

TANZANIA / JUDGMENT

EMMANUEL JUMA VERSUS REPUBLIC JUDGMENT

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28 August 2024

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IN THE HIGH COURT OF TANZANIA DODOMA SUB-REGISTRY AT DODOMA DC. CRIMINAL
APPEAL NO. 13347 OF 2024 (Arising from the Manyoni District Court in Criminal Case No. 54 of
2023) BETWEEN EMMANUEL JUMA APPELLANT VERSUS THE REPUBLIC
..... RESPONDENT

JUDGMENT

Date of the last order: 28/08/2024 Date of the Judgment: 04/09/2024 LONGOPA, J.: The appellant stood charged before the District Court of Manyoni and he was convicted of the offence of rape contrary to section 130(1),

- (2) (e) and the 131(1) of the Penal Code Cap 16 R.E. 2022. The Court proceeded to sentence him to serve thirty (30) years custodial sentence. The appellant was aggrieved with the whole of the decision of the Court thus filed this appeal on this appeal is against both conviction and sentence on the following grounds, namely: 1|Page
1. That, the trial court magistrate erred in law and in fact when accepted the exhibit as documentary evidence and not proving that there was penetration as required evidence proving the commission of the offence of rape badly enough relied on assumption which resulted to the wrongly conviction of the Appellant.
 2. That, the trial court erred in law and in fact by relying on PW1's evidence while PW1 was told by victim in regard with the commission of the offence there for hearsay evidence must not be accepted because it is second hand information.
 3. That, the trial court erred in law and facts by not according the required weight to the evidence of the Appellant and thus convict the Appellant.
 4. That, the trial court magistrate erred in law and in fact for failure to evaluate the evidence adduced by the appellant since the prosecution hand miserably failed to prove their case beyond reasonable doubt.

5. That, the trial court magistrate erred in law and in fact by grounding convict the Appellant in which there was weakens evidence by the respondent. It was on 28th August 2024 when the parties appeared before me for viva voce. Mr. Francis Mwakifuna and Ms. Victoria Njau, learned State Attorneys appeared for the Republic while the appellant appeared in person to fend for himself. 2|Page The appellant prayed to adopt the whole of the grounds of appeal as contained in the Petition of Appeal. He reiterated that all the grounds are self-explanatory thus valid. The PW1 was that victim's mother who testified about the hearsay evidence. The evidence of victim was contradicting with that of PW1. The disparities on the place where examination of the victim medically was done as PW 1 named a different place while the victim named a totally different place too. Also, the appellant argued that there was no DNA test conducted to validate that the appellant is the one who committed the crime. Further, he reiterated that though the offence is allegedly to have happened at 14:00 hours, it took all the time to 21:00 hours for the appellant to be arrested. It is doubtful that there might be instances of someone else having had sex with the victim. For the respondent, Mr. Francis Mwakifuna learned State Attorney argued that all the grounds of appeal have no merits at all. On first ground regard documentary evidence, it was submitted that PF3 which was tendered by PW3 a medical doctor who testified to have examined the victim and found bruises, discharge from the private parts and the same arose from penetration by blunt object thus Exhibit G1. The appellant did not object tendering of the same. Also, during cross- examination PW3 stated the methodologies applied in the examination. The PW3 proved penetration was there. The first ground is devoid as the medical doctor provided details of all the examination findings. 3|Page In respect to 2nd ground, it was submitted that PW1 is the one who received the report of rape incident from the victim. She received the information directly from the victim, they physically checked and found that there are elements of being penetrated. The evidence of PW1 and PW2, the places the victim's and her mother went were Police and hospital. Thus, there was no contradiction as per evidence in page 6 and 7 of the proceedings. The evidence was not contradictory at all. They all stated to have gone to Ntumbi Health Centre and PW3 came from that Health Centre. On third ground the defence evidence consideration, it was submitted that the trial Court did prove the case beyond reasonable doubt as the evidence of the prosecution was so tight to warrant conviction. The defence evidence was considered. It was reiterated that the defence evidence could not dent the strong evidence of the prosecution including that of the victim, the victim's mother and medical doctor. The case of Selemani Makumba vs Republic, the victim's evidence is the best evidence in sexual offences. At page 7 of the proceedings, the victim categorically stated about the incident that was committed by her relative well known to the victim. This third ground has no merits as the testimony of the victim lucidly established the offence. On the 4th and 5th grounds, it was submitted that the prosecution managed to prove its case beyond reasonable doubt. They have no 4|Page merits. The prosecution called a total of four (4) witnesses who testified PW1 the victim's mother informed the Court that victim informed her that the appellant raped her. PW2, victim of the offence at page 7 warranted to have been called and that her clothes were undressed and then raped. She immediately reported to her mother. PW3 corroborated that examined the

