

TANZANIA / JUDGMENT

felix raphael john v republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF BUKOBA AT BUKOBA CRIMINAL APPEAL NO. 18 OF 2023 (Arising from Criminal Case 88
of 2022 District Court of Bukoba) FELIX RAPHAEL JOHN.....
APPELLANT VERSUS REPUBLIC..... RESPONDENT

JUDGMENT

11th September and 2nd October, 2023 BAZL J.: Before the District Court of Bukoba, the appellant was indicted with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap.16 R.E. 2019] ("the Penal Code"). It was alleged in the particulars of offence that, between 22nd and 23rd August, 2022 at Kashabo street, Hamgembe ward within Bukoba Municipality, in Kagera Region, the appellant had carnal knowledge a girl of fifteen years whom I shall refer as the "victim". In order to prove the case against the appellant, the prosecution side called four witnesses and produced two exhibits. On the other hand, the appellant was the sole witness for the defence. In the main, the evidence leading to the conviction of the appellant reveals that, on 22nd August, 2022 Page 1 of 13 the victim (PW1) boarded a bus from Biharamulo aiming to go Chato for work, however, the bus she boarded was in the route to Bukoba and at the end of the journey, she found herself at Bukoba bus stand. Upon getting off the bus, she was received by Petson Kahangwa (PW2), the buses' agent working at Bukoba bus stand and told him that, she was lost because she was supposed to go to Chato. PW2 told her to stay in their office and if possible, she would sleep in that office and the next day he would process free ticket for her to travel to Chato. According to PW2, in the course of their conversation, there was a young man listening to them. Later around 1900 hours, the victim was seen with the said young man walking together. PW2 warned the young man whom he recognised by face not to take her anywhere. However, after some time, they disappeared and he reported the matter to the Police Post within the bus stand. According to the victim, the appellant took her to his rented one room located at Kashabo where he told her that, she would sleep in her mother's room until the next morning when she would continue with her journey to Chato. After reaching there, the appellant locked in the victim and went away whereby, he returned back around 0000 hours. When he returned, he forced to have sexual intercourse with her. In the course of undressing her, he torn out her underpants. She raised alarm seeking for help but no one responded. He Page 2 of 13

undressed himself and had sexual intercourse with her until the next morning when he took her to bus stand. On that next day, PW2 saw the said young man at bus stand selling onions and asked him the whereabouts of the victim. At first, he did not cooperate but later he told them that, the victim was at Mayunga ground. The appellant led them to Mayunga ground where they found the victim and took her to bus stand Police Post. The victim mentioned her rapist by the name of Alex. Later, she was taken by A/Insp. Betrida Mwanga (PW3) to Zamzam Health Centre for examination and treatment. However, she was referred to Bukoba Regional Referral Hospital (BRRH) where she was examined by doctor Mwanga Ramadhan. In examination, the doctor found that, she was raped after finding sperms in her vagina. The doctor collected samples for DNA analysis. The appellant after being arrested, he was also taken to BRRH where, his samples were also taken for DNA analysis. According to H.5111, D/C Joseph (PW4), he sent the collected samples to Chief Government Chemist for DNA analysis. The PF3 of the victim and the appellant were produced and admitted as Exhibits P1 and P2. In the exercise of his right, the appellant prayed for the doctor who examined the victim to be called for cross-examination but later he withdrew his prayer and asked Page 3 of 13 the court to vacate that order on the reason that, the doctor was delaying the proceedings. In his defence, the appellant denied to rape the victim. He contended that, he was staying with his uncle whom he was working for although he had his room in that house. It was his testimony that, on 22nd August, 2022 at morning hours, while he was on the way to Nyakanyasi to buy soap for his uncle, he met the police who forced him to board in the car. In that car, he found other six young men and when they arrived at the Police Station, they were charged with loitering. But later, he was arraigned to court charged with rape. He denied to sell onions or to have ever known the victim. He also denied to be known by the name of Alex that was mentioned by the victim as his rapist. At the end of the trial, the appellant was convicted and sentenced to thirty years imprisonment with corporal punishment of twelve strokes. Aggrieved with both conviction and sentence, the appellant lodged his appeal before this Court containing five grounds. Before hearing, he filed eight additional grounds which taking them together, they hinge on the following complaints thus: one, there was contradiction between prosecution witnesses; two, the case against him was not proved beyond reasonable Page 4 of 13 doubt and three, the charge was defective for not disclosing the time of incident. At the hearing, the appellant appeared in person, unrepresented whereas Mr. Yusuph Mapesa, learned State Attorney, appeared for the respondent. The appellant being a lay person had nothing to say other than praying to adopt his grounds of appeal and additional grounds as his submission and prayed to be released. In reply, Mr. Mapesa opposed the appeal. In his submission, he argued that, the case against the appellant was proved to the required standard. Expounding his stance, he submitted that, as far as the age of the victim is concerned, the same can be proved by the victim herself, relative, parent, doctor or by tendering birth certificate as stated in the case of *Issaya Ren atu s v. Republic* [2016] TZCA 218 TanzLII. In the instant case, the age of the victim was proved by the victim herself when she told the trial court that, she was born in 2007 and in 2022, she was 15 years old, and therefore under 18 years. Concerning the issue of identification, he argued that, the appellant was the last person to be seen with the victim and he stayed with her the whole night. Therefore, she properly identified him and after returning to bus stand the following day, she reported the matter to police. Regarding PW2, he stated that, PW2

