

TANZANIA / JUDGMENT

BERNADO HARRY V

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY AT
ARUSHA CRIMINAL APPEAL NO. 3144 OF 2024 (Originated from Karatu District Court in
Criminal Case No. 49/2023) BETWEEN BERNADO

HARRY..... APPELLANT VERSUS THE
REPUBLIC..... REPUBLIC

JUDGEMENT

11/09/2024 & 27/09/2024 MWENDA, J.: The appellant, Bernado Harry, was convicted and sentenced to life imprisonment by the District Court of Karatu in Criminal Case No. 49 of 2023 for committing unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E 2002. Aggrieved, he preferred the present appeal before this court challenging the trial court's decision. The brief back ground of the matter is that on 13th day of February, 2023 at Gongali Village, Kinnihhe area within the District of Karatu in Arusha Region, the appellant had unlawful carnal knowledge of one H D/O M, the victim 11 p whose identity is concealed to protect her, a girl aged six (6) years old against the order of nature. During the hearing the prosecution alleged that on the fateful date, the victim who had the habit of returning home from school in a companionship of her fellow pupils, did not return as expected as her friend returned home without her. Upon realizing that (PW1) who is the victim's mother decided to make a follow up at her school. On the way to school, she saw the victim (PW3) coming from the bushes with a stranger, now the appellant herein. In the cause PW1 asked the victim (PW3) as to why she was with that stranger and the response she got is that the said stranger, now the appellant, took her to the bush and did bad thing unto her. In her further reply, the victim told her mother that the appellant took off her clothes and then his clothes before he penetrated her against the order of nature. Hearing the said news, PW1 decided to grab the appellant while shouting for help. The said stranger, now the appellant, tried to flee but he was arrested by the people who responded to PW1's call for help. Afterwards the appellant was conveyed to the police station. At the police station PF3 form was issued to the victim for treatment. At the hospital PW5 examined the victim (PW3) and detected presence of white fluids. The said fluids wem 2 | P a g e tested only to be found to be sperms from a male person. PW5 further detected bruises around the victim's anal orifice, which was seen to be tender, a sign proving that she was known against the order of nature. The matter was further investigated and at the end, the appellant was arraigned before the trial court. On his part, the appellant denied in toto to have committed the said offence. His

defence was to the effect that on the fateful date, while on his way towards his sister's residence, PW1 appeared and started to beat up the child/the victim. According to him this act of beating the said child prompted him to ask the reasons thereof and the answers were that the said child had insulted her. The appellant further fended his case in that shortly after receiving the said answer/reply, PW1 started to beat him as well on the ground that he had raped the child. In his conclusion, the appellant believed all the prosecution's witnesses contradicted each other and testified lies against him. After a full trial, the trial court was satisfied that the prosecution proved their case beyond reasonable doubt. The appellant was then convicted and sentenced to serve a sentence of life imprisonment. Being aggrieved the appellant preferred the present appeal based on the six grounds as follows¹ 3 IP a ge

