

TANZANIA / JUDGMENT

baraka john dayo vs the republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB - REGISTRY AT
MOSHI CRIMINAL APPEAL NO. 38 OF 2023 (Appeal from the decision of District Court of Moshi
at Moshi dated 24th April, 2024 in Criminal Case No.38 of 2022) BARAKA JOHN
DAYO.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

20th & 29th February 2024. A.P. KILIMI, J.: Before the District Court of Moshi, the appellant, Baraka John Dayo stood charged with the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 RE 2022. Therein it was alleged that on 20th, 22nd day of August 2022 and on 21st day of October 2022 at Darajani Kilema Pofu Njia Panda area within the District of Moshi in Kilimanjaro region, the appellant did have carnal knowledge of one SD (in pseudonym) a girl aged 9 years old. The appellant denied the allegation hence the prosecution paraded five witnesses to prove their case. After considering the totality of the evidence including the one advanced by the appellant, the trial court was 1 satisfied that the offence charged had been proved to the required standard and convicted the appellant, sentencing him to serve 30 years imprisonment. Before I proceed with the merit of this appeal, I find appropriate to revisit the facts in brief discerned from both sides evidence at the trial court. The victim PW1 told the trial court triple times the appellant raped her, she said the appellant started on 20th August 2022 when she was at Mama Irene home, on the material time she was on the way to take shower appellant caught her and took her to his bed room, undressed her and also the appellant undressed his clothes and inserted his male organ in her female organ. She felt pain but she could not raise alarm because appellant closed her mouth, after the act she could not tell anybody because the appellant threatened her not to disclose the incident. PW1 further testified that the appellant repeated the same evil act on 22nd August 2022 and on 21st October 2022. Later on, 17th October 2022 when they were coming from school PW1 disclosed those incidents to her friend PW5 that the appellant had raped her several times when her mother travelled. PW5 felt bad and told one Mama Nassoro who cause the information reached PW1's mother. Her 2 mother one Modesta Antony Kisaka (PW2) after being informed reported the matter at police where PF 3 was issued and went to Himo health center for medication. The victim was attended by Medical

Practitioner one Dr. Sudi Mohamed (PW4) who indorsed on PF3 the victim was penetrated by blunt object. PW2 returned the PF3 at police station and made her statement thereat. Contesting the said incidents, the appellant told the trial court that on 15th October 2022 at night hours being on the way to his home, he met one victim's mother (PW2) who stopped him and told him why he refused to have sexual intercourse with her. Appellant further said she escaped and run away, he heard PW2 promising to show him bad thing. Upon the trial court found the appellant guilty and sentenced him as stated hereinabove, dissatisfied with the decision of the trial court, the appellant has opted to knock the door of this court by way of appeal basing on seven grounds as follows:

1. That learned trial magistrate strayed into error of law when he failed to comply with the principles stipulated under section 127(2) of the Evidence Act, Cap 6 R.E. 2019, as firstly PW1 and PW5 never promised to tell the truth to the court 3 and not to tell lies. Secondly though it is said that they gave their evidence on oath, they were never sworn.
2. That the learned trial magistrate erred in law and factual analysis when he failed to note that the essential ingredient of the offence of rape that is penetration was not properly proved.
3. That the learned trial magistrate strayed into error of law when he failed to note material variance of the charge and the evidence adduced, as the charge alleges that the incident happened on 20th August, 2022 and the evidence adduced claims that the incident happened more than once on diverse dates.
4. That the learned trial magistrate erred in law and factual analysis when he failed to note that essential prosecution witnesses were not summoned to testify.
5. That the learned trial magistrate erred in law and factual analysis when he failed to consider the defense evidence at all.
6. That the learned trial magistrate erred in law and factual analysis when he relied on weak, contradictory, inconsistency, with material discrepancies and uncorroborated prosecution evidence.
7. That the learned trial magistrate erred in law and factual analysis when he failed to consider that the charge against the appellant was not proved beyond reasonable doubts. At the hearing of this appeal the appellant appeared in person and unrepresented whereas the Republic was represented by Mr. Frank Daud Wambura learned state attorney. The appellant filed a written submission 4 and on the other hand on behalf of the respondent Mr. Wambura made his submission orally. The appellant arguing in regard to first ground submitted that the trial magistrate did not comply with the provision of section 127(2) of the Evidence Act because before taking evidence of PW1 and PW5 no examination was conducted to test their competence and whether they knew the meaning and nature of an oath. Also said he concluded that their evidence would be taken on oath but they were never sworn. Furthering his submission the appellant stated that the promise made by PW1 and PW5 was incomplete because the law under section 127(2) of the Evidence Act requires the

