

TANZANIA / JUDGMENT

godson wogofya vsrepublic

2023 tzhc 18725 30 june 2023

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TZHCDECIDED
30 June 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IRINGA REGISTRY AT IRINGA DC, CRIMINAL APPEAL NO. 22 OF 2023 (Originating from Criminal Case No, 06 of 2021 in the District Court of Njombe at Njombe). GODSON WOGOFYA..... APPELLANT
VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 12.06.2023 Date of Judgment: 30.06.2023 A.E. Mwipopo, J. The offence of rape is widespread in Southern Western Highland Region of Tanzania, Njombe Region inclusive. Most of criminal cases in our Courts are for rape offence. The reason for the widespread of the offence might be factors such as weather, customs and traditions (social factors), and failure to obey the law which forbid sexual intercourse with children below 18 years. In this case, the appellant namely Godson Wogofya was charged and convicted by the Njombe District Court in Criminal Case No. 06 of 2021 for a rape offence contrary to sections 130 (1) and (2) (e) and 131

- (1) of the Penal Code, Cap. 16 R.E. 2022. The particulars of the offence in the charge sheet revealed that on 14.09.2020, at Itambo Village within the District and Region of Njombe, the appellant had carnal knowledge of V.H. (the name of the victim is concealed), a girl aged fourteen years. The appellant pleaded not guilty to the charge, and the prosecution brought two witnesses and one exhibit to prove the case. The first prosecution witness to testify was the victim (PW1). She testified that she was born on 08.08.2004 and lives with her parents. When she was testifying on 15.02.2021 she said her age was 17 years. She said she was a student of the Idilima Primary School and she finished standard seven in 2020. On 14.09.2020 at around 07:00 hours while going to school, she met with the appellant and Odilo Wbgofya. She knew them prior to the incident as brothers who live at Itamba village. The appellant and his brother took her by force to the house of Yusta Wogofya, locked her inside and they left. Around 19:00 hours, Odilo Wogofya brought her stiff porridge (ugali) and vegetables. PW1 ate the food. Odila asked PW1 for sex and they had sexual intercourse. After finishing, he left and she remained alone inside the house. On 15.09.2020 at around 19:00 hours, the appellant came to the house and asked PW1 for sex, but she rejected. The appellant forced PW1 to have sexual intercourse with him. The appellant inserted his penis into her vagina. After finishing, the appellant left and locked PW1 inside the house. Later on,

Sekisakali came. She opened the door and PW1 went out. Sekisakali told PW1 that her father was looking for her and they left together. While on the way, they met with PW1's father. PW1 told her father what happened. PW1's father took her to school before they went to report to police station. At police station, PW1 was given PF3 and she went to hospital for examination. The report shows that she was not pregnant. In cross examination, PW1 said that the house of Yusta Wogofya was far from other houses. She said she stayed inside the house for 2 days and ate only once. It was her first time to have sexual intercourse. The second and last prosecution witness (PW2) is Medical Officer who examined the victim (PW1). PW2 testified that on 22.09.2020 at 12:00 hours noon she met with a teacher from Itambo accompanied by a student. The teacher asked PW2 to examine a student as it was suspected she was raped. He examined her and filled report in the PF3. PW2 tendered the PF3 which was admitted as exhibit P1. PW2 said that the report on exhibit P1 displays 3 that the victim had no virginity and she had sexual transmitted disease. It indicates that she had sexual intercourse. The exhibit P1 which was read loudly to the Court after its admission reveal that it was issued by the police on 22.09.2020 and it shows that PW1 had no hymen and has PV discharge whitish in colour. This was the end of prosecution's case and the prosecution closed their case. The trial Court find in its ruling that the appellant have a case to answer and it afforded him with the right to defend himself. The accused testified in defense on oath as DW1 without calling any other witness or tendering any exhibit in his defense. It was his testimony that he was summoned to the hamlet office on 15.11.2020 around 08:00 hours in the morning and was asked if he know the victim (PW1). He denied to know her. He was informed that she complained the he raped her. The appellant denied to rape her. The victim went to report to the Njombe Police Station and mentioned another person as the one who raped her. But, he was arrested by the police. The appellant said when interviewed by the police he denied to commit the offence. He added that there was a conflict over the ownership of piece of land between the victim's mother and the appellant's father. In cross examination, the appellant said that he did not ask the victim during cross 4 examination as to why she mentioned another person in police station and the conflict between victim's mother and his father does not relate to this case. Then, the appellant closed his case. In its judgment, the trial Court found the appellant guilty for the offence, convicted and sentence the appellant to serve 30 years imprisonment. The appellant was aggrieved with the decision and filed the present appeal. The petition of appeal filed by the appellant contains five grounds of appeal as follows hereunder:-

