

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

HC. CRIMINAL APPEAL NO. 115 OF 2022

(Originating from Nyamagana District Court at Mwanza Criminal Case No. 136 of 2021)

OMARY MOHAMED@ MATOLOLA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

26th May and 6th July 2023

ITEMBA, J.

In the District Court of Nyamagana, the appellant Omary Mohamed @ **Matotola** was charged with the offence of rape contrary to section 130 (1) (2) (e) and (3) of the Penal Code. It was alleged that on 28/9/2021 at Mchafukoga Igogo area within Nyamagana District, the appellant had unlawful sexual intercourse with YY (name withheld) a girl of 13 years. The girl will be referred to as the victim.

After a full trial, the appellant was convicted and he was sentenced to serve 30 years imprisonment. It is against such court order; this appeal has been preferred.

The appellant's petition contains 6 grounds:

- 1. That, the trial magistrate erred in law and fact for convicting while the evidence of PW1 was received c/s 127 (2) of TEA, (Cap 6, R.E 2019).*

- 2. That, the trial court misdirected in law and fact for convicting while the trial magistrate failed to append her signature soon after been recorded the evidence of each and every witness, therefore she gone c/s 210 of CPA, (Cap 20. R.E 2019).*
- 3. That, the lower court erred in law and fact to convict by acting the PW1 evidence without corroborative evidence.*
- 4. That, the trial magistrate both erred in law and fact for convicting no penetration was proved as a crucial ingredient required by law.*
- 5. That, the presiding magistrate misdirected in law and fact to convict by relying upon inconsistency and contradictory evidence.*
- 6. That, I do not pen off without saying that, the prosecution side failed to prove the alleged offence beyond all reasonable.*

Brief facts which led to this appeal are explained by the victim herself who testified as PW1, that, on the incidence day, the victim together with other two girls, PW2 and PW3 used to do extra studies known also known as 'tuition' at a place named TAG. On the fateful day, when the three were going back home from tuition, they passed in the market at 'Mchafukoge' as it was Tuesday and an auction day, PW3 wanted to buy sunglasses. Once they finished shopping, they headed home. Shortly after they left the market, the appellant followed them shouting stating that while at the market, the girls dropped some of the vendor's properties. That, they should go and pay back the vendor. That, the girls

denied to have dropped anything but the appellant insisted that they should go back. That, the appellant offered to act like an uncle to PW1 and pay back the supposedly loss occasioned amounting to Tshs 10,000/=. That, PW1 agreed to go back to the market with the appellant while her friends waited for her at the bus station. When PW1 took longer time to appear, PW2 and PW3 went home.

Meanwhile, the victim had a long day. Back at the **marked** it happened that the appellant was also selling clothes. The victim was told by the appellant to wait until he sells some of the clothes then he will collect the said Tshs. 10,000/= and pay it to the vendor. When it reached 18:00hrs, the victim wanted to leave but the appellant told her that '*I want to assist you and you act as if you are in a hurry?*'. At around 18:30pm the appellant talked to the alleged vendor over the phone and he said he is very far so the money should be delivered to 'his boss'. That, the appellant and the victim started walking supposedly going to the said boss. They walked for a long time passing through hills, then the appellant received a call that the money can be delivered even in the following day. The two started to go back where they came from. Then, the appellant pulled the victim, asked her to take off her shirt, she resisted. The appellant forcefully removed the victim clothes and raped her. That, they

then left the place and the appellant asked her to go to his place '*gheto*' she refused. That the two walked for a long distance, at around 23:00 hrs. the victim ran up to PW4, her maternal aunties' house and spent a night there. Her aunt informed her mother about the incidence. That, the following day, the victim was taken for medical checkup she was examined by PW8. Thereafter, the appellant was arrested on the next market day and charged as explained hereinabove.

When the appeal was scheduled for hearing, the appellant was unrepresented while the respondent had the services of Mr. George Ngemera learned state attorney. In support of his appeal, briefly, the appellant stated that the case against him was not proved beyond reasonable doubts. He explained that the evidence of PW1 was wrongly admitted as the court did not record if the witness knew the meaning of telling the truth or promised to tell the truth but the court took her words as an oath. He finally prayed for the court to consider all 6 grounds of appeal and set him free because he has learnt his lesson and whether he committed the offence or not, he will not repeat the offence.

The learned state attorney opposed the appeal. He supported both conviction and sentence. Replying on the 1st ground, he stated that at page 10 of proceedings the court recorded that PW1 is a girl of under 18

years of age and she promised to tell the truth as per Section 127(7) of the Evidence Act.

In respect of the 2nd ground, he submitted that there was a signature in the proceedings in terms of section 210 of the Criminal Procedure Act that the court can go through the proceedings and witness the same.

