

TANZANIA / JUDGMENT

## DAVID LABIA HANGO Vs

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IN THE HIGH COURT OF TANZANIA (DODOMA SUB REGISTRY) AT DODOMA DC CRIMINAL  
APPEAL NO. 8524 OF 2024 (Arising from the decision of the District Court of Singida at Singida  
dated 15/01/2024 in Criminal Case No. 67 of 2023 before Hon. F.E. Luvinga, SRM) DAVID LABIA  
HANGO..... APPELLANT Versus REPUBLIC  
..... RESPONDENT

## JUDGMENT

Date of last order: 22nd July, 2024. Date of Judgment: 16th August, 2024. E.E. KAKOLAKI, J. The appellant was charged and convicted by the District Court of Singida at Singida on the offence of Rape; contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code, [Cap. 16 R.E 2022] and sentenced to thirty (30) years imprisonment in its decision handed down on 15th January, 2024. Disgruntled he is challenging the said decision by way of appeal expressed in seven grounds of appeal going thus:

1. That, WZ (the victim) was a girl of 10 years therefore was a child of tender age, her competency was not tested before testifying as demanded by section 127(2) of the Evidence Act, [Cap. 6 R.E 2022].
2. That, the age of the victim was not proved by the prosecution side by producing birth certificate or an affidavit, thus appellant's conviction proceeded under shadow of doubts. 1
3. That, taking into consideration the evidence tendered and the circumstances of the case, the prosecution failed to prove the case beyond reasonable doubt.
4. That, the Court erred in law and facts to base on the evidence of the medical doctor (PW4) who examined the victim, without proof as to whether it is the appellant who inserted his penis into the victims vagina and cause the anus to loose.
5. That, the prosecution and Court has to ask themselves whether the appellant at his old age can do that act or not.
6. That, as there is no evidence of involvement of social welfare officer in the case involving a child victim the omission cause her injustice in the eyes of the law.

7. That, the appellant was convicted not on the strength of prosecution evidence but rather weakness of his defence. A brief account underlying conviction of the appellant as discerned from record goes thus. The victim, a child of 10 years whom for the purposes of this judgment I shall continue to refer her as PW1 or WZ as referred in the proceedings and the impugned judgment was a resident of Mwaja area within Mandewa ward, Unyakuni Division within the District and Region of Singida, living with her grandmother Juliana Mohamed (PW2), her mother Elizabeth (of unsound mind), Faustina Joachim (PW3) and her sibling Maria Mohamed. On the evening of 10/05/2023, PW2 had gone to Mabandani shopping area 2 (center) to sell salt leaving the victim and her mother at home as later on Faustina (PW3) and Maria went to the same shopping center to buy vegetables for preparation of dinner. When returned home the two could not find PW1 at home and when asked her mother of her where about were told that David @ Madagaa (nick or local name) had asked her to escort him. Upon unsuccessfully efforts to call and search her around and given the fact that it had started to be dark PW3 and Maria using a torch decided to search her (PW1) heading to the direction of appellant's home before they heard on the way noise coming from the maize farm only to find the appellant on top of PW1 raping her as he had removed PW1's clothes while his trousers removed too to knees level before he took to his heels when saw them. The report was made to PW2 who relayed it to the street chairman on 11/05/2023 and later on to the Police station whereby PF3 (Exh. P1) was issued and PW1 attended medical examination conducted by PW4 at the regional hospital where it was established that PW1 was penetrated in her vagina and had her anus loose too. The appellant was arrested and indicted in court facing the charge of Rape in which he returned a plea of not guilty when called to plead thereto after the case file was sent to the National Prosecution Services office upon the investigation completed by PW6. It was in the appellant's defence that he, was arrested on 16/05/2023 by the street chairman and sent to police where he denied to have committed the offence. He accused PW2 to have fabricated 3 that case against him as they had love relationship which did not last longer. He also claimed, there was contradiction between prosecution witnesses as PW2 said the victim sustained bruises while the doctor said there was none. As alluded to above after full trial, the trial court having satisfied itself that the prosecution proved its case against the appellant beyond reasonable doubt found him guilty as charged, convicted and sentenced him as hinted above, the decision which displeased him hence the present appeal. When the matter was called on for hearing the appellant appeared in person unrepresented while the prosecution enjoyed the service of Ms. Magreth Fyumagwa, learned State Attorney and both parties were heard viva voce. Addressing the Court on his appeal the appellant explained that he has expressed his grievances in seven (7) grounds of appeal in which he prayed to hear first from the Respondent then rejoin to submissions made if need be, the prayer which was cordially granted. On the respondent's side Ms. Fyumagwa indicated from the outset that they were contesting the appeal as the case was proved against appellant beyond reasonable doubt. She prayed to merge the 3rd and 7th grounds of appeal and argue them together while canvassing the rest of the grounds separately. On the first ground of appeal she contended it is not true as complained by the appellant that the provision of section 127(2) of the