1. That, the learned Magistrate erred in law and facts by convicting the appellant without considering that the penetration as an essential element in rape offence was not proved enough to convict the appellant.
2. That, the learned trial Magistrate failed in law and fact by taking into account the evidence of PW1 and PW2 which is contradictory evidence on which school the victim was studying,

3. That, the learned trial Magistrate failed in law and facts by not taking into consideration the defense evidence that the case against the appellant was planned and planted due to the conflict of their parents.
 4. That, the evidence adduced by PW1 has no corroboration with the other independent evidence due to the contradictory testimony of PW1 and PW2. 5
 5. That, the case against the appellant was not proved beyond all reasonable doubt. The appellant appeared in person on the hearing date, whereas Mr. Majid Matitu, a learned state attorney/ appeared for the Republic (respondent). The Court invited parties to make their oral submissions in support of and against the grounds of appeal. The appellant being a layperson, asked the Court to consider all of his grounds of appeal/ and he will make a rejoinder after the respondent has replied to his grounds of appeal. In response, the counsel for the respondent opposed the appeal. He submitted jointly on the 1st, 3rd and 5th grounds of appeal as they are related and also responded on the 2nd and 4th grounds of appeal together. He said on 2nd and 4th grounds of appeal that the appellant claims that PW1 evidence contradicts that of PW2, hence their evidence required corroboration. He said that the victim (PW1) testified that formerly she was studying at Idilima Primary School and she completed standard 7 in 2020. PW2 testified that on 22/09/2022 one teacher and student went to the hospital complaining that the student was raped. PW2 said the teacher was coming from Itambo. PW2 did not say itambo is a village or a school. The charges against the appellant is rape offence 130(l)(2)(e) and 131(1) of the Penal Code, Cap. 16 R.E. 6
2019. The prosecution proved that PW1 was aged below 18 years and was penetrated by the appellant. This is found in the testimony of PW1 and PW2 corroborated PW1'S evidence PW1 was found to have sexual transmitted diseases. All these proved that the victim was penetrated. Thus, these grounds have no merits. On the 1st, 3rd and 5th grounds of appeal, the appellant said the case was not proved beyond reasonable doubt as the evidence on penetration was not sufficient, the case was fabricated and the defense evidence was not considered. The prosecution proved through testimony of PW1 that the appellant penetrated her while on her way to school. The incident took place inside the house of Yusta Wogofya. PW1 said the appellant took off her clothes, put off his clothes and inserted his penis into her vagina. After having sex with her, appellant locked the victim inside the house and left. The testimony of PW1 is supported by the testimony of PW2 the doctor who examined the victim on 22.09.2020 and filed the report in the PF3 (exhibit P1). PW2 testified that PW1 had no hymen and had sexual transmitted infections. This evidence proved that PW1 was penetrated. As the offence appellant charged is statutory rape, PW1 testified that she was born on 08.08.2004. PW1 testimony was recorded on 12/05/2021, when she was 7 aged 17 years. This evidence proved that she was under the age of 18 years old at the time of incident. This evidence proved the case without doubt. In his rejoinder, the appellant said that the prosecution did not bring the owner of the house and the person they say opened the door to the victim to testify. This raises doubts on prosecution case and the court is supposed to infer adverse inference to prosecution case. Also, the teacher who took the

