

TANZANIA / JUDGMENT

DANIEL RICHARD URASA VS REPUBLIC

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB REGISTRY AT
MOSHI DC CRIMINAL APPEAL NO. 23522 OF 2024 (Originating from Criminal Case No. 249 of
2023 of Moshi District Court at Moshi) DANIEL RICHARD URASA
APPELLANT VERSUS REPUBLIC RESPONDENT

JUDGMENT

10/12/2024 & 15/01/2025 SIMFUKWE, J. Before the District Court of Moshi (the trial court), the appellant was charged with unnatural offence, contrary to section 154(1)(a) and (2) of the Penal Code [Cap. 16 R.E. 2022]. The particulars of the offence alleged that, on the 30th day of July 2023, at Mrimbo Urrio within Moshi District in Kilimanjaro Region, the appellant had carnal knowledge of one NKC (identity withheld for privacy) a boy aged six years against the order of nature. 1 The facts giving rise to this appeal are as follows: On the material date, PW1, the victim, was sent by his grandmother (PW2) to purchase cooking oil. It was alleged that while on the way, the appellant called PW1 into his house and sodomised the victim. The incident was disclosed by PW1 to his grandmother (PW2), who subsequently reported the matter to the police station. PW2 was issued with a PF3 form, which facilitated PW1's medical examination at the hospital. PW3, a medical Doctor, testified that upon examining the victim, he found that the victim's anus was penetrated by a blunt object. It was testified further that the victim had no bruises. A PF3 which was filled by PW3 was admitted as Exhibit P1. Further, PW4 the investigator testified among other things that he interrogated the appellant, who denied the allegations. However, he admitted that he knew the victim as his neighbour. PW4 tendered a sketch map which was admitted as exhibit P2. In his defence, the appellant denied to had committed the offence. He argued that the allegations were fabricated by PW2, who is his neighbour. The appellant further testified that PW1 had claimed that it was his grandmother (PW2) who told him to implicate him. Moreover, while being cross examined the appellant raised the defence of alibi, asserting that on the material date, he was at Rombo doing his duties. 2 After analysing evidence of both parties, the trial magistrate concluded that the prosecution had proved the case beyond reasonable doubt. Accordingly, the trial court convicted the appellant and sentenced him to life imprisonment. Aggrieved with the conviction and sentence, the appellant has lodged the present appeal on the following grounds:

1. That, the trial Court erred in law and in fact by convict and sentence without taking into account the strong and relevant evidence adduced by the Appellant. (sic)
2. That, the Trial Court erred in law and fact by taking the testimony of the victim who is tender age without corroboration. (sic)
3. That, the trial Court erred in law and by failing to assert the legal theory and importance of identification parade to determine the proper culprits and holding the appellant liable. When the appeal was called for hearing, the appellant was represented by Mr. Pius Ndanu, learned Advocate, while the respondent was represented by Ms. Bora Mfinanga, learned State Attorney. The matter proceeded by way of written submissions. 3 On the first ground of appeal, Mr. Ndanu argued that the trial Court did not consider the relevant evidence presented by the appellant. He centred his argument on page 22 of the trial court proceedings where the appellant said that he did not know Crispine Nemes Kulaya (PW1). Mr. Ndanu noted further that PW1 had identified the Appellant before the Court and he admitted that it was his grandmother who had instructed him to implicate the Appellant. Additionally, the learned counsel pointed out that people who had arrested the Appellant did not appear in court. Mr. Ndanu emphasized that the principle of law in criminal cases requires the prosecution to prove the case beyond reasonable doubt. He argued that the prosecution had failed to prove that the Appellant was the one who had sodomized the victim. He also contended that the evidence provided by the medical doctor (PW3) was obtained in contravention of the law. Furthermore, he submitted that the prosecution should have provided evidence of proper identification and arrest of the Appellant, as well as evidence of his involvement in the commission of the alleged offence. In respect of the second ground, the learned counsel complained that the trial court relied on the testimony of the victim, who was a child of tender age, without corroborating it with other evidence or conducting a proper 4 voire dire test. Mr. Ndanu submitted that as per the record, the victim was a child of tender age, thus, for such testimony to be admitted or accorded weight, the trial Court was required to conduct a voire dire examination in accordance with the law and the guidance provided by the Court of Appeal in the case of Mohamed Sainyenye vs Republic, Criminal Appeal No. 57 of 2010 (Unreported), as quoted in Edward Nyegela vs Republic, Criminal Appeal No. 321 of 2019 (Unreported). It was further submitted that the trial Court did not ask the victim his name, religious beliefs, or whether he understood the nature of an oath and its obligations. He emphasized that there is no record showing how the Trial Court satisfied itself that the victim understood these aspects. He further contended that the victim's assertion that he was taught at church not to lie and their promise to tell the truth were insufficient to meet the legal requirements outlined in Mohamed Sainyenye's case and section 127 of the Evidence Act. He also noted that PW1's testimony was unsworn as the trial Court did not administer an oath. Mr. Ndanu stated that evidence of PW1, having been taken in contravention of the law, rendered PW1 an incompetent witness. As such, he argued, PW1's evidence held no probative value and should be expunged from the record. The learned counsel further claimed that 5 without PW1's evidence, there was nothing left on record to support the prosecution's case.

