

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No.105 OF 2021

(Arising from the District Court of Serengeti at Mugumu in Criminal Case 276 of 2020)

MKOHI GAGIRI MATIKO APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

14.02.2022 & 18.02.2022

F.H. Mtulya, J.:

Before the **District Court of Serengeti at Mugumu** (the district court) in **Criminal Case 276 of 2020** (the case), Mr. Mkohi Gagiri Matiko (the appellant) was charged for the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code). It was alleged by the prosecution at the district court that the appellant had carnal knowledge of a girl child aged sixteen (16) years (name withheld and in this appeal will be referred as the victim) on 3rd August 2020 at 08:30 hours within Bonchugu Village of Serengeti District in Mara Region.

The appellant denied the allegations as a result the case proceeded to trial where the prosecution called four (4) witnesses and tendered one (1) exhibit to establish its case, whereas the appellant appeared in person without any evidence to tender. At the close of prosecution case, the trial magistrate found out that the appellant had

a case to answer. As for the defence, the appellant relied on his own evidence. Having considered the evidence tendered at the trial, the district court found that the prosecution had sufficiently established the appellant committed the offence of rape against the victim. Aggrieved by the decision of the district court, the appellant appealed to this court and registered six (6) grounds of appeal.

The grounds of appeal are briefly protesting on the following issues: first, the testimony of victim's mother (PW2) was hearsay as she was not present at the scene of the crime; second, the evidence of the victim (PW1) was silent on date and time of the commission of the offence; third, PW1 claimed that she was raped by Mkohi and not Mkohi Gagiri @ Matiko; fourth, the evidence of clinical officer (PW3) tendered as PE.1 was admitted by a wrong person; fifth, the appellant was denied the chance to call witnesses; and sixth, the Village Chairman who was mentioned by PW2 was not marshalled as witness in the district court to testify for the republic.

The appeal was scheduled for hearing on 14th February 2022 and the appellant prayed all six (6) grounds of appeal be adopted to form part of his submission and prayed to this court to scan the record and deliver justice for him. Replying of the grounds of the appeal. Ms. Agma Haule, learned State Attorney, who appeared for the Republic, briefly replied all grounds of appeal contending that: the first ground as no merit as PW2 witnessed bruises in the victim private parts; the

victim mentioned the appellant to PW2 at the earliest time possible as displayed at page 10 & 17 of the proceeding in the district hence her evidence are reliable and credible as per precedent in **Marwa Wangiti v. Republic** [2002] TLR 39; secondly, the victim in his testimony had mentioned the offence occurred on 3rd August 2020 as depicted at page 14 & 15 of the proceedings in the district court.

With regard to the name of the appellant, Ms. Haule submitted that the victim correctly named the appellant with all the names of Mkohi Gagiri and identified him in court during the proceedings at the district court as is shown at page 14 of the proceedings. On the fourth ground, Ms. Haule submitted that PW3 is the person who examined the victim and prepared the report which was admitted as evidence as is displayed at page 20 of the proceeding of the district court. In protesting the fifth ground, the learned State Attorney submitted that the appellant was granted an opportunity to call witnesses, but declined to exercise the right as is recorded at page 28 & 31 of the proceedings of the district court.

Finally, the learned State Attorney, contended that it was not necessary to call the Village Chairman to testify as the four (4) witnesses brought by the prosecution in the case and exhibit P.1 were enough to establish the case against the appellant and in any case, section 143 of the **Evidence Act** [Cap. 6 R.E 2019] (the Evidence Act) and precedent in **Selemani Makumba v. Republic** [2006] TLR 376

show that it is not the number of witnesses, but weight of the evidences tendered in court.

Rejoining the submission of Ms. Haule, the appellant maintained the positions stated in his grounds of appeal arguing that: the PW1 was absent when the alleged offence was committed; no possibility of the victim to remain alone at home without any neighbor or independent witness; the victim mentioned two (2) names whereas the appellant has three names; the victim was found with sperms, but no DNA test was conducted; the appellant was denied the right to call witnesses; and Village Chairman was necessary to be called despite the presence of the four (4) prosecution witnesses as he is the villager and knew his residents.

