

TANZANIA / JUDGMENT

Idrisa Charles

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (BUKOB A SUB- REGISTRY) AT
BUKOB A CRIMINAL APPEAL NO. 12816 OF 2024 (Arising from Biharamuio District Court at
Biharamuio in Criminal Case No, 34 of2023) IDRISA CHARLES @
MAGUTA..... APPELANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

16th October& 4th November 2024 KIWONDE, J. The appellant, Idrisa Charles @ Maguta, was
arraigned before the District Court of Biharamuio for an offence of rape contrary to section 130
(1) (2)

- (e) and 131(1) of the Penal Code, Cap 16 (R.E. 2022). The prosecution alleged that on 25th
March, 2023 at Ruganzu Village within Biharamuio District in Kagera Region, the appellant
did have sexual intercourse with L d/o E (the actual name concealed not to disclose her
identity), a girl aged 17 years old. The appellant pleaded not guilty and the prosecution
paraded four (4) witnesses and tendered six (6) exhibits to prove the case, whilst the 1
fended for himself. Upon conclusion of the trial, the appellant was convicted and sentenced
to serve a term of thirty (30) years imprisonment. Aggrieved by the decision, the appellant
appealed to this court basing on six (6) grounds of appeal below:
- i. That the trial court erred both in law and fact to hold that the prosecution discharged its
onus of proving the case against the appellant beyond reasonable doubt whereas not. ii. That
the trial court erred both in law and fact to admit and rely on exhibit P4 (the report of the
Government Chemist laboratory) which seriously lacked a proper connection of chain of
custody among the produced witnesses during trial. iii. That adverse inference be drawn
against the prosecution case for failure to produce in court material witnesses namely;
medical doctor who examined PW3, the Government Chemist, PW3's mother and the owner
of KK Guest House. iv. That the trial court erred both in law and fact to hold that it was
sufficient to tender exhibit P5, a PF3 by PW1 who lacked medical professional knowledge
and experience a procedure which denied the appellant the right to be heard (cross-
examine). 2

- v. That the trial court erred both in law and fact to admit and rely on exhibit P2 (the under wear) obtained from improper search contrary to PGO No. 226 Order 2(d) for lack of independent witness of search.
- vi. That the trial court misdirected itself by dealing with the prosecution evidence on its own that it was true and arrived at the conclusion without properly evaluating and considering the defence evidence which raised reasonable doubts thereby tilting the prosecution case. The appellant asked this court to allow the appeal, quash the trial court's decision, set aside the sentence meted against him and set him at liberty. During the hearing of this appeal, the appellant appeared in person while the respondent was represented by Ms. Gloria Lugeye, learned State Attorney. In support of the first ground of appeal, the appellant submitted that the prosecution did not prove the case to the standard required based on one reason that the prosecution's evidence creates doubt for failure to call important witness such as Shukuru without assigning any reason. With regard to the second ground of appeal, he argued that it was not testified in which hands the Government Chemist laboratory report passed through and that the said report was tendered by the investigation officer. According to him, an expert on that report was required to be brought before the court so as to testify about it. On the third ground of appeal, the appellant submitted that the material witnesses like a medical doctor, Government Chemist, the mother of PW3 and the owner of KK Guest House were not brought to court to testify; he said these created doubts on the prosecution case. Concerning the fourth ground of appeal, the appellant insisted that the PF3 was tendered by PW1 who did not prepare the said exhibit. According to him, failure to call the medical doctor so as to testify, it infringed his right to cross-examine him, hence, he was denied right to be heard. In the fifth ground of appeal, regarding exhibit P2, the appellant said that the said exhibit was improperly obtained because there was no independent witness during the search. Finally, on the sixth ground of appeal, the appellant submitted that the trial court failed to analyse evidence and that his defence evidence was not considered. He therefore prayed this appeal to be allowed by quashing the conviction and set aside the sentence meted against him.
- 4 In reply, Ms. Gloria Lugeye, learned State Attorney for the respondent submitted that the respondent opposed this appeal and supported conviction and sentence. As to the first ground of appeal, the State Attorney argued that the prosecution proved the case against the appellant beyond reasonable doubt. She said that in the offence of rape, the prosecution has to prove the age of the victim, penetration and that it is the appellant who committed the offence. The state Attorney submitted that the age of the victim was proved by the victim (PW2) by mentioning the date of her birth and age and PW3 tendered a clinic card as exhibit P3 which shows when the victim was born. So, at the time the offence was committed the victim was below 18 years old. Regarding the issue of penetration, the learned State Attorney submitted that the victim explained clearly how the offence was committed and that the victim evidence was consistent and it was corroborated by exhibit P5 that the victim was raped. She submitted that the best evidence in rape cases is that of the victim; she cited the case of *Seleman Makumba V. R* [2006] T. L. R 379 and the case of *Marwa Kihongo Versus Republic*, 5 Criminal Appeal No. 316 of 2020, Court of Appeal of Tanzania sitting at Mwanza. In the second and third grounds of appeal, the learned State Attorney said

