

TANZANIA / JUDGMENT

Amani Josph v

COURT
TANZLIIDECIDED
29 April 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB-REGISTRY AT
BUKOKA CRIMINAL APPEAL NO. 37109 OF 2023 (Arising from Criminal Case 44 of 2023 District
Court of Biharamulo) AMAN I JOSEPH..... APPELLANT
VERSUS REPUBLIC..... RESPONDENT

JUDGMENT

17th and 29th April, 2024 BANZI, J.: The appellant, Amani Joseph, has lodged this appeal faulting the findings of Biharamulo District Court in Criminal Case No. 44 of 2023 in which, he was convicted and sentenced to thirty years imprisonment for raping a girl of 16 years of age whom I shall refer as the victim, contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap. 16 R.E. 2022]. The alleged offence was committed on 16th April, 2023 at Mihongora village, within Biharamulo District in Kagera Region. Briefly, the factual background of the case reveals that, on the date of the incident, the victim was at home with her two young sisters and the appellant who was working for them but her parents were not at home. At Page 1 of 10 about 00:00 hours, while sleeping alone in a separate room, the appellant entered into the room and told her that he wanted to sleep with her. She resisted but the appellant forced her and finally, he managed to have sexual intercourse with her. After satisfying his desire, he went back to his room. The victim claimed that, although there was no light in her room, she managed to identify the appellant by his voice. On the next day, she informed the appellant that, she wanted to go to live at his parents' home. The appellant gave her bus fare and a mobile phone to go to Kahama with the mission that, he would join her later to marry her. The victim's father, PW2 while at Bukoba, he was informed that, the appellant abducted the victim. The appellant was arrested by PW3 on 18/04/2023 on allegation of abducting the victim and taken to ward offices where upon interrogation, he told them that, the victim was at Segese area in Kahama. On 19/04/2023, PW3 together with the appellant and victim's brother went to look for her. They arrested her and took her to Nyakahura Police Post for interrogation. At the Police Post, the victim was given a PF3 so that, she would go to hospital for examination. At Nyakahura dispensary, she was examined by Gloria Sima Lambart (PW4) who after examination, found that the victim was penetrated but she was not pregnant. Page 2 of 10 In his defence, the appellant, despite his admission to know the victim and to have worked for her father, he denied to have raped her contending that, the case was concocted because he owed the victim's father his money. He further claimed that, when he asked for that money, PW2 decided to frame-up the case against him that he abducted her

daughter. After receiving the evidence of both sides, the learned trial magistrate convicted the appellant with the offence of rape after being satisfied that, the case against him was proved beyond reasonable doubt. With such findings, the appellant was sentenced as alluded above. Aggrieved with his conviction and sentence, he knocked the doors of this court armed with six grounds of appeal which can be rephrased as follows; first, the case was not proved beyond reasonable doubt; second, there was contradiction in the evidence of PW2, PW3, PW4 and PW5; third, no document was tendered from Nyakahura Secondary School proving that the victim was a student; fourth, the age of the victim was not proved; fifth, *voire dire* was not conducted and sixth, evidence of identification was weak. At the hearing, the appellant appeared in person unrepresented whereas, the respondent was represented by Mr. Erick Mabagala, learned State Attorney. Being a lay person, the appellant adopted his grounds of Page 3 of 10 appeal as his submission and urged this court to consider them and set him free. Mr. Mabagala strongly opposed the appeal. Responding to the grounds of appeal, he argued that, the prosecution side was duty bound to prove the charge of rape and it was the appellant who raped her. Explaining further, he stated that, the prosecution adduced evidence which proved all ingredients of the offence. The victim explained how she was raped by the appellant and how they agreed for her to go to Kahama. Her evidence was supported by 'PW4 who examined her and found evidence of penetration. According to Mr. Mabagala, the victim was consistent in her narration hence, there was no cogent reason for not believing her. It was further his submission that the victim's age was proved by victim herself and her father, PW2 who stated that, the victim was 16 years old. He cited the case of *Issaya Renatus vs Republic* [2016] TZCA 218 TanzLII to support his submission. In respect of failure to conduct *voire dire*, the learned State Attorney argued that, as the victim was above 14 years, that complaint is misplaced. Furthermore, Mr. Mabagala conceded that, there were contradictions on the evidence of the prosecution witnesses such as, PW2 contradicted Page 4 of 10 himself on the date the victim was taken away by the appellant to Kahama. Also, PW3 and PW2 contradicted on the person who accompanied PW3 to Kahama to arrest the victim be it Kisali or John Clement. However, Mr. Mabagala stressed that, those contradictions were very minor and they did not go to the root of the matter. Moreover, he submitted that, whether the victim was a student or not, is not a requirement of law to prove the offence of rape. Reverting to the complaint concerning identification, Mr. Mabagala argued that, although the offence was committed at night and there was no light in that room, the victim managed to identify the appellant by his voice. Despite conceding that, voice identification is among the weakest evidence as it was stated in the case of *Nuhu Selemani vs Republic* [1984] TLR 93, Mr. Mabagala insisted that, the victim identified the appellant by voice because she was familiar with his voice as they had stayed together for seven months. He further argued that, the act of the appellant to approach the victim and plan to escape, was a clear indication that, it was the appellant who committed the alleged offence. According to him, the plan to escape was a continuation of what they started in the previous night and therefore, it eliminated the possibility of mistaken identity. Moreover, the appellant led Page 5 of 10 the search team to Kahama where they found the victim. He concluded that, the appellant was rightly convicted and hence, the appeal has no merit. In rejoinder, the appellant had nothing to say. Having thoroughly considered the grounds of appeal and the submissions by both sides in the light of evidence on

