

TANZANIA / JUDGMENT

fadhili hussein mohamed vs republic

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
MTWARA DISTRICT REGISTRY AT MTWARA CRIMINAL APPEAL CASE NO 35 OF 2023
(Originating from Masasi District Court at Masasi in Criminal Case No 79 of 2021) FADHILI
HUSSEIN MOHAMED..... APPELLANT VERSUS THE
REPUBLIC RESPONDENT

JUDGMENT

2(7 & 3(7 October 2023 LALTAIKA, X The appellant herein FAD HILI HUSSEIN MOHAMED was arraigned in the District Court of Masasi at Masasi charged with the offence of rape c/s 130(1) and (2) (e) and section 131(1) of the Penal Code Cap 16 RE 2019. When the charge was read over and explained to the appellant (then accused) he denied wrongdoing. This necessitated conducting a full trial. The prosecution paraded 5 witnesses including the victim. On 5/5/2022 the trial court convicted the appellant as charged and sentenced him to 30 years imprisonment. Page I of 12 Noteworthy; this is the second time that this appeal is preferred in this court. Initially the appellant's complaint, as can be gleaned from the five initial grounds of appeal were centered on 1. Proof beyond reasonable doubt 2. Lack of consideration of the defence case 3. Inability to explain the rights of the accused to defend himself. 4. Lack of conviction 5. Change of magistrate. After hearing the appeal on the 5/12/2022, this court proceeded to decide the matter on the 5th ground only namely change of magistrate. The trial magistrate was ordered to compose a proper judgement and use her official name, in compliance with the order, Hon. R.Y. Idd SRM composed a judgement and sentenced the appellant to 30 years in prison insisting that the sentence started running when the first judgement was delivered. The present appeal is based on such a judgement. When this appeal was called for hearing on 20/10/2023 the appellant was present while enjoying the legal services of Ms. Radhia Abdalah Luhuna, learned Advocate. The respondent Republic, on the other hand, appeared through Mr. Melchior Hurubano, learned State Attorney. As she took the podium, Ms. Luhuna asserted that she had three grounds of appeal to argue namely: lack of proof beyond reasonable doubt, not considering the defence case, and improper conviction. In addressing the first ground, the learned Advocate forcefully submitted that section 3(2)(a) of The Evidence Act Cap 6 RE 2022 (herein after TEA) required the prosecution to prove their case beyond reasonable doubt. She argued that this did not happen in

the matter at hand, Page 2 of 12 as there were many gaps that, if considered, would have led to a different

conclusion.

She pointed out that the first doubt was -nQnCo'in|jiiant0x.-V)f;iM: section 127(2) of TEA, which required the evidence of a child of tender age to be taken after the child had promised to tell the truth and not to tell lies. She argued that a child below 14 years of age is not obliged to take an oath but is required to promise to tell the truth. Ms. Luhuna referred to the case of Godfrey Wi Ison versus Republic Crim Appeal No 168 of 2018, where the Court of Appeal of Tanzania (herein after CAT) discussed the requirement for compliance with section 127(2), stating that there was a need to comply with this section in the present case. Referring to the trial court's proceedings, she stated that the court asked PW1 (the victim) questions about whether she knew what she was about to explain and make a promise. The victim promised to tell the truth, but Ms. Luhuna argued that this promise did not meet the requirements of section 27(2) of TEA, which specifies that the child must promise not to tell lies. Instead of promising to tell the truth, the victim asserted that telling lies was a sin. Ms. Luhuna further argued that even on the evidence of PW2 (also a minor at 14 years old), there was no compliance with section 27 of TEA. She pointed out that the evidence of both PW1 and PW2, extracted in a non-compliant manner, should be expunged from the records. ■ Page 3 of 12 Moving on to another doubt, Ms. Luhuna raised the issue of the court or the prosecution's failure to read out the charge sheet at the commencement of the case and during the defense. She argued that there was no indication in the entire proceedings that the charges were read over to the appellant. She emphasized that the duty of reading out charges lies with the prosecution and that this omission was fatal, citing the case of Vitalis: Kyaboha Hagai v. Republic Criminal Appeal No 188 of 2016. Ms. Luhuna prayed that the court make a finding that the omission in this case was fatal, resulting in 'no fair trial for the appellant. On the second ground, of appeal, Ms. Luhuna forcefully asserted that there was a lack of consideration of the defense case during the composition of the judgment. She argued that upon reviewing the entire judgment, it became apparent that the trial magistrate had not taken the appellant's evidence into account, particularly evident in the analysis conducted on pages 7-10, which exclusively focused on the prosecution's evidence. Ms. Luhuna contended further that the trial court, regardless of the weakness or the defense case, was obligated to analyze evidence from both sides. However, she claimed that the trial court failed in this duty, deeming it fatal. She cited the CAT case of Hussein Idd and Another v. Republic

