

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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IN THE HIGH COURT OF TANZANIA MOROGORO SUB-REGISTRY AT IJC MOROGORO CRIMINAL
APPEAL NO. 22828 OF 2024 (Arising out of Criminal Case No. 52 of 2021 in the District Court
Mvomero) ATHUMANI MOHAMED APPELLANT VERSUS
REPUBLIC..... RESPONDENT

JUDGEMENT

21st NOVEMBER 2024 MANSOOR, J. This appeal arises out of the judgment dated 30th June 2022, passed by the District Court of Mvomero (herein after referred as the “Trial Court”) in Criminal Case No.52 of 2019, by which, the Appellant was convicted of the offence charged of rape contrary to Section 130 (1) and (2) (e) and Section 131(1) of the Penal Code, [Cap 16 R: E 2002 now R.E 2022]. He was also charged for the offence of impregnating a schoolgirl c/s 60A (3) of the Education Act, Cap 353 as amended by section 22 of the Written Laws (Miscellaneous Amendments) At No. 2 of 2016. He was sentenced Page 1 of 19 to serve 30 years’ imprisonment for the first count, but he was acquitted on the second count. The particulars of the offences stated that on the diverse dates between 16th May 2021 to June 2021 at Makuyu Village within Mvomero District and Region of Morogoro, the Appellant did have unlawful carnal knowledge with a 14 years’ girl names undisclosed for purposes of concealing her identity, and impregnated the said victim, the victim was in standard Seven, at Makuyu Primary School. The District Magistrate convicted and sentenced the appellant to serve 30 years’ imprisonment for the offence of Rape. The Appellant was aggrieved by the conviction and sentence passed against him, he filed an appeal raising Six grounds. The appellant did not make any submissions when the case was called for hearing instead he simply said he has nothing to add. Mr. Shaabani Kabelwa, the State Attorney appeared for the State, and he opposed the appeal arguing that there was no need of voire dire test since the victim was sworn in and by the affirmation it is Page 2 of 19 implied that she promised to tell the truth, and that the prosecution case was proved beyond reasonable doubt since there was proof by the Doctor that indeed the girl was found to be pregnant when she was examined by the Doctor. That she had already given birth confirming that the girl was impregnated during the month of May 2022. Regarding the first ground of appeal, the Learned State Attorney states that, PW1 and PW4 were the children of less than 14 years old and he agrees that there was a violation of section 127 (2) of the Evidence Act. He said that it is true that PW1 and PW4 are minors and that the Court did not comply with the provisions of Section 127 (2) of The Evidence Act, however since their evidence was recorded under oath, their evidence was

correctly recorded. He refers to the case of Felick Kilipasi vs Republic (Criminal Appeal No. 260 of 2021) [2023] TZCA 17941 (13 December

2023) reported at Tanzlii, in which at page 11 of the decision, the CAT stated that the abrogation of section 127 (2) of The Evidence Act cannot invalidate the proceedings if the evidence of the child Page 3 of 19 was recorded under oath, as the oath is the promise to tell the truth. Regarding the 2nd ground of appeal, that the caution statement of the appellant which was admitted as exhibit P3 was recorded outside the period of four hours, the Counsel opposed this ground and said it is an afterthought as the appellant never objected the admission of the cautioned statement at trial. The Counsel refers to the case of Nyerere Nyague vs Republic, (Criminal Appeal Case No. 67 of 2010) [2012] TZCA 103) (21 May 2012) reported on Tanzlii in which the Court of Appeal of Tanzania at page 6 of the decision held that, the appellate court cannot deal with issues that were not determined or considered by the lower courts. The Counsels refers also to page 13 of the same decision in which the Court of Appeal said, dealing with an issue that was not determined by the lower court is to prejudice the parties and denying the trial court the opportunity to determine the admissibility of exhibits under section 169 (2) of the Criminal Procedure Act. Page 4 of 19 Regarding the third ground of appeal, in which the appellant complains that there was a delay of filing the charge in court since the day of his arrest, the Counsel said it is true that the appellant was apprehended on 03/06/2021 and was arraigned to court on 01/07/2021, more than 20 days after the arrest. He says the delay of arraignment to court cannot invalidate the proceedings. He refers to the case of Shabani Salim vs Republic, (Criminal Appeal No. 519 of 2021) [2023] TZCA 18015 (21 December