the trial court was right to admit the report, exhibit P4. She said in *Director of Public Prosecution Versus Sheriff Mohamed @ Athumani and 6 others*, Criminal Appeal No. 74 of 2016, the court looks at the relevance and that the witness was in possession of it. But the evidence is silent as to the chain of custody how the exhibit was handled. If this evidence is expunged, the other evidence proves the case. Besides that, the State Attorney argued that under section 143 of the Evidence Act, Cap 6, no number of witnesses is required. The PF3 had been tendered. Thus, she said, the grounds lack merits. In the fourth ground of appeal, she replied that the investigation officer had knowledge of the document and the accused did not object the admissibility of the said exhibit. She submitted that the reason that the appellant was not given right to cross-examine the witness was an afterthought. Coming to the fifth ground of appeal, the learned State Attorney submitted that the trial court did not rely on the exhibit P2 in its decision, but the victim's evidence. She submitted that search was conducted to the 6 appellant at the police station. According to her, the said search falls under section 42 of the Criminal Procedure Act, Cap 20. She was of the view that if the court finds the search was improper, still the prosecution evidence is strong to ground conviction. In response to the sixth ground of appeal, she submitted that, the trial court properly evaluated the evidence from both sides. The defence evidence was considered. She further added that the first appellate court can re-evaluate evidence and come up with its own findings. To support this, she cited the case of *Salum Mhando V. R* [1993] T. L. R 170. In the end, she said this appeal lacks merits and it should be dismissed and the subordinate court decision be upheld. In rejoinder submissions, the appellant submitted that the victim did not prove her age and that the exhibit produced differed from what she testified. He said that her evidence was contradictory and so, she was not credible. As to failure to procure attendance of a medical doctor, the appellant submitted that if a doctor who examined her was sick, then his fellow doctor could come to testify. He thus prayed for this appeal to be allowed. 7 From the trial court's records and oral submissions, the main issue for determination by the court is whether the present appeal has been merited. I opt to begin with the second ground of appeal which challenges the admissibility of exhibit P4, the Government Chemist report. This was tendered by PW3, Detective Corporal Angelina, but she said it is corporal Eunice who sent the samples (the appellant's blood and that of the victim and underwear) to the expert in the Government Chemist Laboratory and they were found resembling with the appellant. However, the chain of custody was not clearly established if it was not broken in between. The state attorney conceded that the chain of custody was not proved. Thus, it is apparent that the evidence should not have been admitted in evidence even if the accused did not object. The court was to warn itself on the danger of admitting inadmissible evidence. The second ground of appeal has merit and it is hereby allowed and the exhibit P4 is expunged from the records. Concerning the fourth ground of appeal, it is true that the PF3, exhibit P5 was tendered in court by PW1 who was in possession of it. Under the rules of evidence, it was right. But the appellant presses that this is an expert medical report which required the medical expert to explain it and be cross-examined on it. 8 At the trial, it was said that the medical doctor who examined the victim could not be procured of his attendance in court due to involvement in a car accident and he

could not walk. His statements were admitted in evidence. Under section 240 (3) of the Criminal Procedure Act, Cap 20 (R. E 2022), where an expert medical report is tendered by a person different from the author, the accused person has a right to have the author called for cross-examination. In this case, the medical doctor was prevented by ill-health from attending the court for the purpose. The appellant still said another fellow medical doctor was to be produced. In my view, the PF3 contains expert opinion on the medical findings after examining the victim of rape. So, even a familiar person in the field could have been brought to explain medically, the contents therein. I say this because in the statements of the medical doctor who examined the victim, he just narrated that he examined her and filled the PF3. Failure to call the medical professional made the contents of the expert report go unexplained which deprived the appellant the right to be heard. This ground of appeal succeeds and the exhibit P5 is expunged from the records. Apart from that, the sixth ground of appeal is devoid of merits since the defence evidence was analysed, considered by the trial court as seen at 9 page 8 of the typed judgment but it was found that it did not shake the prosecution evidence. So, this ground crumbles too. Reverting to the first and third grounds of appeal, the appellant complained that the prosecution case was not proved beyond reasonable doubts and that material witnesses were not called to testify in court. It is true that in criminal cases, the prosecution is under obligation to prove the case against the accused beyond reasonable doubt as envisaged under sections 3(2) (a) and 110 of the Evidence Act Cap 6 (R. E 2022) and this was a position in the case of *Mohamed Matula V. R* [1995] T. L. R 3. In this appeal, the appellant faced the charge of statutory rape. The ingredients of statutory rape are that there must exist evidence to prove that at the time of commission of the offence, the victim was below the age of 18 years, so, the age of the victim is important to be established. If it is found that the victim was below 18 years old, then consent will be immaterial. Also, the prosecution to lead evidence that there was penetration however slight it might be, and that it is the accused who raped the victim. In the present appeal, the age of the victim was proved by the victim herself during her testimonies. She explained that she was 17 years old born on 26/06/2006. This evidence was supported by exhibit P3 which is io the clinic card. In law, the age of the victim can be proved by the victim herself, parent, guardian or medical evidence. In *Mathayo Laurence William Mollel Versus Republic*, Criminal Appeal No.53 of 2020

