

TANZANIA / JUDGMENT

Bahati Zephania

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MOROGORO SUB REGISTRY)
AT MOROGORO CRIMINAL APPEAL NO. 11014 OF 2024 (Originating from Criminal Case No. 101
of 2024 at Kilosa District Court) BAHATI ZEPHANIA JAMES APPELLANT VERSUS THE REPUBLIC
RESPONDENT Date of Last Order: 29.07.2024 Date of Judgement: 09.08.2024

JUDGEMENT

MAGOIGA,J. The Appellant, BAHATI ZEPHANIA JAMES before Kilosa District (the trial court) was charged for one count rape contrary to sections 130 (1)(2)(e) and 131 (1) of The Penal Code, [Cap 16, R.E 2022]. After a full trial, the appellant was found guilty, convicted and sentenced to 30 years' imprisonment. Aggrieved with both the conviction and sentence, the appellant preferred this appeal, armed with five grounds of appeal coached in the following language: -

1. That, the learned trial magistrate erred In to convict the appellant based on evidence ofPW1 whose evidence was received contrary to mandatory requirements ofsection 127(2) of the Evidence Act[Cap 6, R.E2022].
2. That, the learned trial magistrate erred In law and facts to place reliance on the evidence of PW1 who was not credible and truthful witness.
3. That, the learned trial magistrate erred In law and facts to find corroborative evidence from evidence of PW2, PW3 and PW4 which are lacking and valueless.
4. That, the learned trial magistrate erred In law to disregard and not consider the defence ofALIBI Hke It was never made.
5. That, the learned trial magistrate erred In law and facts to convict an appellant In a case which was not proved beyond reasonable doubt. On the basis of the afcrementioned grounds, the appellant prayed for this Court to allow the appeal and order his Immediate release. The facts as gathered from the charged sheet by the trial court, are clear and brief that, on the 26^^ day of August, 2023, In Rudewa Batlnl village. HI within Kilosa district in Morogoro region, the appellant did sexual intercourse with PYS (a pseudonym), a girl aged eight years. When this appeal was called on for hearing, the appellant appeared in person, unrepresented, and under custody. Mr. John Mkonyi, learned State Attorney appeared for the respondent. The appellant requested that the hearing be conducted by way of written

submissions; a request which Mr. Mkonyi conceded. Subsequently, I granted the request and set schedule for filing the submissions. In his written submissions, the appellant consolidated the first and second grounds of appeal, arguing and correctly so that they are interrelated, and contended on wrongful conviction based on PW1's testimony, which was recorded in non-compliance with sections 127(2), (6), and (7) of The Evidence Act [Cap 6, R.E. 2022], as amended by the Written Laws [Miscellaneous Amendment] Act No. 11 of 2023. In cases of sexual offences, strict adherence to these provisions is paramount, insisted the appellant. According to the appellant, the trial magistrate failed to assess PW1's competency to testify and neglected to ensure she gave unsworn evidence under a promise to tell the truth and not lies. Also averred that, the examination-in-chief was conducted by the court instead of the party who called the witness. The appellant further argued that the conviction was based on invalid evidence. Proper assessment of PW1's testimony would reveal it failed to meet the requisite standard of truthfulness due to its contradictory, improbable, and implausible nature. The appellant referred this court to the case of *Hamisi Halfani Dauda v. Republic*, Criminal Appeal No. 222 of 2019 (unreported), to support the argument of non-compliance, and the case of *Aloyce Maridadi v. Republic*, Criminal Appeal No. 208 of 2016 (unreported) to underscore the improbability of the evidence. Consequently, the appellant asserted that these circumstances led to a mistrial. Expounding on the second ground of appeal, the appellant strongly argued that looking at the evidence of PW1, was full of contradictions such as date when was raped, school which she studies by mentioning two schools- Batini and Mague. According to the appellant, all these contradictions shows that the victim evidence was improbable or implausible. The evidence of PW1 which was corroborated by PW2 and PW4 was that she was raped on 26.08.2024 and bearing her age, PW2 did not suspect anything until when on 30.08.2024 when the incidence was reported to PW2 and PW4. All these, if at all was true, the ordeal could have been discovered, queried the appellant. On the fourth ground of appeal, the appellant contended that the trial magistrate erred in disregarding his defense of alibi, which was not disproven by the prosecution. The trial magistrate failed to consider the weight of the alibi in the judgment. Although the alibi was not preceded by notice, the prosecution was still obligated to address it, which was not done, thereby violating the appellant's right to be heard. To support this, the Appellant cited the case of *Mwita s/o Mhere and Another v. Republic*, [2003] TLR 107, CAT. Accordingly, the appellant prayed for this ground of appeal to be allowed. Lastly, the appellant argued the third and fifth grounds of appeal jointly, condensed into one issue: the wrongful conviction due to the prosecution's failure to prove the case beyond a reasonable doubt. The appellant submitted that the burden of proof in criminal cases lies with the prosecution, and the standard required is beyond reasonable doubt. This principle has been consistently affirmed by the Court of Appeal in numerous decisions. Further arguments were that, PW1 failure to report the incident at the earliest opportunity and did not provide reasons for this delay, nor for the delay in naming a suspect, thereby casting doubt on her testimony. To support this, the Appellant cited the case of *Jaribu Abdullah v. Republic*, [2003] TLR 271. The appellant added that the medical examination was conducted five days later, during which time PW2 and PW4 did not notice anything suspicious, despite PW1's age.