2023) reported on Tanzlii in which at page 24 of the Judgement, the Court of Appeal said that failure to arraign the appellant within 24 hours of the arrest is not fatal as to vitiate the trial of the appellant. On the fourth ground, the appellant said that the Medical Evidence did not support the prosecution case as it did not show that there was penetration. On this ground the Learned State Attorney argues that the issue of penetration cannot be proved by medical proof, the medical evidence only corroborates the evidence of the victim. The evidence of PW1 the victim was supported by the evidence of PW4, the eye witness who testified as PW4 and who saw the Page 5 of 19 incidence taking place. On this ground the Learned State Attorney refers to the case of Justus Evarist vs Republic (Criminal Appeal No. 242 of 2021), TZCA [17993] (14 November

2023) reported on Tanzlii, in which at page 12 of the judgement the Court of Appeal said penetration can be proved without the medical report. On the fifth and sixth grounds of appeal, on DNA Report, and that the case was not proved beyond reasonable doubt, the Learned State Attorney said the in the offence of Statutory Rape, the prosecution was required to prove the age of the victim, and penetration, and that the accused was the one who penetrated the victim. He said, the entire evidence of the prosecution proved the case and the ingredients of the offence beyond reasonable doubt. He said for proof of the offence of rape, DNA is not mandatory for establishing the offence of rape. The Counsel

refers to the case of Justine Hamisi Juma Chamashine vs Republic (Criminal Appeal No. 669 of 2021), TZCA [214214] reported on Tanzlii, where the Court of Appeal at page 24 of the decision said DNA is not the legal requirements for proving any offence. Page 6 of 19 The Learned State Attorney concluded his submissions by urging the Court to dismiss the appeal. The appellant made a rejoinder submissions stating that he was apprehended on 03/06/2021, he was taken to police, the next day he was taken to a room where there were weapons. He said he was asked for his particulars and he was forced to confess to impregnate her stepdaughter. He said it is true that he was residing in the same house with his stepdaughter but he never raped her. He said he was arraigned in court on 06/07/2021 and charged for two offences, rape and impregnating a schoolgirl, then they took him to remand prison. The appellant said there were contradictions in the evidence of the victim who testified as PW1. He says, during trial the victim said the appellant had raped her in the house. He says the victim was not telling the truth as it is not possible to rape the girl in the presence of her mother and in the presence of all the other two brothers and a sister. The appellant also challenged the medical report saying that it did not prove that there was penetration. He challenged the evidence of PW3 who was a teacher Page 7 of 19 who said he was informed that the victim is pregnant, but he did not say who reported the incident to him. He also said that, PW4 who is 12 years old is his daughter, but she was tortured and was forced to tell lies so as to implicate him and they had lied to him that if he agrees to say that the appellant had raped her sister, he would be released. That, PW5 was his wife, they have six children, two of them are not the appellant's children but he lives with all of them and has been taking care of all of the children. That his wife never said that the appellant had raped her child. The appellant said this case was not proved beyond reasonable doubt. The appellant says the victim was pregnant, and she had a baby in December 2021, and he was convicted in 2022 July, six months later and the prosecution could have brought the DNA to prove if the child born by the victim was his child. In deciding this appeal, I have considered the parties' submissions as well as the entire records of the lower court. I agree that the victim, PW1 was of tender age, she was 14 years old at the time she was found to be pregnant when she was examined by the Page 8 of 19 Doctor. I also agree and as seen at page 5 of the typed proceedings of the Trial Court that the Trial Magistrate never recorded as to whether the victim understood the meaning of oath or speaking the truth and section 127 of the Evidence Act was not complied with. The proceedings show that the victim simply took an oath and went on to give her evidence. Similarly, at page 15 of the typed proceedings of the Trial Court, PW4 who was a child of 12 years old took the affirmations and continued to give her Evidence in chief. Clearly there was a violation of section 127 of the Evidence Act as the Trial Magistrate never tested the abilities of the children to understand the meaning of oath or whether they understood that they were required to tell the truth in court. Similarly, it appears that they gave their evidence in open court contrary to the requirements of section 115 of the Law of the Child Act [Cap 13 R.E 2019] (herein referred as the "Law of the Child"). In the Felick Kilipasi (supra) case referred by the State Attorney, the Court said "In this case, the record bears out at page 12 that, PW2 gave evidence on oath. In this regard, we take that through the oath which he took before

