

TANZANIA / JUDGMENT

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II\ THE COURT OF APPEAL OF TANZANIA AT TABORA (CORIAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.) CRIMINAL APPEAL NO.184 OF 2013 I'DDI sf o

A.MANI APPELLANT VERSUS The R.E-PU,B.LIC • ■

1111111111..... .. :,,1111t11R1:11111111111111rtt,~1 ■ 1RESPONDEF~T (Appeal from the decision of the High Court of Tanzania at Tabora) {Lukelelwa, J.) dated the 3 rd day of September, 2012 in Criminal Appeal No. 114 of 2011 JUDGMENT OF THE COURT 17 th & 20th September, 2013 MBAROUK, J.A.: In Criminal Case No. 311 of 2010, in the District Court of Kigoma sitting at Kigoma , the appellant, Iddi s/o Amani was charged, tried and convicted of rape contrary to section 130(2) (e) of the Penal Code, Cap. 16 R. E. 2002. He was sentenced to thirty (30) years imprisonment. His appeal to the High .Court was dismissed in its entirety. Dissatisfied, he has now appealed to this Court. ~C\,~\~ ~~,~\O:v\~ G...". \;~ \,~-0-lv\SL ~ 0--jQ.C Ou_o,foJ 1.~<,"-:) 11:) \T\iL 'V\Lt\VVi a.):::: ,_-\""-1.;_,,S..."---~ ~ o'\~.c,5,;- &\~ ~ "- .~ ~ c.~ ~-r~s-:-- ~-....t-. (~-0-'-'--"""" ~--o i>(>,:. ::,x,:::.....s: O, Vv\('V~ --,.,s.._r ~ ~.IL vV\"/,/ Q.,¼""<L\~\"<:IV\ Q_p\"-\"-:~.NV~\~ ~ \,~p_ (~, ' ~ ~(.~.AA~ ~ .a ~ _cv~'0...~ .\".√.i \1.Q.\~;(' \~\",,, _~Is- Qb (~, _ \ \"-..St&~t.C.'~ &Jo,Q,)\\"-/ VvO ~<>,,~.~: ~\•\0,,v ?'--~,,~:,.....,~, .:i, <:....\"\"- \.d-~ c-...~t'<- . _ . (J

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- ... ' , V • , • ') . __, i? ;:, ' =\:- i • C ,) , 1-~,-:~:~L.~ - - - :~:~ _ __ :~; - ---- - - . - -~:~-~ Briefly stated the facts of case at the trial court were as I • follows: Saada d/o Juma (PW2) testified that she was a Primary School girl, studying in standard VI at Rukoma Primary School. She said, she had known the appellant since July, 2010 when he . seduced her and had sexual intercourse with him twice. PVV1 further testified that, she used to meet the appellant at. his friend's house named as Muhonya. That on lih September, 2.010 which was an Eid el Fitri day, PW2 deposed to have joined her friends in the viilage market center. to mark the Eid el Fitri celebraHon. She was called by the friend of the appellant to meet the appellant at the house of the appellant's friend. PW2 spent the whole ·night with ·the appellant who could not have . taken her to his own house because he was married to another woman. PW2 testified that the appellant promised to buy for her a piece of cloth for making a gown. On the following day, PW2 . went to her sister's house. Later on that day

PW2 was asked by her brother where she spent the night, and PW2 replied that she had spent the night with the appellant. There after the incident was reported to militiamen who arrested the appellant 2 and on 14th September, 2010 he was sent at Mgambo Police Post where PF3 was issued to her to be medically examined. In his defence, the appellant denied to have committed the alleged offence against him. He stated to have remembered that on 14 September, 2010 while washing his clothes along the lake shores, he was arrested by three militiamen and sent to "Kitongoji" ward chairman. He said, he was informed to have abducted PVv2 who was the daughter of Juma Pama (PW3). In this appeal, six grounds of appeal were preferred in the appellant's memorandum of appeal, but we think they can boil down to four main grounds of complaint, namely:-

