

TANZANIA / JUDGMENT

abubakari issa kayuwanga vs republic 2023 tzhc 21572 29 september 2023

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UNITED REPUBLIC OF TANZANIA IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IRINGA REGISTRY AT IRINGA D.C. CRIMINAL APPEAL NO. 24 OF 2023 (Originating from Criminal Case No.. 32 of 2022 in the District Court of Kilolo at Kilolo). ABUBAKARI ISSA KAYUWANGA..... APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

Pate of the Last Order: 18.09.2023 Date of the Judgment: 29.09,2023 A.E. Mwipopo, J. Abubakari Issa Kayuwanga, the appellant, was charged and convicted by the Kilolo District Court at Kilolo in Criminal Case No. 32 of 2022 for the offence of rape contrary to sections 130(1), (2)(e) and 131 (1) of the Penal Code, Cap 16 R.E 2019. The particulars of the offence in the charge reveal that on the 2nd of June, 2022, at Hula Isele Village, within Kilolo District in Iringa Region, the appellant unlawfully had carnal knowledge of one S.M. (the name of the victim is concealed for her protection), a girl aged nine (9) i years old. The appellant pleaded not guilty to the offence, and the prosecution brought ten (10) witnesses to prove the case. The Court found the appellant with a case to answer, and the appellant defended himself on oath without calling other witnesses or tendering any exhibit in his defence. In its judgment, the trial Court convicted and sentenced the appellant to serve thirty years imprisonment. It also ordered the appellant to compensate the victim for one million shillings (Tshs. 1,000,000/=). The decision of the trial Court aggrieved the appellant and preferred this appeal containing five (5) grounds of appeal as follows:-

1. That, the trial Court grossly erred in law and facts for convicting the appellant based on the hearsay evidence.
2. That, the trial Court erred in law and facts by convicting the appellant on the repudiated confession.
3. That, the trial Court denied to supply the appellant with a copy of the judgment, which is a necessary document for supplementing some grounds in the appellant's petition of appeal.
4. That, the trial Court erred in law and facts for passing the conviction based on the evidence of previous criminal record, which was irreverent to the case at hand.

5. That, the trial Court erroneously continued to convict the accused on the presence of suspicions as to why the victim failed to raise an alarm at the time she was raped. 2 On the 28th of August, 2023, the appellant prayed to file additional grounds of appeal. The Court granted the prayer. On the same day, the appellant filed the supplementary petition of appeal containing nine grounds of appeal and supplied a copy to the respondent. The grounds of appeal in the supplementary petition of appeal filed by the appellant were as follows:-
 1. That, the trial Magistrate erred in law for conducting voire dire test to PW2, PW3, and PW4 without considering that such requirement was repealed.
 2. That, the trial Magistrate erred in law for admitting exhibit P1 (birth certificate), which was not read before the Court after its admission and was not issued during the ordinary cause of the business (was not made ante ritem mortem).
 3. That, the learned trial Magistrate erred In law and facts to convict and sentence the appellant based on the contradictory and misdirecting testimonies adduced by PW2, PW3, PW8 and PW9.
 4. That, the learned trial Magistrate wrongly convicted and sentenced the appellant based on the PW6's findings without considering that the Court's observation was contrary to the observation of PW1 and her fellow teacher immediately after the purported Incident.
 5. That, the trial Magistrate erred in law and fact to convict and sentence the appellant without considering that he denied raping 3 the victim (PW2) at the earliest possible opportunity. The appellant also denied to rape the victim in his cautioned statement
 6. That, the trial Magistrate erred in law by failing to grant the appellant: the right of the opportunity to mitigate, which is a great procedural irregularity.
 7. That, the trial Magistrate erred in law and fact to convict and sentence the appellant without considering that the prosecution side failed to summon two important witnesses, namely Samlati and Grace.
 8. That, the trial Magistrate erred in law and fact to convict and sentence the appellant without considering his defence, which exonerated him from criminal liability:
 9. That, the prosecution failed to prove the case against the appellant beyond reasonable doubt. At the hearing, the appellant appeared in person, and Ms. Veneranda Masai, State Attorney, represented the respondent. The Court invited parties to make their oral submission. The appellant submitted on the grounds of appeal found in the supplementary grounds of appeal and said nothing on the grounds in his first petition of appeal. The appellant said in the 1st ground of appeal in the supplementary petition of appeal that the trial Court erred to conduct voire dire to the PW2, PW3 and PW4 without considering that the requirement has already been repealed. He said on the 2nd ground of appeal that the trial court did not 4 read the content of exhibit P1 (birth certificate) after it was admitted.

