

TANZANIA / JUDGMENT

ngeleka masome vs republic 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY AT
MWANZA HC. CRIMINAL APPEAL NO. 87 OF 2022 (From the Decision of the District Court of
Misungwi at Misungwi in Criminal Case No. 56 of 2021) NGELEKA S/O
MASOME..... APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

07th August & 1CF November, 2023 ITEMBA, J. The appellant herein, ngeleka masome was arraigned before the District Court of Misungwi for two offences. The first offence is Rape contrary to sections 130(1), (2)(e), and 131(3) of the Penal Code Cap. 16 RE: 2019 (now RE: 2022) and the second offence is malicious transmitting HIV contrary to section 47 of the HIV and AIDS (Prevention and Control) Act, 2008. I find it worthy to point out that, as per the records, the appellant was convicted by the same trial court where he appealed and the High Court ordered a retrial. Again, at the end of the retrial, the appellant was convicted of both counts hence this appeal. As per the chargesheet, in respect of the first count, it was alleged that on diverse dates between June 2020 and January 2021 at Ukiriguru village within Misungwi District in Mwanza Region the appellant had unlawful sexual intercourse with a girl aged twelve (12) years who, for purposes of concealing her identity will be referred to, in this judgment, as the victim. In respect of the second count, it was alleged that on diverse dates between June 2020 and January 2021 at Ukiriguru village within Misungwi District in Mwanza Region, the appellant intentionally transmitted HIV to the victim. From the facts, the victim, who testified as PW2, was a grade four student and lived with her father. The victim knew the appellant because he lived with her grandmother. The victim testified that, frequently, the appellant would call her, give her some sweets, and rape her inside her grandmother's house or in the bush. That, the rape was recurrent. That, the appellant will threaten the victim with a knife warning her not to disclose the situation. That, sooner or later, the victim became sick, and upon her father taking her to Ukiriguru hospital, she was diagnosed to have been raped and infected with HIV virus. That, upon being probed, the victim mentioned the appellant as the person who had unlawful sex with her. The appellant was arrested and following medical examination, he tested positive with HIV virus. The investigator (PW3) produced two PF3 forms; that of the victim's and the appellant's in

support of the prosecution case. After the conduct of the full trial, the appellant was found guilty of both offences and he was sentenced to thirty (30) years imprisonment for the 1st offence and six (6) years imprisonment for the second. Aggrieved, the appellant is before this court appealing against both convictions and sentences and listed the following grounds of appeal: -

1. That, the lower court erred in law and fact for convicting me without medical evidence to corroborate the PW2 evidence, failing to summon a doctor allegedly examine PW2 court should draw an adverse inference.
2. That, the trial court misdirected in law and fact to act upon the evidence of PW2 which was received c/s 127(2) of YEA (Cap. 6, RE.

2019) hence PW2 did not promise to tell the truth.

3. That, the trial magistrate erred in law and fact to convict hence PW2 did not raise an alarm, Rape is a reflex action and automatically PW2 should have had screamed. Dn
4. That, the trial magistrate erred in law and fact to convict on second court hence no evidence to prove is me transmitted the said virus and no negating evidence that PW2 was a carrier or not.
5. That, the penetration as a crucial ingredient in SOSPA was not proved. The appellant brought additional grounds of appeal as follows:
6. That, the age was not established as required in SOSPA, merely alleging the victim is of 13 years old without disclosing even the year which was born in not enough.
7. That, the second court was not proved hence no DNA of such virus collected from both (victim and Accused person). Is a scientific matter that not all virus the people been contaminated or affected must be the same.
8. That, the appellant was not positively identified. If you peruse the proceeding thoroughly no any place the court caused the PW1 and PW2 to ask the witness to identify the appellant while was still in the court dock as to ascertain if was the same wrong doer hence the name Ngeieka is not only appellant under the sum. At the hearing, the appellant fended for himself while the respondent was represented by Mr. Evance Kaiza, Ms. Brenda Mayala and Mr. Ibrahim Salim learned State Attorneys. Submitting in support of the appeal, the appellant was very brief. He just told the court that, he was framed because he worked for the victim's father as a mason. That, the victim's father did not pay him, and when he asked for his money, he (the victim's father) accused him of raping his daughter. In reply, Ms. Mayala learned state attorney, informed the court that they were opposing the appeal. Responding to the first ground, she stated that under section 143 of the Evidence Act, the prosecution could have brought any number witnesses because no particular number of witnesses is required to prove a case. She cited the case of Selemani Makumba v. Republic [2006] TLR 379 arguing that the best evidence is from the victim. She stated that, although the medical Dr. was not called as a witness the reasons thereof were given. She referred the

