

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO DISTRICT REGISTRY)
AT MOROGORO**

CRIMINAL APPEAL NO. 8 OF 2021

(Appeal from the Decision of the District Court of Mvomero, at Mvomero)

in

Criminal Case No. 17 of 2019

JOSEPH MANDAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

5th July & 25th August, 2022

CHABA, J.

Formerly, the appellant Joseph Manda was arraigned before the District Court of Mvomero, at Mvomero facing the offence of Rape contrary to section 130 (1) & (2) (e) and 131 (1) of the Penal Code [Cap. 16 R. E. 2002] now [R. E. 2019] (the Penal Code). It was alleged by the prosecution that on 4th day of January, 2019 at staff area, Dakawa Ward within Mvomero District in Morogoro Region the appellant had carnal knowledge of one T. J. or the victim (her name withheld) a girl of 13 years old.

After a full trial, the appellant under section 131 (1) of the Penal Code was convicted and sentenced to serve thirty (30) years imprisonment. Dissatisfied with the trial court decision the appellant filed ten (10) grounds of appeal. For reasons which I will unveil later, I see no need to reproduce these grounds of appeal.

As gleaned from the court records, the evidence which is the basis of conviction of the appellant is *that of the age of the victim and visual identification of the appellant*. Briefly, the prosecution case was this: Three sisters namely; Neema Joseph, Tatu Justin and Gladness Justin who testified as PW1, PW2 and PW3 respectively, all of them used to sleep in the camp called "MAKAMBI YA UTAFUTAJI". That place belonged to the Government, but it appears to have been abandoned. The doors of the building were always open and any one could enter therein and get out at any time. According to the evidence of the victim (PW5), in the night of 4th January, 2019 she slept at the said camp together with her two sisters, PW1 and PW3. At around 04:00 hours while asleep she felt pain into her vagina. When she opened her eyes, she found herself already carnally known by a man. She raised an alarm for help meanwhile saying she was being raped "nabakwa". Her two sisters woke up and managed to see the appellant and recognized him as Joseph Manda using their torch lights. They saw the appellant escaping from the crime scene. All two sisters and the victim chased the suspect/appellant and managed to see him entering in his dwelling house. They tried to raise an alarm for help but in vain. Their testimonies show that they knew the appellant because he was familiar to them.

According to PW1 and PW3, they physically examined the victim's vagina and found that she was bleeding. Early in the morning, they reported the matter to their mother (PW2) who immediately reported the incident to the village chairperson and later to the nearest police station. The appellant also was arrested by village leaders, but he denied the allegation. Later on, was paraded with other two men where the victim did identify him as the person who raped her. Again, while at Dakawa Police Station he was interrogated by PW6, WP D/CPL Janeth and

continued to deny the allegation. During investigation, PW6 visited the crime scene and the house of the appellant. The medical Doctor (PW4) had an opportunity to examine the victim's private parts and she found blood coming out from the victim's vagina. In the mean-time the victim was feeling pain in her vagina. When the Doctor filled the PF3, she then tendered in evidence as Exhibit P.1.

On his part, the appellant denied the allegation though he admitted the fact that at the material time was living nearby "MAKAMBI YA UTAFUTAJI" and that on the material night he slept at his house. He further told the trial court that the victim's mother was threatening to take him to the police station.

As hinted above, the appellant was convicted and sentenced to a term of thirty (30) years in jail, hence this appeal. At the hearing of the appeal, Ms. Theodora Mlelwa, learned State Attorney who entered appearance for the Respondent/Republic supported the appeal lodged by the appellant, while the appellant appeared in person, unrepresented.

Arguing in support of his appeal, the appellant commenced to submit by citing a number of case laws including the case of **Ayoub Haji @ Nyungi v. Republic**, Criminal Appeal No. 237 of 2016 HC DSM Registry (unreported). Amplifying his argument in line with the above case law, the appellant submitted that in this case the provisions of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019] was contravened. In another case of **Kasim Said and Two Others v. Republic**, Criminal Appeal No. 208 of 2013 CAT Arusha (Unreported), the appellant averred that the question of identification was unclear to him. Based on these two authorities, the appellant prayed the court to allow his appeal and find him not guilty of the offence he stands charged.

On her part, Ms. Mlelwa started to argue the appeal by supporting the appellant's appeal. She accentuated that the offence of rape was not proved beyond reasonable doubt and she gave the following reasons: **One;** the age of the victim was not proved. She stressed that the age of the victim is crucial to seek conviction of the appellant. She referred this court to the case of **Robert Andolile Komba v. DPP**, Criminal Appeal No. 465 of 2017 (unreported). In this case, the Court of Appeal (T) held *inter-alia* that proof of age of the victim is very important. Ms. Mlelwa cited another case of **Makenji Kamura v. The Republic**, Criminal Appeal No. 30 of 2018 CAT Mwanza (unreported); where our Apex Court expounded that the victim's age may be proved by the victim, medical practitioner, parents or by birth certificate. She contended that in this case the evidence of the victim (PW5), PW1, PW3, the victim's mother (PW2) and the medical Doctor (PW4) all are silent on the age of the victim.