1. That, the trial court erred in law and fact in failing to assess(sic) the credibility to the evidence on records as required by law section 127(6) of the Evidence Act.
2. That, the trial court erred in law and fact in not finding that the charge sheet is defective.
3. That the trial court erred in law and fact in trying the case which has no police investigator as it was unknown to how did with the crime, (sic)
4. That, the trial court erred in law and fact in convicting and sentencing the appellant with(sic) the exhibit P1 which was not read out after its admissibility.
5. That, the trial court erred in law and fact when (sic) acted on the evidence of PW2 and PW3 which was extracted with non-compliance of section 127(2) of Evidence Act.
6. That, the case against the appellant was not proved beyond reasonable doubt. At the hearing of this matter, which was done orally, the appellant fended for himself without legal representation while the respondent was represented by Mr. CHARLES KAGIRWA, State Attorney. *IP age The appellant was the first to take the floor. Starting with the 1st grounds of appeal the appellant faulted the trial court's findings relying on the evidence of PW2 and P\A/3 which was extracted contrary to Section 127 (6) of the Law of Evidence Act. In expanding his argument, the appellant alleged that the victim was not a credible witness for her failure to explain the kind of the so called "bad thing" alleged to be done by the appellant to her. Further to that he submitted that even the PW4 was not a credible witness as his evidence is hearsay from PW1 who told her that the victim was raped. Responding to the appellant's submission in support of the 1st ground of appeal, Mr. Kagirwa while supporting the conviction of the trial court stated that PW3 was a credible witness. In support to this stance, he cited Section 127 of the Law of Evidence Act which provides that the true evidence in rape cases comes from the victim. According to the learned state attorney, the victim explained how she was raped by the appellant and showed the part of her body where the bad thing was committed to her. Further to that, the learned state attorney said that the victim's evidence was corroborated by the examining Doctor who stood as PW5. Regarding the appellant's argument that the victim failed to explain the meaning of "a bad thing" which was committed to her, while citing case of s|Page MATHAYO LAURANCE WILLIAM MOLLEL VS REPUBLIC (Criminal Appeal No. 53 of 2020) [2023] TZCA 52 (20 February 2023) (Tanzlii),

Mr. KAGIRWA said the meaning of "tabia mbaya" was put forward. Regarding the argument by the appellant that the prosecution's evidence is tainted with contradiction, the learned state attorney opined that minor contradictions are normal, and he added in that minor contradiction which did not go at the root of the case are not fatal and should thus be disregarded. In support to that, he cited the case of EX. G. 2434 PC. GEORGE VS REPUBLIC (Criminal Appeal 8 of 2018) [2022] TZCA 609 (6 October 2022) (Tanzlii). That being the argument from both sides regarding the first ground of appeal, it is apposite to point out that in this matter, the only witness who testified on what befell the victim is the victim herself. In the circumstances where the child victim is the only witness, the law has set conditions for consideration before the court can accord weight or otherwise on the same. Under the Law of Evidence Act, Section 127 (6) provides as follows in that: "Notwithstanding the preceding provisions of this section where in criminal proceedings involving sexual offence the only independent evidence is that of a child of 6 I page 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 of as the case may be 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." (Emphasis is mine). In addition to the above legal principle, there are also several decisions of the court which propounded the said principle in that in criminal offences involving sexual offences the best evidence comes from the victim. See the case of GODI KASENEGALA VS RFEPUBLIC (Criminal Appeal 10 of 2008) [2010] TZCA 166 (12 October 2010) (Tanzlii). The take from the above principal is that the court need to assess the credibility of the witness (a child of tender age) before according weight to it. Based on that, this court is asking as to whether the victim (PW3) is credible worthy to be relied on. From the record, the victim, having promised to tell the truth, testified how the appellant took her to the 7 I P age forest, undressed her and himself and fornicated her against the order of nature. The victim made a dock identification and described the act as bad thing and showed the affected body part to be her back side. The victim's evidence was supported by PW.1 her mother who saw the duo coming from the forest. Having assessed the victim's evidence I believe her to be credible since even during cross examination she insisted that it was the appellant who lured her with money to go. On his part the appellant faulted the appellant's failure to explain the meaning of "doing unto her bad thing" but this court, based on the current legal position found the same with no merits. This is because in our society the act by itself is perceived a shameful pushing the victims to use taboo words in lieu thereof. To solve the problem such as the one which the appellant is trying to raise, the court of appeal came up with the definition of some of the taboo words which are commonly used by victims to describe rape. In the case of MATHAYO LAU RANCE WILLIAM MOLLEL VS REPUBLIC (Supra) the court held inter alia that: "In Hassan Kamunyu, we observed that phrases like "[he] removed my underwear and started intercoursing me", "sexual intercourse" or "have sex", "[he] undressed me and started to 8| page have sex with me" "kanifanyia tabia mbaya", "alinifanya matusi" or "he put his dudu in my vagina" or "did sex me by force", "this accused raped me without my

