

TANZANIA / JUDGMENT

criminal appeal No

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA {KIGOMA SUB-REGISTRY) AT KIGOMA (DC) CRIMINAL APPEAL NO. 16012 OF 2024 (Arising from the District Court of Uvinza in Criminal Case No. 42/2023) BARAKA AMOS APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

25/02 & 27/3/2025 NKWABI, J.: The Appellant is appealing against the decision of the District Court of Uvinza. Despite not indicating, in the petition of appeal which offence that he was convicted with and sentenced upon that he was aggrieved with, what can be gleaned from the notice of appeal lodged in the trial Court on 12/07/2023 is rape. The notice of appeal was lodged in the trial court within 7 days after conviction, which is perfectly within the prescribed time. For avoidance of doubt, the appellant was handed a life imprisonment sentence after that conviction. Nevertheless, the appellant is decrying that the prosecution did not prove the charge beyond reasonable doubt. With great respect to the 1 respondent, I outrightly say that is true despite Mr. Fortunatus Maricha, learned State Attorney, resistance to the appeal on all the grounds of appeal. I will give my reasons shortly. It was the argument of Mr. Maricha, in reply submission, the 1st ground of appeal which states that the respondent failed to prove the charge beyond reasonable doubt, is misplaced because the respondent proved penetration of the vagina of the victim (PW6) and her age was proved at page 27 and 28. He went on to say that there was corroboration by PW1 who is the medical doctor. Too, PW2 assisted the victim when the victim was still crying while the appellant escaped. Mr. Maricha was emphatic that the mother of the victim (PW.4) proved age of the victim and amplified that PW6 identified the culprit. He also noted that the appellant escaped by back door. Addressing the 2nd ground of appeal about the claim that section 127 (2) of the Evidence Act was not complied. Mr. Maricha pointed out that in the proceedings under page 26 to 27, the victim (PW6) promised the trial court to tell the truth. He was minded to cite Hango Omari Hango v. Republic, Criminal Appeal No. 445 of 2022 at Page 9. 2 It was the view of Mr. Maricha regarding the 3rd ground of appeal about caution statement, that the appellant was interrogated. He beefed up that there was no need of the caution statement to be tendered in Court. He stressed that the caution statement might have no quality. Mr. Maricha pressed home the point that the evidence the respondent brought to court was sufficient. Mr. Maricha held the view that there was direct evidence so the 4th ground of appeal, where the appellant criticizes the trial court for relying on circumstantial evidence. He was adamant that the 4th ground of appeal

is not true because there is direct evidence from PW .6. This ground is baseless, insisted Mr. Maricha and asked me to see even page 5 of the

judgment.