witness to promise to tell the truth and not lies but PW1 and PW2 only promised to tell the truth and they did not promise not to tell any lies. In respect to variance between the charge and the evidence, the appellant submitted that the particulars of the offence differed with the evidence of PW1, PW2, PW3 and PW5 concerning the time when the incident occurred. He then elaborated that while the charge alleged the incident have occurred on 20th August 2022 the prosecution witnesses claimed that it occurred seven times and on various dates, therefore it was 5 not compatible with the charge and no effort was done by prosecution to amend the charge, thus the charge was not proved. In regard to failure to consider his defence, the appellant contended that the trial magistrate dealt with the prosecution evidence on its own and arrived at the conclusion as a result he rejected the defence case without analysis. Thus, prayed that since his defence was not considered the conviction should not stand. To buttress his contention referred the cases of Moses Mayanja@ Msoke vs Republic, Criminal Appeal N. 59 of 2009 and Hussein Idd and another vs. Republic (1986) TLR 166. Challenging the appeal Mr. Wambura learned State Attorney submitted in respect to the first ground of appeal and argued that the ground is misconceived because it is a must for the court to ensure that the witness promise to tell the truth. He referred to page 9 of the trial court typed proceedings and said that the law was complied with and that there was no violation of the law as alleged by the appellant. Responding to the fourth ground of appeal where the appellant contended that the prosecution had failed to summon essential witnesses to testify, the learned counsel submitted that the ground lacks merit 6 because the prosecutors are the ones who know which witness is essential to support their case. In respect to the remaining grounds of appeal, Mr. Wambura consolidated them to form one ground that is whether the case was not proved beyond reasonable doubt. Responding then, it was his submission that PW1 who was the victim in this case did explain to the court how the incidents happened and that her testimony showed all elements of rape and how penetration was affected. Referring to the case of Selemani Makumba vs. Republic [2006] T.L.R. 379 [CA], Mr. Wambura submitted that the evidence of the victim was sufficient. Mr. Wambura added further that the victim's evidence was also corroborated by the evidence of the medical doctor who testified that he had examined her and found there was no hymen. Also, it was his opinion that the victim had been penetrated by a blunt object. In that regard it was the learned counsel's view that penetration was proved and the victim said it was the appellant who did it. I have given due consideration to the submission made by the appellant and the response advanced by the learned State Attorney for the respondent. I have noted the appellant though raised seven grounds he has argued on only three grounds, however as rightly argued by the 7 learned State Attorney when responding to the them. I also concede the same may be dissolved by one ground that is whether the prosecution did not prove the case beyond reasonable doubt. However, this being the first appeal the court has found it has a duty of re-evaluating the evidence adduced before the trial court for the purpose of being able to determine the grounds of appeal paraphrased hereinabove. The power of the court to do so was stated in the cases of Yasin Ramadhani Chang'a V. R [1999] TLR 481 and Deemay Daat & 2 Others V. R, [2005] TLR 132 where it was held that, an appellate court is entitled to look into the evidence adduced before the trial court and make its own finding

