

TANZANIA / JUDGMENT

ALFA ATHUMAN

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IN THE HIGH COURT OF TANZANIA DODOMA SUB-REGISTRY AT DODOMA DC CRIMINAL
APPEAL NO. 22104 OF 2024 (Arising from Criminal Case No. 51 of 2023 in the Resident
Magistrates' Court at Singida) ALFA RAMADHANI ATHUMAN..... APPELLANT
VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

5th & 31st December, 2024 MUSOKWA, J. In the Resident Magistrates' Court of Singida, simply referred to as the "trial court", the appellant herein was charged, convicted and sentenced to serve thirty (30) years imprisonment for the offence of rape contrary to the provisions of section 130 (1) and (2) (a); and section 131 (1) of the Penal Code, Cap. 16 R.E. 2022 (Penal Code).

According to the facts, it was alleged that on 18th September, 2023 at Chungu Village, Ihanja Ward in Ikungi District within Singida Region, the appellant had sexual intercourse with a girl who was aged eighteen (18) years without her consent. For the purpose of concealing her identity and protecting her dignity, the said girl will be referred to as "the victim" or "PW1". Aggrieved by the said decision, the appellant has preferred the present appeal based on the following grounds: - i

1. That, the trial Magistrate erred in law and in fact to convict the appellant while knowing that prosecution side failed to prove their case beyond reasonable doubt.
2. That, the trial Magistrate erred in law and fact by convicting the appellant basing on un-re/iab/e and contradicting evidence.
3. That, the whole proceedings were marred by procedural irregularities which led to unwanted judgment and order of the court which also not proper. When this appeal came for hearing on 5th December 2024, the appellant was represented by Mr. Majaliwa Wiga learned advocate; while the respondent had the service of Mr. Sadik Abdulkheri, learned state attorney. Mr. Wiga, started by addressing the 1st ground of appeal. The appellant's counsel asserted that, it is settled law that the best evidence in a charge of sexual offence comes from the victim as provided under section 127 of the Evidence Act, Cap. 6 R.E. 2022 (Evidence Act). Further that such evidence suffices to warrant conviction even without corroborative evidence. However, according to the appellant's counsel, the aforementioned position of the law never intended that the testimony of the victim in sexual offences, should be considered as gospel truth. Instead, the law requires that the victim's testimony should

pass the test of truthfulness and credibility. 2 The appellant's counsel proceeded to question the credibility of the victim's testimony as recorded at page 6 of the typed proceedings of the trial court. The records provide for the testimony of PW1, who stated that she was with the appellant from 18:00pm to 9:00pm. According to the appellant, it is unusual that the victim, who was allegedly forced, would have spent several hours with the perpetrator immediately after the commission of the unlawful act (rape). Thus, the prosecution ought to have provided a reasonable explanation thereof. Mr. Wiga further questioned failure by the victim to resist the attack when the appellant began dragging her towards the forest, as recorded at page 5 of the trial court proceedings. The appellant, in an attempt to further shake the credibility of the victim, asserted that it is highly unlikely that both the landlord, and the mother of the victim, would fail to take immediate action upon being informed of the fateful incident, as indicated in the testimony of PW1. The case of Michael Saidi vs R, Cr. Appeal No. 145 of 2017 (unreported) was preferred by the appellant to fortify the argument that the victim's testimony must pass the test of credibility. On the 2nd ground of appeal, the learned advocate asserted that the evidence adduced by the prosecution was tainted with contradictions. This is reflected by variations in the testimonies of PW1 and PW2 on the 3 time of arrival of the victim's mother at the victim's place of residence. While PW1 states the time of arrival of PW2 to be 23:00 hours, PW2 on the other hand, states that it was at 01:00 am. This is reflected at pages 7 and 9 of trial court proceedings. The appellant argued that contradictory evidence goes to the root of the case. The case of Sist Reuben vs Republic, Cr. Appeal No. 280/2022 (unreported) was relied upon to reinforce his position. In expounding the 3rd ground of appeal, Mr. Wiga pointed out the existence of procedural irregularities during the trial for failure by the prosecution to summon material witnesses such as the police officer who took part in the arrest, as well as the victim's landlord. It was the appellant's submission that this resulted in the weakness of the prosecution case, leaving doubt thereof. Thus, the subsequent conviction that was entered by the trial court against the appellant was unwarranted. In view of the foregoing, the appellant prayed that this appeal be allowed, the conviction and the corresponding sentence be quashed and set aside. In reply Mr. Sadik, learned state attorney contended this appeal in its entirety on the basis that the prosecution successfully proved the case beyond reasonable doubt. The offence of rape is proven by establishing 4 that there was carnal knowledge of the victim (penetration), and that there was no consent because the victim was aged 18 years. The respondent referred to the testimony of PW1 (the victim), as recorded at page 2 of the typed proceedings of the trial court, whereby she testified that she met the appellant on the way, and that the appellant called her by name. Thus, it is evident that the two of them knew each other even before the day of the incident. However, the entire narration of the victim's testimony proves that there was no consent on her part. The respondent's counsel cited the cases of Selemani Makumba vs R,