met the appellant on the Page 5 of 13 following day and asked him the whereabouts of the victim, he led them to Mayunga ground where they found her there. For that reason, there was no need for identification parade because PW2 knew the appellant by face and identified him on the dock. Submitting on the issue of contradiction in the evidence of witnesses, although he admitted that there was contradiction between PW1 and PW2 on the issue of age of the victim /e.z 15 years and 14 years, he stated that, such contradiction was very minor which does not go to the root of the case. He added that, PW2 is not among the eligible persons mentioned by the law to prove the age of the victim. Likewise, the contradiction between PW1 and PW2 about the victim to be found at Mayunga ground is also minor which does not go to the root of the matter. Concerning the issue of defective charge, Mr. Mapesa argued that, the complaint is baseless because it is not the requirement of the law to indicate time in the charge as it was stated in *Yustus Aidan v. Republic* [2022] TZCA 622 TanzLII. He concluded his submission by stating that, PW1 was the key witness who testified on how she was raped. Thus, he urged this Court to dismiss the appeal. In rejoinder, the appellant insisted that, the charge was defective because PW2 stated that, he received the victim on 22nd August 2022 at 1000 hours while he was arrested on 22nd August, 2022 at 0800 hours. Also, Page 6 of 13 the charge shows that, he committed the offence between 22nd and 23rd August, 2022. According to him, by the time PW2 received the victim and at the time he was alleged to rape the victim, he was already in custody following his arrest on 22nd August, 2022 at 0800 hours. He further insisted that, the victim said that she was raped by Alex, however when she was asked to point the person in court, she did not point anyone. Having thoroughly considered the grounds of appeal and the submissions by both sides in the light of evidence on record, the main issue for determination is whether the appeal has merit. It is prudent to underscore that, a first appeal is in the form of a re- hearing. This being the first appellate court, it has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. See the case of *Vuyo Jack v. The Director of Public Prosecutions* [2018] TLR 387 [CA]. It is settled law that, in sexual offences, the best evidence comes from the victim. This was stated in the case of *Selemani Makumba v. Republic*

[2006] TLR 379. However, in the case of *Mohamed Said v. Republic*

[2019] TZCA 252 TanzLII it was emphasised that, the word of the victim of sexual offence should not be taken as a gospel truth but rather her or his testimony should pass the test of truthfulness. In another case of *Elisha Page 7 of 13 Edward v. Republic* [2021] TZCA 397 TanzLII, it was insisted that, the position concerning evidence of the victim being the best evidence in sexual offences, depends on the unquestionable credibility of the respective witness on the facts of the incident and the connection of the suspect to the complained offence. As far as credibility is concerned in the case of *Vuyo Jack v. The Director of Public Prosecutions* (supra), it was held that: "We are also aware that, the credibility of a witness is the monopoly of the trial court but only in so far as the demeanour is concerned. The credibility of a witness can be determined in two other ways. One, when assessing the coherence of the testimony of that witness, two, when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person."