victim and found penetration through bruises and discharge that established penetration by blunt object. PF3 was tendered, admitted read and formed part of the evidence of the prosecution. It is submitted that the offence was proved beyond reasonable doubts. There are no merits on the appeal. There was nothing to affect the strengths of the prosecution evidence. Thus, there was prove to the required standard. We pray that appeal be dismissed and the conviction upheld. The appellant has nothing to rejoin except stating that he is not related to the victim and her mother at all. The case was only because of dispute over land existing between then whereas the victim's family wishes to grab the land belonging to the appellant. Having heard the parties on the grounds of appeal, I have dispassionately considered the proceedings and judgment of the trial court, and it is this Court now is enjoined to determine validity or otherwise of this appeal. 5|Page The tendering of documentary evidence is normally tendered to substantiate or support the oral testimony. The medical report is supporting evidence to the oral testimonies in establishing the ingredients of the offences. In the case of Christopher Marwa Mтуру vs Republic (Criminal Appeal 561 of 2019) [2022] TZCA 652 (27 October 2022) (TANZLII), at pages 10-11, the Court of Appeal of Tanzania stated that: Furthermore, in sexual offence cases, the testimony of the doctor is not the only evidence to prove the offence, other evidence on the record can as well prove it. Specifically, in Edward Nzabuga (supra), the Court having considered as whether the expert's opinion or production of medical report (PF3) overrides oral evidence by witnesses who witnessed the incident, it stated that the sexual offence can be proved orally without an expert opinion or oral evidence by experts i.e. without a doctor who examined the victim testifying in court and/or tendering a PF3. Similarly, in the case at hand, we are satisfied that, even without the evidence of the doctor, the testimony of PW2 and PW3 is quite sufficient to prove the offence the appellant was charged with. It is evidence of PW 3 that she examined the victim and found that the victim had bruises in her private parts. It was PW 3 testimony that 6|Page the bruises might have caused by a blunt object say male sexual organ. It was PW 3's testimony that he filled in a PF 3 which he could identify it. There are three main aspects indicated on record with regard to PF 3 which is the only documentary evidence in this case. First, PW 3 stated the manner in which he could identify the PF 3 including her signature, handwriting and seal of the duty station of Ntumbi Health Centre. Second, the appellant did not object tendering of the PF 3 thus the same was tendered, admitted and marked as Exhibit J.1 thus forming part of the evidence on record. Third, the contents of Exhibit J.1 was read in court before the accused person. These aspects reveal compliance with the procedure for tendering documentary evidence. The law is settled that any documentary or exhibits must undergo three processes in tendering them. In the case of Robinson Mwanjisi and Three Others vs. R. [2003] T.L.R. 218, at 226, the Court of Appeal stated that: Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Indeed, reading out the contents of the document so admitted is an important stage of the trial in the sense that it avails the accused with the right to prepare its defence well beforehand. It explains all or 7|Page some of the ingredients of the offence for which the accused stand charged. In cross examination by the accused, PW 3 stated that the victim had

