

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL REVISION NO. 32 OF 2023

(Originating from Criminal Case No. 306 of 2022, District Court of Kilosa)

CARLOS ROBERT DUGO..... APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

Ruling on: 26/07/2023

NGWEMBE, J.

The applicant in this revision was arraigned before Kilosa District Court (trial court) for the offence of rape contrary to sections 130 (1)(2)(e) and 131 (1) **of The Penal Code, Cap 16 R.E 2019**. On 20/06/2023, the trial court passed its judgment in which it convicted the applicant and sentenced him to a statutory term of 30 years imprisonment.

Having received this complaint, the court initiated this revision *suo motu*, thus called for the records from the trial court for the purpose of satisfying itself on the propriety of the proceedings, findings and sentence meted by the trial court as provided for under section 372 of **The Criminal Procedure Act, Cap 20 R.E 2022**.

From the proceedings, it was alleged that on 29th October 2022 at Magomeni area, Kilosa District in Morogoro region, the applicant had



sexual intercourse with the victim, a girl of 14 years old. However, when the charge was read he pleaded not guilty.

The evidences for prosecution were made by four witnesses and one documentary exhibit, thus moved the trial court to find a *prima facie* case against the accused. Upon invitation to defend, the accused testified as a sole defence witness. The magistrate found the offence to be proved beyond reasonable doubt. He seemed to be guided by the famous case of **Selemani Makumba Vs. R [2006] T.L.R 379**, that in rape cases the best evidence comes from the victim. Also, he rightly considered the judgment in the case of **Andrew Francis Vs. R, Criminal Appeal No. 173 of 2014** regarding proof of the victim's age in statutory rape cases.

Having examined the proceedings before the trial court, one question must be answered that is, whether the proceeding and conviction of the trial court was proper in law and in fact. The subsequent question is whether the sentence was proper? Equally another question is whether the findings of the trial court was proper in law? According to the analysis of the trial court's proceedings, the following are apparent from the face of records; *First* – the charge sheet was not supported by the testimonies of the prosecution witnesses. *Second* – in applying the **Selemani Makumba's** principle of victim's best evidence, the victim's credibility was never tested. *Third* – taking the evidence as a whole, there was a serious contradictions and inconsistencies in the prosecution evidence which negated validity of the whole prosecution evidences. I will take time to address them at a considerable length.

To begin with, I accept what the trial magistrate stated about the position in **Selemani Makumba's** case. However, what the trial

magistrate held and stated was a non-updated version of the rule. A proper application of that principle is now subject to credibility and reliability of the victim's evidences. This court in a number of cases has called upon magistrates to be extra careful in sexual offences before accepting the victim's evidence as the best evidence like holly books. The witness must be credible and trustworthy. This caution is nothing new in our jurisdiction, it equally given by the Court of Appeal as well in many cases, including that of **Hamisi Halfan Dauda Vs. R, Criminal Appeal No. 231 of 2019** where it was observed that: -

"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)"

The trial magistrate did not follow the rule in its true width. He does not seem to have tested the reliability of the victim, yet he accepted her testimony as a reliable truth in the whole case. On this, I am settled in my mind, the trial magistrate went wrong. Certainly, the victim (PW1) was not a reliable witness. Even PW2, the victim's mother was not credible. It is not much hard to tell if a witness is credible or otherwise; coherence and consistence can broadly reveal it as held in the cases of **Shani Chamwela Suleiman Vs. R, (Criminal Appeal No. 481 of 2021) [2022] TZCA 592** and **Elisha Edward Vs. R, Criminal Appeal No. 33 of 2018** among many others. A thorough analysis of the evidence would have given the trial magistrate a true reflection of the facts, same would guide the trial court's verdict.



For instance, the victim stated that, she was seduced by the applicant on July 2022 and she accepted. That they used to have sexual intercourse without a condom, about five times at the applicant's home. She did not explain the said five times as to whether were on the same day or at least within a certain period of time. She did not state if she was a virgin before being raped by the applicant. Though in some other place of her testimony she stated that, during the time when she was in an affair with the applicant, she did not have sexual intercourse with other men. She stated that, on the eventful day, she was at the applicant's room with the applicant when the police came and arrested them both; the victim and the rapist.