court to page 32 of the typed proceedings where it was stated that the said medical Dr. was away for studies and her summons was produced before the court. She insisted that, the court could not have reached an adverse inference against prosecution. That according to Azizi Abdallah vs. R (1991) TLR 71, adverse inference is made only when there is no valid reason given for non-appearance of a witness. Qz? In respect of the 2nd ground, she stated that according to pages 25 and 26 of the typed proceedings, the victim promised to tell the truth in accordance with section 127 of The Evidence Act. Arguing the 3rd ground she stated that page 26 of the proceedings shows that the victim was threatened not to shout else, she would be murdered and under section 130(2)(e) of the Penal Code if the girl is under 18 there is no need of consent. On the 4th ground, she responded that at the same page 26, the victim stated that she started being sick after engaging in sexual acts with the appellant. That, the victim was told she had HIV at the hospital and exhibit P3, which is the victim's PF. 3 shows the victim is HIV positive. The learned state attorney argued the 5th ground that the victim proved that the appellant raped her. That, according to the PF3 of the victim which shows the victim was 13 years old and had no hymen and the appellant did not object to its admissibility. Moving to additional grounds of appeal, she argued that, the victim said she is 13 years old and a student and PW1 her father corroborated this evidence. She added that absence of a DNA test of the appellant is immaterial. She cited the case of Hamis Shaban @ Ustadhi v Republic Cr. Appeal No. 25 of 2010 where it was stated that, there is no legal requirement for a DNA test to prove that the accused has committed the offence of rape. That, the victim said it was the appellant who was the 1st to have raped her thus he is the one who raped the victim and infected her with HIV. She argued the 3rd ground that, PW2 properly identified Ngeleka who was living with the victim's grandmother. That, the victim identified the appellant at the earliest stage. She finalized her submission by stating that regarding the complaints by the appellant that he had grudges with the victim's father, records do not show that the appellant cross-examined PW1 on the said debts. That, the explanations are afterthoughts and should be dismissed. In his brief rejoinder, the appellant complained that the victim testified that he was circumcised and that he asked the court to inspect him but they did not. After the rival submissions by parties, the central issue to be determined is whether the prosecution managed to prove the case beyond reasonable doubt against the appellant. The offence of rape is created under sections 130 and 131 of the Penal Code as follows:- 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:
- (3) N/A;
- (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.
- (4) For the purposes of proving the offence of rape-

- (a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; 131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person. Furthermore, section 47 of the HIV and AIDS (Prevention and Control) Act, 2008 provides that: 'Any person who intentionally transmits HIV to another person commits an offence, and on conviction shall be liable to imprisonment to a term of not less than five years and not exceeding ten years.' Therefore, the main two issues which the prosecution was supposed to prove were:
- (i) The appellant had carnal knowledge of the victim and the victim was under the age of 18 years. (ii) In the second count, that the appellant was HIV positive and he is the one infected the victim, exclusively. In respect of the first ground, it is evident that the medical Dr. could not appear before the court because she was away for studies. However, the investigator of the case produced the PF3 forms which contained the details of the appellant and victims' statuses. The investigator was a competent person to testify because he is the one who received the copies from the hospital. Either way, in terms of section 127(6) of the Evidence Act, because PW2, the victim herself testified, there was no necessity for the medical evidence to prove the offence of rape. The medical evidence is there to corroborate that of PW2. See also the case of Godi Kasenegala v Republic Criminal Appeal No. 10/2008 Court of Appeal of Tanzania at Iringa, where it was stated that in rape cases, the best evidence is that of the victim and the rest of the evidence is merely corroborative. In the second and third counts, I agree with the prosecution that, the records are clear that the victim (PW2) at page 26 of the typed proceedings, promised to tell the truth. Either, apart from the appellant threatening the victim not to disclose her misery, the fact that the victim did not scream does not mean that she was not raped. I will skip the fourth and seventh grounds for now because they refer to the second count. In the 5th ground, the appellant complained that penetration as a special ingredient was not proved. This ground resembles the 6th. I have gone through the appellant's grounds of appeal and I find that the victim herself established that it was the appellant who raped her several times at her grandmother's house and in the bush. This evidence is corroborated by a medical Dr. who observed that the victim was penetrated. The victim and her father (PW1) told the court that she was 13 years and when the offence was alleged to be committed, she was 12. Therefore, the offence of rape was established. In the 8th count, indeed the victim did not point to identify the accused. She did, however, mention him by a name that: "Z know the accused person by the name of Ngeieka. Ngeieka lived with my grandmother and his wife'. These words are enough to show that the victim identified the appellant. In addition, I do not find this omission fatal because at the trial court, the appellant was the only accused person and he could not be confused with anyone else. Back to the 4th and 7th grounds, the appellant challenges the evidence towards the second count. That, it was not known whether the victim was a carrier of HIV

virus or not. Scientifically, HIV virus is spread through several ways including sexual intercourse blood transfusion and sharing of sharp objects among others. Infants can also be born with HIV or contact it soon after birth. In the present case, the victim who was just 12 years, was diagnosed with HIV. At page 26 of typed proceedings, she stated that it was only the appellant who had raped her. Based on the facts, because the appellant is an adult, and probably engages more in sexual activities than the victim, chances are that, the appellant is more likely to be the one infected the victim. However, the status of the victim before engaging in sexual intercourse with the appellant was unknown, therefore it cannot be said for sure as to who infected who, between the appellant and the victim. In criminal proceedings, it is a trite law that the defence only need to raise a doubt and not to prove anything. See Yusuph Nchira vs. The Republic Criminal Appeal No. 174 of 2007 (Unreported) where the court stated that: - "The appellant had only to raise doubts ...and prosecution had to prove its case beyond reasonable doubt. The appellant's story needs not be believed. He had only to raise a reasonable doubt and not to prove anything." This being a criminal case, the standard of proof is high and it means that, the prosecution evidence must leave no doubts which is not the case herein. Therefore, the 4th ground of appeal is allowed in that, the second count was not proved. Finally, based on the evidence on record, I find that the prosecution managed to prove their case in the first count. However, the second count was not proved beyond the reasonable doubt. Accordingly, this appeal is partly allowed. The conviction and sentence of thirty (30) years imprisonment imposed on the appellant Ngeleka Masome in the first count is upheld. The conviction and sentence of six (6) years imprisonment in the second count is hereby set aside. It is so ordered. The Right of Appeal is explained to the parties. Judgement delivered- this 10th day of November 2023, via audio conference in the presence of the appellant in person, Ms. Brenda Mayala learned state attorney for the respondent and Ms. Gladys Mnjari, RMA. L. J. ITEMBA JUDGE

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