[1986] TLR 283, underscoring that a similar decision was emphasized in the case of Abel Masikiti v. Republic Crim-Appeal- No 24 of 2015 (TANZLII) page 9. Ms. Luhuna suggested that, in line with the Masikiti case, the finding should be nullified; as indicated on page 10. In that regard, Ms. Page 4 of 12 Luhuna prayed for the court to recognize the omission as improper and requested the release of the appellant. Arguing in support of the third ground of appeal, Ms. Luhuna quickly stated that she decided to abandon this ground and proceed to the conclusion. She pointed out that on page 10 of the trial court proceedings, the appellant had posed a question to the victim (PW1), and the response was, "n i m ekuj

a kuzungu mza ya I e n iliyo a m biwa sha mba n iA Ms. Luhuna contended that this indicated that the evidence of PW1 was fabricated and not based on truth. She suggested that if the appellant had been knowledgeable in law, he could have asked .more questions to reveal the illegality. Ms. Luhuna acknowledged that ignorance of the law is not a defence and failure to cross-examine is considered agreement. Despite this, she argued that the simplicity of the question highlighted the pre- prepared nature of the evidence. Addressing- other evidence presented by the prosecution, Ms. Luhuna stated that it indicated a delayed report of the incident, extending to the appellant's apprehension and subsequent arraignment in court. The matter was reported to the police on 8/12/2020, yet the appellant was not arraigned until 1.5/7/2021, with no provided reason for the delay. In conclusion, Ms. Luhuna argued, based on the reasons and authorities cited, along with considering the time spent by the appellant in remand custody until his sentencing in 2022 and the current appeal in 2023, Ms. Luhuna prayed for the appeal to be allowed and for the appellant to be set free. Page 5 of 52 Mr. HurubariO/ the learned State Attorney, started off by initially acknowledging and responding to the issues raised by Ms. Luhuna during the conclusion. He acknowledged that the incident was reported on 8/12/2020, as mentioned in the charge, and explained that the time lapse until arraignment depends on the sufficiency of evidence, with no guaranteed timeline. Continuing his response, he argued that the alleged rape occurred in the farm "shamba /a mikoroshok'According to Mr. Hurubano, the appellant had conveyed various messages to the victim both before, during, and after the incident, including warning her against reporting the matter to the police. He asserted that this-, explained the child's response during cross- examination, emphasizing that her language was not expected to mirror that of an adult. Mr. Hurubano also observed that Ms. Luhuna had concentrated more on the proceedings than on establishing the innocence of her client, Mr. Hurubano, in his argument against the second ground of appeal, expressed agreement that the trial court did not consider the defense evidence. However, he disagreed with the idea that the court could nullify the judgment. Referring to the CAT case of Bulai v. R. Crirn App No 46 of 2006 CAT, 'Dar (TANZLII) page 13, he pointed out that the CAT was of the opinion that in the event of the trial court's inability to consider defense evidence, the appellate court could step into the shoes of the trial court and formulate its own findings. Mr. Hurubano pleaded with this court to evaluate the evidence presented by the appellant and arrive at its own findings. i'nuc 6 of 12 Mr. Hurubano, opposing the first ground of .appeal?addressed the assertion of failure to prove the prosecution case. He acknowledged the first allegation concerning noncompliance with section X27(2)of TE% arguihg that the language used by the minors is open to interpretation and may vary. He contended that section 127(2) has no prescribed formula for how a child of tender age should promise a court to tell the truth and not to tell lies. Mr. Hurubano argued that the language used by the children was sufficient to show their intention to tell the truth. He questioned the applicability of the case of Athumarii Mussa (supra), which, being a High Court-case, he clai med does not' bind this court. Mr? Hurubano emphasized that the child in that case did not promise at all to tel! the truth, unlike in the present matter where the focus is on the language used. Regarding

