

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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IN THE COURT OF APPEAL OF TANZANIA AT PODOMA (CORAM: KOROSSO. J.A.. RUMANYIKA, J.A., And ISSA. J J U CRIMINAL APPEAL NO. 779 OF 2023 ABDALLAH NASIBU @KISIMPO APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the Resident Magistrate's Court of Singida at Singida) (Masawe. SRM-Extended 3.) Dated the 26th day of July, 2021 in Criminal Appeal No. 09 of 2021 JUDGMENT OF THE COURT 10th & 25th March, 2025 KOROSSO, JA.: The appellant, Abdallah Nasibu @Kisimpo together with two others Rafael Joseph and John Juma, who were then the 2nd and 3rd accused persons (and not subject to this appeal) were arraigned in the District Court of Manyoni at Manyoni (the trial court) on a charge with three counts. First count, Conspiracy to commit an offence contrary to section 384 of the Penal Code, Cap 16 (the Penal Code). It was alleged that on unknown date, time, and place within Manyoni District, Singida Region, the appellant and his two colleagues mentioned above did conspire to commit offences namely, rape and armed robbery. In the second count, gang rape contrary to section 131A (1) (2) of the Penal Code. Allegedly, the appellant and the two colleagues mentioned above jointly and together on 20/01/2019, on or about 23.00 hours as a group did have sexual intercourse with one Mariam Sylvester. The third count, armed robbery contrary to section 287A of the Penal Code. The allegations were that the appellant and the then 2nd and 3rd accused persons mentioned above jointly and together on 20/01/2019, on or about 23.00 hours at Ujasiriamali Mwanzi area, within Manyoni District, Singida Region did steal cash money Tshs. 40,000/- and a mobile phone make Tecno valued at Tshs. 33,000/= all with a total value of Tshs. 73,000/=. the property of one Maryam Sylvester and immediately before or after such stealing did use actual violence to obtain and retain the said stolen properties. Briefly, the prosecution evidence in totality, as narrated by PW1 (the victim), Eunice Ally (PW2), Elinuru Junda (PW3) and Dr. Kasiri Amoni Makeleja (PW4) was that on the night of 20/01/2019 around 23.00 hours, after completing her business at Samaria, PW1 hired the appellant, a motorcycle rider popularly known as "bodaboda rider" to take her home. Enroute there, riding on the appellant's motorcycle she noticed a motorcycle following them with lights turned off. She alerted the appellant on this, but he told her not to worry. They kept riding and when they reached Makaburini area, on seeing the other motorcycle still behind them, PW1 again, informed the appellant that it was still behind them but he was unbothered and continued riding. When they reached Ujasiriamali area, the other motorcycle, which PW1 could see had two persons, rode past them and it was then that the appellant stopped the motorcycle with PW1 on it. Fearful, PW1 started running from the scene

but the appellant and the two people in the other motorcycle chased her and when they caught her, she was pushed down, then undressed and subsequently, one by one of the three persons raped her. In the ordeal her neck was strangled somewhat. According to PW1, the appellant, whom she knew before as Kisimpo and had been her rider from the place of departure where she hired him was the first one to insert his male organ in her private parts and thereafter the two others followed suit, one by one. She further testified that her screams for help managed to bring some people to the scene, including PW2 and PW3. According to PW2 and PW3, they were woken from sleep by cries for help and upon follow-up, found PW1, who narrated her ordeal naming the appellant as one of those who raped her and stole from her some cash and her mobile phone. Subsequently, PW1 was taken to the Police Post Manyoni and later to the hospital for medical attention. PW4's testimony was that he attended the victim on the night of 21/1/2019 around 2.00 hours. He stated that his examination found the victim's private parts to discharge white stuff and the labia majora and labia minora were in good condition without bruises. He recorded his findings in the PF3 which was admitted as exhibit PI. Two other exhibits were tendered and admitted to support the prosecution case, the cautioned statement of the then 2nd accused (exhibit P2) and the cautioned statement of the appellant (exhibit P3). On his part, the appellant, denied the charges and narrated the circumstances surrounding his arrest and controverted the evidence of PW1 and the contents of the PF3. On the part of the then 2nd and 3rd accused, they also denied the charges and denied knowing the appellant prior to their arrest. After considering the evidence from the prosecution and the defence sides, the trial court found that the case against the appellant had been proven beyond reasonable doubt and not so on the part of the then 2nd and 3rd accused and thus acquitted them. The appellant was convicted and sentenced to thirty years imprisonment. Dissatisfied, his appeal which was determined by the Resident Magistrate Court of Singida with extended jurisdiction, was however dismissed, the first appellate court upheld the decision of the trial court. Still Undeterred, the appellant knocked the doors of this Court, armed with a memorandum of appeal fronting 13 grounds of appeal which essentially address the following grievances against the trial and first appellate court.