Exhibit P1 was made after the case had been instituted in Court to prosecute the appellant and ensure he was convicted. The appellant prayed for this Court to expunge from the record exhibit P1. In the 3rd ground of appeal, the appellant said the evidence of PW2, PW3, PW8 and PW9 contradicted. Hence, the trial Court was not supposed to rely on it. PW2 said the culprit wore black trousers, a green gumboot, an orange bag, a red cap and a red jacket. But, during the arrest, the appellant was found wearing a black coat. PW2 said in his evidence that the appellant wore black trousers, a black gumboot, a black sweater, a black cap with a white dot, and an orange backpack (bag). PW8 said that the appellant wore black trousers, a black gumboot, a red jacket, a cap and a backpack (bag). PW9 testified that students said the appellant was wearing black trousers, a black gumboot, a red sweater, and another red bag was inside the bag. The appellant said another contradiction is found in the evidence of PW2, who said the appellant was holding his hand before the incident. When PW3 and PW8 passed the area, the appellant released her hand. After they passed, he grabbed her neck and took her to the forest, where he had carnal knowledge of her. PW3 said in his evidence that while on their way to the 5 restaurant they met PW2 going to school from the restaurant. After ten paces, they met with the appellant. The appellant called PW2. PW3 and PW8 asked the appellant what he wanted to do to PW2, but the appellant did not answer. The appellant said that the evidence of these witnesses contradicted each other. Regarding the 4th ground of appeal, the appellant said that PW6's findings after examining the victim were contrary to what was observed by PW1 immediately after the incident. PW1 said she saw sperm, sand and something like Petroleum jerry in the victim's vagina. While PW6 said after examining the victim, he saw blood coming from the victim's vagina. It is an apparent contradiction as to why the blood observed by PW6 was not seen by PW1, who observed the victim first. In the 5th ground of appeal, the appellant said that he denied committing the offence from the beginning, and the trial court failed to consider this. Even in his cautioned statement, he declined to rape the victim. In the 6th ground of appeal, the appellant said the trial court denied him the right to mitigation after conviction. In the 7th ground of appeal, the appellant said the prosecution failed to call Samlati and Grace, who were material witnesses. The victim (PW2) 6 testified that she was in their company immediately before being raped. They were supposed to be called to testify on what transpired immediately before the incident. The appellant said in the 8th ground of appeal that the trial court did not consider his defence. In the last ground of appeal, the appellant said the prosecution failed to prove the case beyond reasonable doubt. The prosecution withdrew the prayer to tender clothes he alleged he wore after the victim said they were not the ones he wore during the incident. In her reply, Ms. Veneranda Masai, State Attorney, opposed the appeal. She said in the 1st ground of appeal in the supplementary petition of appeal that the Court examined PW2, PW3 and PW4, who were children of tender ages, by asking some questions. After these witnesses promised to tell the truth and not lie, the trial court recorded their evidence under Section 127(2) of the Evidence Act, Cap, 6 R.E. 2022. On the 2nd ground of appeal, the counsel said that exhibit P1 was not read over after it was tendered by PW5 and prayed for the same to be expunged from the record. However, the counsel said there is still oral evidence from PW5 which proves the victim's age to be below

