

IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO. 82 OF 2023

(Arising from the Judgment in Criminal Case No. 10 of 2023 of Mkinga District Court dated 26th October 2024)

SAID MAHERA MWINYIKOMBO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

K. R. Mteule, J

16/4/2024 & 18/4/2024

The Appellant Said Mahera Mwinyikombo is aggrieved by the decision of the District Court of Mkinga (the trial Court), in **Criminal Case No. 10 of 2023**. In the trial Court, the Appellant was charged with the offence of Rape contrary to **Section 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap 16 RE 2022]** (the Penal Code).

It was alleged that, on diverse dates between June, 2021 and April, 2022 at Moa area within Mkinga District in Tanga Region, the accused person did have sexual intercourse with the victim who is a girl of 11 years' old. The Appellant denied the charge in the District Court hence the case went to full trial.

What I gather from prosecution's factual evidence in the trial Court comes from the evidence of the victim (**PW1**) who testified in court that she was raped by the victim for several times. From her story, it appears that it all began when one Mwamoto who was the victim's teacher asked her (the victim) if she was having sexual intercourse with the Appellant and one Shamsi as she has been hearing rumours about it. The source of the said rumours is not clear in the evidence but according to the victim she agreed to the teacher that she has been having sexual intercourse with the Appellant and the said Shamsi. That after some weeks, according to PW1, the Social Welfare Officer (**PW3**) went to the victim's school and asked her how she was doing sexual intercourse with men and why she was not telling her parents about it. According to **PW3** the victim admitted and mentioned three men with whom she was having sexual intercourse. This time she mentioned the names of Said Mwahera (The appellant), one Kisifu and Hamisi.

The incident was reported to the family of victim by **PW3** who told them that he got the information from a secret informer and that she interrogated the victim who admitted it.

The aunt of the victim was the one who reported the incident at the police station accompanied by the victim but according to PW5, they

were unable to mention the names of the suspects apart from the description of their physical appearance.

Basing on the above evidence, in the District Court, the Appellant was found guilty and convicted. He was sentenced to serve 30 years imprisonment in jail. Being dissatisfied with the conviction and sentence, the Appellant appealed to this court raising 6 grounds of appeal which can be summarised into the following points:

1. The correctness of how the trial court procured the evidence of PW1 who was of tender age.
2. Prosecution failure to explain the reason of delay in the arrest and the arraign of the appellant.
3. Unexplained victim's delay to report the incident to her parents.
4. Propriety of the analysis and evaluation of evidence and
5. prosecution failure to prove the case beyond reasonable doubt.

The Appeal was argued by written submissions. The Appellant was represented by Abdulkadri Athumani Mohamed Adv while Mr. Nathaniel Chagama, learned State Attorney represented the Respondent.

In his submission Mr. Abdulkadri started by challenging the questions asked to the victim which in his view do not prompt the victim's

explanation to reveal her understanding to the nature of the oath. He cited several cases including the cases of **Jumanne Manocha versus The Republic Criminal Appeal No 404 of 2019, Court of Appeal of Tanzania at Dar es Salaam (Unreported)**.

Mr. Abdulkadri made lengthy submission condemning the unexplained delay in reporting the rape incident. He cited several cases including **Selemani Hassani v. Republic, Criminal Appeal No 203 of 2021 CAT, at Mtwara (Unreported)**. He submitted that there was a delay of one year and in his view, this time is too long to tolerate without sufficient explanation.

Regarding the grounds concerning weakness in the prosecution's case, Mr. Abdulkadri submitted that no prosecution witness in the trial court who mentioned the exact dates when the alleged incident of rape occurred. In his view, this creates a missing link between the charge and the evidence adduced. In his view, this clouds the prosecution case with doubts which renders the entire case not proved beyond reasonable doubt. He cited the case of **Sylvester Staphano vs The Republic, Criminal Appeal No. 537 of 2016** cited in the case of **DPP vs Godfrey Michael Mwanvongo @ Godfrey Gabriel, Criminal Appeal No. 116 of 2020, High Court of Tanzania, Mwanza**.

Mr. Abdulkadri challenged the source of the information of the incident which in his view makes the entire evidence to be hearsay and uncorroborated evidence. He further challenged prosecution failure to call material witnesses who conveyed the information to PW3 and PW2. Supporting the assertion that failure to call material witnesses affects prosecution evidence negatively, Mr. Abdulkadri cited that case of **Azizi Abdallah vs the Republic (1991) TLR 71.**

The Respondent being represented by Mr. Nathaniel Chagama who draw the submission supported the appeal basing on ground No. 3 concerning unexplained unreasonable delay to report the incident.

Mr. Chagama, referred to the evidence of PW1 at page 10 and 11 of the trial proceedings, where PW1 testified that she was raped by the Appellant in 2022 and 03/02/2023 was the date when PW1 was called by her teacher who asked her about rumours of PW1 having sexual intercourse with men where PW1 agreed and told her teacher that she has been having sexual intercourse with the Appellant and Shamsi. He further referred to PW1 who testified that after some weeks Social Welfare Officer (PW3) came to her school and asked her about the same incident in which PW1 told PW3 that she has been having sexual intercourse with men and she hasn't told her parents because she was afraid of being beaten by her parents. In his view, this shows that the

incident occurred in 2022 yet PW1 informed her teacher on 03/02/2023 which is a year later after the alleged occurred of the incident and there was nowhere in records that shows why PW1 delayed to inform her parents or any other person about the cruel acts done to her by the Appellant.

