

TANZANIA / JUDGMENT

## JUDGEMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT PAR ES SALAAM CRIMINAL APPEAL NO. 13000 OF 2024 REF. NO. 202405152000013000 (Originating from Criminal Case No. 425 of 2022 dated 14th December 2023 District Court of Temeke at Temeke by Hon. A. T. Millanzi PRM) HAMIS ABDALLAH HAMIS@USTADH ..... APPELLANT VERSUS REPUBLIC.....RESPONDENT:

## JUDGEMENT

19th Aug & 30th Sept 2024. KIREKIANO J: The appellant herein found himself on the wrong foot before the District Court of Temeke in a bid to defend a charge with two counts under the Penal Code Cap 16 [RE 2019]. The first count was rape contrary to sections 130 (1) (2) e and 131 (1), and the second count was an unnatural offence contrary to sections 154 (1) (a) and (2) of the Act. 1 It was alleged that on diverse dates between 2021 and June 2022 at Chamazi kwa Mapunda within Temeke District in Dar es Salaam, the appellant did have carnal knowledge of a girl aged 13 years. It was alleged that on the said diverse dates, the appellant did have canal knowledge of the girl against the order of nature. The girl's name was mentioned, but for a good reason; I shall withhold her name and sufficiently refer to her as the "victim" The prosecution side paraded five witnesses and one exhibit. The witnesses were PW1, The Victim, PW2 Habiba Omari, PW3 Dr Michael Idan, PW4 WP 3884 Dsgnt. Agness PW5 Fatuma Omari. On the other hand, the appellant fended himself as DW1 Hamis Abdallah Hamis @Ustaadhi. The evidence that led to the appellant's trial and conviction is as follows. PW2 Habiba Omari is the victim's mother. She is a neighbor of the appellant; as such, her daughter (the victim) was 13 years old and a primary school student. The appellant is also her brother-in-law, married to her young sister. Sometimes, in 2022, the victim went to the appellant's house and slept over. She suspected the victim was communicating with the appellant via chat SMS. She also had a tip from the appellant's wife, who is 2 her young sister, and ultimately learnt from the victim that the appellant occasionally had carnal knowledge of the victim, that is, a daughter of the appellant-in-law. Following this news, there was a stampede among family members. PW5 Fatuma Omari participated in a family meeting involving the victim's mother and the Appellant. This was on 11/6/2022. The complaint that the appellant did have carnal knowledge of PW2's daughter angered the members, causing the dispersing of the meeting. It was PW5's testimony that upon recess, the victim disclosed that Hamis was having sexual intercourse with her. This witness (PW5) ensured that the matter was

reported to the police, who issued PF-3 requesting a medical examination of the victim. The victim was examined at Kigamboni Health Centre by PW3 Dr Michael Idan. This was on 13/6/2022. According to his findings, the victim had no hymen, and she had bruises on her genitals, suggesting there was penetration. Her anus was also wide and loosened. He made his finding in PF-3, which was tendered as Exhibit P.1, that there was evidence of penetration. 3 PW4 WP 3884 Dsgnt Agness investigated the case. Her version was the story narrated by the victim to the effect that she was raped and sodomised by the appellant. The Victim's mother also told her how the victim disclosed the news to her, which the appellant denied. She was convinced that there was evidence to charge the appellant. The victim's version was that she was abused by the appellant since 2021, sometime in February 2022. He went to take care of her auntie's children, that is, the appellants' Children. According to her, the appellant is married to the young sister of her mother. On the fateful night, he could recall, around 21:30 hrs, the appellant undressed her and had carnal knowledge both naturally and against the order of nature. On another occasion, she said the appellant allured her to his house when his wife was absent, did undress her, covered her with a piece of clothes and had carnal knowledge of her naturally and against the order of nature. This witness explained that the appellant did that on three occasions, threatening her death if she told her mother. She, however, told her mother PW2 after enduring the pain for some time. On his part, the appellant DW1 Hamis Abdallah fended himself. His version was that he was married to the sister of the victim's mother but 4 separated. He said his wife accused him of demanding sexual intercourse against the order of nature, which is why their marriage did not end well. The appellant's defence was that his ex-wife faked this case and accused him of such a lousy story. He denied all this, saying the victim was couched to tell lies against him. Upon full trial, the trial court was satisfied that the charge was proved to the required standard; it convicted the appellant and sentenced him to a thirty-year term of imprisonment for the first count and life imprisonment in jail for the second count. Dissatisfied with this decision, the appellant, through the service of Mr. Halifa Ngemba, learned advocate, challenged this decision on eleven grounds, thus;