On the last ground of appeal which is the 5th ground of appeal, that the appellant was convicted based on weakness of his defence Mr. Maricha submitted that this is not true. He was of the stand view that the evidence of the respondent was strong and sufficient to convict the appellant. He finally prayed the appeal be found to be unmerited and be dismissed. In rejoinder submission the appellant intimated that he is a citizen of Burundi and was a servant of the guest. He lamented that PW.1 did not tell the trial court that the victim was bleeding and had semen in her vagina and added that the evidence is very unreliable. He said, the local leader was not brought to testify. He criticized the evidence of the respondent on the ground that some important witnesses were not brought to testify. Unfortunately, the complaints of the appellant appear justified than the stand view held by the learned State Attorney. I move further with my reasons why I accept the view of the appellant that the respondent did not prove her case beyond reasonable doubt. The incident happened on 11 th March 2023, at 17:30 hrs. according to the charge sheet, it is unclear why PW.6 was not sent to the hospital for examination on the very day, but was sent to hospital at 19:00 hrs. the next day as per the testimony of PW.1 but which (his testimony) is however, contradicted by the PF3 (exhibit P.1) which shows that the victim of the offence, who at the material time was aged 4 years, was received at the medical Centre and treated on 11/03/2023. Going by the testimony of PW.4 and PW.2, it is difficult to tell whether the hospital was far away from the scene. Whether the parents of the victim had no money for transportation or there was no transportation at all. It is also unclear whether the police station was close to the scene of the offence to be reported at the very time as indicated on the exhibit P.1. The doubts 4 should be resolved in favour of the appellant as per Hussein Hassan @ Antiti v. Republic, Criminal Appeal No. 541 of 2021, CAT. Too, the handwriting of the doctor (PW1) may imply that the victim was sent to the hospital on the very day on 11/03/2023, but that was contradicted when in his testimony he said it was in the morning of 12th July 2023. But as indicated above, it is shown on exhibit P.1, the victim was received at the hospital at 19:00 hrs. My stance against the evidence of PW.1 is fortified by the decision in Awadhi Abrahamani Waziri v. Republic, Criminal Appeal No. 303 of 2014, CAT which quoted with thumb-up the decision in Augustine Njirige Ritho @ Chabah v. Republic, Criminal Appeal No. 99 of 1986, CAT, where it was held that: "It is trite law that where evidence is inconsistent or where it is contradicted it cannot be relied upon. // Thus, exhibit P.1 and PW.1 cannot corroborate any evidence in this case. Next, while PW.1 says it was the mother of the victim who sent the victim to hospital, (probably she introduced herself so), PW .2 who purported to be the victim's mother did not say she sent the victim to hospital. She was recorded to have said, in evidence that: "People advised for the victim to be taken to Mgambo police station. She was taken and thereby a PF3 was issued for the victim to be taken to the hospital.. "But as per the evidence 5 PW.4, the grandmother sent the victim to the Health Centre. If it is the grandmother who sent the victim to the Health Centre, it is unclear why the mother of the victim did not send her daughter to hospital, despite her grandmother

describing the victim's health condition that, "she couldnt watk". It is also worthy to note here that PW.4 is the one who went to report to the police though she was not the first one who to have gone to the scene of the offence at the material time. Additionally, PW4 did not tell the trial court what did she do to calm her (the victim) down for the whole night when she spent the night to await the treatment the next day. Another problem with the respondent's evidence is that it is also opaque why the hamlet chairperson Shomari Yusuf Mbalanga assisted PW5 to draw the sketch map of the scene of offence instead of the mother of the victim who was the first to respond to the scene. The sketch map (exhibit P.2) could have been the result of hearsay account of the incident consequently, inadmissible and irrelevant to convict the appellant. It has very little evidential value against the appellant. Further, unfortunately to the respondent, it is also murky whether a child who could not walk, as testified by PW4, could be left the whole night without being treated and if she were admitted or what? The testimony 6 of PW.2 might put the picture clearer. She was quoted to testify that: ': .. while putting the child down she was full of stool. Its at this moment I decided to look her on her genitalia and I found her to be different with other kids. There were redness in her vagina and the vagina had been wluene .,-1 d..... // In addition to the ailments of the respondent's case I have explained above, what the victim of the offence testified appears to me to be very unsatisfactory. I reproduce for clarity: "Examination in chief I live with Keru and Lai. I also live with my grandmother. That one inserted his dudu into me. Court: PW6 has shown or pointed her hand to the accused and she says is the one who inserted his dudu into her (while pointing her genitalia area) Signed M.M. MAJULA - SRM ath May, 2023 PW6- When he was inserting his Kidudu I was cryin~ then Mama Rahma came State Attorney- Thats all. ,, 7 If she (the victim) were crying because she was feeling pain which pain caused her to release stool all over, how did the pain stop while there is no evidence to show that she was even given pain killers. It should be remembered that that PW.6 is a witness who promised the trial court to tell the truth and not tell lies. What I do not get here is the reason as to why the prosecution did not lead her to answer simple questions about the surroundings. If she could remember what was done to her and the assailant, I think she could remember even the persons who came to her assistance (her mother) and the one who sent her to the medical Centre (her grandmother). It is difficult to assess her credibility. In Sikujua Deogratias Makamba @ Siku v. Republic, Criminal Appeal No. 740 of 2023, CAT, (unreported) dated 24/03/2025, the Court acquitted the appellant who had been convicted of rape while reiterating its stance that the testimony of the victim of sexual offence should not be taken as gospel truth but has to pass the test of truthfulness. See also Shabani Daudi v. Republic, Criminal Appeal No. 28 of 2000, CAT, (unreported) where it was underscored that: "The credibility of a witness can also be determined in two other ways: One/ when assessing the coherence of the testimony of that witness. Two/ when the testimony of 8 that witness is considered in relation with the evidence of other witnesses, including that of the accused. One may be induced to ask, why this Court is entertaining all those questions while the child proved penetration. Apart from what I have stated above, at the age she had at the material time, typically it is unclear how could she know that what was done to her was an offence. If not why report something which is not an offence to her. Invariably it is the elders such as PW2, PW.3 and at least PW4 who made it possible for the public to know that an offence had been committed. Are PW2, PW.3 and PW4 they credible so that this Court takes their testimonies