some bruises signifying that she was raped and that it is blunt object a male sexual organ that seems to have caused the bruises in victim's vagina. Also, PW 3 found that virginity of the victim was perforated. The complaint by the appellant that admission of the documentary evidence was improper to establish the offence of rape is far-fetched. It does not reflect the truth. The Exhibit J.1 was tendered in accordance with the requirements of the law and it was a corroborative evidence of the victim's testimony that she had a sexual encounter with the appellant which contravened the law. I shall overrule the first ground of appeal for being devoid of merits. The second aspect related to complaint on failure to consider defence testimony in course of determination of the case before the trial court. It is a law that failure to consider defence evidence vitiates the decision. This is a principle in the case of Leonard Mwanashoka vs Republic (Criminal Appeal 226 of 2014) [2015] TZCA 294 (24 February

- 2015) (TANZLII), at page 6, the Court of Appeal noted that: We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. The appellant's defence was not considered at all by the trial court in the evaluation of 8|Page the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice. It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction. I have perused both proceedings and judgment of the trial court. The judgment reveals that evidence of the defence was summarized within the judgment. Also, the evidence was critically evaluated and weighed against prosecution evidence in order to determine if the defence evidence had poked holes in the prosecution's evidence. The only aspect from defence case is that appellant was trying to raise a defence of alibi. However, the record indicates that such probable defence was raise in contravention of the law. It was correct for the trial court to exercise its discretion to accord no weight or lesser weight to the defence of alibi that is raised in contravention of the law. This is a principle stated in the case of Mohamed Hussein Pagweje vs Republic (Criminal Appeal 557 of 2017) [2021] TZCA 709 (1 December
- 2021) (TANZLII), at page 12, the Court of Appeal stated that: 9|Page It was the appellant's claim that on the material night he was at Arusha. It is on record that the appellant raised this defence at the stage when the prosecution case had been closed hence in contravention of section 194 (4) and (5) of the CPA. In such circumstances and in terms of section 194 (6) of the CPA the trial court had to consider it but it had the discretion to accord it no weight or lesser weight- see Mwita s/o Mhere and Ibrahim Mhere v. R [2005] T.L.R. 107 and also Sijali Juma Kocho v. Republic [1994] T.L.R. 206. Thus, any complaint on the failure to consider defence evidence is far fetched and has nothing to do with truth of the matter. The second ground of appeal thus crumbles naturally. The remaining grounds can be summed up in a single broader ground on failure to prove the case to the required standard. This broad

ground caters for three main aspects. First, the burden and standard of proof. Second, elements of offence of rape. Third, evaluation of available evidence in relation to proving the case. It is settled law in this jurisdiction that it is the onerous duty of the prosecution to prove a criminal case against the accused person and the standard of proof is that of beyond reasonable doubts. This is in line with section 2(a) of the Evidence Act, Cap 6 R.E. 2022 which states that: 10 | Page

(2) A fact is said to be proved when-

- (a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists. This principle on the burden and standard of proof have been reiterated in the case of Hezron Ndone vs Republic (Criminal Appeal No. 263 of 2021) [2024] TZCA 15 (6 February 2024) (TANZLII) at pages 12-13, where the Court of Appeal of Tanzania observed lucidly that: It is momentous to state that, in our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution. This is a universal standard in all criminal trials and the burden never shifts to the accused. As such, it is incumbent on the trial court to direct its mind to the evidence produced by the prosecution in order to establish if the case is made out against an accused person. This principle equally applies to an appellate court which sits to determine a criminal appeal in that regard. The term beyond reasonable doubt is not statutorily defined but case laws have defined it, in the case of Magendo Paul & Another v. Republic (1993) T.L.R. 219 the Court held that: “For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a 11 | Page remote possibility in his favour which can easily be dismissed.” The appeal at hand being a criminal appeal, it is incumbent to this court to determine as the trial court had whether or not the prosecution managed to prove the case to the required standard and discharged its burden of proof. Illustratively, to prove the case to the required standard entails role of prosecution to adduce evidence that is sufficient to establish existence of all ingredients of the offence. The offence of rape in the circumstances of the case has two main elements, namely the penetration of female sexual organ by male sexual organ and age of the victim should be below the age of 18 years old. However, if the victim is an adult then there must be proof the lack of consent to the sexual encounter. Upon critical evaluation of the available evidence on record, it is settled view of this Court that sufficient evidence was laid before the court to prove commission of offence of rape. The oral testimony of PW 1 testified to the effect that PW 1 reported to her immediately on the occurrence of the offence, PW 1 took the victim to police for reporting whereas PF 3 was given to take the victim to medical examination at a Health Centre. PW 2 who is the victim stated that on 24th March 2023 around mid-day the accused called the victim inside the house while the appellant sent other children to go at the farm to take a hoe. It was PW 12 | Page 2 testimony that the appellant undressed the victim and inserted his “dudu” in victim’s vagina. According to PW 2, the victim felt so painful but she could not shout for help as the appellant grabbed the victim. The incident was reported immediately to her mother who took the victim to police then taken to Health Centre. It is this evidence