PW1 reported the incident to PW2 and PW4, but they delayed taking her to the hospital until a day later, even after observing bruises. Furthermore, PW1 mentioned students who were discharged by the appellant before the incident and even named them; these students were material witnesses, but the prosecution did not call them to corroborate PW1's evidence. The appellant cited numerous cases to support the argument that the court should draw an adverse inference from the prosecution's failure to call these material witnesses. In response, Mr. Mkonyi told the court that partially they concede that the evidence of PW1 was taken in abrogation of the law but was quick to argue that guided by the case of Wambura Kigingira Vs. Republic, Criminal Appeal No. 301 of 2018 which hold that: based on that understanding, we were satisfied that it not impossible to convict a culprit of sexual offence where section 127(2) of the Evidence Act is not complied with provided that some conditions must be observed to the letter. The conditions are: first, that there must be a dear assessment of the victim's credibility on record, and second, the court must record reasons that notwithstanding non-compliance with section 127(2), a person of tender age still told the truth." Guided by the above holding of the Court of Appeal and the record of the trial court at page 3 of the judgement, the learned Attorney surmised that the testimony of PW1 was credible, true and was properly used under section 127(6) of Evidence Act. Based on the above reasons, urged this court to dismiss the first and second grounds argued jointly. According to the learned Attorney, the learned trial magistrate was legally justified in relying on the evidence of PW1, which was corroborated by PW2, PW3, and PW4. Mr. Mkonyi pointed out that, in sexual offence cases, the best evidence typically comes from the victim. Therefore, PW1's testimony was the best evidence, deserving of credence and belief, as there were no substantial reasons to disbelieve her, and it was probable and plausible, despite minor contradictory statements that do not affect the core of the case. On this point he referred this court to the case of Goodluck Kyando Vs. R [2006] TLR 363. Mr. Mkonyi went on arguing that the contradictions complained of were minor and did not go to the root of the matter. Mr. Mkonyi further contended that PW1's inability to remember the exact date of the rape is a normal discrepancy, which can be attributed to normal errors of memory due to the passage of time or mental disposition such as shock and horror, citing the case of Dickson Elia Nsamba Shapwata and Another v. Republic, Criminal Appeal No. 92 of 2007 Court of Appeal Tanzania. Regarding the fourth ground of appeal, Mr. Mkonyi conceded that the trial court did not consider the appellant's evidence, but was quick to argue that fairness dictates that both prosecution and defense evidence should be considered. This omission is serious in the context of a fair trial, but it did not necessarily invalidate the proceedings and findings of the trial court unless the appellate Court, upon review, finds that the omitted evidence undermines the prosecution's case. The learned Attorney urged this court being first appellate court to intervene and come to its own findings. As to the defence of alibi and not considered, Mr. Mkonyi argued that the appellant's alibi contravened the requirement of Section 194(4) of the Criminal Procedure Act [Cap 20 R.E. 2022], thereby reducing the evidential value of the alibi. It was the strong view of Mr. Mkonyi that, if this Court considers the appellant's defense, it will find that it was presented in contravention of the law, thus, the omission by the trial court is not fatal, and this ground of appeal should be dismissed.