From the materials registered by the appellant, Ms. Haule prayed for leave of this court to reply two new raised issues on DNA test and presence of Village Chairman or any other villagers to witness the crime. According to Ms. Haule, the test of DNA is not mandatory requirement of the law, but evidence of the victim of the rape. To her opinion, the best evidence in proving sexual offences is that of the victim. With regard to presence of any other villager at the scene of the crime, Ms. Haule argued that the circumstances under which the victim was raped, it was impossible to have any other villagers as the appellant invaded the victim in the house and raped her in presence of a child under two (2) years of age. Finally, Ms. Haule urged this

court to scrutinize consistency of evidences brought by the witnesses in the case and uphold the decision of the district court.

On my part, I have scanned the record of this appeal with special attention on the evidences brought by PW1 and PW2 in the district court. PW1 testified that at page 14 & 15 of the proceedings that: *I know the accused person, namely Mkohi Gagiri a resident of Bonchugu Village...I remember on 3rd August 2020 about 08:00 hours, I and my young brother Mtongori aged two years old were at home...accused came knocked the door...pushed me down and put his hand on my mouth and another hand undressed my underwear...he removed his trouser and did put his penis in my vagina. I felt pain and raised alarm for help...I saw fluids like flew in my vagina after removal of his penis.*

The evidence of PW2 on the other hand shows that: *I remember on 3rd August 2020 at about 05:00hours, I went to Mugumu Township to sale charcoal...my house remained with my children NMG and Mtongori aged 16 and 2 years old. Others went to school...I turned back at 16:00hours. I heard a crying voice. I saw my daughter NMG in tears. She told me that she was raped by the accused person. I looked at her private parts, saw bruises and white fluids in her private parts...we went to Mugumu Police Station...we went to Nyerere DD Hospital and NMG was examined.*

From the facts registered by PW1 and PW2, the materials show that PW2 did not witness the appellant raping the victim hence her evidence qualifies to be hearsay evidence. However, the evidence of PW2 stating that she saw bruises to the victim and took immediate measures to report the matter to Mugumu Police Station makes her to qualify as credible and reliable witness to be called by the prosecution to corroborate the evidence of PW1. In any case, the record shows that the evidence of PW2 and PW1 are in consistence of each other.

The Evidence of PW1 at page 15 of the proceedings in the district court shows that the victim was certain and mentioned a person who raped her, circumstances of the rape and specific date which the event took place. The appellant was well mentioned in two names and accordingly identified in the dock. The date was again mentioned by PW2 as displayed at page 17 of the proceedings of the district court, 3rd August 2020. Therefore, the argument of the appellant with regard to the mention of specific dates and time has no merit.

I understand the appellant complained that the evidence produced by the clinical officer (PW3) tendered as PE.1 was admitted by a wrong person. However, the record shows different fact. Mr. Albert Kassanga @ Mnalimi, a clinical officer at Nyerere DD Hospital, was marshalled and testified at page 20 of the proceedings of the district that: *I remember on 4th August 2020, I was at work and at*

around 11:00 hours, I received a girl namely NMG aged 16 years old...I examined her and medical results revealed that she was raped...she had bruises in her vagina and there were sperms inside. She was not virgin. I gave her antibiotics and pain killers.

This piece of evidence shows that it was not a different person other than PW3 who conducted the medical examination and prepared the medical report. In any case, the practice of our superior court, the Court of Appeal shows that the fact that the victim is examined at the same hospital by different person other than a witness, that alone does not render the evidence of the witness invalid (see: **Yohana Said @ Bwire v. The Republic**, Criminal Appeal No. 202 of 2018).