seriously? I do not think so based on the above discussion. I find solace in Nyakuboga Boniface v. The Republic, Criminal Appeal No. 434 of 2016, CAT, 29/11/2019 (unreported) where it was underscored that: "... it is the fact that observation and assessment of the demeanour of a witness, is in the exclusive monopoly of the trial Judge/magistrate. Moreover, besides observing the appearance of the witness, in resolving as to whether the witness is trustworthy and telling the truth/ the trial judge/magistrate/ is enjoined to correlate the demeanour of the witness, and the statements he/she makes during 9 his/her testimony in court If they are not consistent, then the credibility of the witness, becomes questionable. N The above is not all. The evidence about the hamlet chairman (which hamlet was not mentioned) featured in cross-examination of PW.4 which is not admissible. PWS, a police officer, who issued the PF3 for the victim to be treated did not mention that the hamlet chairman was there too when the offence was reported at the police station. This is what he said, "There came Anastazia Apolinali {PW4} who was with a little child named Anastazia Editoli aged 4 years.... N He did not say he recorded the statement of the hamlet chairman. As to the credibility of PW.4 and PWS the decision that becomes relevant here is Musa Buguso v. Republic, Criminal Appeal No. 738 of 2023, CAT, dated 20/03/2025 where it was said that: "It is evident that the mother, PW2 of the victim received the information of rape of her daughter at the earliest time, but she did not examine her to ascertain ifat all she was raped Moreover, although PWJ and PW2 claim that the victim was taken to police and secured a PF3 which enabled her to be medically examined at the hospital however the alleged hospital was not named and no 10 apparent reason was assigned for not naming that hospital. More so/ there is no testimony from the prosecution witnesses that indeed the victim was medically exemmed. in such arcumstsnces. the element of penetration was not given deserving attention at the trial and during investigation. In absence ofreliable evidence from credible witnesses to prove penetration/ it is unsafe to conclude with certainty that the victim was penetrated. We cannot agree with the lower courts and learned Senior State Attorney that penetration was established and proved beyond reasonable doubt Likewise/ in the absence of proper identification of the appellant at ... In the case of Tito Paulo Kuchungura v. Republic, Criminal Appeal No. 570 of2020/ CAT dated 13/12/202~ the Court set out though not exhaustive that the following elements must be proved: penetration however slight· proof ofabsence of consent to a woman above the age of majority but same is not applicable to girls below 18 years. proof of age of the victim (in statutory repe): 11 corroboration where possible including medical report, proper identification of the rapist if the offence was committed at night and there is no proper light or by a stranger; overall circumstances leading to the offence of rape; and the most important is availability of watertight evidence. Those prerequisites are essential to prove rape beyond reasonable doubt because of the nature of the offence itself. Therefore, it is not always the case that the victims evidence is the best, unless that testimony passes the requisite test of truthfulness. The trial court might have been moved by circumstantial evidence which appears to have been created by PW2. That evidence is unsatisfactory. In first place, I have said, PW.2 is not a credible witness. Even if she were, the circumstances were not conducive for one to use circumstantial evidence to ground conviction because it is known that a guest house could have guests or anyone else who might have committed the offence. So, even the purported statement of PW2 that the accused person replied to her that, "nije kufanya nini, mimi sijafanya chochote"has nothing of essence to assist

the respondent. I rely on *Marecha Mashaka. v. Republic*, Criminal Appeal No. 447 of 2019, where the Court of Appeal 12 of Tanzania considered the holding of the Privy Council in *Lezjor Teper*