18 years. The victim's age could be proved by the victim's testimony, parents, medical 7 doctors or documents. The positions were stated in Makende Simon vs. Republic, Criminal Appeal No. 412 of 2017, Court of Appeal of Tanzania at Mwanza (unreported) on page 15. Even in the absence of exhibit P1, the evidence of PW5 proved that the victim was aged nine years during the incident. The counsel for the respondent submitted jointly on the 3rd and 4th ground of appeal in the supplementary appeal petition on the contradictions in the testimony of PW1, PW2, PW3, PW4, PW6, PW8 and PW9. On the contradiction of what the appellant wore when he committed the offence, the counsel said the contradiction is minor and does not affect the prosecution case. The exact position was stated in the case of Sylvester Stephano vs. Republic, Criminal Appeal No. 527 OF 2016, Court of Appeal of Tanzania at Arusha (unreported), on page 11. Not every discrepancy in the prosecution case will cause the prosecution case to flop. It is only where the gist of the evidence is a contradiction that the prosecution case will be dismantled. The Court has to decide whether the inconsistencies and contradictions are minor or go to the case's root. Where there are several witnesses of the incident, there is a possibility of minor discrepancies or contradictions in their evidence caused by the lapse of time and concentration of what they saw. The contradictions stated by the appellant were minor and did not go to the gist of the prosecution's case. The respondent's contention to the 5th ground of appeal is that the trial court considered the appellant's defence in its decision. The Court considered all evidence in the record, including the appellant's cautioned statement and found that the evidence was sufficient to prove that the appellant was responsible for raping the victim. Thus, the appellant's complaints that his defence was not considered were incorrect. In the 6th ground of appeal, the respondent said that the ground has no merits as it is the discretion of the Court to allow the appellant to mitigate after his conviction. The appellant was sentenced to the minimum sentence for the rape offence. Even if the appellant is afforded the right to mitigate, the sentence could be within the minimum sentence provided by the law. The denial of the right to mitigate has not affected the appellant. The Court of Appeal faced a similar position in Issa Mustapha Gora and Another vs. Republic, Criminal Appeal No. 330 of 2019, Court of Appeal of Tanzania at Arusha (unreported). On the 7th ground of appeal, the counsel said that the prosecution has to prove its case, and no specific number of witnesses is required to prove the case. What is important is the credibility and competence of its witnesses. The position is provided under section 143 of the Evidence Act, Cap 6 R.E. 2022. Prosecution witnesses were credible and proved the case against the appellant. Failure to bring Samlati and Grace as witnesses does not affect the prosecution's case. PW2 is the victim, and PW3 and PW4 saw the appellant talking to the victim and identified him as the person who raped her. The victim also identified the appellant to be the person who raped her. Even in the absence of the testimony of Samlati and Grace, the evidence available is sufficient to prove that the appellant raped the victim. The ground has no merits. In the 8th ground of appeal, the respondent contended that the trial Court considered the appellant's defence, and it found that the defence evidence failed to raise any doubt about the prosecution case. The appellant failed to ask any question to the PW1, and he did not cross examine PW2 on the issue of rape. Regarding the 9th supplementary ground

of appeal, the counsel said that the answer is the same as in grounds No. 1 and 5 in the supplementary petition of the appeal. All these grounds have no merits. Prosecution evidence proved that it was the appellant who committed the offence. PW2 proved how the appellant penetrated her. PW6's evidence supports PW2's evidence. The appellant was identified by PW2, PW3 and PW4 by his clothes. The minor contradictions in the evidence of the prosecution's witnesses about the colour of the clothes the appellant was wearing do not go to the gist of the prosecution evidence. The incident occurred during the day as PW1, PW2, PW3, and PW8 stated they were at school. It was easy to identify the appellant. The victim proved that she was nine (9) years old at the time of the incident. PW1, immediately after the incident, informed her mother about the incident. The defence case did not raise any doubt to the prosecution's case. The appellant's defence supports the prosecution's evidence. The failure to ask material questions during cross examination is the same as the appellant admitting the testimony of these witnesses. There is no hearsay evidence in this case. The Court relied on other evidence available in the record. The Court did not rely on the previous conviction. On the issue that he was convicted on suspicion, the respondent said the victim (PW2) testified that she did not scream for help because the appellant told her that he would inject her with an injection. The grounds raised by the appellant in this appeal have no merits. As the appellant was 11 convicted of raping a girl below ten years, the sentence imposed by the law is life imprisonment. The trial court sentenced the appellant to serve 30 years contrary to the law, and this Court has to impose a proper sentence under section 388 of the Criminal Procedure Act, Cap. 20 R.E. 2022. In rejoinder, the appellant retaliated his submission in chief. Having heard the rival submissions by the parties, the Court is called upon to determine whether the appeal has merits. In determining the appeal, III start with the 3rd, 4th, 5th and 9th grounds of appeal In the supplementary petition of appeal as the same is capable of disposing of the appeal. The appellant is saying on these grounds of appeal that the prosecution failed to prove the offence against the appellant without doubt as there were contradictions in the prosecution evidence, and the appellant denied having carnal knowledge of the victim in the cautioned statement (exhibit P3). The appellant averred that the evidence of PW1, PW2, PW3 and PW4 has discrepancies on the clothes the appellant wore at the time of the incident. He added that there are further discrepancies in the testimony of PW1 and PW6 on what was observed when they examined the victim. In contention, the respondent said the discrepancies were minor and did not go to the gist of the prosecution case. 12 As stated by the appellant and admitted by the counsel for the respondent, there are some contradictions in the testimonies of the prosecution's witnesses. Linder normal circumstances, a witness is not expected to be right in narrating each detail when testifying. The Court of Appeal In the case of Emmanuel Lyabonga vs. Republic, Criminal Appeal No. 257 of 2019, Court of Appeal of Tanzania at Iringa (unreported), observe that contradictions by any particular witness or among witnesses cannot be avoided in any specific case. Where there is a contradiction, the trial Court must look at it and determine if it affects the prosecution case. The law is settled that where there are discrepancies in the evidence, the Court has to decide if the contradiction is minor or goes to the gist of the evidence. The position was stated in Dickson Elia Nsamba Shapwata