Regarding the third ground of appeal, it was the appellant's lamentation that the trial Court erred in law and fact by failing to assess the necessity and significance of an identification parade to determine the proper culprit. He criticised the investigator for failing to conduct an identification parade after the victim had mentioned the alleged culprit which would have eliminated doubts about the identification. He submitted that while the victim may have been sodomized as alleged, proper identification procedures, such as an identification parade, were necessary to corroborate the victim's testimony and strengthen the prosecution's case. Mr. Ndanu continued to submit that the Appellant had testified at page 22 of the proceedings that he did not know PW1 before the alleged incident, which, in his view, warranted an identification parade. He argued that absence of an identification parade rendered the victim's testimony uncorroborated. He also emphasized the principle that an accused cannot be convicted based on the weakness of their defence but rather on the strength of the prosecution's case. He cited the case of Edward Nyegela

- v. Republic, Criminal Appeal No. 321 of 2019 (Unreported). He was of the view that evidence of the appellant was without any reason ignored by the trial court. The learned counsel continued to submit that with the exception of the evidence of PW1 and PW2, the rest of the testimonies were purely hearsay and lacked evidential value. Referring to the case of Selemani Makumba v. Republic [2006] TLR 379, Mr. Ndanu acknowledged that the best evidence in sexual offences is that of the victim. However, he maintained that such evidence must be impeccable and properly taken. In conclusion, Mr. Ndanu stressed that the prosecution failed to prove its case to the required standard of beyond reasonable doubt. Also, he argued that the trial Magistrate did not conduct a just and fair trial. Based on the above grounds, the learned counsel urged the Court to allow the appeal, quash the conviction, set aside the sentence, and order the immediate release of the Appellant. In her reply submission, the learned State Attorney vehemently opposed the appeal. Responding to the first ground of appeal that the trial court did not consider the strong and relevant evidence adduced by the Appellant, it was submitted that the trial court did take into account the defence evidence in its judgment considered the appellant's evidence. She explained that after analysing the said defence, the trial court found that it lacked merit as it failed to raise doubt on the prosecution's case. The learned State Attorney elaborated further that during the defence hearing, the Appellant enjoyed legal representation of the Learned Advocate Emmanuel Anthony, as reflected on pages 22 and 23 of the trial Court's typed proceedings. Through this representation, the Appellant was able to defend himself and present final written submissions, all of which were considered by the trial Court Magistrate in her judgment. Ms. Bora observed that, at page 3 of the trial court judgment dated 23rd July 2023, the defence evidence was summarized, and on pages 12 to 13, it was analysed. The court gave credit to the prosecution's evidence, as the Appellant failed to explain why PW1 or PW2 would fabricate the case against him. Ms. Bora added that it is a settled principle of law that failure by a trial court to consider the defence case is not fatal. She cited the case of Sabas Kuziriwa v. The Republic, Criminal Appeal No. 40 of 2019 which held that appellate courts have the power to step into the shoes of the trial court and do what ought to have

