

TANZANIA / JUDGMENT

FRANK FIDELISI JUDGMENT

COURT
TANZLIIDECIDED
28 April 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 BUKOBA SUB-REGISTRY AT
BUKOB A CRIMINAL APPEAL NO. 16170 OF 2024 (Arising from criminal case No. 92 of 2022 in the
District Court of Bukoba) FRANK FIDELIS..... APPLICANT VERSUS
THE REPUBLIC..... RESPONDENT

JUDGMENT

07/11/2024 & 15/11/2024 E.L. NGIGWANA, J The appellant Frank Fidelis was charged in the
District Court of Bukoba at Bukoba with the Offence of Attempted Rape Contrary to section 132
(1), (2)

- (a) of the Penal Code, [Cap. 16 R.E 2022] At the trial court, it was alleged that on the 28th day of
April 2024 at Hamugembe within Bukoba Municipality in Kagera Region, the appellant did
attempt to rape G.D (pseudonym), an adult woman without her consent. The appellant
denied the charge. After a full trial in which the prosecution relied on the evidence of three
(3) witnesses and one documentary exhibit (Cautioned statement of the accused). At the
same time, the appellant depended on his evidence in defense as a sole witness and
tendered no 1 exhibit, the trial court was satisfied that the case had been proved beyond
reasonable doubt. The appellant was consequently convicted and sentenced to serve a term
of thirty (30) years in jail. Aggrieved by the trial court decision, the appellant appealed to
this court. At the appeal hearing, the appellant appeared in person and fully relied on his
grounds of appeal, while Elias Subi, State Attorney, appeared for the respondent Republic.
In his self-crafted memorandum of appeal, the appellant raised eight (8) grounds of appeal
upon which he asked this court to quash the conviction and set aside the sentence. However,
upon careful reading and perusal of the grounds, they can be merged into a single ground to
wit; the trial court erred in law in convicting the Appellant for the offence charged which
was not proved beyond reasonable doubt. When invited to submit in support of his appeal,
the appellant argued that in criminal cases, the standard of proof is beyond reasonable
doubt. He added that, in the matter at hand, the said standard was not reached. He went on
to submit that, a material witness was not called but exhibit P1 was admitted contrary to the
law and thus deserves to be expunged. 2 He went on to submit that had the trial court
analyzed and evaluated the evidence correctly, it would have found that the case against him
was fabricated. He ended his submission by praying to the court to quash the conviction, set

aside judgment, and set him free. The respondent through Mr. Elias Subi supported this appeal. Mr. Elias Subi submitted that; according to the law, to convict the accused of the offence of Attempted Rape, the prosecution must prove beyond reasonable doubt the following ingredients; (i) that the accused intended to rape the victim, (ii) That, he was prevented to accomplish the act. He added that in the matter at hand, the incident occurred during the night (22:00 hours) therefore, the question of identification was very important. He elaborated that the victim testified on pages 10-14 of the typed proceedings that the incident occurred during the night and was attacked from behind. He added that initially, the victim told the trial court that she did not identify the person who attacked her. She further said she identified him with the moonlight, voice, and electricity from a neighbor house. Mr. Subi went on to elaborate that the victim further testified that her husband appeared and hence the attacker failed to accomplish his mission but she did not explain the intensity of the moonlight or the distance between the scene of the crime to the nearby house which had electricity light. He added that, as a matter of law, the evidence of visual identification must be watertight; thus; it is not enough to assert that there was sufficient light at the crime scene; descriptions must be given on the intensity of the light, but also the circumstances of the crime scene. He cited two cases; Christopher s/o Ally vs Republic (Criminal Appeal No. 510 of 2017) [2020] TZCA 321 (11 June 2020) Tanzlii, and Waziri Amani versus Republic (1980) TLR 250, to support his stance. He further explained that identification of an accused person through voice is not sufficient. He cited the case of Boniface s/o Siwingwa vs Republic (Criminal Appeal 421 of 2007) [2010] TZCA 108 (21 July 2010) Tanzlii where the Court stated that though familiarity is one of the factors to determine whether the appellant identified the assailant, the same is not enough without the required details or descriptions. He ended the issue of identification by saying the appellant was not properly identified as the person who attempted to rape the victim. On the appellant's complaint that this case was fabricated, Mr. Subi submitted that it is possible to say so because the evidence of PW2 (who is the husband of the victim), is to the effect he saw two people laying over each other, but a man escaped. Mr. Subi added that PW2 narrated that he assisted his wife 4 in reporting the matter to the Police but PW3 who is a policeman told the trial court that the matter which was reported by the victim was common assault and not Attempted Rape, and hence the accused was arraigned before the Primary Court. According to Mr. Subi, an inevitable question is that, if PW2 witnessed the appellant attempting to rape his wife (PW1) and instructed her to report the matter to the police, why PW1 reported the incident of common assault instead of Attempted Rape? On the complaint that the material witness was not called to testify before the trial court, Mr. Subi submitted that according to PW3, the appellant made an oral confession before the Primary Court Magistrate that he attempted to rape the victim, but the said magistrate did not appear in court to testify on whether the appellant confessed before him. He further submitted that as per the case of Aziz Abdallah versus Republic [1991] TLR 71 failure to call the said Magistrate without assigning reasons, has affected the prosecution case. As regards the complaint that the appellant's cautioned statement was admitted contrary to the law, Mr. Subi argued that the complaint is meritorious because the trial court records show the appellant objected to