of PW 2 that was corroborated by the testimony of PW 3 that penetrative action happened into the victim's vagina. Indeed, Exhibit J.1 which was uncontested documentary evidence concludes it all. In this jurisdiction there are different ways of expressing penetration. In *Hamis s/o Kayanda vs The Director of Public Prosecutions* (Criminal Appeal 166 of 2018) [2021] TZCA 487 (17 September 2021) (TANZLII), at pages 9-10, the Court of Appeal stated that: In our view, the above piece of evidence proved penetration of the victim's genitalia by the appellant's male sexual organ. There are many expressions by victims of sexual violence and those various forms, however implicit and encrypted, are all acceptable in courts. In the case of *Hassan Kamunyu v. R*, Criminal Appeal No. 277 of 2016 (unreported), this Court of Appeal observed that: "Thus words like "[he] removed my underwear and started intercoursing me" in *Matendele Nchanga @ Awilo* (supra), "sexual intercourse" or "have sex" in *Hassan Bakari @ Mamajicho* (supra), "[he] undressed me and started 13 | P a g e to have sex with me" in *Nkanga Daudi Nkanga* (supra), "kanifanyia tabia mbaya" in *Athumani Hassan* (supra), "alinifanya matusi" in *Jumanne Shabani Mrondo* (supra) or "he put his dudu in my vagina" in *Simon Erro* (supra) 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" in *Baha Dagari* (supra) were, though not explicitly described, taken by the Court to make reference to penetration of the penis of the accused person into the vagina of the victim." As the victim in the instant case stated in both examination in chief and in cross examination that the appellant inserted his "mdudu" or "dudu" in her vagina after undressing her, such words fall within the meaning of penetration as per the principle in the cited case. Moreover, PW 2 stated that he knows the appellant as the person who defiled her on that material date at midday hours. PW 2 categorically stated the ordeal that she felt painful by the insertion of the appellant's penis in her female genitalia thus reported the matter immediately to her mother, PW 1. 14 | P a g e In the case of *Denis Joseph @ Saa Moja vs Republic* (Criminal Appeal No. 121 of 2021) [2023] TZCA 104 (13 March 2023) (TANZLII), at page 9, the Court of Appeal stated illustratively that: It is trite law in our jurisdiction that, the best evidence in the offence of rape is that of the victim of the offence. In the celebrated case of *Seleman Makumba* (supra), the Court stated thus: "True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration." As a result, the evidence of PW 1 and PW 3 was only corroborative in nature. It was the evidence of PW 2 that had established the element of penetration of the victim's vagina by the male sexual organ. The role of the PW 1's testimony was only to support that of PW 2 that upon receipt of the report of incident of rape she took the victim to the police station for reporting and then to medical examination. It corroborated the credible victim's evidence that was not shaken by the defence even during cross examination. Similarly, in *Wambura Kigingwa vs Republic* (Criminal Appeal 301 of 2018) [2022] TZCA 283 (13 May 2022) (TANZLII), at page 28-29, the Court of Appeal reiterated that: 15 | P a g e In all categories of rape, the basic ingredient for the prosecution to prove is penetration of the female genitals by the male sex organ. When it comes to statutory rape, there is an additional burden of proof of age of the victim in order to ascertain that at the time the offence was committed