[2006] TLR 379; and Shomari Mkwama vs R, Cr. Appeal No. 606 of 2021(unreported). It was submitted by the respondent that the position of the law in the above cited cases is that the best evidence in sexual related offence is from the victim. Mr. Sadik argued further

that, despite the testimony of PW1 which sufficed to warrant the trial court to enter conviction and issue the sentence; also, the testimony of PW3, the medical doctor corroborated the testimony of the victim. The testimony of PW3, confirmed that the victim had been raped and in support thereof, the PF3 was tendered by this witness, admitted and marked as Exhibit P1. This is recorded at page 5 of the trial court proceedings. In addition to the foregoing, the testimony of PW4, the 5 police officer who interrogated the appellant is also material and forms part of the court records. The learned state attorney objected the assertions by the appellant on failure to bring material witnesses for being unmeritorious. Further that the existing variations in the testimonies of the witnesses are merely minor and have no adverse impact on the prosecution case. Consequently, the respondent prayed that this appeal be dismissed for want of merit. In rejoinder, Mr. Wiga, learned advocate maintained his submission in chief. In light of the parties' submissions and upon careful scrutiny of the records before this court, the pertinent issue to be determined is whether the charge against the appellant was proved to the required legal standard in a criminal matter, therefore beyond reasonable doubt. According to the charge against the appellant, it is alleged that he had sexual intercourse with the victim without her consent. In this regard, this is not statutory rape where the question of consent is immaterial. This fact is also confirmed by the testimony of the victim's mother (PW2) regarding the age of the victim. At page 8 of the typed trial court proceedings, PW2 testified referring to the age of the victim that "she was born on 29/8/2005, she is now 18 years old".⁶ To begin with, the appellant criticized the credibility of the victim's testimony. For instance, the victim stated at page 6 of the typed trial court proceedings that she was with the appellant during the incident from 18:00 pm to 9:00pm. In response thereof, the respondent submitted generally that the victim and the appellant knew each other even before the incident. Further that, the entire narration of the victim's testimony proves that there was no consent on her part. Considering the allegation that the victim was forced to have sexual intercourse with the appellant, the duration of three hours (18:00pm to 9:00pm), spent with the appellant, is reasonably too long. Again, after the incident, the victim and the appellant went together to the victim's residence. Hence, I do not expect, and it is not testified by the victim that the appellant kept closing the victim's mouth for the entire three hours to avoid shouting, if any. Additionally, the victim approached her landlord one hour after the appellant had already left the victim's residence. In the circumstances, I agree with the learned counsel for the appellant that the testimony of the victim was not credible. Notably, the case of *Hamisi Halfan Dauda vs The Republic*, Criminal Appeal No. 231 of 2019 (unreported) is relevant when it comes to reliability⁷ of the testimony given by the victim in sexual offences. The Court of Appeal of Tanzania (CAT) observed with caution as follows: - "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)." [emphasis added] Another aspect in the case at hand, is the contradictory evidence of PW1 and PW2.