[2023] TZCA 52 (20th February 2023) TanzLii it was stated that the age of the victim of sexual offence can be proved by the victim, relative, parent or where available, the birth certificate. Therefore, it is sufficiently proved that at the time of rape, the victim was under 18 years old. Regarding penetration, the victim clearly explained that the appellant, having undressed her and himself, he started inserting his fingers into her vagina and thereafter, he inserted his penis into the vagina. The witness, PW2 (the victim) told the court that it was her first time to have sexual intercourse, so, she felt pains and blood oozed from her vagina. This evidence proves that there was penetration. Even if the medical evidence, the PF3 was expunged from the records, in law, rape can be proved in absence of the medical evidence since the same is not conclusive proof of rape. In *Jafari*

Salum @ Kikoti Versus Republic, Criminal Appeal No.370 of 2017 [2020] TZCA 221 (13th May

2020) TanzLii, the Court of Appeal of Tanzania held that conviction can be entered in the absence of the PF3 if there exists other sufficient evidence to prove rape. The other ingredient of rape is that there must be evidence to prove that the appellant perpetrated the unlawful act. In the present appeal, the victim said the appellant raped her. The incident occurred in the morning hours at around 8:00, the broad day light and the appellant was familiar to the victim as she mentioned his name when she reported the incident. She said she knew the appellant as a tenant in that guest house. During the trial, the victim clearly explained how she was raped by the appellant. She testified that on the material date, while at work at the cafe (Mgahawa), the appellant went there and he ordered breakfast where he told her to send it to him at KK Guest house. The victim said that when she was sending the breakfast to the guest house, the appellant followed her from the back and on arrival at the reception, the appellant tightly caught her on her neck and mouth, pulled her into his room, closed the window and door, he put off his clothes and the victim's underwear and he started inserting his fingers to the victim's vagina and later on, he inserted his penis into her vagina. Also, the victim said it was her first time, so, she felt pain and blood came out from her vagina. She managed to escape leaving behind her under 12 pant. The witness said she met Shukuru and told him to inform her brother-in-law one Erick Zakaria on the incident. This Erick Zacharia, she said, came and saw the appellant coming from KK Guest House and he was arrested. The underpant was found with the appellant in his trouser pocket during search at the police station and it was tendered and admitted as exhibit P2. The appellant said it was improperly obtained for lack of independent witness at the search. But Erick Zacharia explained that he was present at the police station when the appellant was searched and the certificate of seizure was admitted in evidence. So, this argument was vague. Not only that but also, this witness managed to identify the appellant in a court room at the trial. It is trite law that in sexual offences, the best evidence comes from the victim. This position was propounded in the *Selemani Makumba V.R* [2006] T. L. R 379 in which it was held inter alia that true evidence of rape has to come from the victim, if an adult; that there was penetration and no consent; and in case of any other woman where consent is irrelevant, that there was penetration. In law, the court can ground conviction based on the evidence of the victim if it is satisfied that the witness is credible and could tell only the truth and not otherwise. 13 This evidence of the victim was corroborated by the evidence of PW4, one Erick Zacharia. The witness said he knew the appellant well before the event and on the material date of the rape, he was at the cafe where the victim works and he saw the victim sending burns to the appellant at KK Guest house. But after about ten minutes, one Shukuru called him and when he went at the KK Guest House, he saw the victim crying. The witness said the victim named the appellant to have raped her. He said the appellant was seen escaping from therein using the hind door but people surrounded him, that it was PW4 who rescued him and sent him to police station. To the contrary, the appellant distanced him from liability

on reason that the prosecution case was not proved for failure to call material witnesses such as Shukuru, the owner of KK Guest House and the victim's mother. However, these witnesses were not eye witnesses for Shukuru was merely told about the event by the victim herself, even the owner of the guest house is not shown to know anything about the event and the mother too. Thus, these were not material witnesses and failure to call them to testify did not weaken the prosecution case. Therefore, since the victim (PW2) who is credible witness testified how she was raped and named who is responsible (the appellant), therefore this court finds that the prosecution case was proved beyond all 14 reasonable doubt. The first and third grounds of appeal are wanton of merits. Consequently, the appeal is partly allowed but with no negative effect to the prosecution case. The judgment, order of conviction and sentence passed by the trial court are upheld. F. H. KI WON DE JUDGE 04.11.2024 Court: Judgment delivered in chamber under the seal of this court in the presence of Ms. Gloria Lugeye State Attorney for the respondent Republic, and the appellant and Grace Mutoka this 4th November 2024 and the right of further appeal is explained. F.H. KI NDE JUDGE 04.11.2024 15

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