

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

CRIMINAL APPEAL NO. 19 OF 2022

*(Originating from Criminal Case No. 41/2021 in the District Court of Lindi
at Lindi)*

**ANAFI MOHAMEDI NCHEPENJEAPPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT**

JUDGMENT

Muruke, J.

Anafi Mohamedi Nchepenje was charged, and found guilty, with one count namely; Rape contrary to section 130(1),2(e) and 131(1) of the Penal Code, Cap. 16 R.E 2019. He was sentenced to serve 30 years jail and 1,000,000/=T.shs as compensation to the victim.

Being dissatisfied, appellant filed six grounds of appeal as articulated in the petition of appeal.

On the date set for hearing respondent was represented by Nunu Mangu Senior State Attorney, while applicant appeared in person. Applicant prayed his grounds of appeal to be admitted as his submission in chief and reserve the right to rejoin if any, the prayer which was not objected by council for the respondent.

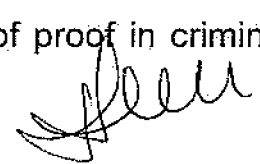


In reply, respondent consolidated grounds 1, 2, 3, 4 and 5 as they both speak of evidence. Respondent supported conviction and sentence meted by trial court. She submitted that evidence of PW2 victim explained in details how she met appellant and agreed to go to the place where the incidence took place. PW2 who was only 16 years, was not in position to consent. She was a girl below 18 years with or without her consent is an offence in sexual offences. PW2 was the victim thus her evidence was to be believed. PW1 (Medical Doctor) proves that PW2 was penetrated, thus evidence of PW2 was credible, argued respondent, counsel.

On ground six Learned State Attorney submitted that, complaint is failure by trial court to take on board evidence of accused person or convicting the appellant on his weak defence case. That is not true. Evidence of both parties were discussed and weight given, insisted respondent, counsel.

In rejoinder, appellant submitted that, he was at Rondo Chioja village around 10: am. He was arrested on 24/06/2021 and taken to village leader then to police and finally taken to court. PW2 said that, they were together on 23/06/2021 but it is not true. Doctor testified that, she did examination of the PW2 and found nothing, while PW2 said she was raped on 23/06/2022 while examination was on 26/06/2022. There was a lot of time passed, in between anything can happen, insisted appellant.

Having heard both parties' submissions, evidence on records, gone through grounds of appeal, there is only one issue to be determine, whether the prosecution proved its case to the required standard of the law? It is a settled principle of law that, the burden of proof in criminal

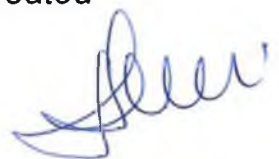


cases is on the shoulder of the prosecution, and that proof is beyond reasonable doubt. This requirement stated in various decisions including in the case of **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda Vs. Republic [2006] TLR 395**, whereby the Court of Appeal of Tanzania adopted the principle in the case of **Mohamed Matula Vs. Republic**, where it was held that:-

"In criminal trial the burden of proof always lies on the prosecution. And the proof has to be beyond reasonable doubt."

This court being the first appellate court, has a duty to go through the evidence adduced at the trial court, to see if the prosecution adhered to the required principal standard of proof. I have read the trial court judgment; the conviction and sentence meted to appellant is based on the evidence of PW2, the victim. I have no doubt that, the best evidence of rape cases comes from the victim, but such evidence must be taken with a great care. This is to avoid victimizing innocent persons from the evidence of untruth witnesses who could give evidence contrary to what real happened. In the case of **Hamis Halfan Dauda Vs. The republic, Criminal Appeal No. 231 of 2019** (unreported) held: -

"We are alive however to the settled position of law that best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s). in such cases, therefore, the victim's evidence should be considered and treated with great care and caution."



At page 9 of the trial court typed proceedings the evidence of PW2 victim was recorded as follows: -

On 23/06/2021 at night I was at "unyago ceremony" at around sokone area. While there I meet Anafi who took me till to the house of my brother one Said Abdallah Mtochi.

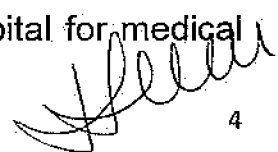
While during cross examination PW2 responded that: -

Dr said I was not penetrated; I was at home and you were at your residence.

Looking on the above quoted evidence, I don't think if that evidence is enough to ground conviction to the appellant. The evidence did not prove that the appellant had sexual intercourse with PW2 victim or she was penetrated. More so, the evidence contradicting itself. She said she was taken by appellant at the same time she said, PW1 said she was not penetrated while at the same time she was at her home. PW1 (Medical Officer) from Lutamba Health Center at page 6 of the typed proceedings was recorded to have said: -

On 26/06/2021 I was at Lutamba Health Center going on with my daily duties. I received a girl who came while accompanied with her father. I examined her vagina which it outer it was ok but its virginity was removed. There were no bruises, fluid, or any other thing. The absence of virginity means there was penetration of brunt object.

According to Exhibit P1 (PF3), PW2 victim examined on 26/06/2021 at 9:00 am while PW2 alleged to have been raped by DW1 on 23/06/2022. By simple calculation from the date when PW2 alleged to have been raped on 23/06/2021 to the date she was taken to hospital for medical



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examination on 26/06/2021 it is more than two days. Surprisingly, there is no any justifiable reasons given by the prosecution as to why the victim was not taken to hospital for medical examination on the same day. Failure to take the victim of rape to hospital for medical examination on the same day without giving the reasons creates doubt to the prosecution evidence. In the case of **Johanes Kisulilo Vs. Republic, Criminal Appeal No. 315 of 2017**(unreported) at Dar es salaam, held: -

"Time had passed before the victim was examined by the doctor..... from the evidence in record, it was not stated as to how long did it take when the victim's mother discovered the PW1 was raped. The gap between the time when the appellant left the premise and when PW2 noticed that PW1 was raped was not established. From the above analysis it is clear that the prosecution side left a lot of questions which creates doubts as to whether the appellant is the one who committed the crime."

Reasonably, there is a highly possibility for PW2 to have been raped by another person than the appellant and deciding to incriminating the appellant. At page 9 of trial court proceeding PW2 the victim said: -

While there I meet Anafi who took me till to the house of my brother one Said Abdallah Mtochi.

At page 10 of trial court proceeding PW2 victim said: -

We had sex at the house of my brother. You asked key from my brother and bring me to his house.

In plain language, appellant raped PW2 at her brother's house. I think it is not possible for appellant to rape PW2 in her own brother's house. It is

doubtfully for brother of the victim to give key to the appellant for him to rape her sister. I have reviewed the trial court judgment, at page 10 it is produced as follows: -

However, it has to be noted that in sexual offences the evidence of victim is of utmost important as shown above in Seleman Makumba's case. The prosecution evidence was so strong to prove the case against the accused.

With due respect, there is nothing in PW2 evidence apart from confusions. I have carefully scanned the evidence of PW2 as prosecution star witness together with other corroborative evidence, there is no strong evidence to ground conviction. The prosecution did not proved the case beyond reasonable doubts. Appeal allowed. Conviction is quashed, sentence is set aside. Appellant to be released forthwith unless lawful held.



A handwritten signature in blue ink, appearing to read "Z.G. Muruke".

Z.G. Muruke

Judge

12/09/2022

Judgment is delivered in the presence of Wilbroad Ndunguru Senior State Attorney assisted by Florence Mbamba Anosisye for the respondent and appellant in person.



A handwritten signature in blue ink, appearing to read "Z.G. Muruke".

Z.G. Muruke

Judge

12/09/2022