Regarding the third and the fifth ground of appeal, Mr. Mkonyi submitted that the prosecution's case was proved beyond reasonable doubt. According to Mr. Mkonyi, in cases of statutory rape, the victim must be under 18 years of age, and proof of age in this case was indicated by the charge sheet that the victim was eight years old. PW2 testified on page 6 of the proceedings that the victim was born on 22/08/2015, corroborating that she was indeed eight years old, with this evidence further supported by PW4. As to the identity of the perpetrator, PW1's testimony sufficiently established that it was the appellant who raped her. The best evidence in sexual offences comes from the victim, citing the case of *Seleman Makumba v. Republic* [2006]TLR 379. Further added that, in this case, penetration was proved by PW1 and corroborated by PW3, whose medical evidence confirmed the penetration. Mr. Mkonyi further submitted that failure to summon Amina and Merry as prosecution witnesses is not fatal since they were not material witnesses. The fact that PW1 named the appellant on the fourth day after the offence does not automatically create doubt about the prosecution's case unless there are circumstances suggesting that the delay cast doubt, which was not the case here. Therefore, this ground of appeal should be dismissed. No rejoinder submissions were filed. The paramount duty of this court now in this appeal is to determine the merits or otherwise of this appeal. My deliberation will address the grounds as presented by the parties, noting that all contentions revolve around the necessity of proving the case to the requisite standard in criminal law, which is beyond a reasonable doubt. Regarding the first and second grounds of appeal, the appellant's primary contention was that the testimony of PW1 was taken in violation of sections 127(2),(6), and (7) of the Evidence Act [Cap 6 R.E. 2022]. 10 The appellant argued that, had the trial magistrate thoroughly assessed the evidence, it would have been deemed improbable due to numerous contradictions. Mr. Mkonyi, representing the respondent, strongly opposed this assertion, arguing that PW1's testimony was sufficiently corroborated by PW2 and PW4, and thus should be deemed credible. He acknowledged the existence of minor contradictions but contended that these did not affect the core of the case. I will now reproduce sections 127(2), (6), and (7) of the Evidence Act, which are alleged to have been contravened: 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.
- (6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or of the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.