Returning to the case at hand, the appellant denied to have raped the victim. He also denied to be Alex who was mentioned by the victim as the person who raped her. Equally, he denied to have led PW2 to Mayunga grounds where the victim was alleged to be found following the incident. On the other hand, the victim in her testimony said to have met the appellant at bus stand who took her to his room and raped her. She shouted but there was no neighbour who offered assistance. In the morning, he took her to Bukoba bus stand and from there, she went to police station at the bus Page 8 of 13 stand. According to PW2, he claimed to receive the victim on 22nd August, 2022 and after he realised her challenge, he assisted her by calling her brother with his mobile phone but his brother told him that, he was busy. He also claimed to have seen the young man leaving with the victim and in the following morning, he saw the young man alone. He interrogated him over the whereabouts of the victim and he took them to Mayunga ground where they found the victim. After finding her, they took her to police post at the bus stand. Looking closely at the testimony of the victim and PW2, there is no coherence on the facts of the events prior and after the alleged rape. The victim in her testimony did not mention about giving her brother's number to PW2, leave alone, the latter talking to her brother. On the other hand, it was doubtful whether PW2 was the person who assisted her while she arrived at the bus stand. According to PW4, the investigator of the case, upon reading the statement of the victim/ it showed that, upon arriving at Bukoba bus stand, she used the mobile phone of Fahadi to communicate with her brother asking for money but her brother told her to wait. Page 12 of the proceedings indicates that, on 24th November, 2022, the prosecutor informed the trial court, they are intending to call one witness, Fahadi Said Kazinja but he was attending his sick mother. So, they prayed to proceed at Page 9 of 13 1400 hours. The court was adjourned and resumed at 1430 hours when another person by the name Petson Kahangwa appeared and testified as PW2. It can be recalled that, PW2 was the one who claimed to have assisted the victim by communicating with her brother. It is not known if Fahadi Said Kazinja and Petson Kahangwa are one and the same person. Apart from that, the victim and PW2 differed on the place where the Victim was alleged to be found on the following morning. While PW2 said to have found her at Mayunga ground after being taken there by the said young man, the victim herself did not say anything about being taken to Mayunga ground after she left the appellant's home. According to her, the appellant took her to Bukoba bus stand and from there, she went to police post at the bus stand. If the victim is saying the truth, then which victim did PW2 found at Mayunga grounds? Their inconsistency on the facts of the events prior and after the alleged rape, cast doubt on the occurrence of the incident of rape. Moreover, in the course of testimony of the victim, at page 8 of the proceedings the trial Magistrate recorded the following; "Court; PW1 is hesitating and keeping quiet for a long time without saying anything we have to wait for her word for a long time like 30 minutes, being asked what the accused did to her. We have to adjourn for 30 minutes." Page 10 of 13 It is apparent from the extract above that, the victim was hesitant and remained mute for thirty minutes when she was asked to explain what the accused did to her. Her hesitation to explain what befallen create doubt not only on her credibility but also on the occurrence of the incident of rape.

The hesitation and quietness of the victim as observed by trial Magistrate together with inconsistencies between the victim and PW2 on the facts of the event prior and after the alleged rape leaves a lot to be desired in respect of their credibility. In that regard, I don't buy the argument by learned State Attorney that, the inconsistencies are minor ones which do not go to the root of the case. Furthermore, it is on record that, some samples were taken from the victim as well as the appellant and the same were sent by PW4 to the Chief Government Chemist for analysis. It is common knowledge that, the DNA evidence is the accurate evidence linking the accused person with alleged offence. Also, the same can be used to prove or disprove fact the offence alleged to be committed by the accused person. I am aware that, the Evidence Act [Cap. 6 R.E. 2022] governing the admissibility of evidence, does not make DNA evidence compulsory. Also, it is the prosecution who prefers type of evidence to bring before the court in order to prove their case. However, with above mentioned controversy of prosecution's case regarding Page 11 of 13 the fact that, the appellant was a stranger to both PW1 and PW2, it is the considered view of this Court that, in the particular circumstances of this case, the DNA result could have sorted out the said controversy. Nonetheless, despite the samples being sent for analysis, it was not disclosed what happened after analysis. Non-disclosure of the outcome of the analysis without assigning any reason leaves a lot to be desired. Under these circumstances, it is inevitable to draw an adverse inference that, had the result being revealed, it wouldn't be in favour of the prosecution. That being said and since PW1 and PW2 were not coherent with regard to the facts prior and after the occurrence of the alleged rape, it is the finding of this court that, their credibility was questionable and thus, the prosecution had failed to prove the case against the appellant on the required standard. Thus, I find the appeal with merit and I allow it by quashing the conviction and setting aside the sentence of imprisonment and twelve strokes. Consequently, I order the immediate release of the appellant unless otherwise lawfully held. "A I. K. BANZI JUDGE 02/10/2023 Page 12 of 13 Delivered this 2nd October, 2023 in the presence of the appellant in person and Mr. Yusuph Mapesa, learned State Attorney for the respondent. Right of appeal duly explained. I. K. BANZI JUDGE 02/10/2023 Page 13 of 13

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