1. The prosecution failed to prove the charge against the appellant beyond reasonable doubt.
2. Insufficiency of the identification of the appellant at the locus in quo considering the obtaining unfavorable circumstances.
3. Failure to address the impropriety of the charge preferred considering to have counts on conspiracy to commit the offence of armed robbery and gang rape, and also counts on armed robbery and gang rape.
4. Failure to properly assess and analyze the evidence of PW4 relating to his medical examination of PW1 in proving the offence of gang rape.
5. Failure to properly address the confusion in numbering exhibits particularly' the PF3 and cautioned statement of the then 2nd accused person and relying on exhibit PI which was not read aloud in court upon being admitted.

6. Non-compliance of section 214 of the Criminal Procedure Act, Cap 20 (the CPA).
7. Impropriety in admitting the cautioned statement of the appellant for failure to comply with section 50, 51, 57(2)(a) and (b) of the CPA and absence of a certificate signed by appellant to prove the voluntariness of recording the statement in the absence of his advocate, friend or relative.
8. Failure to address the inconsistencies and contradictions in the evidence of prosecution witnesses particularly, PW1 and PW2 on the stolen items and their value.
9. Non-compliance of section 192 (3) and thus vitiates the Preliminary Hearing and noncompliance of section 10(3) and ((3) of CPA.
10. Failure to consider the appellant's defence. On the day the appeal was scheduled for hearing, the appellant, appeared in person and fended for himself whereas, the respondent Republic was represented by Mr. Paschal J. Marungu, learned Principal State Attorney assisted by Ms. Rachel Cosmas Tulli, learned State Attorney. Commencing his submission, the appellant prayed to adopt his grounds of appeal and prayed that the respondent Republic side respond to his grounds first and he retain his right to rejoin thereafter. On taking the floor, Mr. Marungu informed us that the appeal was not resisted. Before venturing into the reasons for his stand, he traversed through grounds of appeal number four, five, nine and ten arguing that these were neither canvassed in the first appellate court nor are they points of law. He prayed that these grounds be disregarded in line with the decision of this Court in *Godfrey Wilson v. Republic*, Criminal Appeal No. 168 of 2018, TZCA 109 (6 May 2019). As rightly pointed out by the learned Principal State Attorney that the settled position of the law on grounds of appeal before this Court that were not canvassed in the first appellate Court, cannot be entertained for lack of jurisdiction. Having revisited the record of appeal, we are satisfied that grounds four, five, nine and ten did neither feature in the first appellate court nor are they points of law. Therefore, we shall disregard them following suit to our previous decisions in such matters in *Hassan Bundala @Swaga v. Republic*, Criminal Appeal No. 416 of 2013, *Charles Juma v. Republic*, Criminal Appeal No. 391 of 2016 and *Elia Wami v. Republic*, Criminal Appeal No. 30 of 2008 (all unreported). With regard to the remaining eight grounds of appeal the learned Principal State Attorney informed us that he will explicate them generally. However, before venturing into that, he sought leave to address us on a point of law not canvassed by the appellant, but which he discerned while preparing for the appeal hearing. He invited us to consider and determine the propriety of the conviction of the appellant and faulted the first appellate court for not addressing the matter on appeal. The learned Principal State Attorney submitted that the record of appeal, particularly, pages 97 and 98 of the record of appeal, reveals that upon holding that the prosecution side failed to prove the charged offence of conspiracy, gang rape, and armed robbery against the appellant, the trial court convicted the appellant of contravening section 130(2)A of the Penal Code. He argued that this was not proper since conviction for contravening section 130(2)A of the Penal Code, meant that the appellant was convicted of rape, which in terms of sections 304 and 300 of the CPA is neither an alternative or a minor offence to the offence of

