

TANZANIA / JUDGMENT

Emanuel Joseph vs R edited 2222

COURT
TANZLII

DECIDED
30 October 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB REGISTRY OF
MANYARA AT BABATI CRIMINAL APPEAL NO. 3394 OF 2024. (Originating from criminal case
No.90/2024 from Hanang’ District court at Katesh.) EMANUEL
JOSEPH..... APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

18th September & 30th October, 2024 Kahyoza, J.: Emanuel Joseph (Emmanuel), the appellant, was charged with the offence of rape, convicted after full trial and thirty years’ sentence. Aggrieved, he appealed contending that he was convicted on the weakness of the defence case, the evidence was not properly evaluated, the caution statement was recorded after four hours, the prosecution did not prove the case beyond reasonable doubt, the prosecution evidence was contradictory thus, insufficient to prove the case, the defence was not considered and lastly that trial court did not comply with sections 9(3) and 291(1) of the Criminal Procedure Act, [Cap. 20. R.E. 2024] (the CPA). Brief background from the prosecution’s account is that on 9th day of October2020, at Gabadaw village within Hanang’ District in Manyara Region, Emanuel Joseph did unlawful sexual with the female person aged 1 of 62 years marked as victim. It further alleged the appellant broke into the victim’s house at 03:00 am when the victim was asleep, victim lit the appellant with her touch. The appellant went where the victim and started indecently touching her. The victim tried to escape in vain as the appellant held tightly her and strangled her. He undressed her. She fainted. When she regained her consciousness, she realised that she had been raped as her private parts were went. The victim deposed that later when it was dawn as the cock had crowed, the appellant raped her again without her consent. In the morning, the victim asked the appellant to her go out for a call of nature, he agreed. She went out and raised an alarm. On hearing the alarm, the appellant escaped to the bush before people who responded to the victim’s call for help arrived at the scene of the crime. They arrived at the scene of the crime and the victim showed them where the appellant had escaped to, pursued and arrested him. The appellant, on his part, denied to commit the offence and contended that the offence was fabricated. He deposed that he was arrested whilst at his home place. The trial court believed the prosecution’s evidence, found Emanuel guilty and sentenced him to thirty years’ imprisonment. Aggrieved, he appealed to this Court (Hon. Barthy, J.), which quashed the proceedings, 2 set aside judgment and ordered trial de-novo. Emanuel was retried, convicted and sentenced to save 30 years’

imprisonment subject to deduction of the time he had served. Aggrieved Emanuel filed an appeal with eight grounds, which raised the following issues-

- 1) Was he convicted on the weakness of the defence case?
- 2) Did the trial court evaluate the evidence properly?
- 3) Was the caution statement was recorded within time allowed?
- 4) Did the prosecution prove the case beyond reasonable doubt?
- 5) the prosecution evidence was contradictory thus, insufficient to prove the case?
- 6) Did trial court consider the appellant's defence?
- 7) Did the trial court comply with sections 9(3) and 291(1) of the CPA? Reading the appellant's grounds of appeal, it is obvious that his basic complaint is that the prosecution did not prove him guilty beyond reasonable doubt. This being the first appeal and relying on the grounds of appeal, I will determine one issue whether the prosecution proved the appellant guilty beyond reasonable doubt. I will before retiring discuss others issues raised by the appeal which are not covered by the general ground of appeal. 3 Did the prosecution prove the appellant guilty beyond dispute? The appellant is charged with offence of rape contrary to section 130 (1) (2) (b) of the Penal Code [R.E. 2019 now 2022]. To prove the appellant guilty, the prosecution is bound to prove that the victim was penetrated without her consent and it was the appellant who penetrated her. Was the victim penetrated? The victim (Pw1) deposed that the appellant broke into her house and indecently touched her. She attempted to escape but the appellant held her tightly and strangled her. She lost consciousness and when she gained consciousness she found herself undressed and her private parts wet. Thus, she was penetrated. But before it was down, the appellant penetrated her the second time and this time she was alive all the time. Paulo Sarwatt (Pw3), the doctor supported the evidence of the victim that the victim's labia majora and minora were swollen with bruises and the vagina was reddish. He noted presence of sperms in her vagina which proved that a male person penetrated her. He tendered a PF.3 as exhibit P. 1. Given, the victim's evidence and that of the Paulo Sarwatt (Pw3), the doctor, I found that the prosecution proved that the appellant was 4 penetrated. I find no reason to discredit the victim. She was a credible witness and the doctor confirmed her testimony that she was penetrated. It is trite that the best evidence in sexual offences is that of the victim of the offence. See *Charles Yona vs Republic* (Criminal Appeal 79 of 2019) [2021] TZCA 339 (2 August 2021). I find that the prosecution proved the victim was penetrated. Penetration is one of the key element in proving the offence of rape as held in *Mathayo Ngalya @Shabani V Republic*, Criminal Appeal No. 170 of 2006 (unreported). It stated that; "The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) of section 130 (4) of the Penal Code provides; -for the purpose of proving the offence of rape, penetration even slight is sufficient to constitute the sexual intercourse necessary to the offence" Having found that the victim was penetrated the