1. The learned trial Magistrate erred in both law and fact in convicting the appellant based on defective charge sheet in respect to the ambiguity of material date;
2. That, the learned trial Magistrate erred in both law and fact in convicting and sentence the appellant based on the evidence of PW1 (victim) whose testimony was barely insufficient, incredible, untruthful and unreliable to warrant the appellant's conviction as charged;
3. The learned trial Magistrate grossly erred in both law and fact in convicting and sentence the appellant based on the evidence of 5 PW-1, PW-2, PW-4 and PW-5 which was insufficient of proof beyond all reasonable doubts against the appellant;
4. The learned trial Magistrate erred in both law and fact in convicting the appellant without evaluating the evidences by the Appellant the omission which resulted to wrong and unfair decision;

5. That learned trial Magistrate erred in both law and fact in convicting and sentence the appellant while the charge against the appellant was not proved at required standard of law in criminal case;
6. THAT, the trial Magistrate grossly erred in both law and fact by holding the conviction and sentence against the appellant as the Medical Examination Report (PF3) had no evidential value linking or tending to connect the Appellant in the offence of rape and unnatural offence of one Latifa d/o Maendeleo;
7. THAT, the trial Magistrate grossly erred in both law and fact by holding the conviction and sentence the appellant relying on contradictive testimony of PW-1,' PW-2, PW-4 and PW-5 which was not water tight to warrant conviction against the Appellant with the charged offences;
8. THAT, the trial Magistrate grossly erred in law and fact by holding the conviction and sentence against the appellant by improperly evaluate the evidence of DW-1 and arrived to a wrong and unjust decision; 6
9. THAT, the trial Magistrate grossly erred in law and fact by holding the conviction and sentence against the appellant relying on the evidence of PW-3 who had no qualification to deal with Gender Based Violence and Violence Against the Child;
10. THAT, the trial Magistrate grossly erred in both law and fact by holding the conviction and sentence against the appellant without considering that procedures governed criminal justice in Tanzania were not followed;
11. THAT, the trial Magistrate grossly erred in both law and fact by holding the conviction and sentence against the appellant without considering that prosecution side did not prove the case beyond reasonable doubt; 12 THAT, the trial Magistrate grossly erred in both law and fact by failure to make proper evaluation of the evidence and arrived to a wrong and unjust decision. During the hearing, as indicated, the appellant had the service of Mr Halifa Ngemba while the respondent was represented by Mr Leonard Reuben Chalo, the learned senior state attorney. It is noted here that the appellant abandoned the 1st and 12th grounds of appeal. Submitting on the second ground, Mr Ngemba doubted PW1's (victim) credibility as he delayed reporting the incident of rape; he cited Martin 7 Jacob versus Republic, Criminal Appeal No. 434 of 2021, to the effect that the delay affected her credibility. On the 11, 5 & 3 grounds, Mr Ngemba faulted the trial Magistrate, arguing that the prosecution did not prove the case beyond reasonable doubt. Evidence of victim (PW1): She neither stated the date nor month when the alleged offence was committed. The victim stated that it was in 2021 only. Mr Ngemba also argued that the charge mentioned in the charge was 11/6/2022, during which a family meeting occurred. Thus, it was improbable that it was the date of offence. When a specific date, time, and place is mentioned in the charge sheet, the prosecution must prove the same. He cited the case of Saturn Rashid Chitende versus The Republic, Criminal Appeal No. 204 of 2015, CA OF TZ at Mtwara (TANZLII) On the 6th and 9th ground, the same challenges the evidence of the medical practitioner and the PF3