gang rape contrary to section 131A of the Penal Code which the appellant was charged with. Thus, the conviction was improper, and the anomaly is incurable under section 388 of the CPA, he argued. Addressing us on the possible remedy in those circumstances, Mr. Marungu submitted that normally, the remedy is to remit the file back to the convicting court for a proper conviction. However, in light of the weakness of the prosecution evidence to prove the offence charged against the appellant, he argued that such cause of action will neither be the proper avenue to take in this case nor what justice demands. Elaborating further, the learned Principal State Attorney contended that, plainly, the case for the prosecution was weak considering the key elements to prove it were not met. Addressing us on whether the appellant was sufficiently identified at the locus in quo, he faulted the evidence relied upon by both the trial and first appellate courts. He contended that in light of the evidence on record, which reveals that the incident took place at night around 23.00 hours with no source of or intensity of light revealed and thus, in unfavourable conditions, plainly, the case against the appellant as the culprit to the exclusion of anyone else was dented with doubts. According to him, even if the evidence of PW1 of having known the appellant before the incidence is considered, that is of recognition, it should be borne in mind that where identification is one of recognition, the essential elements for proper identification such as intensity of light, time witness spent with culprit, proximity, early naming of the culprit are essential, to do away with possibility of mistaken identity. He cited the decisions of the Court in Chrispin Charles Mwaluvando v. Republic, Criminal Appeal No. 613 of 2021 (unreported) to augment his assertion. The learned Principal State Attorney argued further that, in this appeal, PW1's claims to have known the appellant prior to the incident are not supported by any description of the adequacy of light and thus they remain to be bare assertions. In light of his submissions, he implored us to find that the appellant was not sufficiently recognized, which is the essential element to prove charges against him. As such, he contended, the appeal is meritorious and be allowed. In rejoinder, the appellant had nothing of substance to add, apart from reiterating his prayers as found in the grounds of appeal and to extend his appreciation and support for the submissions by the learned Principal State Attorney. In consideration of the submissions before us from both parties in this appeal, in determining the appeal we will confront two main issues drawn from the point of law raised by the learned Principal State Attorney and the grounds of appeal. One, whether the conviction of the appellant was proper under the circumstances; and two, whether the prosecution proved the case beyond reasonable doubt. In confronting issue one, we find it prudent to revisit the conviction itself, as found at pages 96 and 97 of the record of appeal stating: "... there is no strong evidence adduced before this court to prove that, DW2 and DW3 conspired with DW1 to commit the offence of gang rape, and armed robbery. For the above reasoning this court hereby acquits the second accused named Rafael s/o Joseph and the third accused person named John Juma as per section 235(1) of the CPA, Considering the first accused person, this court hereby convicts the accused forthwith as per section 130(2)A of the Penal Code." [Emphasis Added] Conversely, the first appellate court, upon considering the evidence on record, was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt and that the grounds of appeal were meritless. The

appeal was thus dismissed upholding the conviction and sentence meted to the appellant by the trial court. Noteworthy, is the fact that at the beginning of the first appellate court Judgment, it states that the appellant is charged on three counts; conspiracy to commit and offence, contrary to section 384 of the Penal Code. In the second count, gang rape contrary to section 131A (1) (2) of the Penal Code and in the third count, armed robbery contrary to section 287A of the Penal Code. It is also stated that after a full trial the trial court convicted the appellant with rape contrary to section 130(2) of the Penal Code. We are of the view that, considering the evidence before it, inadvertently, the first appellate court failed to address the propriety of the appellant's conviction of rape contrary to section 130(2) of the Penal Code instead of gang rape contrary to section 131A (1)(2) which he was so charged, it was incumbent upon the first appellate court to determine whether the conviction was on a cognate or minor offence to the one the appellant was charged with. In determining the issue on hand, we are guided by the provision of section 300(1) and (2) of the CPA which allude as follows: "300(1)- When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved he may be convicted of the minor offence although he was not charged with it

- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with."
- Reading through the provision above, plainly, what is required under section 300 (1) is for the substituted offence to be minor and cognate to the offence that an accused was initially charged with. The Court has on several occasions endeavored to construe this provision. In the case of *Robert Ndecho and Another v. Republic* (1951) 18 EACA 171, the then East African Court of Appeal observed: "In order to make the position abundantly dear we restate again that... where an accused is charged with an offence, he may be convicted of a minor offence, although not charged with it, if that minor offence is of a cognate character, that is to say of the same genus and species. We entirely agree and subscribe to that interpretation. We have no flicker of doubt that the offence of gang rape is cognate to that of rape. Both of them are related and carry similar characteristics and differ only on gravity. Furthermore, we are of the view that the provision requires that for an accused person to be convicted of a lesser or minor offence, the offence should be on the face of it minor and cognate in character to, the greater offence. We also adopt what was in the case of *Richard Estomihi Kimei and Another v. Republic*, Criminal Appeal No. 375 of 2016, that, notwithstanding that subsection 1 of section 300 of the CPA allows for an accused person to be convicted of a minor offence, although not initially charged with such in the original charge, nevertheless, any substitution of the charge should not be prejudicial to the rights of the accused person. The accused person is entitled to know and understand the nature of the charge against him. In that case the Court further observed: "Additionally, there must be evidence in support of the substituted charge and the accused person must be accorded a right of defending himself on that new charge in a sense and spirit of a fair trial." In the instant case, as submitted by the learned Principal State Attorney, upon the trial court finding that

the evidence on record on which the appellant was convicted of, was short of proving gang rape, taking account the fact that the evidence on the identification of the appellant left a lot to be desired and cannot be said to be watertight, even the charge of rape for which he was convicted of was not proven. The victim together with PW2 and PW3 failed to adduce evidence on the source of light at the scene of crime, nor was there evidence by PW1 on the light source at the point of departure, which invariably provides room for possibility of mistaken identity. For the foregoing reasons, we are of the view that it was wrong in principle for the trial court to convict the appellant of the offence of rape instead of gang rape which is what he was charged with, on the strength of the evidence which was adduced in the trial court, which essentially was for a charge of gang rape. Undoubtedly, the substitution of the charge leading to the appellant's conviction for rape must have prejudiced the appellants because he did not get an opportunity to defend it sufficiently. In the event, we are of the settled view that in terms of section 300

- (1) (2) of the CPA, a conviction for the offence of rape cannot be a substitute as an alternative verdict to that of gang rape. We cannot allow such substituted charge to stand. That said, we exercise our powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 and revise all the proceedings and judgment of the High Court. We also set aside the sentence imposed on the appellant. Ordinarily we would have ordered for a proper conviction by the trial court and nullified the proceedings of the first appellate court. However, upon carefully going through the evidence before the trial court we find that the case against the appellant for the offence charged, was not proved beyond reasonable doubt as discussed hereinabove. In that regard, due to insufficiency of evidence, we find that justice demands for us to order for the release of the appellant. All in all, we order for the appellant to be released from prison forthwith, unless otherwise lawfully incarcerated. DATED at DODOMA this 24th day of March, 2025. W. B. KOROSSO JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL A. A. ISSA JUSTICE OF APPEAL The Judgment delivered this 25th day of March, 2025 in the presence of the appellant in person and Ms. Zubeda Lyaumi, learned State Attorney for the respondent-Republic is hereby certified as a true copy of the original.

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