the admission of the same on the ground that it was obtained through torture 5 but no inquiry was conducted to determine the voluntariness of the said statement, and for that matter, the statement deserves to be expunged from the court record. It was Mr. Subi's further submission that when the same is expunged, the remaining evidence will not suffice to sustain conviction. He went on to submit that in sexual offenses, the evidence of the victim is the best but the victim as a witness must be credible and her/his evidence must be strong evidence linking the accused with the offence. He ended his submission by saying that since the appellant was not correctly identified, it cannot be said that he is the one who committed the alleged offence. Having heard submissions from both sides and having gone through the trial court record and the grounds of appeal, the issue for determination is whether this appeal is meritorious. It must be noted that the cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt. See Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019. In *Mohamed Haruna @ Mtupeni & Another vs Republic* (Criminal Appeal 259 of 2007) [2010] TZCA 141 (4 June 2010) Tanzlii the Court had this to say; 6 "Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence." As correctly submitted by the learned State Attorney, the incident in the instant case occurred during the night (22: 00hrs) thus, the evidence on how the appellant was seen and identified is so crucial because generally, the evidence of visual identification has never been reliable. In *Waziri Amani v, Republic* (Supra) it was held that; "... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight" The Court further stated that, "Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear that 7 he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not" In revisiting the evidence of the two identifying witnesses (PW1) this court found that she said she was attacked from behind, then she identified the appellant with the help of the moonlight, voice, and electricity light from the house which was close to the crime scene. Evidence of Identification of an accused through voice must be treated with great care because the voice can easily be imitated. This stance was articulated in several cases including the case of *Manyanda Ncheya vs Republic* [2021] TZCA 409 TanzLII, it was stated that: "Pertaining to voice identification, great care must be taken before the court relying on such evidence

because it is generally perceived as the weakest type of evidence as there is always a possibility of imitating another person's voice." At the same time identification through moonlight without explaining the intensity of the moonlight is also not enough. In *Pontian Joseph v. Republic*, Criminal Appeal No. 200 of 2015 (unreported), the Court of Appeal had this to say regarding identification with the aid of moonlight: "Though under certain circumstances identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 merely said there was moonlight, the complainant said there was "enough moonlight: It is our considered view that it does not suffice to say there was moonlight or enough moonlight. Its brightness had to be explained" As already pointed out, the record revealed that PW1 was attacked from behind, and then she identified the appellant through voice and the moonlight which she did not even explain its brightness. Under the circumstances, and guided by the herein above cited case, I shake hands with the learned State Attorney that, it cannot be concluded that the appellant was undoubtedly identified. Indeed, the appellant deserves to enjoy the benefit of the doubt. Again, PW3 alleged that the charge of Attempted Rape was preferred against the appellant because he orally confessed before the Hon. Magistrate of the Primary Court of Bukoba Urban that he committed the said offence. As submitted by Mr. Subi, such a material witness was not summoned, and no reasons were assigned for such failure. Undoubtedly, as per section 143 of the Evidence Act, no particular number of witnesses is required to prove a case as what matters is the quality not the quantity of evidence. It is equally trite that, much as the prosecution exercises discretion in parading their witnesses, all the material witnesses should be summoned and the failure to parade them attracts an inference adverse to their case. These principles were articulated in the case *Omary Hussein @ludanga & Another vs Republic* (Criminal Appeal 547 of 2017) [2021] TZCA 543 (30 September