exhibit P1. Mr Ngemba argued that without citing any law, the clinical officer was not qualified to examine the victim. As such, he argued that the evidence of penetration by blunt penetration does not prove that it was the appellant who penetrated her. Instead, DNA 8 evidence could have done better. He cited Daudi Anthony Mzuka versus Republic, Criminal Appeal No. 297 of 2021, CA of TZ at Mtwara (TANZLII), where on page 18, the evidence of an expert is not conclusive but rather a non-binding opinion. On the seventh ground, the appellant questioned the credibility of the witnesses due to the inconsistent evidence as to when precisely the offence was committed for the first time. On the 10th ground, the trial court called afresh witnesses when the case was re-assigned to him as a new magistrate. This contradicts section 214 (1) of the Criminal Procedure Act (Cap 20 R: E 2022). He also referred to page 7 of the typed proceedings, arguing that there was a discrepancy in the victim's name. Thus, argued no promise was taken as required under section 127 TEA Cap 6 On his part, Mr Chalo submitted on the second ground, arguing that the trial magistrate was correct to believe the victim was credible, taking note that the victim was in fear for the life of her mother and herself. He cited Goodluck Kyando Versus Republic, [2006] T.L.R. 363 to the effect that this witness was entitled to credence and must be believed and 9 his testimony accepted unless there are good and cogent reasons not believing a witness. He submitted that the delay in reporting to the office was explained, and the victim was not cross-examined. He cited the case of Nyerere Nyague V. Republic, Cr. Appeal No.67 of 2010, in which it was on failure to cross-examine the victim. The 3rd, 5th, and 11th grounds involve the standard of proof. Mr Chalo was of the view that the trial Court rightly convicted the appellant, having directed its mind on the standard of evidence, as elucidated in Yohanes Nkize v. Republic [1992] T.L.R. 213. He argues that this court should consider the evidence of the victim and the doctor and sustain the conviction. On the 6th and 9th grounds, the same involves the proof by the clinical officer and the value of PF3. Mr. Challo submitted that the appellant's argument at this stage is an afterthought since the appellant did not object to the tendering of said PF3. As such, PW3 exhibited his education as a Clinical Officer. On the 7th and 10th on change of magistrate, he was of the view that there must be shown there is material prejudice on the part of Appellant to 10 make a point under section 214 (2) of Criminal Procedure Act [Cap.20 R.E.2022]. On grounds 8 and 4, Mr Chalo maintained that the trial court evaluated the evidence and found him guilty. He cited the case of Issa Said Versus Republic, Cr. App. No. 10 Of 2014, cited in [www.tanzlii.org.tz](http://www.tanzlii.org.tz), to the effect that rejecting defence evidence does not mean that the same was not considered. On my part, I will start with the second ground of appeal on the credibility of the witness PW1, the victim. I am aware that the law is that in these types of offences, the best evidence is that of the victim. There are several court decisions to this, to the effect that the proof of rape comes from the prosecutrix herself. Other witnesses, such as doctors, may give corroborative evidence if they never actually witnessed the incident. Selemani Makumba but also in Godi Kasenegala v Republic-Criminal Appeal No. 10 of 2008 concidered. Considering the role of the victim's evidence, her credibility is crucial. Mr Ngemba attacked her credibility following the delay in disclosing the offence to her mother, PW2 Habiba. While I address this, I also consider the 11 date of the commission of the offence in which the victim's

credibility is faulted in the seventh ground. In principle, the offence has to be proved as alleged in the charge regarding the time and place of the incident. See *Simon Abonyo Vs R Cr Appeal No. 144 Of 2005 Cat Mwanza*, but also the case in *Saturn Rashid Chitende versus The Republic*, Criminal Appeal No. 204 of 2015, CA OF TZ at Mtwara (TANZLII) cited by Mr Ngemba. According to the amended charge, which the appellant pleaded on 7.9.2022, the offence was committed on diverse dates between 2021 and June 2022. In her testimony, the victim told the court that the appellant abused her on different occasions; he also mentioned February 2022. As such, the victim was subjected to cross-examination on this, and at page 11, she said; “I don’t remember the date, even the Month. He just started to sodomise me and rape me in 2021.” Based on the above, I am satisfied that the complaint that it is not known when the offence was committed is baseless. The victim's testimony is within the alleged dates; I see no reason to question her credibility on this aspect alone. 12 I now consider the victim's delay in reporting. The victim told her mother PW2 the ordeal that happened to her; it is on record that the victim explained that the appellant threatened her that her mother would die if she told her mother. She, however, told her mother PW2 after enduring the pain for some time. In my re-evaluation of evidence on this, I have taken note that the victim was a primary school girl aged 13 years; she was accusing a relative of a man married to her mother's young sister; these were circumstances of the kind calling tranquil consideration when victims silence is at issue. After all, the victim said she was threatened; it is on record that she said; *Mama nitakwambia lakini nilikuwa naogopa*” She reply “*Baba aliniambia nikisema wewe utakufa*” she went on to tell her mother; “*Mshtakiwa amekuwa akiningilia mbele na nyuma, na hakua anampaka mafuta*, In *Godson Dan Kimaro vs Republic* (Criminal Appeal 54 of 2019)