where there is misdirection and non-direction or the lower court misapprehended the substance, nature and quality of the evidence. Starting with the first ground, the appellant contention is that the trial court did not comply with the provision of section 127(2) of the Evidence Act, Cap 6 R.E. 2022, for ease of reference in respect to this ground, I find appropriate to reproduce this provision as hereunder; “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.” [Emphasis added] Now to check if the above was complied, I am forced to revisit the trial court at page 9 in which shows what transpired prior to the recording of the testimony of PW1 and reads that: “PROSECUTION CASE OPENING: PW1: SD (in pseudonym), 9 years, Chagga, resident of Himo, Kilimanjaro, SDT V Pupils at r. Shein Primary School: Question: What is your name? Answer: Glory Annicent Mushi Question: What does it mean by saying the truth? Answer: to say the truth you then get heaven and saying lies you go to hell. Question: When do you pray and what is the penalty to the person saying lies? Answer: I am praying at Roman Catholic Church Himo and the person telling lies shall get eternal everlasting fire. 9 Question: Will you say the truth in this case or rather you shall tell lies? Answer: I shall tell only truth and solely the truth. Court: I am satisfied to the extent PW1 possess sufficient knowledge and that she knows the nature of an oath and speaking the truth, but more important she has promised to tell the truth as such PW1 therefore give her testimony on oath.” I have examined the above proceedings in light of the provision of the law cited above, first; the excerpt above shows that the evidence of PW1 was taken after the conduct of what is considered to be “voirie dire test”. Second; In my considered opinion that the above provision was complied with because PW1 did promise to tell the truth before her testimony was recorded. Although the trial magistrate said that her testimony was to be taken on oath it does not change the fact that she had already promised to tell the truth and this is what the law requires, the fact that she was not sworn did not affect the credence of her testimony, taking regard the law above allow for a child to give evidence without oath. 10 Nonetheless, in my view the same applies to ‘not to tell any lies’ by promising to tell the truth does not mean the opposite is true. Nonetheless, I have considered the questions administered to PW1 above, in essence test her on telling the truth and not to tell lies and she answered confidently that she is not ready to tell lies. Thus, I find the knowledge of difference between truth and lies was actually tested by the trial court learned Magistrate. It is therefore my considered view that there was complete adherence to the provision of section 127(2) of Evidence Act (supra). Having observed as above, I find the first ground of appeal without merit and thus dismiss it forthwith. I now turn to ground number three, the appellant is complaining that, there was material variance of the charge and the evidence adduced, as the charge alleges that the incident happened on 20th August, 2022 and the evidence adduced claims that the incident happened more than once on diverse dates. For purpose of clarity the charge read as follows; “PARTICULARS OF OFFENCE: BARAKA S/O JOHN @ DAYO on the 20th, 22nd day of August 2022 and 21st day of October 2022 at Darajani Kilema Pofo Njia Panda area 11 within the District of Moshi in Kilimanjaro Region, had carnal knowledge of one SD (in pseudonym) a girl of 09 years of age without her consent.”