Two; concerning the appellant's identification, Ms. Mlelwa briefly submitted that the trial court proceedings portray deficiency on aspect of visual identification of the appellant. She averred that the relevant conditions underscored by our Apex Court concerning visual identification of a culprit in the case of **Amani Waziri v. Republic**, (1980) TLR, page 250 were not complied with. She ended her submission by requesting this court to allow the appellant's appeal, quash conviction and set him free from Prison.

Following the respondent's submission, the appellant had nothing useful to add in rejoinder. He prayed to be released from prison.

Even though this appeal is not resisted by the Republic, I find it apposite to enlighten the following observations. I have impassively considered the grounds of appeal by focusing at the main controlling

issues and/or most important points at issue which forms the basis of conviction of the appellant. These are the age of the victim and visual identification of the appellant. As regards to the age of the victim, I fully subscribe to what the learned State Attorney submitted before this court. I have read and perused the trial court record starting with the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 and found that there is nowhere the court record indicates that the age of the victim was mentioned, determined and resolved to the extent proving the same. In the case of **Robert Andolile Komba v. DPP** (Supra) the Court of Appeal at pages 17 to 19, held inter-alia that:

"... the law requires that in statutory rape cases, the age of the victim must be proved. See the cases of **Rwekaza Bernado v. Republic**, Criminal Appeal No. 477 of 2016, **Mwami Ngura v. Republic**, Criminal Appeal No. 63 of 2014 and **Solomon Mazala v. Republic**, Criminal Appeal No. 136 of 2012 (All unreported).

The Court went on to state that:

.... Not only that, but in cases of statutory rape, age is an important ingredient of the offence which must be proved".

In **Makenji Kamura v. The Republic** (Supra) our Apex Court articulated inter-alia that: "As we understand the law, age of the child can be proved by the victim, relatives, parents, medical practitioners or a birth certificate. It may as well be proved by inference of existing facts. See, for instance: **Isaya Renatus v. R**, Criminal Appeal No. 542 of 2015 and **Iddi s/o Amani R**, Criminal Appeal No. 184 of 2013 (Both unreported)".

Basing on the above precedent, in this appeal apart from the citation by the magistrate regarding the age of a witness (PW5) before giving her evidence is not evidence of the victim's age. Similarly, citation in a PF3 relating to the age of the victim is not evidence. Thus, this ground is answered in affirmative.

Now, coming to the issue of virtual identification, both the learned State Attorney and the appellant have common view that the appellant was not identified on the material date. It is on record that the incident occurred at night. In **Kasim Said and Two Others v. Republic** (Supra) the Court of Appeal was faced with a similar situation. Addressing the matter, the Court had the following to state, among others:

- i. Evidence of visual identification is of the weakest kind and most unreliable and should not be acted upon unless all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is absolutely watertight;
- ii. When it comes to the issues of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witness was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. Bare assertion that "there was light" would not suffice.

In the instant appeal, the prosecution alleged that on the fateful date PW5 slept on a mattress with PW1 and PW2. At around 04:00 hours in the night she felt pain into her vagina and soon upon opened her eyes she found herself already carnally known by a man. Seen that she raised an alarm for help to the effect that "nabakwa". Her two sisters woke up

and saw the appellant. The court record reveals that without delay they put on their torch lights and saw the appellant, Joseph Manda. By then the appellant was put on towel while his chest was naked. He then ran away. They tried to chase him but in vain, but they saw him entering inside his house. Now, the question for consideration and determination is whether the appellant was correctly identified.

From the above pieces of evidence, all three witnesses testified that they managed to identify the appellant through a torch lights. However, the prosecution witnesses did not explain the intensity of the light, whether it was bright or otherwise, the distance between the appellant and the witnesses and the time spent by the appellant while at the crime scene. On this facet I noted that the prosecution witnesses were not led to estimates the time the incident lasted. It should be noted that when it comes to the issues of light, evidence must be given by the prosecution to establish beyond reasonable doubt that light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. In other words, bare assertions that there was light would not suffice.

As the trial court proceedings depict deficiency on visual identification of the appellant and taking into account that the relevant conditions underscored by the Court of Appeal of Tanzania concerning visual identification of a culprit in the case of **Amani Waziri v. Republic, (1980) TLR, 250** were not complied with. If that is the case, I find that this issue was not proved beyond reasonable doubt.

Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed to the appellant. I order the immediate release of

the appellant from prison unless his incarceration is in relation to some other lawful cause. **It is so ordered.**

DATED at MOROGORO this 25th day of August, 2022.



M. J. CHABA

JUDGE

25/08/2022

Court:

Judgment delivered at my hand and Seal of the Court via video conferencing this 25th day of August, 2022 in the presence of the appellant who appeared in Court by remote through video conferencing and Mr. William Dastan, learned State Attorney who entered appearance for the Respondent/Republic.



M. J. CHABA

JUDGE

25/08/2022