been done. Nevertheless, she emphasized that in this case, the trial Court had properly analysed the 8 defence evidence. She urged the court to dismiss the first ground of appeal for lack of merit. On the second ground of appeal which concerns reliance on the victim's evidence without corroboration; Ms. Bora argued that the testimony of the victim (PW1), a 6 years old child, was recorded in accordance with section 127(1) of the Evidence Act (supra). Ms. Bora stated that before hearing, the respondent conducted a proper perusal of the original case file and confirmed that the statements of PW1 and PW2 were present. She illustrated that on 20th September 2023, when PW1 testified, the trial Magistrate assessed the child's intelligence and concluded that although PW1 did not understand the nature of an oath, he understood the duty of telling the truth and promised to do so. She emphasized that this complied with the requirements of section 127(1) of the Evidence Act. To support her submission, the learned State Attorney referred to the case of Selemani Makumba v. Republic (supra) and section 127(6) of the Evidence Act, which are to the effect that in sexual offences, the victim's evidence is the best evidence. That, corroboration may be required for unsworn testimony, as stated in the case of Mashishi Lwenge v. The Republic, Criminal Appeal No. 660 of 2021. Ms. Bora continued to state that, PW1's testimony which was supported by PW2 (the victim's grandmother) and PW3 (the doctor), clearly proved the charge beyond reasonable doubt. She prayed for the dismissal of the second ground of appeal for lack of merit. Lastly, countering the third ground of appeal, in respect of identification parade, the learned State Attorney was of the opinion that the identification of the Appellant by PW1 was watertight. She added that an identification parade was unnecessary since the Appellant was well-known by PW1. She referred PW2's testimony, which stated that the Appellant was her neighbour and brother-in-law, the facts that were not disputed by the defence. Ms. Bora subscribed to the case of Crosprey Ntagalinda Koro v. Republic, Criminal Appeal No. 312 of 2015, in which the Court of Appeal held that: "Every witness is entitled to credence and his testimony believed unless there are good and sufficient reasons for not believing the witness." In her final remarks, Ms. Bora prayed for the dismissal of the appeal and urged the court to uphold the decision and sentence of the trial court. 10 In his brief rejoinder, the learned counsel for the appellant reiterated his submission in chief. Having considered the grounds of appeal, submissions of both parties and the trial court's record, the issue for determination is whether this appeal has merit, focusing on whether the prosecution proved the case beyond reasonable doubt. Starting with the first ground of appeal, the appellant's counsel faulted the trial magistrate for failing to consider the strong and relevant evidence presented by the appellant. The specific evidence that was allegedly disregarded included the appellant's statement to the court that he did not know the victim. In addition, the appellant's counsel argued that the trial court failed to analyse the victim's testimony, who stated that he was instructed by his grandmother to implicate the appellant. The above argument was disputed by Ms. Bora, learned State Attorney for the Respondent, who contended that the defence evidence and submissions were duly considered in the impugned judgment. I have carefully reviewed the entire evidence with a clear mind. As rightly submitted by both parties, it is well established that the best evidence in cases of this nature usually comes from the victim. There are

numerous authorities to that effect, some of which were cited by both parties. 11 Again, I am mindful of the established legal principle that a conviction in a sexual offence case can be based solely on the uncorroborated evidence of the victim, provided the court is satisfied that the victim is truthful. This principle is grounded in section 127(6) of the Evidence Act, Cap. 6 [R.E. 2022], which I hereby quote: “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 age 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 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 age or the victim of the sexual offence is telling nothing but the truth.” However, this cherished principle must be applied with caution. The court is required to ensure that the credibility of the victim is beyond reproach. Both this Court and the Court of Appeal have consistently emphasized that 12 this principle should not be treated as a rule of the thumb. The law mandates that the victim's testimony must undergo a rigorous test of truthfulness to determine its reliability. In the case of Mohamed Said vs Republic (Criminal Appeal No. 145 of 2017) [2019] TZCA 252 (23 August

2019) Tanzlii the Court of Appeal had this to say: “...it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness.” In the instant case, I am of considered opinion that, the victim's evidence, which is considered the best evidence, is found to be wanting. The victim described how the appellant sodomized him and was able to identify the appellant during the trial. However, during cross-examination, the victim explicitly stated that it was his grandmother who instructed him to implicate the appellant. This fact undermines the credibility of the victim's testimony given during examination-in-chief. Moreover, I scrutinized the doctor's evidence together with the PF3, which was tendered as Exhibit P1. With due respect, this evidence is questionable, as it indicates that the victim who was examined was a female who had suffered vaginal rape. This discrepancy, when considered alongside the victim's testimony, casts doubt on the prosecution's case. 13 Had the trial magistrate thoroughly scrutinized the prosecution's evidence, she could have noted the above weakness. In light of the foregoing, the appeal is allowed, as the findings above are sufficient to dispose of the entire appeal. Accordingly, the appellant's conviction is hereby quashed and the sentence of life imprisonment is set aside. The appellant is ordered to be released forthwith unless lawfully held on other grounds. It is so ordered. Dated and delivered at Moshi this 15th day of January 2025. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 15/01/2025 14

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