in the cases of **Ramadhani Mohamed v. Republic**, Criminal Appeal No. 112 of 2006, **Richard Mgaya @ Sikubali Mgaya Republic**, Criminal Appeal No.335 of 2008, and **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 (all unreported). categorically, in the case of **Ramadhani Mohamed v. Republic**, it was stated that:

*"We take it to be settled law, which we are not inclined to depart from that, this Court will only look into matters **which came up in the lower court and were decided**, not on matters which were not raised **nor decided** by neither **the trial court** nor the High court on appeal." [Emphasis supplied]*

Consequently, the Appellant's contention was not a matter, and it was not decided upon in the trial court; hence, it is beyond the purview of this court to act upon.

Now, with regard to the grounds of appeal, this court is tasked with considering whether the prosecution successfully substantiated the case to the requisite standard, namely, beyond a reasonable doubt. In addressing the first ground of appeal, it is a well-established legal principle that the burden of proof in criminal law rests squarely upon the prosecution. Section 3(2)(a) of the Evidence Act, Cap 6 R.E. 2019 unambiguously delineates:

*"(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.*

*(b).....N/a"*

This section was solidified in the case of **Selemani Makumba v. Republic** (*supra*). The Court of Appeal expounded that:

*"It is, of course, **for the prosecution to prove the guilt of an accused person beyond a reasonable doubt** and an accused person does not assume any burden to prove his innocence."* [Emphasis supplied]

In the present appeal, the fact that the appellant pleaded not guilty to the offences charged and was subsequently convicted by the trial court does not undermine the necessity for the prosecution to establish the case beyond a reasonable doubt. To me, it is his plea of not guilty that



necessitated the prosecution to parade six (6) witnesses to prove his guilt. If the court was satisfied that a case was proven to the required standards in criminal law, the accused's plea of not guilty was immaterial. I, therefore, agree with Ms Dotto that this ground of appeal lacks merit.

The second and third grounds of appeal are intertwined, thus requiring a collective determination. **First**, the appellant asserts that his conviction was predicated upon hearsay evidence. **Second**, he asserts that the victim's age was not substantiated by documentary evidence. **Third**, he contends that no witness saw him committing the alleged offence.

Considering the **first** and **third** parts, it is now settled law that in sexual offence cases, the best evidence emanates from the victim. Other testimonies may simply be considered to corroborate the victim's evidence. In the case of **Selemani Makumba vs. Republic** (*supra*), it was categorically stated that:

*"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in the case of any other women where consent is irrelevant that there was penetration." [Emphasis Supplied]*

In this appeal, the proceedings and judgment of the trial court unambiguously outlined the basis for the appellant's conviction. Initially,

PW1 provided testimony detailing the sequence of events leading to the sexual and physical assault inflicted upon her by the Appellant. Even without corroboration, if the court believes the victim's testimony, it may proceed to convict the accused. This was established in the case of **Amini Ismail v R** (Criminal Appeal No. 178 of 2015) [2016] TZCA 213, where the court categorically stated that:

*"....., in sexual offences, the evidence of a victim, if believed, can, **without corroboration**, form the basis for the conviction of an accused person." [Emphasis supplied]*

In the appeal at hand, however, the victim's testimony was corroborated by pieces of evidence from other witnesses. PW2, the daughter of the appellant, witnessed the appellant's actions, including the caning of PW1 and the retrieval of additional sticks. She returned to find PW1 in distress and exhibiting difficulty in movement after she was released by the appellant. It is on record that PW2 in her statement clearly, to corroborate the evidence by PW1 stated at pages 22 and 23 of the proceedings that:

*".....then the visitor did leave and immediately I saw my father(accused)coming with a stick inside the house and started to ask DM as to why she was coming at our place while he had already stopped her, and he told her that*

*"Kumbe wewe huwaga hausikii", and he started to hit her with a ..... and after some time I come back at home in fear and tried to push the door but a house was closed from the inside. I had left the accused and DM inside, and after a knock, the accused opened the door from inside, and I heard the accused saying to DM, "Nisije kukuona umekanyaga hapa" She left crying and in shambles like someone in pain and having difficulty walking." [Emphasis supplied]*

Furthermore, the victim's testimony was substantiated by a medical practitioner's examination, confirming signs of rape and physical assault manifested by cane marks across her body. Furthermore, the appellant himself confessed both in a cautioned statement and before a justice of the peace to perpetrating the assault and rape upon the victim. In light of the abundance of evidence presented, these grounds of appeal fail as well.

Regarding the **second** part, i.e., proof of the victim's age, it is trite law that such proof may be furnished by the victim, a parent, a relative, a medical practitioner, or through the production of a birth certificate where available. See the case of **Rutoyo Richard v. Republic** (*Supra*). Furthermore, in the case of **Mathayo Laurence William Mollel v R** (Criminal Appeal 53 of 2020) [2023] TZCA 52, it was expressly declared that:

*"The age of a person may be proved by the **victim, relative, parent, or, where available, the birth certificate.**"*  
*[Emphasis supplied]*

It was further stated in the case of **Andrea Francis versus The Republic**, Criminal Appeal No. 173 of 2014 (Unreported), that:

*"... in a case such as this one where the victim's age is the determining factor in establishing the offence, the evidence must be positively laid out to disclose the age of the victim. Under normal circumstances, evidence relating to the victim's age would be expected to **come from any or either of the following**:- the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc." [Emphasis supplied]*

In this appeal, not only did the victim prove her age as 14 years at the date she testified, but her mother and the attending medical practitioner also attested to her age, as documented on pages 15, 16, 25 and 28 of the typed proceedings. Under these circumstances, the production of a birth certificate is rendered unnecessary, given the absence of any dispute regarding the victim's age. It, therefore, is evident that in the trial court, the victim's age, as required in statutory rape, was proved accordingly. Hence, these grounds of appeal must fail due to a lack of merit.

Regarding the fourth and fifth grounds of appeal, upon review of the trial court's judgment, it becomes evident that the presiding trial magistrate diligently scrutinised and deliberated upon the defence testimony as delineated in his judgment. This is well elucidated on pages 3 and 4 of the judgment. Furthermore, notwithstanding the presence of witness statements within the proceedings, as stated by Ms Dotto (see pages as indicated on pages 2 and 3), the trial court meticulously analysed statements provided by all 6 prosecution witnesses who testified before it, as indicated from pages 4 to 7 of its judgment. To me, the judgement is in line with the requirements of section 312 of the **Criminal Procedure Code, Cap. 20 R.E. 2022**. It goes without saying that the said judgment has passed the standards set in the case of **Amiri Mohamed v. Republic** [1994] T.L.R. 138, where it was stated that:

*"Every magistrate or judge has got his or her own style of composing a judgment, and what vitality matters is that the essential ingredients shall be there, and these include a **critical analysis of both the prosecution and the defence**"*

Therefore, any assertion that the trial court disregarded the appellant's testimony or failed to afford due consideration to witness statements lacks merit.

In conclusion, I find no merit in the appeal and dismiss it in its entirety.

The decision of the trial court is hereby upheld.

**DELIVERED** at **GEITA** on this 16<sup>th</sup> day of April 2024.



**G.V. MWAKAPEJE**  
**JUDGE**

Right of Appeal explained.

Judgment delivered on this 16<sup>th</sup> day of April 2024 in the presence of Ms  
Ms Verena Mathias, a learned State Attorney and the Appellant in person



**G.V. MWAKAPEJE**  
**JUDGE**