

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)**

AT MTWARA

CRIMINAL APPEAL NO. 4 OF 2022

*(Originating from Criminal Case No. 90 of 2021 in the District Court of Kilwa at
Masoko)*

MTILAI ABDALLAH ALMAS @ KIBANGACHILO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Muruke, J.

Appellant, Mtilai Abdallah Almas @ Kibangachilo was accused of raping twenty (20) years old women, who had eight (8) months pregnant without her consent. It was alleged that, on 18th August 2021 at 10:00 hours appellant passed by victim house, and asked to be given water to drink. While victim was inside taking water, she was followed by the appellant, who held her by force undressed, then raped her. Victim tried to shout but her voice was low. Appellant having satisfied, left victim crying. The victim was a married woman, at the time of incident, her husband has gone finishing, she explained the ordeal when he came back, having found her crying.

On the date set for hearing appellant was in person, he thus requested his ground of appeal to be received as his submission in chief, reserving right to make rejoinder, after State Attorney submission replying grounds of appeal. On the other hand, Nunu Mango learned State Attorney represented respondent. Vigorously contested the appeal on account of

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conviction and sentence arguing that, trial court correctly convicted and sentenced the appellant.

Learned State Attorney joined first ground on additional ground of appeal and fifth ground of main appeal, as they both speak of defence of Alibi and submitted that, trial court dealt with evidence of Alibi as seen at page 17 and 18 of the Judgment. Evidence was discussed and came to the conclusion that such defence did not raise any doubts to the prosecution case, citing the case of Anangistye Masendo Mgwangwa TLR 1993, page 2002 to support her arguments.

Ground Three of main petition and ground two of additional ground they all speak of corroboration of evidence, both lacks merits. PW1 victim evidence was clear no any ambiguity. She is the best witness on sexual offences. Court was satisfied that evidence of the victim was reliable. More so, evidence of PW1 was corroborated by evidence of Doctor PW3 who tendered exhibit P1, PF3, that proved that, victim was penetrated. What is important is penetration whatever slight it might be, same was started in the case of Selemani Mkumba Vs R TLR 2006 at page 379, insisted learned State Attorney.

On ground two of the main petition speaks of contradiction, between PW1 and PW3 on the age of the victim. PW3 Doctor said victim was pregnancy was three (3) months, while PW1 victim said is eight (8) months. Such contradiction did not raise any doubts as the charge sheet was on rape. Issue of age of pregnancy was material. Issue of contradiction of witness not necessarily raise any doubts.

Ground three of additional grounds complaints is on fabricated and hearsay evidence. Trial Court did not relay on hearsay evidence.



Trial court relied on the evidence of both prosecution witnesses. Thus ground lacks merits. On sentence, given by trial court, it is the proper sentence in terms of section 138 (1) of Penal Code Cap 16 R.E 2019 by then. In Rejoinder, appellant insisted on his defense of Alibi that was not taken on board as he was with DW2 and DW3 from 8:00 am to 5pm on the date of the incident on the sale transaction of shamba.

Having heard both parties' submission, gone through grounds of appeal, and court records, it should be noted that, this is rape case involving an adult women aged 20 years, who had pregnancy of eight months. Under those circumstances, three issues need to be proved, **penetration**, **identification** of the rapist, and **credibility** of the victim evidence.

Appellant major complain as seen on ground five of main petition, and ground one of additional grounds of appeal, and rejoinder submission is failure by trial court to appreciate his defense of alibi. According to trial court proceedings at page four in the memorandum of facts one of fact not in dispute is :-

That on 18th August 2021, the accused was at Manzese village within Kilwa District in Lindi Region.

Assume that the defence Alibi would have raised doubts, yet, the defence of Alibi was raised contrary to section 94 (4) of the CPA Cap 20 R.E 2022. The necessity to give sufficient notice was to enable prosecution to be able to raise defence on such evidence. Since appellant did not give sufficient notice, at the trial court, thus section 94 (6) of CPA gives power to the court not accord any weight evidence that did not comply with notice or section 94 (4) or 94 of CPA, Cap 20 R.E 2022. Same principle was discussed by Court of Appeal in the case of Reter Mtengo and four other vs R [1994] TLR at page 112.



Complaint on ground two of the additional ground is court relaying on un corroborated evidence of the PW1 the victim. As said before, this a rape case. Evidence of the victim is important as she is the one who witnesses the incident being done to her. In rape cases, evidence of the victim alone grounds conviction. PW1 evidence as recorded at trial court is straight forward, does not need any corroboration more so evidence of the Doctor who examined the victim corroborated PW1 evidence.

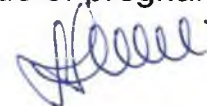
PW1 while being cross examined by the appellant then accused she replied.

"I am sure on 18th August, 2021 you came at my home. You came alone. I know you by seeing you close to that old woman. I know you or got close to my resident through that old woman".

From the above evidence of PW1 (victim) when cross examined by the accused now appellant, it is clear that, PW1 knew appellant by face. She identified him. She mentioned the appellant to her husband immediately when he come back. Her evidence is worth of being believed. On the other hand, DW1 (appellant) while being cross examined by prosecutor at page 15 of proceeds he replied

"We are not in bad relation with Silaji. I used to pass at the residence of Silaji. We know each other".

From defence evidence of appellant then, accused (DW1) he used to pass at victim place. Victim knows him. More so, he had no any bad relations with victim, that's why he was easily to be given water upon request. Thus PW1 (victim) evidence should be believed. On the issue of contraction of PW1 and PW3 medical doctor, as raised on ground two of main petition is not fatal. It is true PW1 said she was eight months' pregnancy while PW3 said PW1 was three months' pregnancy. Issue to be proved at the trial court was who raped PW1, not issue of pregnancy.

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Although there is contradiction, that does not go to the root of the case, because, such contradiction does not lead to miscarriage of justice. Court of Appeal in the case of Hamisi Angola Vs R, Criminal appeal no. 442 of 2007 (unreported) held at page 9 that: -

“With unfeigned respect, we have failed to see or identify such contradictions which are fatal to the prosecution case. It is now settled that not every contradiction will make the prosecution case flop”.

Ground two of additional ground of appeal lacks merits. Ground four of the main petition complaint is trial court reliance on hearsay evidence. That is not true. PW1 victim was an eye witness. PW3 testified on his findings as medical doctor after examining the victim. PW2 who is PW1 husband testified how he found PW1 victim crying then was told what happened. PW2 testified on step he took to arrest appellant.

In totality conviction was mainly grounded on the evidence of victim of sexual abuse PW1. Sentence meted by trial Court was correct in law. It was under section 138 (1) of the Penal Code Cap 16 R. E 2011 by then, now R.E 2022. In totality appeal lacks merits, it is dismissed.




Z. G. Muruke

Judge

30/11/2022

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




Z. G. Muruke

Judge

30/11/2022