According to the prosecution evidence at the trial court, the eye witness is only the victim PW1, I have considered her evidence, she told the court on all three incidents as per dates stipulated in above particulars of the offence. However, I have noted is PW5 and not the victim who said that she was told by PW1 that she was raped seven times. In my view despite that assertion being hearsay evidence, I find appropriate to see whether the same amount to contradictions which distort the root of this matter. Although this might happen due to lapse of memory, but, as said above the same is hearsay evidence, in my view cannot supersede the eye witness PW1, in view thereof I am settled the contradictions is minor and do not go to the root of the matter. I wish to fortify my opinion by referring the case of Dickson Elia Nsamba Shapwata &. Another vs. Republic, Criminal Appeal No 92 of 2007 (Unreported), when the court had this to say; "In evaluating discrepancies, contradictions 12 and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter." For the foregoing reasons, I also dismiss this third ground of appeal for want of merit. Another ground argued in submission is the ground no. 5 where the appellant alleges that his defence was not considered. It is settled law that failure to consider the evidence of the defence is fatal to the trial or proceedings, I am buffed by the case of James Bulow & Others vs Republic [1981] T.L.R. 283. Where it was observed that; It is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty. In this matter at hand in my view of the record the defence evidence was considered. I have reached this decision, after I have read the trial court's decision, I noted that when analysing the evidence considered the evidence of the appellant as jotted down at page 5, then framed the issue which also reflects its 13 consideration. Then at page 9 of the typed trial court judgment, the learned Senior Resident Magistrate had this to say; "...the prosecution side in this case successful prove the case beyond reasonable doubt as required by the law. In all evidence provided before this court there was no any kind of doubt raised and to that the advantage remains to the prosecution side" [Emphasis is mine] From the above excerpt, I am settled the trial court considered the defence evidence in a whole and satisfied that there is no any kind of doubt raised that is why stated as above. Thus, it is my view the above demonstrates the merit of the defence, therefore the learned Senior Resident Magistrate considering the defence cannot be taken lightly. Consequently, I also find this ground unmerited and thus dismissed forthwith. In respect to other grounds which were not argued in submission as said above the issue cutting across them is whether the prosecution case was proved beyond reasonable doubt. In this kind of offence charged to 14 the appellant, I stand guided by the Court of Appeal where a number of its decisions emphasized that the true evidence of rape has to come from the victim herself, in case of a woman where consent is irrelevant like in the present case, that there was penetration. Therefore, to prove a statutory rape the important element to be established by the prosecution is penetration. See the case of Semani Makumba vs. Republic, (supra). Therefore, prosecution evidence should give clear details of how the alleged rape took place. This offence of statutory rape has two important elements in order for it to be established.

The elements are penetration and the age of the victim. Based on records there was no dispute as to the age of the victim. The victim herself said that she was 9 years old and also her mother who testified as PW2 told the court that PW1 was 9 years old. Based on these two testimonies from PW1 and PW2 the prosecution did establish with evidence that the victim was of tender age. Moving on to the second element that is penetration, was also proved through the evidence of PW1 and corroborated by the evidence of PW4 (Medical Practitioner). The victim (PW1) explained in her testimony as reflected on page 10 of the proceedings that on the material date the 15 appellant caught her and took her to bed where he undressed her and then undressed himself and inserted his male organ inside her female organ. PW1 further explained for other two incidents of the appellant by the same manner and told the trial court how penetration happened and how the appellant's penis was inserted in her vagina. If this is not enough the doctor who examined the victim also told the court as reflected on page 17 of the proceedings that the victim's hymen was not intact and that it suggested that there was blunt object penetrated therein. With these two testimonies I am of the considered view that the prosecution's evidence did prove the element of penetration. (see Mathayo Ngalya @ Shabani Vs. Republic, Criminal Appeal No. 170 of 2006 Amour Mbaruku @ Aljeb v. R Criminal Appeal No. 226 of 2019 CAT at Dsm (Both unreported) With the above observation in mind and based on the principle that the best evidence in rape cases comes from the victim (see Selemani Makumba vs. Republic (supra), It is my considered opinion the prosecution case proved the case against the appellant beyond reasonable doubt. Thus, I see no reason to fault the trial court's decision of conviction. Before I pen off, having entirely perused the record of the court, according to the charge sheet in this matter, the appellant was charged for 16 this offence of rape under Section 130 (1) (2) (e) and 131 (1) of the Penal Code, but the particulars of this offence charged shows the age of the victim was 9 years. The point for determination at this juncture is whether that age was proved by the prosecution. Since proof of the age of the victim in statutory rape cases is mandatory, on many occasions the Court has widened the scope as to who has that mandate. For instance, in Victory Mgenzi @ Mlowe vs R, Criminal Appeal No. 354 of 2019, the Court referred to its decision in George Claud Kasanda v. DPP, Criminal Appeal No. 376 of 2017 (both unreported) the court observed that: "... Proof of age may come from either the victim or her relative, parent, medical practitioner, or by producing a birth certificate" In this matter, as alluded to above earlier, the girl's mother, PW2 who is one of the above listed qualified persons to prove the girl's age was a witness and testified at page 12 of the trial court record that the victim was aged 9 years. 17 The above age proved is reflected in the particulars of the offence, and for ease of reference I reproduce the said particulars hereunder; "P AR TI CULAR OF OFFENCE: BARAKA S/0 JOHN @ DAYO on the 20th, 22nd day of August 2022 and 21st day of October 2022 at Darajani Kilema Pofo Njia Panda area within the District of Moshi in Kilimanjaro Region, had carnal knowledge of one GLORY D/0 ANISETH @ MUSHI a girl of 09 years of age without her consent." [Emphasis added]. From the above, it entails that the section concerning the sentence for punishment of anybody convicted of rape a child under the age of ten be among sections to be stipulated on the charge sheet, but in my view above, the charge sheet in this matter has no provision of