In the present appeal record shows further that the appellant on 13th April 2021 when he was found to have a case to answer and addressed in terms of section 231 (1) of the **Criminal Procedure Act** [Cap. 20 R.E 2019] (the Act), as displayed at page 28 of the proceedings in the district court, the appellant stated that: *I will give evidence on oath and I have no witness to call*. Similarly, on 28th April 2021, as depicted at page 31 of the proceedings, when the appellant completed his defence, he stated that: *I have no witness to call. I pray to close my case*. The claim of the appellant that he was denied the right to call witnesses is contrary to the facts displayed on the record. I think, I have to trust the record on what transpired during

proceedings in the district court in the case. The practice regulating court record is that the court record is sanctity document and cannot easily be impeached as it depicts what exactly transpired on the proceedings of the day (see: **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 and **The Director of Public Prosecution v. Labda Jumaa Bakari**, Criminal Appeal No. 45 of 2021).

I am aware the appellant claimed that Village Chairman was not marshalled in the case as he knows his residents or any other village to testify as an independent witness. I am well aware of the danger of inviting family members in testifying against accused person in rape cases (see: **Alex Rwebugiza v. The Republic**, Criminal Appeal No. 85 of 2020). However, in those cases the criminal investigation machinery of the government was not involved. In the present dispute, the matter was reported at Mugumu Police Station and WP 8651 PC Leah was summoned to testify during the proceedings in the district court.

The practice in our superior court is that no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what she claimed to have seen, and her credibility (see: **Yohanis Msigwa v. Republic** [1990] TLR 148). In the present case, record shows that the victim saw and knew the appellant and PW2 witnessed the bruises in victim's private part. It is

my belief that PW1 and PW2 are reliable and credible witnesses who established the prosecution case against the appellant.

In any case, the true evidence of rape comes from the victim. That is the practice established in this court and Court of Appeal. There is a bundle of precedents on the subject (see: **Selemani Makumba v. Republic** (supra); **Yohana Said @ Bwire v. The Republic** (supra); **Bashiri John v. The Republic, Criminal Appeal No. 486 of 2016** **Abasi Ramadhani v. Republic** (1969) HCD 226; **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013; and **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015).

I understand the new developments on the subject with regard to the words of victims of sexual offences were not intended to be taken as gospel truth, but her testimony should pass the test of truthfulness (see: **Mohamedi Saidi v. Republic**, Criminal Appeal No. 145 of 2017 and **Alex Rwebugiza v. The Republic** (supra). However, in a circumstance where the victim testified to have been raped and her evidence was supported by PW2 and medically proved by evidence in PE.1, I think, in the present case, the testimony of the victim has passed the test of truthfulness.

I know the appellant in an attempt to discredit the case against him in the district court, he contended that the case was fabricated by the victim and his mother (PW2) because PW2 failed to pay him the money from his work done in cutting trees and woods. However, the

allegation alone without the support of any other facts or evidences, does not raise any reasonable doubt to the prosecution case.

Before I pen down, I must take the words of our superior court, the Court of Appeal, that it is a settled law in this jurisdiction that court record is always presumed to accurately represent what actually transpired in court (see: **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018; **Shabir F. A. Jess v. Rajkumar Deogra**, Civil Reference No. 12 of 1994; **Flano Alphonse Masalu @ Singu & Four Others v. Republic**, Criminal Appeal No. 366 of 2018 and **Paulo Osinya v. R** [1959] E.A 353. Court record, in short, is a serious document and cannot be lightly disregarded (see: **Halfani Sudi v. Abieza Chichili** (supra) and **The Director of Public Prosecution v. Labda Jumaa Bakari** (supra).

Following the scanning of the present record of this appeal, I have no reason to interfere with the findings of the district court in the case. In the event, I find this appeal has been brought in this court without sufficient reasons and the same is hereby dismissed in its entirety.

It is so ordered.

Right of appeal explained.



F.H. Mtulya

Judge

18.02.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Mr. Nimrod Byamungu and in the presence of the appellant Mr. Mkohi Gagiri Matiko through teleconference.

A handwritten signature in blue ink, appearing to read 'F.H. Mtulya', is written over a horizontal line.

F.H. Mtulya

Judge

18.02.2022