In the 3rd ground he stated that PW1 evidence was corroborated. That, although the Evidence Act under section 127(6) allows for the evidence of victim by itself to be relied to convict the accused, yet PW2 and PW3 corroborated the evidence of PW1 as they had the same story. And that the medical doctor also corroborated the evidence of PW1 that she was penetrated.

In the 4th ground the learned counsel stated that at page 14 of the proceedings, through her own words, PW1 herself proved that she was penetrated and that the medical doctor found bruises and sperms in the private parts of PW1.

In the 5th ground he submitted that there was no contradiction because PW2 and PW3 were corroborating the evidence of PW1. In the last **ground** he reiterated that the prosecutions' evidence was strong enough to prove that the victim was raped by the appellant and the evidence was well corroborated. He insisted that penetration however

slight, is enough to prove the offence of rape. He prayed for the appeal to be dismissed and conviction and sentence be sustained.

The appellant did not have any rejoinder he claimed that he is not a lawyer thus he leaves the court to decide. Upon further inquiry by the court, the appellant stated that he was working for the victim's mother, that he was selling juice for her but he was not paid so he decided to sell second hand clothes. When he asked for his money, he was accused of rape. That he had explained this situation at the police and before the court.

Having objectively considered the evidence, record of appeal and both parties' rivalry arguments, the issue is whether the prosecution has established the offence of rape against the appellant.

Section 130 (1) (2) (e) and (3) of **the Penal Code** establishes the offence of rape. It provides thus:

130.-(1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions

*(e) **with or without her consent when she is under eighteen years of age, unless the woman is his***

wife who is fifteen or more years of age and is not separated from the man. (Emphasis supplied).

I will respond to the grounds of appeal in the flow which they appear in the petition. In respect of the first ground, section 127(2) of the Evidence Act cited by the appellant, provides that a child of tender age may give evidence without taking an oath or making an affirmation but before giving such evidence, shall promise to tell the truth to the court and not to tell any lies. As rightly stated by the learned state attorney, at page 10 of typed proceedings it reflects that PW1 explained that she knows the meaning of an oath and she promised to tell the truth. Therefore, PW1 gave her evidence in accordance with section 127(2) of the Evidence Act and this ground fails.

In respect of the second ground, I have gone through the handwritten proceedings in respect of all prosecution witnesses and the trial magistrate duly signed after recording such testimony. I see no violation of section 210 of the Criminal Procedure Act. This ground fails as well.

In the 3rd ground, to start with, PW1 being the victim who was competent to testify, her evidence could be relied to prove the offence of rape with or without corroboration. This is because in sexual offences including rape, the best evidence comes from the victim. This is according

to section 127(6) of the Evidence Act and more than a dozen of cases including **Selemani Makumba vs R**, [2006] TLR 379. Either, PW1 evidence was well corroborated by that of PW2 and PW3 as regards the claims by the appellant that the victim has dropped someone's clothes in the market and that it was the appellant who was last seen with the victim before she was allegedly raped. There is also evidence from the medical doctor that the victim's private parts had bruises as sign of penetration and from the victim's aunt PW4 that PW1 reached her home at 23:00hrs. PW1 mentioned to PW4 that she was raped. This ground holds no water.

In the 4th ground, according to PW1's testimony. She stated that she was raped. She graphically explained that the appellant penetrated her. Basically she is not legally required to be such graphical, see the cases of **Hassan Kamunyu v R** Criminal Appeal no. 277 of 2016 CAT Arusha (unreported) and **Hassan Bakari @ Mamajicho v R** Criminal Appeal no. 103 of 2012 where the Court stated was that the victim need not to explicit describe what happened as there are several ways which can be interpreted to make reference to penetration of the penis of the accused person into the vagina of the victim. Therefore, according to the victim's words, it was quite clear that the act amounted to penetration. The 3rd and 4th grounds have no merit.

In the last two grounds the appellant is not clear as to which were the contradictory therefore it is not easy to respond out of guessing. In the last ground as already explained herein above it was established by the victim's mother (PW5) that the victim was 14 years, that she was raped by the appellant. I find that the offence against the appellant was proved beyond reasonable doubt. These two grounds fail.

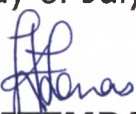
Finally, regards the claims that the appellant was framed by the victim's mother, I find this as an afterthought because it does not feature anywhere in the proceedings, either in the appellant defence or even in the cross examination of the victim's mother who testified as PW5.

At this stage, I agree with the trial magistrate in sustaining both conviction and sentence against the appellant. The appeal has no merit and it is hereby dismissed.

It is so ordered. Right of appeal explained.

Dated at MWANZA this 6th day of July 2023.




L. J. ITEMBA
JUDGE