Evidence Act was violated by the trial court for failure to test victim's competence as the typed proceedings at page 10 clearly indicate how the law was complied with by testing PW1's competence. 4 According to her what ought to be indicated in the proceedings is that the test was conducted and the child promised to tell the truth and not lies as it was held in the case of Mohamed Jumanne Vs. R, Criminal Appeal No. 569 of 2021 (CAT-unreported) something that transpired in this case. She thus prayed the Court to find the ground lacks merit. On the second ground in which the complaint is that, victim's age was not established by birth certificate or an affidavit she retorted, age is not established by birth certificate or affidavit only as it can also be proved by the victim, parents, relatives, doctor or any birth certificate. She explained further that, in Issaya Renatus Vs. R, criminal Appeal No. 542 of 2015 (CAT- unreported), the Court of Appeal emphasized that, even the court can make its observation and establish child's age. In this case the victim at page 8 of the proceedings said was by then 10 years and nursery school student at Kitope, primary school and further the trial court made its observation and satisfied itself that, the victim was a child of tender age hence could only testify after promising to tell the truth. She added that PW2, who is victim's grandmother stated also at page 13 of the proceedings that victim (PW1) as born on 27/05/2013 hence proof that she was a child of tender age. As to the 4th ground on the complaint that, the doctor did not prove that it is the accused who inserted his penis into victim's vagina she countered, it was not for the doctor to prove that fact as the best evidence in sexual offences 5 comes from the victim as well stated in Seleman Makumba Vs. R, Criminal Appeal No. 94 of 1999 (CAT-unreported). In this case she submitted, it was the victim who was to tell who committed the offence to her as the doctor was to confirm only whether she was raped or not. She explained at 8-10 of the proceedings PW1 was elaborate on who raped her as the appellant was her teacher. That, aside she added there was eye witness evidence of PW3 at pages 17-19 of the proceedings who she stated that, after hearing victim's noise they went to the scene of crime and found the appellant raping the victim. And that the appellant was familiar to her hence proof that the rapist was identified. On the 5th ground she submitted that, the appellant was given a chance to defend himself and had a chance also to cross examine prosecution witness on the issue as to whether he was capable of raping the victim but did not exercise such right nor raise it during his defence. To raise it at this stage she noted is an afterthought in which this Court should disregard. Regarding the 6th ground of appeal on the complaint that, it is was important to have a social welfare officer present in court given the fact that the case involved the child victim, Ms. Fyumagwa responded that, section 115 of the Child Act does not make it mandatory for the child witness to testify in the presence of social welfare officer. That, the requirement is for the child who 6 is in conflict with the law which is not the case in this matter, hence urged the Court to find the ground unmeritorious too. Lastly on the 3rd and 7th grounds of appeal on whether the offence of Rape was proved or not Ms. Fyumagwa argued that, as per section 130(1) and (2)

- (e) of the Penal Code, the prosecution was duty bound to establish victim's age, existence of penetration and that, it is the appellant who committed the offence. On the first ingredient of age she said as submitted above the same was proved through the evidence of PW1 and PW3. On the element of penetration she said PW1 at pages 8-11 of the proceedings explained on how the accused penetrated her, the evidence which is corroborated by PW4 the doctor at page 21 of the proceedings as well as the PF3. That PW4 proved the victim was penetrated in both vagina and anus, hence the element of penetration was proved beyond reasonable doubt. Lastly on who perpetrated the offence she explained PW1 and PW3's evidence proved it all in that, it is was the appellant who was found naked raping PW1. Since the two witnesses were known to him before she argued, the same could not have mistaken his identity hence a proof beyond reasonable doubt that, it is the appellant who raped her. She explained to the Court that, throughout his defence the appellant never raised any doubt to the prosecution's case hence prayed this Court to find the case was proved against the appellant beyond reasonable doubt and proceed to dismiss it. 7 In his rejoinder the appellant having heard the submission from the respondent indicated to the Court that he was not learned in law thus prayed it to look into whole evidence and his defence and then come up with its own findings as what was submitted by the State Attorney was no true for going against what exactly happened. He complained, the case was concocted against him and pray the Court to allow the appeal and flee him from prison. What is discerned from the 1st and 2nd grounds of appeal in the appellant's petition of appeal is the complaint that, PW1's evidence was received in violation of the provisions of section 127(2) of the Evidence Act, putting it mandatorily that before reception of evidence of the child of tender age who cannot testify under oath he/she must promise to tell the court the truth and not tell lies and that, the victims age was not proved by way birth certificate or affidavit. Having considered the evidence on record and the submission by Ms. Fyumagwa, I find the two ground to be unmerited. I so do as the record is very clear as to the compliance of section 127(2) of the Evidence Act by the trial court when receiving evidence of the victim (PW1) as shown at page 9- 10 of the proceedings, when PW1 was examined first to establish her intelligence and see whether she understood the meaning of oath and whether was promising to tell the Court the truth and not lies. Part of the excerpt from the inquiry conducted reads and I quote: Court: What do you do when you are at the church. 8 PW1: We are taught how to sing. Court: Is it good to tell lies. PW1: No, is not good. Court: Why. PW1: A person who tell lies go to hell. Court: Do you tell lies. PW1: I do not tell lies. Court: Promise that you will speak the truth only. PW1: I promise, I will speak the truth only. Court: Do you know about oath. PW1: I never heard about it. Court: The witness is intelligene enough to give rational answers. She has promised to speak the truth. Since she does not know the nature of oath she will not be sworn. Sgd: U.S. Swalo-PRM 27/06/2022. The above excerpt from part of PW1's evidence tells it all that, the law was fully complied by the trial court when receiving her evidence as apart from being preceded by an inquiry to satisfy itself as to whether the child (victim) understood the nature of oath or not before she promised to tell the Court the truth and not lies, the witness gave her promise to tell the Court truth and 9 not lies which is the legal requirement under section 127(2) of the Evidence Act as it was also held in the case of