vs. Republic, Criminal Appeal No. 92 of 2007, Court of Appeal of Tanzania at Mbeya (unreported), where it was held that: "In evaluating discrepancies, contradictions or omission, it is undesirable for a Court to pick al/t sentences and consider them in isolation from the rest of the statements. The Court has to decide whether the discrepancies or contradictions are only minor or whether they go to the root of the matter." 13 The prosecution case fails only where the gist of the case is in contradiction. In Vuyo Jack vs. Director of Public Prosecutions, Criminal Appeal No. 334 of 2016, Court of Appeal of Tanzania at Mbeya (unreported), the Court held that: "Not every discrepancy in the prosecution case will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory that the prosecution case will be dismantled." In the present case, there is a contradiction in the testimony of PW1 and PW6 of what they saw when they physically examined the victim (PW2). The evidence on record shows that immediately after the incident, PW1 physically examined the victim in her sexual organs. In her examination, PW1 observed sperm, sand and jerry substance in the victim's vagina. Later, the victim was taken to Hula Lutheran Hospital for examination, where PW6 examined the victim physically. PW6 said that he observed in the victim's vagina blood flowing, bruises, hymen was perforated, and the victim was experiencing pain when touched in the vagina. There are evident discrepancies in the testimony of PW1 and PW6, who physically examined the victim's sexual organs. PW6 said he saw blood in the victim's vagina, but PW1, who was the first to examine the victim physically, did not see any 14 blood in the victim's vagina. This evidence raises doubts about the testimony of PW1 and PW6. Another contradiction is found in the evidence of PW2 (the victim) and that of PW1, PW3, PW4, and PW8 on the clothes, cap and shoes the appellant wore during the incident and when he was arrested. PW2, in her testimony, said that she did not know the person who raped her before the incident. However, she informed PW1 that she could identify the person by his face and clothes. Unfortunately, PW2 did not describe the culprit, but she provided what he wore during the incident. PW2 said that the culprit was wearing a red sweater, green gumboot, black trousers, and red cap and was wearing an orange bag. PW1 said in her testimony that the victim (PW2) informed her that the culprit was wearing a gumboot, black trousers, a black sweater, and a cap. PW3 testified that he saw the appellant talking to the victim immediately before the incident. It said the appellant wore a black gumboot, black trousers, a black sweater, a black cap with a round red dot in the front, and an orange bag. PW4, who was in the company of PW3, said nothing about what the appellant was wearing. There is a discrepancy in the colour of the sweater, gumboot and 15 cap worn by the culprit during the incident in the PW1, PW2 and PW3 testimony. The evidence of PW8, the cell leader of the Minge area within Masukanzi Hamlet, shows that he arrested the appellant following the information he received on what he was wearing. PW8 said that PW1 informed him that the person who raped PW2 was wearing black trousers, a red coat, a bag at his back and a black cap. PW8 arrested the appellant because of what he was wearing. The evidence shows a difference between what the victim (PW2) said the culprit was wearing and what PW8 said the appellant was wearing when he arrested him. The discrepancy of what was dressed by the appellant is not minor as the respondent submitted it. The same goes for the issue of