- (7) For the purposes of this section the term "sexual offence" means any of the offences created in Chapter XV of the Penal Code. As a general rule, evidence must be taken under oath or affirmation. However, section 127(2) of the Evidence Act [Cap 6 R.E. 2022] provides an exception for a child of tender age, on the condition that the child promises to tell the truth to the court and not to lie. The above position implies that the child's promise to tell the truth and not lie must be preceded by preliminary questions from the court assessing their position as a witness. There is no gain saying that the above provision was not complied with to the letter as readily conceded by the learned Attorney but who sought the reliance of sub section 6 of section 127 of the Evidence Act and the interpretation of the section 127 (2) and (6) in the now famous case of Wambura Kigingira Vs. Republic (supra) when the only evidence comes from the victim who is of tender age. I wish to add that the parliament's intention under section 127 and its interpretation is to do justice. And justice in all cases is either confirm conviction and sentence or acquit the accused person who do not deserve the same. I have had time to read the trial court's record and the holding and well guidance in case of Wambura Kigingira Vs. Republic (op cit) that before employing subsection (6) of section 127 of Evidence Act, two conditions must be complied to the letter. These are: first that there must be clear assessment of the victim's credibility on record, and second that the court must record reasons that notwithstanding non-compliance with section 127(2), a person of tender age still told the truth. This being a first appellate court, if this was not done by trial court, still I can deduce the credibility of PW1 after considering the whole incidence. In doing this, I resorted to revisit the testimony of PW1 and PW2 and PW3 which is the basis of conviction of the appellant. This being the reason for conviction of the appellant. Having read and read the testimony of PW1 and having found that it is true the trial Magistrate at page 3 gave reasons for believing PW1 but the reasons with due respect to the learned trial magistrate and learned Attorney were 13 given without assessment of the credibility of PW1 but what was done was what was cautioned in the case of Hamis Khalfan Dauda Vs. Republic, Criminal Appeal No. 231 of 2019 in which it was held that: - "we are alive however to the settle position of law that the best evidence in sexual offence come 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 victim utilization the opportunity to unjustifiably incriminate the otherwise innocent person" (Emphasis mine). I will explain why I found so. One, if I were to believe PW1 that she was raped on 26/08/2023, but no reason whatsoever was given for delay in reporting this heinous act either from the victim herself because no any suggestion of threats was imputed to her by the appellant to the victim. Two, PW2 whom the trial magistrate held that she corroborated the testimony of PW1 and who was staying with PW1 did not explain why she did not detect the heinous act for four of five days while she was staying with the victim. Three, I have as well considered the testimony of PW3- medical doctor who examined the vagina of PW1 and observed just bruises 14 five days later but given the age of the victim and considering her age, one would expect to see more damage to the vagina even after those days, if indeed, truly PW1 was raped. Unfortunately, no extent of bruises were explained given her age. Four, the explanation by PW1 the way the rape was done is too general to tender girl aged of 8 years as

if rape was done to an adult who is used to sex and she just walk easily to her home and no blood was traced from her pants at all. Five, Mr. Mkonyi argued that the failure to call Amina, Mery and others mentioned was not fatal, but seriously considering the circumstances of this appeal, these two were very material witnesses to this case for they could have cleared the alibi which was not considered at all. In my considered opinion, these two younger ladies were material witnesses whose testimony could clear the air whether truly, the victim was in the house of the appellant on the alleged day which was not working day of 26/08/2023. I am, therefore, entitled as such to draw adverse inference to the prosecution case in the circumstances of this case for failure to call the named material witnesses. On the foregoing reasons, I find that the prosecution did not prove the case to the standard required in criminal case, namely, beyond reasonable doubt. Not only that but the conditions as explained in Wambura Kiginga's case 15 by the Highest Court of this court on how to employ subsection 6 of section 127 of the Evidence Act where there is non-compliance of sub section 2 of section 127 were not met and as such the argument by Mr. Mkonyi that the trial magistrate gave reasons but never made any serious assessment of the credibility of PW1, PW2 and PW3 whose testimony was the basis of conviction of the appellant. Given the above considerations, I find merit in the first, second and fifth grounds of appeal and I am not persuaded by Mr. Mkonyi's arguments. Consequently, I find this appeal merited and is allowed. Consideration of the remaining grounds will be of no essence. I rest this appeal. In these circumstances, I find the 1st and 2nd and 5th grounds of appeal to be meritorious and sufficient to resolve this appeal in its entirety; hence, it is hereby allowed. Consequently, I quash the conviction and set aside the sentence imposed by the trial court. The appellant is to be released immediately unless held for another lawful cause. Order accordingly. Dated at Morogoro this 09th day of August, 2024. 16 "r> oT np C T . MAGOIGA •J UJ -5:. JUDGE y L09.08.2024 COURT: Judgement delivered in chambers at Morogoro in the presence of Appellant and Mr. John Mkonyi, learned state Attorney for the respondent today on 09th Day of August, 2024. OF M/V o u a: a s MAGOIGA 5- JUDGE 09.08.2024 COURT: Right of appeal fully explained. /I oT Oc ry C LO UJ .14. MAGOIGA JUDGE 09.08.2024 17

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