testifying carried a promise to tell Page 9 of 19 the court the truth and not to tell lies, and therefore his evidence had evidential value.....Much as the so called voire dire test was mistakenly conducted being not a requirement of the law, in the sense that section 127(2) of the Evidence Act was not complied with, still section 127(6) of the same Act can salvage the situation since PW2 gave evidence on oath and was assessed to be a credible witness who could tell nothing but the truth. In this regard, we find that the witnesses' evidence was properly taken and he told the truth to the court and, thus, this ground lacks merit and we hereby dismiss it.” The issue is whether in the instant case PW1, the victim who was 14 years old, and PW4, the child witness who was 12 years old understood the meaning of taking oath or giving affirmation. It appears from the facts of the case cited by the Learned Counsel for the State, the child witnesses were assessed by the Trial Magistrate and the Trial Court was satisfied that the child understood the meaning of oath or affirmation, and allowed them to give their evidence and their evidence was taken as credible evidence. In the present case the Trial Court’s proceedings does not indicate that Page 10 of 19 the court had addressed the children on the meaning of oath and affirmation and that through the affirmation the children have promised to tell the truth. The evidence of PW1 and PW4 were recorded as if they were adults and they understood the meaning of affirmation. I understand that under section 127 (2) of the Tanzania Evidence Act, [Cap 6 R.E 2022], the evidence of the child may be taken without taking oath or affirmation but the court is required to make sure that the child promises to tell the truth, this section reads: Section 127 (2) “ A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.” The trial court ought to have recorded in the proceedings that the child witnesses understood the meaning of oath or affirmation and that they are required to speak the truth and not to tell lies. Again, under subsection 6 of section 127 of the Tanzania Evidence Act, the Court must be satisfied that the child is speaking the truth and the Page 11 of 19 reasons for believing so must be recorded in the proceedings, this section provides: Section 127 (6) “...if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age or the victim of the sexual offence is telling nothing but the truth...” Furthermore, under section 115 (1) of the Law of the Child Act , the court is mandatorily required to record that it is satisfied that the child understands the meaning of oath or affirmation or that she understands the duty of speaking the truth and not to tell lies. This section provides: 115.-(1) “Where in any cause or matter a child called as a witness does not, in the opinion of court, understand the nature of an oath, the evidence may be received if in the opinion of the court, which opinion shall be recorded in the proceedings, the child is possessed of sufficient intelligence to justify the reception of the laws of evidence and understands the duty of speaking the truth”. Page 12 of 19 There was no compliance of the two subsections of the Evidence Act as well as section 115 of the Law of the Child Act by the Trial Magistrate during the taking and recording of the evidence of the two children, as she did not record in writing in the proceedings that the two witnesses (PW1 and PW4) who were the child witnesses were possessed with enough intelligence to understand the duty of speaking the truth. Since the evidence of the children were the sole

evidence used by the Trial Magistrate to convict the appellant for the offence of rape, and since the evidence of the two child witnesses were recorded in violation of section 127 (2) and