identification of the appellant as the person responsible for the offence. It is settled that visual identification evidence is the weakest kind and must be watertight before it is taken as a basis of conviction. In the landmark case of *Waziri Amani vs. Republic* [1980] TLR 250, the Court of Appeal stated that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence is absolutely watertight. In the case of *Chacha Jeremiah Murimi and 3 16 Others vs. Republic*, Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania at Mwanza (unreported), the Court of Appeal, while discussing the possibility of mistaken identity in visual identification, provided some guidelines for eliminating the possibility of mistaken identity. The Court held that: "The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification of the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it?" In the present case, the incident occurred in the afternoon, which means there was sufficient sunlight for the victim to identify the culprit. In her testimony, the victim said it was the first time she had seen the culprit, but she could remember his face and dressings. She informed PW1 what the culprit was wearing. PW1 told PW8, who found and detained the appellant. 17 It is the clothes the appellant did wear which made him apprehended. The victim was shown the appellant after he was arrested and identified him through what he was wearing. The appellant's identification was based on what he was wearing at the time of committing the offence. As there are discrepancies in the colour of clothes, cap and gumboot, which the culprit was wearing at the time of the incident and what the appellant was wearing at the time of arrest, the same affects the credibility of the prosecution's evidence. Further, the victim (PW2) identified the appellant in the dock. However, an identification parade was not conducted before the appellant was identified in the dock. This Court, in the case of *Francis Petro vs. Director of Public Prosecutions*, Criminal Appeal No. 44 of 2020, High Court of Tanzania, Arusha District Registry (unreported), held on page 6 of the judgment that:- is always imperative to conduct a parade of identification in case the one allegedly identified and identifying person did not know each other before the incidence as opposed to those who were familiar to each other before an occurrence of a crime. The essence of conducting a parade of identification is to give assurance regarding the alleged identification (See the case of *Waziri Amani vs Republic* [1980] 250." 18 The purpose for conducting the identification is also provided by section 60 (1). of the Criminal Procedure Act, Cap. 20 R.E. 2022. The section states that a police officer in charge of the police station or investigating an offence may hold an identification parade to ascertain whether a witness can identify a person suspected of committing a crime. Back to the present case, the evidence of PW1, PW2, PW3, PW4, PW8 and PW10 shows that after the appellant was arrested, he was taken by a car near the school

where PW3 and PW4 identified him by his clothes as the person who was talking to the victim immediately before the rape incident. The appellant was taken by the same car to Hula Lutheran Hospital, where the victim (PW2) also Identified the appellant by what he was wearing as the culprit. The identification of the appellant by PW2, PW3 and PW4 inside the car. The same is not an identification parade. After arresting the appellant, the police were supposed to conduct an identification parade so that PW2, PW3 and PW4 could ascertain if they could identify the appellant. The law is settled that dock identification has value where the identifying witness previously identified the accused person in the identification Parade. In the case of Abdul Farijallah vs. Republic, Criminal 19 Appeal No. 99'of2008, Court of Appeal of Tanzania at Mbeya (unreported), it was held on page 5 of the judgment that:- "That it is trite la w that the test in an identification parade is to enable the witness to identify a person or persons whom he or she had not known or seen before the incidents." Failure to conduct an identification parade means the dock identification of the appellant by PW2, PW3 and PW4 has no value. There Is no valid evidence in the record from the victim (PW2) and other witnesses (PW3 and PW4) identifying the appellant as responsible for raping the victim. in the absence of evidence identifying the appellant, his cautioned statement is the only available evidence connecting the appellant with the rape offence (exhibit P3). PW8 tendered exhibit P3 without objection from the appellant. However, the cautioned statement shows that the appellant took the victim to the bushes to have sexual intercourse with her, undressed her, and took off her underwear, which was dirty. After seeing the victim's dirty underwear, he lost interest and left her to go. It is clear from the cautioned statement (exhibit P3) that the appellant was denying having sexual intercourse with the victim. The same could not be the basis for the conviction. 20 Therefore, the appeal has merits, and it is allowed. The appellant's conviction by trial District Court is quashed, and the sentence is set aside. The appellant, namely Abubakari Isa Kayuwanga, has to be released from prison immediately or otherwise held for other lawful cause. It is so ordered accordingly. JUDGE 29/09/2023 21

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