the omission to read the charge during the commencement of the prosecution and defense cases, Mr. Hurubano disagreed with -the appellant's counsel. He asserted that the charge was read over to the accused, and the court adjourned the matter several times. He argued that the case of Magai (supra), which is not binding on this court, differs as the trial court in that case had. not reminded the accused person of his charge before the commencement of the Preliminary Hearing (PH). Mr. Hurubano stated that the case was proved beyond reasonable doubt and highlighted the significance of the victim's evidence, citing section 127(G) and the case of Mohamed Said versus Republic Crim Page 7 of 12 Appeal No 145 of 2017. He emphasized that credibility of the victim must be tested, and, in this case, there was no contradiction in her evidence. In rejoinder, Ms. Luhuna focused on the issue of meeting at the shamba, asserting that the appellant did not mention the shamba but rather "njisam kuelekea shariibani," indicating a lack of connection between the evidence of the appellant and the victim. She expressed gratitude for the acknowledgment that the defense evidence was not considered, citing the case of Masikiti and claiming that it renders the entire judgment a nullity. Ms. Luhuna addressed the case of Athurnani (supra), acknowledging its non-binding nature but arguing that it is not barred from being referred to. She emphasized the clarity of section 127(2) of TEA, stating that although there is no prescribed formula, the child must promise to tell the truth and not to tell lies, She concluded by praying for the dismissal of the appeal for lack of merit. Ms. Luhuna, submitting further in her rejoinder, addressed the issue of the statement asserting that telling lies is a sin, stating that it is not sufficient to demonstrate a promise not to tell lies. She emphasized that the witnesses, PW1 and PW2, merely asserted that telling lies is a sin but did not explicitly promise not to tell lies. Ms. Luhuna argued that this lack of a direct promise constitutes non-compliance with section 127(2), and, invoking the case of Athumani, she prayed for the expungement of the related evidence. Page 8 of 12 Furthermore, she noted that the learned State Attorney referred to the case of Jonas Bulayi (supra), a 2006 case, but she insisted that more current decisions, such as the Masikiti's case of 2015, hold more weight and are more binding as they are CAT cases. Ms. Luhuna expressed concern that allowing the court to step into the shoes of the trial court based on Jonas Butoyi could create loopholes for lower courts to leave gaps in their judgments. Regarding section 127(6) of TEA, which states that the evidence of the victim alone is sufficient, Ms. Luhuna highlighted that the provision also requires the court to be convinced that only the truth was spoken by the victim. She focused on the victim's words, "niliyo ambiwa kule shambaHii," asserting that the emphasis should be on the fact that she was asked to tell the truth. * She argued that the victim was told by another person, not the appellant, as indicated by the question coming from the appellant himself and being replied to by the victim. Ms. Luhuna contended that this aligns with the requirements of logic and consistency, as stated in the case of Shabani. She further argued that there was no corroboration between the victim's evidence and that of the appellant, making the cases of Sha'bani and Marvva inapplicable. In conclusion, Ms. Luhuna reiterated her submission in chief and the authorities cited, praying for the release of the appellant, and urging the court to allow the appeal. I have dispassionately considered the rival submissions and have keenly reviewed

the lower court's records. Page 9 of J 2 Tn criminal law, we do not assume that a witness wanted to say something even though he/she ended up saying something else completely different. We cannot enter into the mind of the victim herein, a child of tender age, and somehow conclude that she wanted to say something she did not. We can only connect the dots bearing in mind that a child cannot be expected to be spotless in her testimony. In this regard, I agree with the learned State Attorney that this court should not impose a very strict requirement of precision of speech to a child of tender age. That is totally fine. However, I have compared such advice with Ms. Luhuna's submissions, and it appears to me that logic favours the latter. Promising to tell the truth and being aware that telling lies is a sin are not the same thing. The former is anchored on informed consent while the latter is supported with fear. Several approaches have been employed by courts throughout the world with the aim of devising better ways on how to engage children in testifying in Court. See Prefafirtg Cbifdren- far Court: A Practitioner's Department of Justice: Justice Program 2000). The emphasis is always to try and relieve the child of all real and perceived fear. Fear as used in this context, can be triggered by a wide range of stimuli, including physical danger, social situations, uncertainty, or even abstract concepts. It can manifest in different intensities, from mild anxiety to overwhelming terror, and can have both short-term and long-term effects on an individual's thoughts, feelings, and behavior. Children who are raised in religious environments where the concept of hell is emphasized may Pitge U) of U develop a fear of hell as part of their moral and spiritual education. This is hot . what the legislator indeed to guide courts in extracting eyidenceW children. The legislator wanted a child to be free from any dogmatic instructions and testify to what he/she knows to be true and to have happened. I think it would be dangerous to entertain children who come to court as witnesses while harboring deep inside them the fear of committing a sin and ending up in a lake of fire commonly knowm as hell. The court may hot be able to tell whether the evidence is truthful or is an extension of that fear. The evidence of PW1 is therefore, expunged from the court records. I think I should employ some emphasis here with regard to the admission by the learned State Attorney that the learned Magistrate did not consider the defence evidence. This is a very serious omission. I subscribe to Ms.. Lu h u na's su b m issi o n based on the CAT■ case of ■ H u ssei n Idd a nd Another v. Republic [1986] TLR 283, underscoring that a similar decision, was emphasized in the case of Abel Masikrti v. Republic Crim Appeal No 24 of 2015 (TANZLII) improper and requested the release of the appellant. Premised on the above, I hereby order that the appellant MDHILI HUSSEIN'MOHAMED be released from prison forthwith unless he is being held for any other lawful cause. It is so ordered.

30.10.2023 Page 11 of 12 Court Judgement delivered under my hand and the seal of this court this 30ln day of October 2023 in the presence of Mr. Steven Aron Kondoro, learned State Attorney and the appellant and the appellant. JUDGE 30^0,2023' Court The right to appeal to the Court of Appeal of Tanzania is fully explained.

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