

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 24 OF 2022

*(Originating from Criminal Case No. 87 of 2020 of Lindi District Court at
Lindi)*

ALLY MFAUME MALINGULA@ KACHA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Muruke, J.

Ally Mfaume Malingula@Kacha, was arraigned and charged before the District Court of Lindi with an offence of rape contrary to section 130(1), (2) (e) and 131(3) of the Penal Code, Cap 16 R.E 2019. He was convicted and sentenced to life imprisonment. He was also ordered to pay compensation of Tshs. 3,000,000/= for the injuries caused to the victim. Being dissatisfied, he filed present appeal, raising six grounds as articulated in the petition of appeal.

On the date set for hearing, respondent was represented by Wilbroard Ndunguru senior state Attorney, while appellant appeared in person. Appellant prayed for his grounds to be received as his submission in



chief, and reserved right to make rejoinder if need arise, prayer which was not objected by respondent counsel. Court then, asked learned State Attorney to submit replying grounds of appeal.

Counsel for the respondent supported conviction and sentence meted by trial court. He joined grounds 1,3,4 and 5 formed one ground as whether prosecution proved their case beyond reasonable doubt. In this ground he argued that, appellant was charged with an offence of rape. The victim was three years. Legally under such offence following issues need to be proved.

One, age of the victim, that was proved by Hadija Said PW3 the mother of the child at per page 15 of the typed proceedings. Also, the evidence of PW2 Doctor who examined the victim and the evidence of PW4(victim) at page 17 to 20 of the typed proceedings.

Two, is penetration. Evidence of PW3, Hadija Said the mother, PW2 the Doctor and PW4 the victim who explained how the incident took place. Three, identification of the accused appellant which was properly done. During preliminary hearing appellant admitted that, he knows the victim as they are living on the same village. Four is reliability of PW4 the victim. At page 17 and 18 of the judgment trial court explained reliability of victim evidence.

On ground two complaint is on procedure of taking evidence of the victim, and more so, appellant claimed that it was fabricated. Respondent counsel submitted that, evidence considered section 127(2) of TEA, Cap 6 R.E 2022. After compliance of the above section, then PW4 (victim) testified coherently, there is nothing like fabrication. On ground six complaint is failure by trial court to consider defense case. In this ground respondent counsel argued that, appellant complained that



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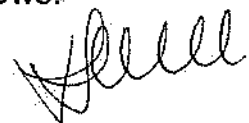
evidence was taken without oaths, that was not right. If one gives evidence without oath, such evidence need corroboration, which evidence of PW4 was well corroborated. In totality ground of appeal lacks merits, insisted Learned State Attorney.

In rejoinder, appellant submitted that court go through his grounds of appeal and set him free.

Having heard both parties' submission, gone through court records, it is evident from the particulars of the offence in charge sheet clearly state that PW4 (victim) was 3 years old. To prove statutory rape, four elements must be proved, **first** is the age of the victim. Age of the victim is very important to determine the proper punishment to impose to the accused. It can be proved by the victim, parents, school teacher where the victim was registered or medical practitioner or any other relatives who have a knowledge on when victim was born. In the case of **Issaya Renatus Vs. The Republic, Criminal Appeal No. 542 of 2015 CAT** (unreported) at Tabora, the court held: -

We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130(1)(2) (e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of birth certificate.

I have reviewed the evidence on records, age of the victim was proved by PW2 (Johana Zabron) Doctor who examined the victim at page 12 of the typed trial court proceedings. PW3(Hadija Saidi) victim's mother proved the age at page 15 of trial court proceedings as follows: -



.....my husband is Ally Abdallah Mfumo and my children are Rashidi Ally and the victim. All my children are girls in which Rashidi is 12 years old and victim is 3 years.

So, apart from charge sheet, the evidence of PW2 and PW3 proved that the victim was 3 years old.

Two, another element to be proved is **penetration**. It is settled that penetration however slight is sufficient to constitute sexual offence. In the case of **Omary Kijuu Vs. The Republic, Criminal Appeal No. 39 of 2005** (unreported) Court of Appeal at Dodoma at page 8 held;

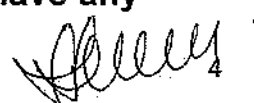
"..... But in law, for the purposes of rape, that amounted to penetration in terms of section 130(4) (a) of the Penal Code Cap. 16 as amended by the sexual offences special provisions Act 1988 which provides: For the purposes of proving the offence of rape- penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."

It is principally that, the best evidence in rape cases is from the victim as reiterated in the famous of **Selemani Makumba Vs. Republic [2003] TLR 203** when the Court of Appeal held: -

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

PW4 evidence is supported by the testimony of PW2 Doctor Johan Zabron from Mnazi Mmoja Health Center who examined the victim after being taken to hospital. She testified at page 12 of the typed proceedings that: -

.....I did examine victim to her whole body, the vagina part and anus part. The victim's vagina did not have any



bruise no any bleeding or blood no any discharge. Victim virginity is perorated. Also, I find that inside vagina walls (mucosa vaginal wall) were reddish instead of pinkish in color. The reddish color in the victims inside vagina walls means that she is penetrated by a blunt object such as penis.