punishment in such effect. For purpose of clarity the section provides; “131(3) Subject to the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment” [Emphasis added]. In view thereof, I have asked myself whether by not citing the above provision, the appellant was offended, and if not whether this court can impose an appropriate sentence. In the case of Maganga s/o Udugali vs. Republic Criminal Appeal 144 of 2017, the Court of Appeal sitting at Tabora, observed that in terms of sections 132 and 135 (a) of the Criminal Procedure Act Cap.20, every charge must contain a statement of a specific offence or offences with which the accused is charged. It is also required that, the statement of offence must make reference to the specific provision of the law creating such offence. Further, the charge must contain particulars of offence. The reason or aim of the charge to contain the statement and particulars of offence is to give an accused person reasonable information as to the nature and seriousness of the offence and to enable him prepare his defence. In this case, the particulars of the offence quoted above, were read to appellant, therefore he was informed that the age of the victim is 9 years old. Also, before the victim testified as shown at page 5, the trial court before asked her ten questions to know her capability of knowing the nature of oath, asked and recorded that the victim is a child of tender age of 9 years. Furthermore, in examination in chief of PW2 one Modesta Anthony Kisaka, the mother of the victim, at page 12 of typed trial court proceeding testified loudly that victim is 9 years old studying at Dr. Shein primary school in standard V. I have considered that, all the above was conducted in the presence of the appellant, and since the particulars of the offence and evidence were very clear as shown above. I am of considered opinion, the appellant was clearly informed about the age of the victim and the nature and seriousness of the offence he was facing. Therefore, it is my view the defect appears in charge sheet of not citing the required punishment provision is cured under section 388 (1) of the CPA Cap 20 R.E. 2022. (See Jamali Ally @ Salum vs Republic [2019] TZCA 32 (TANZLII), and Jafari Salum @ Kikoti vs Republic [2020] TZCA 221 (TANZLII). Having observed as above, according to the said provision not cited which is section 131 (3) as quoted above, and since provides a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment. For the sake of justice, I hereby quash the illegal sentence of thirty (30) years imprisonment imposed by the Trial Court and substitute it with the mandatory sentence of life imprisonment in accordance with section 131 (3) of the Penal Code. In the event, for the foregoing reasons, the appeal against conviction is dismissed. The sentence is varied to the extent stated above. Order accordingly. DATED at MOSHI this day of 29th February, 2024 X JUDGE Signed by: A. P. KILIMI Court: - Judgment delivered today on 29th day of February, 2024 in the presence of the Appellant in person and Mr. Fred Wambura Learned State Attorney for the Republic. Sgd; A. P. KILIMI JUDGE 29/02/2024 21 Court: - Right of Appeal duly explained. Sgd; A. P. KILIMI JUDGE 29/02/2024 22

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