[2022] TZCA 621 (7 October 2022) citing *Selemani Hassan v. Republic*, Criminal Appeal No. 203 of 2021 (unreported), held at page 12 thus 13 Delay in reporting an incident of sexual offence due to fear of reprisal or shame does not affect the credibility of the victim. The charge of a sexual offence is not undermined by the silence of the victim if such silence is fully explained. I take the same position and hold that, in this appeal, the delay in reporting was explained; it did not affect the victim's credibility. As such, I see nothing to fault the victim's credibility. The second and seventh grounds of appeal fail. Before I address the weight or otherwise of the evidence of the victim, I wish to say in a few words that I have considered the aspect of the name of the victim posed in the tenth ground. This came up when the trial court was posing questions to the victim to ascertain her competence; the appellant's argument is that the victim mentioned another name; I have seen this, and I need not disclose the names in spirit indicated from the outset. What is clear is that the victim consistently mentioned her name, before she gave testimony in chief and upon cross-examination. I shall end her and hold that to my satisfaction; there is nothing on record suggesting that the victim who testified was not the one in the charge. 14 While I address the 3rd, 5th, and 11th grounds, I have indicated above that the best evidence is that of the victim. Now, the evidence of the victim, who testified as PW1, told the trial court categorically how the appellant, on different occasions, undressed her and

forcefully had carnal knowledge of her but also against the order of nature. I have revisited the victim's oral account as it appears on pages 7 to 13 of the proceedings; the same shows that the victim was penetrated in her genitals and against the order of nature. While this witness deserves to be believed, I know that the witness evidence should not be taken as gospel truth, but her testimony should pass the test of truthfulness. See CAT decision in Mohamed Said v. the Republic, Criminal Appeal No. 145 of 2017 (unreported). However, as I have indicated above, having put the witness's credibility under scrutiny, as argued in the second ground, I am satisfied that the trial court correctly relied on the evidence of the victim to find a conviction. The 3rd, 5th, and 11th grounds lack merit. Concerning the complaint on the competence of PW3, the appellant attacked his competence to examine the victim and give an opinion; I have revisited the proceedings, and the medical practitioner testified as Dr 15 Michael Idan Mchunguzi (Sic). It is on record on page 27 of the proceedings he said; "I am a clinical officer at Kigamboni Health Center and a diploma holder; hence, I am a clinical officer. I got it at the Kennedy Center. I completed it in 2011. My duties are to treat people. I have 11 years of experience." The court of appeal was faced with akin scenario in Makende Simon vs Republic (Criminal Appeal 412 of 2017) [2021] TZCA 156 (3 May

2021) but also the recent decision in Alfred Pasa Lima Msumba vs Director of Public Prosecutions (Criminal Appeal No. 104 of 2022)

[2024] TZCA 905 (19 September 2024). In the latter case, the court of appeal found that a person holding a Diploma was a qualified medical practitioner in terms of section 3 of the Medical, Dental and Allied Health Professionals Act, 2017. I have the same view about PW3 that he was qualified to examine the victim; ground number nine lacks merit and is dismissed. In the sixth ground, the appellant argued that the evidence in the Medical Examination Report (PF3) Exhibit P1 had no evidential value linking or tending to connect the appellant in the offence of rape and unnatural 16 offence of one Latifa d/o Maendeleo; from this evidence and the oral account of PW3 Michael, the same is to the effect that the victim was examined on 13/6/2022 she was found with bruises caused by a blunt object penetration, no hymen and anus was wide and loosened suggesting penetration. The appellant complained that even with evidence of penetration, this did not link him with the offence; instead, it was the scientific evidence of DNA that would have proved the offence. In this, what is not disputed here is that the evidence by PW3 was an opinion; the value of this is that one, it corroborated the victim's story that she was penetrated both naturally and against the order of nature. Two it is such a piece of evidence that there was a sexual offence committed and negates the appellant's version that the charge was faked. I thus find that this evidence was worth corroborating the victim's evidence. I thus proceed to dismiss the sixth ground of appeal. In my re-evaluation, I have also considered the defence evidence that the victim's mother faked the charge and that the victim was coached in her testimony. The appellant complained that the defence was not considered; the trial magistrate, in his judgement, held that though the accused person 17 denied committing the offences, there is strong evidence associating him with the offences

charged as all the necessary elements of the offences have been proved. As such, having considered this defence, I tend to agree with the trial magistrate that the appellant's denial did not doubt the prosecution case. The said appellant's wife did not testify for or against the appellant. The evidence of the victim and the medical practitioner all suggest that such an offence was committed. Having believed the victim's credibility, I thus see no basis to fault the trial court's finding on this. I, therefore, find that the charge was proved in the required standard, and this appeal was brought without sufficient merit. The same is dismissed in its entirety, The conviction and sentence meted against the appellant is sustained. 18 A. J. KIREKIANO JUDGE 30.9.2024. COURT: Judgment delivered in the presence of the appellant and Miss Banana Kalema advocate for the appellant, and Miss Jackline Werema learned state attorney for the Republic. A. J. KIREKIANO JUDGE 30.9.2024. 19

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