Three, Identification of the person who raped the victim. As correctly submitted by respondent counsel, that during preliminary hearing, appellant admitted that he knows the victim as they were living on the same village, thus, appellant is known by PW3 and PW4 very well, who even identified appellant by name, when told her mother that Kacha Kanitomba. So, PW4 knew appellant not only by face but also by name.

Another complaint is on the procedure of recording the evidence of the victim especially section 127(2) of the Evidence Act, Cap 6 R.E 2019 was not followed. The record is clear that at the time of giving evidence the victim was aged three years. Section 127(4) of the Act, defines who is a child of tender age as follow;

“For the purpose of subsection (2) and (3), the expression of tender age means a child whose apparent age is not more than fourteen years.”

So, because at the time she gave her evidence PW4 was a child of tender age, the procedure for taking her evidence was provided under section 127(2) of the evidence Act, which state that: -

“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 lies.”



I have carefully reviewed the evidence on record, at the trial court when the victim testified, the trial court conducted inquiry and the victim promised to speak the truth not lies. At page 18 of the typed proceedings trial court recorded as follows: -

Inquiry to victim.

Court: - I greeted the child

Answer: shikamoo

Qs: what is your name

Answer: my name is(victim)

Qs: what is your father's name

Answer: my father's name is Ally

Qs: what is your sister's name?

Answer: my sister is called Dada Rashi

Qs: did you take tea today?

Answer: yes, I took tea with Andazi

Qs: can you promise to tell the truth?

Answer: I promise to tell the truth only.

Court: - the victim in this case who is a child posse the intelligence of having capacity of understanding and responding correctly to all questions put to her and she promised to tell only truth.

Then the trial court proceeded recording the evidence of the victim. To my opinion the procedure of recording the evidence of the victim was



followed as laid down under section 127(2) of the Evidence Act. The victim as a child age three years old, promised to speak the truth not lies.

Four is reliability of the victim evidence. PW4 (victim) knew the appellant well. She explained in details as seen at page 19 of the trial court typed proceeding when she testified that: -

.....I used to go to dance music at the house of kacha. I went to play music at kacha's house and "akanitomba". When accused alipo nitomba alichukua mdudu wake aka uweka kwenye huku. Victim took her hand and placed into her vagina part to show where accused enter his mdudu.....then I told my mother that "kacha kanitomba". I showed my mother where kacha has raped me victim point into her vagina parts. I told my mother to wiper my vagina parts because kacha left some water alipo nitomba.

She gave evidence coherently without any hesitation. She gave account of what happened while testifying. She reported the incident at her mother PW3, immediately after coming from appellant house. Her evidence was water tight having been supported by PW2 Medical Doctor and her own mother PW3.

On his defence appellant who testified as DW1 at page 23 of trial court typed proceedings, his evidence corroborated evidence of the victim(PW4), as follows:

I know victim and victim knows me as we are neighbor.

Victim is a small child.

I don't have any misunderstand with victim



I was arrested on 04/08/2020

I don't remember the date of incident

Me and victim's mother knows each other.

I don't have any problem with victim's mother.

It is true victim said in this court that "Nimemtomba".

Victim named Kacha who is me that I have raped her.

I did not ask victim any question after she testified.

The above reproduced evidence of appellant at the trial court is self-speaking. In fact, defence case carried further prosecution case. Appellant failure to cross examine the victim after she testified as admitted by himself in his defence case, is plane admission of all what was said by the victim PW4. In rape cases evidence of the victim is very vital in grounding conviction, as the case here.

The last complaint is the failure by the trial court to consider defense case. The records speak by itself, from page 20 to page 23 of the typed judgment, trial magistrate considered the defense of the accused. In totality, prosecution proved its case beyond reasonable doubt. This appeal has no merits, it is dismissed.



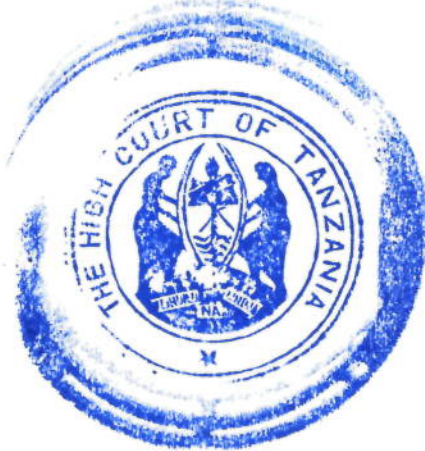
A handwritten signature in blue ink, appearing to read "Z.G. Muruke", is written over the printed name.

Z.G. Muruke

Judge

25/10/2022.

Judgment delivered in the presence of Florence Mbamba Learned State Attorney for respondent and the appellant in person.



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

Z.G. Muruke

Judge

25/10/2022.