consent", "While this accused was sexing me I alarmed" and "fortunately one B s/o T came to my home and he found this accused still sexing", though not explicitly described, referred to penetration of the penis of the accused person into the vagina of the victim. (Emphasis is mine). Guided by the above authority this court is of the view that when PW3 said the appellant "did a bad thing to me" alinifanyia tabia mbaya" she meant penetration of the male organ of the accused person into her anal orifice. Thus, the appellant's allegation that the victim did not describe what happened to her is baseless. This ground thus fail for being unmerited. Regarding the 2nd ground of appeal, the appellant faulted the trial court for acting upon a defective charge sheet. In support he asserted that in the charge sheet it was stated that the appellant carnally knew the victim against the order of nature while PW4 and PW5 testified that he raped her. According to him, the charge sheet ought to be amended vide Section 234 (1) of the 9 I Pa ge Criminal Procedure Act re. TM ' V P 20 R.E 2022], To support the point, he cited e GODFREY SIMON & ANOTHER VS REPUBLIC (Criminal Appeal No.2% of 2018) (2022) TZCA 8 (11 February 2022) (Tanzlii). On the other hand Mr . ' r* ^a9'rwa said that there is no variance between the charge sheet and the evidence because the victim testified that she was carnally known against the order of nature. He distinguished the cited case of GODFREY SIMON (supra) to the present matter for being irrelevant. \N\th the rival submission on the second ground of appeal, this court went through the charged sheet only to find particulars stating that the appellant had carnal knowledge with the victim against the order of nature. In the proceedings, the victim said the appellant "he did to me bad thing" while point her hind part. On her part, PW1 said the victim told her that the appellant penetrated her against the order of nature. Based on the said evidence there is no variance between the charge and the evidence of the prosecution because both PW.1 and PW.3 spoke about penetration against the order of nature. After all, since in rape cases true evidence comes fronr the victim as discussed above, even if there was such variance, true evident on what befell the victim in this matter came from the victim herself. 10 \ P a g e Regarding the 3rd, 5th and 6th grounds of appeal, the appellant complained that the case against him was not proved beyond reasonable doubt. According to him, the evidence of PW2 and Pw3 was procured contrary to section 127 (2) of the Law of Evidence Act, as the victim did not promise to tell the truth. To buttress the point, he cited the case of JOHN MKORONGO JAMES VS REPUBLIC (Criminal Appeal No. 498 of 2020) [2022] TZCA 111 (11 March 2022) (Tanzlii). Responding to the above grounds, Mr. Kagirwa submitted responded that it is true that the court recorded that "she promised to tell the truth" and Section 127(2) of the Law of Evidence Act was not complied with, however the same does not make her evidence rejected (disregarded). His argument was supported by citing the case of GEORGE JONAS LESILWA VS REPUBLIC (Criminal Appeal No. 374 of 2020) [2024] TZCA 269 (16 April 2024) (Tanzlii). It is trite law that the burden of proof against the accused always lies on the prosecution and no conviction shall be entered on account of weak defence but upon proof of the case beyond reasonable doubt. (See JOHN MAKOLEBELA, KULWA MAKLOBELA AND ERIC JUMA ALIAS TANGANYIKA,