she was below eighteen (18) years of age since birth. The first appellate court agreed with the trial court and dismissed the appeal having agreed that the evidence of the prosecution witnesses was credible. Likewise, we must observe at this juncture that, the cross examination of the appellant to the victim did not shake the girl's truth. Her evidence remained the best, for she was the victim of the crime and the appellant, her aggressor. We find no reason to fault the two courts below for having accorded the prosecution evidence credence and belief. Further we find no good reasons for questioning the credibility of the prosecution evidence. Evidence of PW 2 and PW 3 categorically stated that there was penetration of the victim's vagina, thus the crucial aspect of the offence was proved. Further, the age of the victim was established by the evidence PW 1, PW 2 and PW 3. PW 1 stated that victim is aged eight (8) years old. 16 | P a g e PW 2 also re affirmed that she is 8 years old. That is what is reflected in the Exhibit J.1 which is PF 3 indicating age of victim to be 8 years old. Age of the victim can be proved by different mechanisms including the evidence of the victim himself, parents, school records or medical record that has indicated the age. In the case of Hassan Bundala @ Swaga vs The Republic (Criminal Appeal 386 of 2015) [2015] TZCA 261 (23 February 2015), at page 4, the Court of Appeal observed that: Not only was the age of the victim mentioned in the charge sheet but the medical evidence through PW6 and the PF3, exhibit PE1 showed that the victim was aged 8 years when she was raped. The appellant did not challenge this evidence then and he can't be heard at this stage to say that the age of the victim was not proved. The same principle was reiterated in the case of Jafari Juma vs Republic (Criminal Appeal 252 of 2019) [2023] TZCA 216 (3 May 2023) (TANZLII), at page 14, the Court of Appeal of Tanzania stated that: It is a peremptory principle of law that in statutory rape cases like the one before us, the age of the victim must be proved. Mr. Mtoi, referred us, to the case of Leonard Sakata (supra) where the Court underlined in imperative terms that in cases of statutory rape, age is an important ingredient of the offence which must be 17 | P a g e proved. There is in this regard an array of authorities to support this settled position of the law, see for example Rwekaza Bernado v. Republic, Criminal Appeal No. 477 of 2016, Mwami Ngura v. Republic, Criminal Appeal No. 63 of 2014 and Solomon Mazala v. Republic, Criminal Appeal No. 136 of 2012 (all unreported). In the instant case, the age was proved by oral testimonies of PW 1, the victim, PW 2 the parent and PW 3, a Clinical Officer who examined the victim medically to establish if PW 1 was raped. Indeed, Exhibit J.1 vividly reflected that there was presence of bruises on labia minora and presence of sperms represents penetration. Exhibit J.1. states that expected age of the victim is 8 years old. In cross examination, the contents of Exhibit J.1 was not challenged seriously to poke holes on the prosecution's evidence. I am of the settled view that available evidence is sufficient to warrant conviction of the appellant as it was coherent and credible pointing only to one direction that it is the appellant who was the aggressor against the victim, a child girl of 8 years old. The 2nd, 4th and 5th grounds of appeal are entangled with lack of merits thus deserved to be dismissed for lack of cogent merits. It is the position of this Court that those three grounds shall stand dismissed. 18 | P a g e Conclusively, the analysis and re-evaluation of the evidence on record reveals that the District Court of Manyoni acted correctly within confines of the law to convict and sentence the appellant to serve 30 years

imprisonment as per requirements of the law. At this juncture, I shall proceed to uphold the conviction, sentence and order of the District Court of Manyoni dated 28th December 2023. The appeal against conviction and sentence is hereby dismissed for want of merits. It is so ordered. DATED at DODOMA this 4th day of September 2024. E.E. LONGOPA JUDGE
4/09/2024. 19 | P a g e

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Prepared on 14 October 2026 · Esheria