victim to hospital was not called testify despite his prayer to the Court for the teacher to be called as witness. In the Preliminary Hearing, the facts shows that the victim was aged 14 years but in her testimony she said she is 17 years old. This confused him and he failed to defend himself properly. The victim said she is studying at Ipilima Primary School, but PW2 said she was studying at Itamba School. This is a contradiction which raises doubt to prosecution's case. The victim said she was raped on 15.09.2020, but she was examined on 22.09.2020. The victim was examined after 7 days. The victim said other person was in his company and had sex with her. But there is nothing stated about the said person. He was not charged and no witness said where is. The case was fabricated and there is doubt in prosecution's case. 8 Having heard submissions from both sides, the main issue for determination is whether this appeal has merits. The appellant said in his submission the prosecution case was not proved Without doubt following the presence of contradictions in the evidence and their failure to bring to testify material witnesses. He said that the case against him was fabricated. The said issues are found in appellant's grounds of appeal number 2,3,4 and 5.1 will commence to determine these grounds of appeal as the appellant's submission was basically on these grounds only and the grounds appears to dispose of the matter, The appellant said on the issue of contradiction in the prosecution evidence that there is contradiction as to the age of the victim in the facts of the Preliminary Hearing and her testimony and the school which the victim was studying. In his response, the respondent counsel said that the evidence of PW1 proved that she was below 18 years. I have read the evidence available in record. The evidence shows that the particulars of the offence reveals that the appellant was charged for having sexual intercourse with the victim a girl aged 14 years. However, in her testimony the victim said that she was born in 08.08.2004. As the incident occurred in 15.09.2020, the victim aged 16 years during the incident. The evidence proved that she was 9 below 18 years. There is variance between the charge and the evidence adduced in support of it with respect to the age of the victim. But, the variance did not prejudice the appellant in any way as still the evidence proved the victim was below 18 years. On the issue of the school which the victim was studying, the victim testified that at the time of incident she was student of Ipilima Primary School. The evidence of PW2 that a teacher from Itamba brought the victim for examination does not mean the victim was studying at Itamba Primary School. On this issue, I agree with the state attorney that there is no contradiction as to the school which the victim was studying. Regarding the issue of failure of the prosecution side to call material witnesses, the appellant said that three material witnesses were not called by prosecution to testify. He said that the teacher who took the victim to hospital for examination, the owner of the house where the incident occurred and Sekisakali who opened the door from the house the victim was locked inside are material witnesses, but they were not brought to give their evidence. The respondent said in reply that the material witness in rape offence is the victim and in this case the victim testified that it was the appellant who inserted his penis into her vagina. 10 I agree with the counsel for the respondent that the evidence of the victim is the best evidence in rape offence as it was stated by the Court of Appeal sitting at Iringa in the case of including the case of Godi