At page 5 of the trial court proceedings, PW1 testified that: - "On 18/9/2023, it was about 17:00hrs during evening hours when I was coming from home headed to the house that I rent so that tomorrow morning I can go to school, it was on Monday. I went home to take my necessities for school (school needs) I took my uniforms, cooking oil and vegetables. On the way, there is a place for alcohol-local bar, there was many youths who are playing pool table. I identified two of them namely Alfa and Mikidadi. I continued with my journey but when I went ahead, I heard someone calling me at my back. He used the names of C victim'), I turned back and see Alfa who said wait for me. I did not wait him; I continued with the journey. He speeds up till he reached me. He greeted me and I respondent. He asked me where are you going, but I remained quiet. He continued to follow me. As we reached at the forest, He touched my hands. He started pulling me towards the directions of the forest I also pulled myself back but could not succeeded. We started arguing each other. As we reached at the centre of that 8 forest, he let me down by force. (Akanipiga Mtama).I started raising alarm but he dosed my mouth by using his palm of his hand, he then told me if I continue to scream, he will finish me...He then took his penis and inserted into my vagina...But I woke up the house lord and informed what transpired to me. It was at 09:00- 10:00pm at night. I4fe were together since 18:00pm to 9:00pm with Alfa. The land lord went outside but did not see anyone. I asked him to phone and called my mother. I explained to my mother what happened my mother said, she is coming right now. She arrived home at about 23:00 hours during night hours." [Emphasis added] On the other hand, PW2 testified at page 8 of the trial court proceedings as follows: - "(9/7 18/9/2023 during evening hours at 17:00hrs, my daughter [victim] was heading to school from my house, and at 10:00pm she called me what happened on the way. That she met Alfa on the way, then she heard the voice calling her name [victim]. When he reached her, he told her that, today I want to make love to you. As they started arguing, he pulled her at the forest and undressed her tight, he then undressed his trouser and inserted his penis into her vagina. As she told me that, I headed to Ihanja where she stays, we arrived at about 01:00 am, we slept and the following day, we went to Ihanja Police Station and given PF3, we headed to hospital." [Emphasis added] In light of the above records, the contradictions in the evidence of PW1 and PW2 is evident because, PW1 testified that she informed her mother 9 about the offence and her mother arrived at her residence at 23:00 hours being night hours. On the other hand, PW2 testified that upon a call from PW1, she arrived at the residence of PW1 at 01:00 am. It is my view that, the variation of two hours is not a minor discrepancy as suggested by the learned state attorney for the respondent. Instead, the contradictory evidence goes to the root of this matter. In the CAT case of Solea Mdadija and Another vs the Republic, Criminal Appeal No. 580 of 2022 (unreported), the issue of contradictory evidence was deliberated and it was held as follows: - "We further agree with the /earned state attorney on contradictory evidence of the prosecution witnesses. It is a rule that in evaluating discrepancies or contradictions the court has to decide whether that contradictions or discrepancies are only minor or if they go to the root of the matter. Looking closely on these contradictions, it is dear to us that they are not minor and also, they bring up question on credibility and reliability of those

witnesses. In those circumstances, the contradictions go to the root of the case." [Emphasis added] Equally important, in the course of her testimony, PW1 stated that she informed her landlord after the incident but the said landlord was not called before the trial court to testify. Again, it is the landlord's phone which facilitated the communication between PW1 and her mother (PW2). Therefore, I am of the view that the said landlord was an important witness whose testimony would have provided some clarity of the incident. So, failure to summon this important witness would have prompted the trial court to draw an adverse inference on the part of the prosecution. In the case of Samweli Japhet Kahay vs Republic, Criminal Appeal No. 40 of 2017 (unreported) the CAT stated that: - "Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw an adverse inference since if a party to the case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act." [Emphasis added] For the reasons I have endeavoured to indicate herein, I am of the settled view that, the prosecution failed to prove the case beyond reasonable doubt. In the premises, this appeal is entirely allowed. The conviction and the corresponding sentence against the appellant are hereby quashed and set aside. Accordingly, I order immediate release of the appellant from prison forthwith unless otherwise lawfully held. It is so ordered. Right of appeal fully explained. Judgment delivered in the presence of the appellant; and in the presence of Mr. Gotharb Mwingira, state attorney for the respondent. 12

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