following issue is whether she did consent. There is no rape if the victim consent to have sex with another person. Did the victim consent? The victim deposed that the appellant broke into the house and started touching her indecently. She tried to escape but the appellant held tightly strangling her neck. She fell unconscious. She gained her consciousness and found her private parts wet and her underpants 5 lowered up to her knees. Later, the appellant carnally knew her on second time when she was alive. She did not explain whether she resisted the appellant's second encounter. However, after the appellant finished ravishing her, she prayed to attend the call of nature and as she got out she shouted for help. Daniel Mataya (Pw2), the appellant's uncle deposed that at 07:00am on the 9.10.2020, the victim notified him that the appellant raped her. They commenced a search and found the appellant in the bush at 08:00am. Had the victim consented to have sexual intercourse she would not have complained. The sexual act was committed at night she had no reason to divulge the act if she had consented. I find that the victim was penetrated without consent. The last issue is whether the appellant committed the offence. Did the prosecution proved that the appellant is the one who raped the victim? Having found that the victim was carnally known without her consent, the issue is whether the prosecution proved that the appellant is the one who committed the offence. The appellant raised the defence of alibi during his defence. He did not give notice as required by section 194 of the CPA. Apart from the fact that the appellant did not comply with the procedure of raising the defence of alibi, I resolved to consider the defence against the prosecution's recognition evidence. 6 The offence was committed at night. The victim (Pw1) averred that Emmanuel broke into the room at 03:00 hrs in night. She lit her torch to the person who entered the house and identified him the Emanuel. The victim and the appellant were familiar to each other. She deposed that the appellant was her nephew (her sister-in laws' son). She recognized him properly. The victim testified further that in the appellant raped her twice. At first, she fell unconscious when she did gain her conscious she found her private parts wet. However, during a second shot of sexual intercourse, she was alive and witnessed the appellant raping her. After he finished a second round, she asked the appellant to let her go out to attend a call of nature. He permitted her. She went out and shouted for help. The appellant escaped. She had ample time to identify the culprit as they stayed together for a long time and they conversed. It was easy for the victim to identify for the appellant with whom she was familiar with. She also saw him escaping after she shouted for help. That was another opportunity for her to identify the culprit. She even told Daniel Mataya (Pw2), the direction her assailant had taken. In addition, the victim named the appellant as the person who raped her at the earliest available opportunity to Daniel Mataya (Pw2). Mr. Rwezahura submitted that the victim's act of naming the suspect at the 7 earliest opportunity was the proof that the victim identified the appellant. To support his contention, he cited the case of George Jonas Lesilwa vs Republic (Criminal Appeal No. 374 of 2020) [2024] TZCA 269 (16 April 2024). It is settled that naming the suspect at the earliest opportunity was also significant in giving assurance that the identifying witness is reliable. The Court of Appeal in Mafuru Manyama & Others vs Republic (Criminal Appeal 256 of 2007) [2011] TZCA 129 (18 February 2011) quoted with approve its position in Marwa