Mohamed Jumanne (supra) when the Court of Appeal made the following observation after having cited the section concerned: "It is glaring that victim's promise was not preceded by any inquiry by the trial magistrate. A follow up question is whether the absence of the inquiry vitiated the victim's account. Our answer is in the negative because according to section 127(2) of Evidence Act, what is paramount is for the child witness to promise to tell the truth and not tell lies prior to giving evidence which must be reflected in the record. See. Yusuph M olo Vs. R , Criminal Appeal No. 343 of 2017 and M siba Leonard M chere Kum w aga Vs. R , Criminal Appeal No. 550 of 2015. I n the prem ises, the law does not require that the inquiry preceding the prom ise m ust be recorded as suggested by the appellant." (Emphasis supplied). Regarding proof of PW1's age I agree with Ms. Fyumagwa that, the evidence of PW1 herself corroborated by that of PW2 (her grandmother) was sufficient enough to prove her age as during court inquiry PW2 mentioned to the Court that she was 10 years old and a pupil at nursery school in Kitope Primary School. Her age was confirmed by her grandmother PW2 being a close relative when told the Court that she was born on 27/05/2013. As correctly submitted by Ms. Fyumagwa, the law allows a relative amongst other persons to establish child's age as the same can as well be proved by the victim, parent, 10 guardian medical practitioner or where available by the production of a birth certificate. See the cases of Isaya Renatus (supra), Mohamed Jumanne (supra) and Shani Chamwela Vs. R, Criminal Appeal No. 481 of 2021 (CAT- unreported) Tanzlii. In view of the above legal position it was not mandatory that PW1's age be established by way of birth certificate or affidavit as the appellant would want this court to believe. Next for determination is the appellant's complaint in the 4th ground that, the evidence by the doctor (PW4) who examined PW1 failed to establish whether it was the appellant who had inserted his penis into her vagina and cause the anus to be loose too. I think this ground need not detain much this Court, as it is uncontroverted fact as rightly submitted by Ms. Fyumagwa that, doctor's duty was to establish whether the victim was raped or not and not state who abused her. I so view as throughout his testimony PW4 never stated to have attended the scene of crime thus it would not be expected of him to testify anything on what happened on the incidence date and who exactly perpetrated it. I therefore disregard this ground and proceed to the 5th ground in which the appellant's concern is that the prosecution and the trial court ought to ask themselves whether at his age he could have committed the offence he was convicted with. There is no merit in this ground too as it has come at this odd hours as an afterthought as rightly put by Ms. Fyumagwa for not featuring and be determined during the trial. It was open for the appellant to raise the issue of impotency during cross examination of 11 prosecution witness or during his defence for both prosecution and the court to be availed with the opportunity to address it. Since he acquiesced or slept on such right he cannot be heard at this stage complaining as the issue could not be dealt with without being raised by himself. Had he thought it important to displace prosecution evidence relying on the issue of impotency if any, he ought to have requested the Court for the test of his potency the right which he failed to exhaust. As the appellant slept on his rights he is now estopped from raising the same at these hours hence this ground is bound to fail too. Next in consideration is on the 6th ground in which the issue is whether it was