2021) *Tanzlii* where the Court stated thus; "Much as we are aware that in terms of section 143 of the Evidence Act, Cap 6 R.E. 2019 no particular number of witnesses is required for the proof of any fact, the law is very clear where a crucial witness who is within reach is not called to testify in court. Failure to call such material witnesses entitles the Court to draw adverse inferences where such witnesses are within reach but are not called without sufficient reason being shown by the prosecution

- (See *Aziz Abdalla v. Republic* [1991] T.L.R 7" As far as the matter at hand is concerned, the trial court ought to have drawn an adverse inference because the Magistrate was within reach but was not called without sufficient reason being shown by the Prosecution. PW3 further told the trial court that he recorded the cautioned statement of the appellant. The same was admitted in evidence as Exhibit P1. However, I agree with Mr. Subi that Exhibit P1 was un-procedurally admitted. The appellant objected to the admission of the same on the ground that he was beaten by the police and the victim's husband. The objection was overruled on the ground that it was on evidential matters which needed to be proved. The procedure to be followed when a subordinate court conducts an inquiry or the High Court conducts a trial within a trial was clearly stated in the case of *Selemani Abdallah and Two*

others v. The Republic, Criminal Appeal No. 384 of 2008, (unreported). The procedure entails the following:

- (i) When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings. 11 (ii) The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of that aspect of voluntariness. The witnesses must be sworn or affirmed as mandated by section 198 of the Criminal Procedure Act, Cap. 20. (iii) Whenever a prosecution witness finishes his evidence, the accused or his advocate should be given an opportunity to ask questions. (iv) Then the prosecution to re-examine its witness.
- (v) When all witnesses have testified, the prosecution shall close its case. (vi) Then the court is to call upon the accused to give his evidence and call witnesses, if any. They should be sworn or affirmed on the prosecution side. (vii) Whenever a witness finishes, the prosecution shall be given an opportunity to ask questions. (viii) The accused or his advocate shall be given an opportunity to re-examine his witnesses. 12 (ix) After all witnesses have testified, the accused or his advocate should close his case.
- (x) Then a Ruling to follow (xi) In case the court finds out that the statement was voluntarily made (after reading the Ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. The court should accept and mark it as an exhibit (xii) The contents should then be read in court. (xiii) xii) In case the court finds out that the statement was not made voluntarily, it should reject it. Since the herein above procedure was not followed, I hereby expunge exhibit P1 from the record. Having done so, as correctly said by Mr. Subi, the remaining evidence is insufficient to sustain conviction. All said and done, I allow this appeal against conviction for Attempted Rape, and the sentence is hereby quashed and set aside accordingly. The net effect 13 is that the appellant should be released forthwith from custody unless he is held lawfully for another cause. It is so ordered. Dated this 15th day of November 2024 E. L. Ngigwana Judge 15/11/ 2024 Delivered this 15th day of November 2024 in the presence of the Appellant, Ms. Upendo Shemkole (SSA) for the Respondent/ Republic, Hon. A.A. Madulu-JLA, and Ms. Queen Koba. E. L. Ngigwana Judge 15/11/ 2024 14

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/322748/source_file/cb785cc48f5042da/FRANK_FIDELISI_JUDGMENT.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/frank-fidelis-v-the-republic-AttemptedRape-tanzlii-2024--6a3ea5243b1caa9129819f9c

Prepared on 13 October 2026 · Esheria