- (1) That, the age of the victim was not proved by a birth certificate.
- (2) That, there were inconsistencies and contradictions which were not resolved by the prosecution.
- (3) That, the prosecution relied on the event of rape which occurred on 14th September, 2010, the event which seemed not to be reported by the victim.
- (4) That, the tendered love letter (Exhibit P.2) was contradictory, hence full of doubts. Before us, the appellant appeared in person, while the respondent Republic was represented by Mr. Hashim Ngole, learned Senior State Attorney. The appellant had nothing to add apart from what he has stated in his ground of appeal. From the outset, Mr. Hashim Ngole indicated not to support the appeal. As concerning the complaint on the issue of the age of PW2 (victim), the learned Senior State Attorney submitted that, in the charge sheet, the age of PW2 was stated to be 16 years and when PW2 testified in court, she disclosed her age as 16 years. However, he said the age of PW2 was not contradicted by the appellant at the trial court, hence it is just a mere afterthought to raise such an issue now. Apart from that, the learned Senior State Attorney submitted that PW3 who was the father of PW2 confirmed that his daughter was 16 years old at that time. He said as a father, PW3 was in a better position to know his daughter's age. In support of his argument, Mr. Hashim Ngole, cited to us the decision of this Court in the case of *Edward Joseph vs. Republic*, Criminal Appeal No. 19 of 2009 (unreported) where the case of *Emmanuel Kibona and others V. Republic* (1995) TLR 241 was quoted. For that reason, he urged us to find this ground of complaint devoid of merit. On our part, we fully agree with the learned Senior State Attorney that raising the complaint on the issue of the age of the victim at this stage in a second appeal is mere afterthought. This is because, the appellant neither cross-examined PW2 nor did he raise any objection concerning the age of PW2 at the time when the trial was proceeding at the trial. After all, as pointed out by Mr. Hashim Ngole, various decisions including the decision in the case of *Edward Joseph* (supra) and *Emmanuel Kibona* (supra) held as follows:- "Evidence of a parent is better than that of a medical doctor as regards that parents' child's age." In this case, the appellant claimed that there was no

birth certificate tendered in court to prove the age of PW2. However, as pointed out herein above the evidence of a parent and in this case PW3 being a father was in a better position to prove the age of his daughter PW2. For that reason, we find this ground devoid of merit. Concerning the complaint on the issue of inconsistency and contradiction, the learned Senior State Attorney reacted by submitting that the claim that the charge sheet and when preliminary hearing was conducted, the record shows that the appellant raped PW2/ whereas PW3 (the father of PW2) testified that her daughter was abducted is immaterial. This is because, as he said, the appellant is charged of the offence of rape and not abduction. After all, Mr. Hashim Ngole submitted that the best evidence of rape comes from the victim herself. In support of his submission, he cited to us a decision of this Court in Selenani Makumba v. Republic, Criminal Appeal No. 94 of 1999 (unreported), where it was stated that: "True evidence of rape has to come from the victim/ if an adult that there was penetration and no consent in case of any other woman where consent is irrelevant that there was penetration." Under section 130 (2)(e) of the Penal Code, a male person commits the offence of rape if he has sexual intercourse with a girl or a woman, with or without her consent when she is under eighteen years of age. Whereas, in this case, PW2 was a girl aged 16 years old and as per the record, she had done sexual intercourse twice with the appellant before 12 September,

2010. The trial court was in a better position to assess the credibility of PW2. The two courts below found PW2 as credible and believed her when she said she had done sexual intercourse twice with the appellant. We are of the considered opinion that when PW2 said she had sexual intercourse twice with the appellant, she meant that the appellant's male organ entered into her female organ, which we think is sufficient proof that PW2 was raped by the appellant. This Court in the case of Hassani Bakari @ Mamajicho v. The Republic, Criminal Appeal No. 105 of 2012 (unreported) when trying to examine the issue of proving the offence of rape stated that: "It is therefore common knowledge that when people speak of sexual intercourse/ they mean the penetration of the penis of a male into the vagina of a female. It is now and then read in court records that trial courts just make reference to such words as sexual intercourse or male/female organs or simply to have sex/ and the like. (Whenever such words are used or a witness in open court simply refers to such words/ in our considered view/ they are or should be taken to mean the penis penetrating the vagina. "Aliahi, in this case, we too are of the same view. The two courts below believed PW2 as credible witness and as far as true evidence of rape has to come from a victim, we have no reason to fault the concurrent findings of fact of the courts below. We therefore find that there was no contradiction as far as the charge sheet clearly stated that the charge against the appellant is rape, and as pointed out above, the offence of rape was proved against the appellant. Hence, we find this ground of appeal devoid of merit. As for the ground of complaint concerning the difference of the date when the offence of rape was committed as it appears in the charge sheet and from the testimonies of PW2 and PW3, the learned Senior State Attorney submitted such an error is curable under section 388 of the Criminal Procedure Act (CPA). On our part, we are

satisfied that such an error has not occasioned failure of justice and as per section 388 of the CPA such an error is curable. Concerning the ground of appeal on the issue of a love letter, the -learning Senior State Attorney urged us to find that, the said letter was immaterial in connection with the charge of rape against the appellant. We too are of the same view, 9 hecat:Jse the said love letter did not have any bearing to the . . charge against the appellant. All said and done, we are of the view that the appeal is . . devoid of mer-it and we hereby accordingly dismiss it. th . PATED at TABORA this 20 day of September, 2013. i . Z.A.ffit DEPUTY REGISTRAR COURT OF APPEAL 10

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