Kasenegala vs. Republic, Criminal Appeal No. 10 of 2018, (unreported). Usually, sexual offences are committed in the secrecy hence it is not possible to get witnesses other than the victim and the offender. The Court 'is also aware that under section 143 of the Evidence Act, Cap 6, R.E. 2019, no particular number of witnesses is required to prove a fact. See YOH AN A MSIGWA vs. Republic, [1990] TLR 148. What matters is the credibility of the witnesses. However, the law is settled that failure to bring key witness lead to adverse inference to the prosecution in criminal cases. The position is stated in section 122 of the Evidence Act, Cap. 6 R..E. 2019. The Court may infer the existence of any fact which it thinks likely to have happened, regard being had to the ordinary course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. In Aziz Abdallah vs. Republic [1991] TLR 71, it was held on page 72 that: ii "The general and well known rule Is that the prosecutor Is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the Court may draw an inference averse to the prosecution." In this case, the evidence by the victim shows that the appellant and another person took her in the morning of 14.09.2020, when she was heading to school, to the house of Yusta Wogofya and they locked her in. The owner of the house was not present. In the evening, the other person (Odilo Wogofya) bought her ugali and she ate it. He asked her for sexual intercourse and she agreed. They had sexual intercourse. Odilo Wogofya left and locked her inside. On the evening of the next day, the appellant came to the house and asked her for sex and she was not ready. The appellant forced himself to her and inserted his penis into her vagina. After he was satisfied, he left and locked her in. It was Sekisakali who opened the door for her. As the victim's evidence shows that the incident occurred inside the house where she was locked and it was Sekisakali who helped to release her from the house, it was expected for Sekisakali to be called as prosecution witness to give evidence among other facts as to how she knew that the 12 victim was inside the house. On the circumstances of this case, Sekisakali was material witness and prosecution were supposed to call her as witness or to give the reason for failure to bring her as witness. The said evidence is lacking. For the teacher and the owner of the house they were not material witness. Besides, I have observed that the credibility of the victim in this case is questionable. The victim said she had sex in the evening of 14.09.2020 with Odilo Wogofya after she agreed, and on 15.09.2020 the appellant had sexual intercourse with her without her consent. But during cross examination she stated it was her first time to have sex. The fact that she admitted she consented to have sexual intercourse with the Odilo Wogofya shows the possibility that it was not her first time to have sexual intercourse. This contradict her testimony and raises doubts as to her credibility. With such evidence from the victim, it was important for her evidence to be corroborated. The evidence available corroborating the victim's evidence is the testimony of PW2 and PF3. PW2 said in his testimony that he examined the victim on 22.09.2020. PW2 said that the victim had no hymen layer and she had sexual transmitted diseases. He tendered PF3 as exhibit Pl. It was his 13 conclusion that the victim was penetrated into her vagina. The PF3 shows that the

victim had no hymen and she had whitish discharge from her vagina. But, the PF3 does not say the whitish discharge found in the victim's vagina was the sign of sexual transmitted diseases. The PF3 is silent if the victim had sexual transmitted diseases. This means there is contradiction between the testimony of PW2 and his report in PF3 (exhibit Pl). Moreover, the fact that the victim had no hymen does not prove that it was the appellant who penetrated her. It might be anyone. Further, the testimony of PW1 shows that after Sekisakali helped her to unlock the door, they went to report to school. From school they went to police where PF3 was issued. Thereafter, the victim was taken to hospital for examination. It was expected after obtaining PF3 from police immediately the victim could be taken to hospital for examination. PW2 testified that he examined the victim on 22.09.2020, which means it took 7 days for the victim to be examined. The victim testified that on the same date she was raped (15. 09.2020) she went to report to her school before she went to police station. Police issued PF3 on the same date. However the PF3 shows that it was issued on 22.09.2020 and not on 15.09.2020 as state by the victim. The victim was taken to hospital 7 days after the incident. The reason for such 14 delay was not stated. This raises doubt on the prosecution case as for the reason for the delay and on the credibility of PW1 testimony that she reported to school and police station on the same date and PF3 was issued. PW1 testimony contradict the evidence of PW2 and content of PF3. The appellant in his defense said that the case was fabricated because of the land dispute between his parent and the victim's parent. He also said that he was arrested on 15.11.2020 and the victim mentioned another person to be responsible at the police station. This appellant evidence was not cross examined. It means it was admitted by the prosecution. The fact that the appellant was arrested on 15.11.2020, which is two months after the incident raised doubt if the victim mentioned the appellant to the police after the incident. The question is why it took two months for the police to arrest the appellant? Looking at the prosecution's evidence and the doubts raised, it could not be ruled out the possibility that the case was made-up. The said doubt affect the credibility of the victim and PW2. The said evidence required another independent evidence to corroborate and the said another independent evidence is not available in record. Therefore, I find that the prosecution evidence failed to prove the rape offence against the appellant without doubt. For that reason, the appeal is allowed. The conviction of the appellant by the trial Court is quashed and the sentence is set aside. The appellant is released forthwith from prison in respect of this case otherwise held for other lawfully reason. It is so ordered accordingly. 30/06/2023 16

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Prepared on 13 October 2026 · Esheria