Wangiti Mwita and Another v. Republic, Criminal Appeal No. 6 of 1995 (unreported) that- "The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry." The victim named the appellant to Daniel Mataya (Pw2) as her rapist and directed them where he had escaped to and as a result the appellant was arrested. She caused the appellant's arrest shortly after she reported to Daniel Mataya (Pw2). I am of the firm position that the victim recognized the appellant, thus, the appellant's defence of alibi did not raise reasonable doubt to the prosecution's recognition evidence. I am alive of the principle that in a criminal case whose determination depends entirely on identification evidence, conditions 8 favouring a correct identification is of utmost important. In the present the case the victim and the appellant were familiar to each other. The victim lit at the appellant when he broke in to her room with a torch. She did not describe the intensity of the torch but she testified that she identified him. She also described that the appellant had intercourse with her for a second round and she identified him. After she alarmed and the appellant escaped, she identified and pointed to Daniel Mataya (Pw2) when he escaped to. The appellant was found hiding where the victim had told Daniel Mataya (Pw2) and neighbours that he escaped too. With that evidence coupled with the fact the victim named the appellant at the earliest opportunity proves that she had properly recognized him. The appellant complained that the caution statement was recorded after six-hours from the time of his arrest contrary to section 50(1) of the CPA. For that reason, it was improperly admitted. The learned state attorney opposed the allegation and submitted that the statement was recorded within time permitted. He submitted that the prosecution gave evidence that the appellant was arrested at 08:00 am and he was taken to the victim's house. He was interviewed and handed to the village militiamen who took him to Katesh police station. No. PF 21954 A/Insp. Elias (Pw4) deposed that the accused was taken to Katesh police station 9 where he reached at 12:00pm and he interrogated at 02:00pm. He concluded that the statement was recorded within time. I went through the record and found that the appellant retracted the confession saying that he did not make it as a free agent. The trial court conducted an inquiry. The trial court titled the inquiry as a trial within trial. I am of the view that error is not fatal as whether it is an inquiry or a trial within trial, the difference is just a nomenclature, the procedure, and the purpose of conducting either an inquiry or a trial within trial, are the same. Unfortunately while conducting an inquiry, the trial court called upon the appellant to testify first as if he had a duty to establish that he was tortured instead of calling the prosecution establishing that the appellant gave the statement as a free agent. The trial court shifted the burden of proof to the appellant. In a criminal trial, the accused person has no duty to prove anything unless the law specifically gives him that burden. (See section 3(2) of the Evidence Act, [Cap. 6 R.E. 2022]. As the record bears testimony, No. PF 21954 A/Insp. Elias (Pw4) did not testify regarding the time the accused was taken to police station while giving evidence in the main case. No. PF 21954 A/Insp. Elias (Pw4) gave evidence as to the time the appellant was taken to police during the inquiry proceedings when he testified as No. PF 21954 A/Insp. Elias 10 (Dw1). The evidence given during the inquiry cannot be applied in the main

case. Hence, I find that the prosecution did not establish when the appellant reached the police station. It is very likely that the appellant reached the police station as he alleged at 08:00am and No. PF 21954 A/Insp. Elias (Pw4) interviewed him at 14:00pm as shown in the caution statement. I therefore, give the appellant the benefit of doubt that the caution statement was recorded out of time specified under section 50(1) of the CPA and expunge it from the record. The appellant complained that his defence was not considered. I examined the record and found that the trial considered the defence but did not find it worth. The fact that the trial court considered the appellant's defence is evident at page 8 of the trial court's judgment. Even, if the trial court did not consider the defence, the fact that this first appellate court has considered the appellant's defence of alibi, cures the irregularity. The appellant complained further that the trial court did not comply with section 9(3) and section 291(1) of the CPA. The state attorney submitted that the appellant prayed to be given the victim's statement as shown at page 33 and applied for adjournment to go through the statement. The Court adjourned the case to another date. On the date fixed for hearing the appellant did not complain that he was not given a copy. The court record does not show that he was given a copy but the fact that the appellant did not complain that he was not given a copy is a proof that he was given a copy as he requested. Indeed, the appellant prayed for a copy of the victim's statement. The prosecution promised to give him a copy. The appellant prayed for an adjournment to go through the statement and the trial court granted the prayer. When the trial resumed, the appellant did not complain that he was not supplied with the copy he had prayed for. I agree with the state attorney that the appellant's failure to complain that the prosecutor did not give him the copy of the statement raises a reasonable presumption that the prosecutor supplied him the copy as he requested. It is settled that a fact may be proved by conduct of the parties. I find no merit in the complaint. Lastly, the appellant complained that section 291(1) of the CPA was not complied with. Section 291(1) of the CPA provides that- "291.-(1) In any trial before the High Court, any document purporting to be a report signed by a medical witness upon a purely medical or surgical matter, shall be receivable in evidence save that this subsection shall not apply unless reasonable notice of the intention to produce the document at the trial, together with a copy of the document, has been given to the accused person or his advocate." 12 I wish to say that section 291(1) of the CPA does not apply to the trial before subordinate court. For that reason, the complaint is baseless. I find, without hesitation, that the appellant had carnal knowledge of the victim without her consent. He raped her. The trial court was right to convict the appellant. I uphold the conviction and since the sentence imposed was the minimum sentence, I uphold the sentence. Consequently, I hold that the appeal is meritless and dismiss it in its entirety. Dated at Babati this 30th day of October, 2024 John R. Kahyoza Judge Court: Judgment delivered in the presence of the appellant and Ms. Blandina Msao the learned State Attorney representing the Respondent. Right of appeal explained. B/C. Mr. Shadrack (RMA) present. John R. Kahyoza Judge

30. 10.2024 13

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/320273/source_file/f4f519e752c7684d/Emanuel_Joseph_vs_R_edited_2222.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/emanuel-joseph-v-the-republic-Rape-tanzlii-2027--6a3ea52e3b1caa91298271a4>

Prepared on 13 October 2026 · Esheria