[2002] T.L.R. 296). In proving the case of unnatural offence against the appellant under section 154(1) (a) and (2) of the penal Code, the prosecution 11 I P a g e required to establish that the appellant had carnal knowledge of the yictiir against the order of nature (penetration) and further that the offence ^ias committed by none other than the appellant. From the record and as discussed above, the victim testified how she was fornicated against the order of nature. Her evidence was supported by AQher mother') who testified that the victim was a child of six years old. On top of that, the prosecution summoned PW5, the Doctor who medically examined the victim. His oral account is that the victim's anal orifice was penetrated, and male sperms were visible. This evidence proves nothing other than penetration on the victim's anal orifice. Regarding the second ingredient which is whether the appellant is the perpetrator of the said crime, the court got the answers from the evidence of PW1 and PW2. From the record, the victim testified that the appellant took her into the forest where he raped her against the order of nature. While coming from the said forest, the victims mother (P.W.1) surprised them walking together and in the cause, she attempted to grab her. Her efforts were greeted by punches from the appellant who attempted to escape but was apprehended by persons who responded to PW.1's scream for help After his arrest, the appellant was conveyed to the police station where 12 | P a g e nvestigation was mounted leading to his arraignment in court. During trial, lbe victim testified against him and made a dock identification. That being the case, since the appellant was identified by the victim when he committed that offence on a broad day light, and the fact that the appellant was arrested shortly after he had committed the said offence, this court is of the view that the appellant one BERNADO HARRY is the one who committed the offence in question. Coming to the 4th ground of appeal, the appellant faulted the trial court when it relied on Exhibit P1 (PF3], the exhibit which was not read aloud after its admission. The appellant submitted that such failure prejudiced him as he was denied the right to know it's content for him to prepare his defense. In support to this point he referred this court to the case of ROBINSON MW ANUS AND 3 OTHERS V. THE REPUBLIC [2003] TLR 218. Having submitted as such, the appellant concluded by praying this appeal to be allowed, conviction quashed and the sentence to be set aside. On his part, Mr. Kagirwa responded in that truly, exhibit P1 was not read aloud after its admission. He however was quick to point out that even if the said exhibit is expunged from record as he prayed the court to do, to the remaining evidence is still strong to support the prosecution's case. In 13 \ P a g e support to this point he cited the case of ABAS KONDO GEDE VS REPUBLIC (Criminal Appeal No. 472 of 2017) [2020] TZCA 391 (12 August 2020) (Tanzlii). I have considered the appellant's concern only to find substance in it. The law has emphasized the urge of having the intended exhibits cleared for admission first and after their admission, the contents in them to be reads aloud in the court room. There are several authorities in that regard, for example in the case of EVARIST NYAMTEMBA V. THE REPUBLIC, CRIMINAL APPEAL NO. 196 OF 2020 (CAT at Kigoma, Unreported), the Court held inter alia that: "It is a settled position of the law that whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted in evidence, before it can be read out in court."

Guided by the cited provision of the law and the authorities, it is undisputed that Exhibit P1 (PF3) was not read aloud after its admission. Although the same was admitted without objection from the appellant, the trial court omitted to order the contents of the said exhibit to be read to make the appellant understand and make a meaningful defence. ¹⁴ [P a g e] Such failure is not left without consequences. The consequences are covered in several decisions. For example, in the case of *LACK S/O KILINGANI V. THE REPUBLIC*, Criminal Appeal No. 405 of 2015 (CAT- Unreported), the Court held inter alia that: "Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful. The Court in *Robinson Mwanjisi and Three Others v. The Republic* [2003] T.L.R. 218, at page 226 alluded to the three stages of clearing, admitting and reading out, which evidence contained in documents invariably pass through, before their exhibition as evidence." See also the case of *WALII ABDALLAH KIBUTA AND TWO OTHERS V. THE REPUBLIC*, Criminal Appeal No. 181 of 2006. Guided by the foregoing authority, Exhibit P.1 is hereby expunged from the record. However, having expunged Exhibit P.1 from the records, the remaining evidence from PW3 (the victim) is sufficient to prove the case. ¹⁵ [P a g e] The appellant herein as she explained what befell unto her and the person responsible, who is the appellant. \n the circumstances and on the foregoing reasons, this court is of the view that the prosecution proved its case beyond reasonable doubt. As such this appeal is hereby dismissed for want of merit and the conviction and sentence meted by the trial court are upheld. Right of appeal is fully explained. Ordered accordingly DATED ARUSHA this 27th day of September, 2024. JUDGE

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