- v. *Reginam* [1952] A.C. 480 at page 489 where it was stated that: "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. // See also *Mark Kasimiri v. Republic*, Criminal Appeal No. 39 of 2017 (unreported) CAT dated 24/03/2020, which offers the following principles for a perfect conviction based on circumstantial evidence:
1. That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else (See *JUSTINE JULIUS AND OTHERS VS REPUBLIC*, Criminal Appeal NO. 155 of 2005 (unreported)). 13
 2. That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt· and that before drawing inference of guilt from circumstantial evidence/ it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See/ *SIMON MSOKE VS REPUBLIC*, (1958) EA 715a and *JOHN MAGULA NDONGO VS REPUBLIC*, Criminal Appeal No. 18 of 2004 {unreported}]
 3. That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death he or she will be presumed to be the killer. [See - *MATHA YO MWALIMU AND MASAI RENGWA VS REPUBLIC* {supra}.]
 4. That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt the whole chain must 14 be rejected. [see *SAMSON DANIEL VS REPUBLIC*, {1934} EA.CA. 154]
 5. That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. [See *SHABAN MPUNZU @ ELISHA MPUNZU VS REPUBLIC*, Criminal Appeal No. 12 of 2002 (unreported)]
 6. That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See *ALLY BA KARI VS REPUBLIC* (1992) TLR, 10 and *ANETH KAPAZYA VS REPUBLIC*, Criminal Appeal No. 69 of 2012 (unreported). In the premises, it is unsafe to rely on circumstantial evidence because the witnesses who try to imply that the appellant committed the offence are unreliable as I have explained above. As a postscript, nonetheless, I have noted that despite the judgment of the trial court was delivered while

having been typed, it took a duration of almost a year for the appellant to lodge his appeal in this Court. It is unclear what caused the delay. Truly, I was troubled by the delay. The notice of appeal and the petition of appeal were lodged in time (which infers diligence on the prison side) sadly, despite my attempt to get records on when the trial Court supplied the copies of the proceedings and judgment, my efforts proved futile. There is nothing (correspondences) in the original file to indicate when the trial court supplied the necessary documents to the appellant. I say so, because at the time when the judgment of the trial court was delivered, supply of both necessary documents was supposed to be done within not more than 30 days, or even less. For an appeal to be filed in this Court after about a year from the date of conviction, is incomprehensible. Admittedly, that period of delay might be deemed short when compared with such delays a few years back. Anyway, with the introduction of eCMS in the administration of justice in Tanzania, things are getting better and fast, parties to suits might bear witness. I have ever, in a judgment in another case, eulogized the police, therein for their investigation. Like I did then, I take liberty to recite the case of *Hatibu Gandhi v. Republic*

[1996] T.L.R. 12 at page 30 where it said that: "We note that out of five persons who reported the conspiracy to the authorities, four of them were soldiers 16 of the TPDF. This demonstrates, in our view how over the years the TPDF has truly become a peoples/ defence force - an army which every Tanzanian of good will is entitled to be proud of/ In the like manner, this time, I applaud the Judiciary of Tanzania (JoT) Management Team, led by his Lordship, Prof. Ibrahim Hamis Juma, the Chief Justice of Tanzania being assisted by His Lordship, Dr. Mustapher Mohamed Siyani, the Principal Judge for their dedication and leadership for making eCMS a dream come true. Some few years back, it was impossible, to think, in our judiciary, a party to a case, could get proceedings, judgment and decree on the very day a judgment is delivered to enable them to take any further legal steps, but currently, it is a daily norm. One may be tempted to argue that that has been possible due to technological advancement. The argument might be true, but comparing our judiciary and some judiciaries in this part of the world today, one may appreciate what I have just expressed. To add, one of our prominent leaders in this country has recently said, "If you want to go quick!½ go alone. If you want to go far, go together. "So, no one of our stakeholders should be left behind in respect of eCMS. 17 Withal, I conclude by allowing the appeal. I quash conviction and set aside the sentence imposed on the appellant. The appellant is to be released from prison unless held therein for other lawful cause(s). It is so ordered. 18

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