record, the main issue for determination is whether the case against the appellant was proved beyond reasonable doubt. This being a statutory rape, it was the duty of the prosecution to prove the following things; one, that, the victim was below eighteen years; two, that, there was penetration and three that, it was the appellant who is responsible for the alleged crime. In the case of *Masanyiwa Msplwa vs Republic* [2022] TZCA 456 TanzLII, it was stated that: "In cases of rape of persons aged below 18 years, which is called statutory rape, a further condition on the part of the prosecution kicks in. Age must be proved." Reverting to the case at hand, according to the learned State Attorney, the age of the victim was proved by the victim herself and her father, PW2. I am very much aware that, the victim and PW2 are competent person to Page 6 of 10 prove the age of the victim in rape cases. In the case of *Omary Rashid @ Milanzi vs Republic* [2023] TZCA 167 TanzLII it was held that: "It is a settled principle of law in this country that the age of the victim can be proved by the victim, relative, parent, medical practitioner, Birth Certificate, teacher, dose friend or any other person who knows the victim." In our case, at page 7 of the proceedings, the victim stated as hereunder: "I am sixteen years old. I am a student, I am in form two at Nyakahura secondary school." (Emphasis supplied). Likewise, at page 11 of the proceedings, PW2 being the victim's father, among other things, he stated as hereunder: ". my daughter Sophia is sixteen years old..." It is apparent from the extracts above that, the victim and PW2 just mentioned that, the victim is sixteen years old. It is important at this juncture to underscore that, when it comes to counting age of a person, a mere mention of a purported age, (say sixteen years of age), is not a sufficient proof of that age. For purposes of proof, rather, it is important to state the exact date when that person was born. Since the victim's age was the Page 7 of 10 determining factor in establishing the charged offence, evidence must be positively laid out to disclose the age of such victim. In Other words, the victim and PW2 were supposed to mention the exact date disclosing when the victim was born tn order to prove that, she was sixteen years old. In the absence of such evidence from the victim and PW2, it is the considered view of this court that, the victim's age was not proved to the required standard. Since age of the victim was one of the essential ingredients in statutory rape, it cannot be concluded that, the offence of rape was proved beyond reasonable doubt against the appellant. This in itself is sufficient to fault the conviction of the appellant. Apart from that, the fact that, the victim asked the appellant to let her live with his parents is not the conclusive proof that, it was the appellant who raped the victim on the night of the incident. Besides, the evidence of identification against the appellant leaves a lot to be desired. As admitted by the victim, there was no light in the room of the victim where the alleged rape took place. Although the victim claimed to have identified the appellant by his voice, it is settled law that, voice identification is the weakest evidence to be depended by the court to prove the case against the accused. In the case of *Manyanda Ncheya vs Republic* [2021] TZCA 409 TanzLII, it was stated that: Page 8 of 10 "Pertaining to voice identification, great care must be taken before the court relying on such evidence because it is generally perceived as the weakest type of evidence as there is always a possibility of imitating another person's voice." In this case, although the victim claimed to have identified the appellant by his voice because she was familiar with his voice as they stayed together for seven months, that in itself does not eliminate the possibility of imitating the appellant's voice. Besides, the evidence shows that, at the time of the incident, the appellant was no longer living at PW2's house. However, the victim claimed that,

after finishing his desire, the appellant returned to his room. One may wonder which room was the victim referring to. Can it be the appellant's room at the house of his new boss one Mashaka Joseph? By any means, it cannot be his old room because according to PW2, apart from them, there were two workers living with them i.e. Boniphace and his wife. Unfortunately, neither Boniphace nor his wife was called to testify if on the night of event, the appellant spent the night within PW2's house. Under these circumstances, it cannot be concluded that, the appellant was positively recognised or identified as the person who stormed inside the victim's room and have sexual intercourse with her. Page 9 of 10 Having said so, it is the finding of this court that, the prosecution side had failed to prove the case against the appellant beyond reasonable doubt. In that regard, I allow the appeal by quashing the conviction and setting aside the sentence meted against the appellant. I order his immediate release from prison, unless otherwise lawfully held. It is accordingly ordered. Delivered this 29th April, 2024 in the presence of Mr. Erick Mabagala, learned State Attorney for the respondent, the appellant in person, Mr. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala, RMA. Right of appeal duly explained. Page 10 of 10

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