- (6) of the Evidence Act as well as section 115 of the Law of the Child Act, the noncompliance vitiates the proceedings, and warranting the re-trial. The issue in this appeal is not whether the child was penetrated and as a result of the penetration, she fell pregnant, the issue is whether the prosecution was able to prove that it was the appellant herein who had penetrated her and had impregnated the schoolgirl. Page 13 of 19 His defense in respect of all two counts essentially amounts to a denial that he committed the offences concerned. It is trite law that there is no obligation upon an accused person to convince the court of his innocence where the state bears the onus. If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. A court is further not entitled to convict unless it is satisfied, not only that the explanation of the accused is improbable, but that it is also false beyond any reasonable doubt. I understand that the victim told the Court that she was raped by the appellant, and that since she is the child her evidence must be believed. She said the appellant is her stepfather and was having sexual encounter with her almost three times a week. That she was being raped when her mother was fast asleep, and that she was sleeping on the same mattress with her brother, and in the same room with another brother and sister who testified as PW4. When testifying in court PW1 was almost 15 years old on October 2021. She said she had sexual encounter with the appellant several times, not once and she did not report anywhere as the appellant Page 14 of 19 threatened to kill her and her mother if she tells anyone. There was not any other proof of rape apart from the statement of the victim and the statement of another child witness who testified as PW4, whose evidence were recorded in contravention of the requirements of the Evidence Act as well as the Law of the Child Act. The victim did not report to anybody about her being forced to have sexual encounter with the appellant. She only mentioned the appellant herein after she was found to be pregnant, and that will be months after the incident. There was also no proof that the child born by the victim was of the appellant as no DNA test was conducted. On the material placed before the court it has not been proved beyond reasonable doubt that the victim was raped or impregnated by the appellant. There is a danger here of punishing an innocent man, and therefore the offences of rape must be proved beyond reasonable doubt. It is on record that the victim PW2 was examined by the Doctor but the report (PF3) did not mention that the victim was carrying a Page 15 of 19 pregnancy of how many weeks. In his oral testimony, PW2, the Doctor confirmed that the victim was pregnant, but she did not confirm the age of the pregnancy. According to PW4, the teacher of the girl, he was informed by the Village Executive Officer that the student is pregnant and the man responsible is the appellant. The victim said she has had several sexual intercourses with the appellant, and that the appellant was threatening her not to tell anyone and if she tells anyone she would be killed. It is not disputed that the appellant was arrested after the victim was found pregnant. The victim denied to have been pregnant even after the interrogations by the teachers and the police until she was medically examined,

she then told the teacher, PW3, that the Appellant was responsible for her pregnancy. There is however no report that the appellant was medically examined, which report could have affirmed about him having preserved biological samples including sample of the blood of the appellant confirming that he had impregnated the victim. It has been reported during the hearing of this appeal that the victim gave birth to a child. However, there is no report submitted in court proving Page 16 of 19 as to when the child was born and that after birth, the child was medically examined and samples of the blood of victim and the appellant were taken and passed on to the investigation in order to prove that the father of the new born child was the Appellant. There was no DNA conducted and presented at trial to prove that the father of the newborn child was the appellant. I have gone through the evidence of the victim (PW-1) very carefully. She said she started having sexual intercourse with the appellant when she was in standard Seven. It is apparent from the very fact that the victim, giving birth to a child or being found pregnant, had been subjected to sexual intercourse but the PF3 which was admitted in court never stated if the girl was found pregnant and of how many weeks so it is not known as to when the child fell pregnant. The State Attorney alleges that victim gave birth to a baby, he however did not provide any proof that the victim had a baby and when the baby was born, and this means that the court is left to guess as to when the child might have been raped and as to when she fell pregnant. Page 17 of 19 Given the background facts, only PW-1, the victim would know as to who the person was, who had engaged her in the sexual intercourse. Her evidence was however not recorded properly so as to enable the court to safely use the evidence solely for conviction of the appellant of the offence of Rape. There were no DNA tests for proving that the Appellant was responsible for her pregnancy or that the appellant is the father of the victim's child. Consequently, and based on the above observations, the conviction entered by the trial court against the appellant in relation to the first count is quashed, and the sentence is set aside. I shall however order retrial by a different Magistrate since there was mistrial and violation of the law when taking the evidence of the children and this time the Magistrate shall make sure that he complies with the requirements of Section 127 (2) and (6) of the Evidence Act [Cap 6 R.E 2022] as well as the provisions of the Law of the Child Act [Cap 13 R.E 2019] when recording the evidence of the child. It is so ordered. Page 18 of 19 DATED AND DELIVERED AT MOROGORO THIS 21ST DAY OF NOVEMBER 2024. L. MANSOOR JUDGE 21/11/2024 Page 19 of 19

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