necessary for the Court proceedings to be conducted with aid of social welfare officer on the ground that the victim in the case was a child of tender age. Having consulted the law I agree with Ms. Fyumagwa that, presence of social welfare officer in Court is not mandatory when the child is testifying in court as victim rather when she/he is in conflict with the law and placed before it as accused person as provided under section 112 of the Child Act, [Cap. 13 R.E 2019]. This ground is wanting in merit too. Lastly is the 3rd and 7th grounds of appeal which in general the complaint is that, the prosecution failed to prove its case beyond reasonable doubt against the appellant since he was convicted on the weakness of his defence instead of strength of prosecution case. The issue here is whether the case against the appellant was proved beyond reasonable doubt to warrant his conviction and sentence meted on him. It was appellant's contention that, the case against him was fabricated by PW2 whom they had broken love relationship. Ms. Fyumagwa is of the contrary view in that, the prosecution proved all three ingredients of the offence of Rape, in particular statutory one under section 130(1) and (2)(e) of the Penal Code, which are age, penetration and that, it is the appellant who perpetrated it. Having examined the evidence on record and considered the contending submission by the parties I am at one with Ms. Fyumagwa that, the prosecution discharged its duty when proved to the required standard that, PW1 was raped and it is the appellant who perpetrated the said offence. To start with the first element of age as already found above when determining the 2nd ground, age of PW1 was established on the required standard to be 10 years when the offence was committed, hence the same is proved. As to the 2nd ingredient of penetration as submitted by Ms. Fyumagwa, the submission which I embrace the best evidence on sexual related offences comes from victim. See the cases of Seleman Makumba Vs. R, [2006] TLR 379 and Hamis Halfan Dauda Vs. R, Criminal Appeal No. 231 of 2019 (CAT) Tanzlii. In this case PW1 is recorded to have told the trial Court on how the accused person whom she identified as Mwadagaa who also is known as David asked her to escort him but she refused before he forced her when pulled her by her hand and took her to the nearest farm of mama Tina where he removed her clothes and his. She said, he then inserted his dudu into her 13 vagina (pointing at her private parts) while laid on the ground and the accused slept on her until when her sisters Maria and PW2 came and lighted them up by using a torch that is when the accused person fled from the scene. Her evidence is corroborated with evidence of PW4 plus the PF3 (exhibit P1) in that, PW1 was found to have no hymen and her labia skin was pink and there was open gap in her vagina suggesting that she was penetrated in her vagina and further that she has loose anus. From PW1's evidence corroborated with that of PW4 and the PF3 like the trial court this Court is satisfied that, it was sufficient enough to prove the vital element of penetration since penetration however slight it is, is sufficient to constitute sexual intercourse to prove the offence in terms of the provision of section 130(4) of the Penal Code. I so find as PW1 was so categorical in her testimony that, the appellant inserted his "dudu" in her vagina which she later on described it as penis hence use of penis was also proved. Lastly is on the identification of the appellant as perpetrator of the said rape. Having revisited the evidence on record like the trial Court this Court is satisfied that, the appellant was properly identified when PW1 identified him in Court as Madagaa or David

and her teacher who used to teach her to read and the person who took her forcefully from their home in the presence of her mother (of unsound mind) despite the fact that it was dark already as there was electricity light on. Her evidence on identification of the rapist as 14 victim is corroborated by PW3 whom together with Maria on 10/05/2023 evening using the torch light found the appellant lying on top of PW1 in the maize farm before he fled from the scene of crime, when PW3 took PW1 back home and reported the matter to PW2 who also reported the same to Police on the next day. She also confirmed the fact that, appellant was PW1's teacher on extra time (tuition), the fact which proves that both PW1 and PW2 were known to the appellant before hence could not have mistaken him. My doubt on the mistaken identity is further cleared by fact that, even the appellant himself did not dispute the fact that was found at the scene of crime by the two witnesses either by way of cross examination or during his defence. As he was properly identified by PW1 and PW2 to be the person who raped PW1 and since it is already found that, PW1 was penetrated which is an essential ingredient in proving the offence of rape and given the fact that, PW1 was the child of tender age when raped, I do not find justification in appellant's complaint that his conviction was premised on weakness of his defence rather was predicated on the strength of prosecution evidence as demonstrated above. In the premises and for the fore stated reasons this Court is satisfied that, appellant's appeal is devoid of merit as the same is hereby dismissed in its entirety. It is so ordered. 15 Dated at Dodoma this 16th August, 2024. E. E. KAKOLAKI JUGDE 16/08/2024. Court: The Judgment has been delivered at Dodoma today on 16th day of August, 2024, in the presence of the appellant in person, Ms. Magreth fyumagwa, State Attorney for the respondent and Ms. Veradina Matikila, Court clerk. Right of appeal explained. E. E. KAKOLAKI JUGDE 16/08/2024. 16

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