The day of arrest according to the statement of facts filed by the prosecution was on 30/10/2022. While PW2 and PW3 testified about the victim being pregnant, the victim did not state anything about impregnation by the applicant. The charge states about rape, yet the PF3 was prepared and sent to PW3 for the victim to be examined if she is pregnant. Nothing about rape was stated in PF3. The Clinical Officer did not state anything about rape or at least penetration of the victim's vagina. Again, while the victim was said to be raped on 29/10/2022 she was diagnosed on 31/10/2022 and found 10 weeks pregnant. On 07/03/2023 when testifying in court, the victim's mother stated that the pregnancy was miscarried, dates were not mentioned, no medical evidence was adduced to show that the victim faced miscarriage. Again, the victim did not tell anything about miscarriage of such pregnancy not even the fact that she was pregnant.

PW2, the victim's mother testified before the court the victim was unruly and disobedient girl. She used to go out without parent's permission, going out for men for the sake of having sex with them.

That the victim's mother was aware of the victim's sexual relationship with a man or men since July 2022 and at least each month the victim had an incident, and throughout she miscondacted the same way.

In July 2022 she saw the applicant with the victim, when he questioned, it seems the applicant confirmed that they were in love affairs. But she decided to keep quiet, she did not report the matter anywhere, neither did she deal with the girl (her child). On August she sent the victim to a shop, the girl did not return on time, when asked she said she was with a man, according to the witness, that man is the applicant. This time she went to Carlos' home and found his grandmother who showed them Carlos' room. She told the grandmother about the love affairs between Carlos and the victim, again no further action was taken. On October 2022, same trend, she sent the victim but the victim returned late and said was with Carlos. The mother went at Carlos home and warned Carlos. As usual, she took no measure against the acts. In October, 2022 the victim was sick. The witness took her to hospital where she was found pregnant. This is when she reported the matter to police where PF3 and RB were issued.

If we take PW3's evidence to be the truth and assuming that the victim got pregnant upon being raped, then the victim was raped more than two months prior to the date stated in the charge sheet. The applicant was alleged to have raped the victim on 29/10/2022 and it was said also he was the one who impregnated the victim. But from the evidence on record, it seems that the victim was raped and impregnated before that date recorded in the charge sheet.

PW1 and PW2 stated that, the applicant was arrested when was in his room with the victim. But the applicant in his defence whose part was alibi, stated that on 06/04/2022 he travelled to Dodoma to work. On



26/09/2022 he was called through phone to return to Kilosa. On 30/10/2022 he was on the way back, then he was arrested by three people who took him to the police station.

Under the circumstance, the arresting officers, occupiers of the premises within which the arrest was made, neighbours and any person who witnessed the arrest, were material witnesses but none was called to prove that fact. It is known, failure to call material witness entitles the court to draw adverse inference against the party. It was well stated in the case of **Aziz Abdalla Vs. R, [1991] T.L.R 71** and followed in the case of **Esther Aman Vs. R, [2020] 2 T.L.R. 248**, where the Court of Appeal held: -

"To say the least, Said Amri Ramadhani was a material witness and the prosecution was under a prima facie duty to call him as he would have testified on material facts relating to the fateful incident. Since nothing was said if he was not within reach or could not be found, the Court is entitled to draw an inference adverse to the prosecution"

Apart from the above failure, I am also necessitated to address PW2's conduct being a mother. She stated that, she had no husband, but had three children. Being the only parent and custodian of the victim, she seems not to be displeased by the victim's fornication and her moral turpitude. She seems to have been comfortable with the victim's conduct. She did not take any measure nor did she report about the said behaviours of the applicant with the victim for the whole period of four months until when the girl was allegedly pregnant. In this case it was unsafe to accept that the evidence of PW1 and PW2 were credible witnesses. All the three witnesses gave testimonies inconsistent to each

other as above shown and the charge was not supported by such evidence as pointed.

This being the case, the trial magistrate had the duty to consider what I have pointed out and satisfy himself if it was safe to convict the applicant on the circumstances. Had the trial magistrate paid consideration of the contradictions and inconsistencies he would have reached at a different conclusion that the offence was not established and proved beyond reasonable doubt.

For the trial court's failure to properly follow the principles and analyse the evidence correctly, I invoke my revisional powers to revise the trial court's judgment to the extent that, the evidence did not support the charge, hence the conviction was wrongly entered as the offence was not proved beyond reasonable doubt.

Following the evidence on record, the applicant was not guilty for the offence of rape. Hence the conviction is quashed and the sentence of 30 years set aside. The applicant should be set at liberty with immediate effect unless otherwise lawfully held.

Order accordingly.

Dated at Morogoro this 26th July, 2023.




P. J. NGWEMBE

JUDGE

26/07/2023

Court: Ruling delivered at Morogoro in chambers on this 26th July 2023 in the presence of both sides.


Sgd: A.W. Mmbando, DR

26/07/2023

Court: Right to appeal fully explained.


Sgd: A.W. Mmbando, DR

26/07/2023