Mr. Chagama agrees with the Appellants' submission that PW1 never stated in her testimony if she was ever threatened by the Appellant or any other person. He submitted that it is a settled law that delay to report an incident has to have a justifiable reason such as threats or intimidation or any other reason depending on the circumstances of the case. He referred to the case of **Marwa Wangiti & Another v. Republic [2002] TLR 39** where it was held that a delay in reporting a crime should put a prudent court to inquiry and dents the credibility of the witness and that this was further cemented in the case of **Selemani Hassani v. Republic, Criminal Appeal No 203 of 2021 CAT, at Mtwara (Unreported)**.

Mr. Chagama finds the circumstances in the instant case to be similar to the ones in **DPP v Juma Abdallah Chuwa and another Criminal Appeal No 85 of 2018, CAT at Zanzibar (Unreported)** where the incident took nine months to be reported and the suspect to be arraigned without any evidence from the prosecution side to provide

evidence explaining the cause of that delay. He therefore supported the Appeal due to the above reason.

Having considered the grounds of appeal and the appellant's submissions it appears that all the grounds of appeal revolve around three issues one on the propriety of the procedure of taking the evidence of the victim, unexplained delay in reporting the alleged rape incident and the case being proved beyond reasonable doubt.

As stated by Mr. Chagama, there was unreasonable delay in reporting the incident and such delay is not explained. It took one year to report the incident and the victim did not state in her evidence why she did not report the incident to her parents or teachers in the earlier time before she was asked by the teacher Mwamoto and PW3. I agree with both parties that the delay in reporting the incident was unreasonably long and the trial court ought to have interpreted this as causing doubt to the prosecution case since there was no sufficient explanation as to why such a delay.

The issue of delay was sufficient to dispose of the matter. However, I would like to comment on the issue of voire dire test since it is a legal issue. It is not disputed that the victim (PW1) was a child of a tender age. Evidence by a child of tender age is guided by the provision of

Section 127 (1) and (2) of the Evidence Act Cap 6 of 2022 RE. It provides:

"127.-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.

(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."

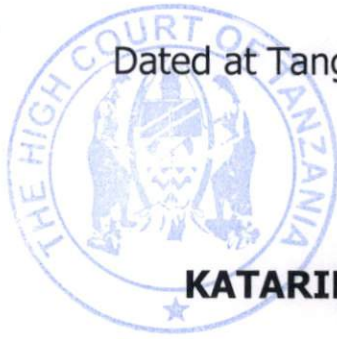
It is apparent in this provision that a child of tender age may give evidence without oath, and she has to promise that she/he will tell the truth. I see no necessary requirement to impose the question on understanding the nature of oath especially when the child is not giving an oath. In the instant case, it is clear in the trial court that the witness gave evidence without an oath. Question to probe her understanding to the nature of oath was not necessary. Therefore, the first ground of appeal fails.

Despite of unexplained delay which was supported by the respondent, The analysis of evidence left so much desired in the trial Court. The source of information seems to be hearsay in all the witnesses. None of them saw the incident. PW2 testified that he heard about it from his wife, but the said wife was not called to testify. PW3 got it from a secret informer who was never called to tell the court how such information came to him.

The Doctor who examined the victim could not find bruises, neither hymen yet she concluded that there was a rape. What made her to make such a conclusion was not explained. Although she stated to have noticed the anus of the victim not intact, she did not explain if that was what made her concluding that the victim was raped. In my view, more explanation should have been given by the doctor to let the court understand professionally what is the relationship between the rape committed one year ago and an anus which was not intact.

I agree with the appellant's counsel that lack of source of information of the incident, lack of the specific date on which the said incident occurred and the unexplained delay in reporting the said incident all weakens the prosecution case making it leaving doubts. I agree that the evidence was not sufficient to prove the prosecution case beyond reasonable doubt. Therefore, the trial Court should not have convicted the

Appellant. Therefore, I allow the Appeal. The Judgment, conviction and sentence of the District Court of Mkinga are all quashed and set aside. The Appellant is released unless lawfully held for another offence.



Dated at Tanga this 18th Day of April 2024

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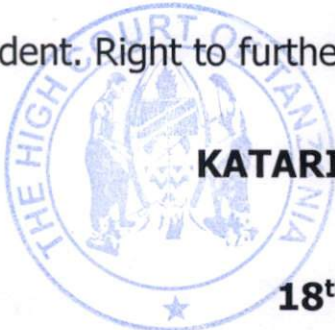
KATARINA REVOCATI MTEULE

JUDGE

18TH DAY OF APRIL 2024

Court:

Judgment delivered this 18th Day of April 2024 in the presence of the Appellant and Mr. Nathaniel Chagama, State Attorney for the Respondent. Right to further appeal is explained.



A handwritten signature in blue ink, appearing to read "Katarina Revocati Mteule".

KATARINA REVOCATI MTEULE

JUDGE

18th Day of April 2024