

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CRIMINAL APPEAL NO 17081 OF 2024 (Originating from District
Court of Mbeya at Mbeya in Criminal Case No. 51 of 2023) JACKSON JOHN
MUSHUMBUSI.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

Date: 20 August 2024 & 1 November 2024 SINDA, J.: The appellant was charged with the offence of rape c/s 130 (1) (2), (e) and 131 (1) of the Penal Code [CAP 16 R.E 2022] (the Penal Code). The District Court of Mbeya (the Trial Court) convicted and sentenced him to serve 30 years imprisonment. The particulars of the offence are that on 13 April 2023 at Ituha – Ilomba area within the District and Region of Mbeya, the appellant did have carnal knowledge of one CL (name withheld) a girl child of 10 years old. The incident is said to have taken place where the appellant resides. He was arrested and arraigned before the Trial Court. After full trial, he was found guilty of the said offence. Dissatisfied with the decision, the appellant appeals on a number of grounds as hereunder provided:

1. That the trial court erred in law when convicted and sentenced the appellant without evaluating deeply the credibility of the evidence of a tender age witness Pw1 and reached in a wrong decision against the appellant.
2. That the trial court erred in law when convicted and sentenced the appellant without taking into account that if PW1 was together with her friend by the name of TEDY and was witnessed while Pw1 entering to the room of the appellant, why this best and cogent witness was not called by the prosecution side to corroborate the evidence of Pw1? See: SELEMANI MAKUMBA VS. REPUBLIC 2006 TLR 379.
3. That the trial court erred in law when convicted and sentenced the appellant without taking into account that in her testimony Pw1 mentioned other person who witnessed while herself and TEDY 2 accompanied by the appellant such as TOFA and DORIS but none of them called to proof the same.

4. That the trial court erred in law when convicted and sentenced the appellant without taking into account that the evidence of Pw3 was not clear and was doubtful since Pw1 was found with UTI and fluids resulted by the said infections in fact none of penetration found to prove the same.
 5. That the trial court erred in law when convicted and sentenced the appellant relying on the family members. See in ABRAHAM WILSON SAIGURAN and 2 others V. R 1981 TLR.
 6. That the trial court erred in law when convicted and sentenced the appellant without evaluating deeply the prosecution evidence and the defence evidence and convicted the appellant unlawful. At the hearing of the appeal, the appellant was represented by Mr. Godfrey Namoto and Mr. Peter Kilanga, learned counsels. The respondent was represented by Mr. Upendo Lyimo, learned State Attorney. In his submission in chief, Mr. Namoto prayed to consolidate all grounds of appeal together. As the main issue is whether the prosecution proved the case beyond reasonable doubt. 3 To commence, the counsel argued that in rape cases the victim's evidence is the one to prove the case. However, he was of the view the same should not be treated as gospel truth and should be supported by other evidence. Supporting his argument, he cited the cases of Mohamed Said vs. Republic, Criminal Appeal 145 of 2017 and Issa Regi Mafita vs. Republic, Criminal Appeal No. 337b of 2020. The counsel added that the testimony of PW1 was not credible to convict the appellant. To highlight on a few, at page 8 of the Trial Court's proceedings (the Proceedings), the victim lied about where she resides, which brings doubt on other instances as to whether she said the truth or not. It was the counsel's further submission that the victim gave contradictory statements, that were not cleared by the prosecution. He continued, even if the testimony by PW1 is considered reliable, it was unfortunately taken against the rules of taking evidence in court. As provide under Section 127
- (2) of the Evidence Act, Cap 6 R.E 2022. The Section requires the witness of a tender age to promise to say the truth and not lie. The counsel cited the case of Godfrey Wilson vs. Republic, Criminal Appeal No. 168 of 2018. 4 Mr. Namoto continued, that non-compliance with Section 127 (2) of the Evidence Act is fatal and entitles the evidence of a witness to be discarded. As such, because the procedure was not followed the evidence of PW1 should be expunged from record. The counsel insisted, the prosecution failed to prove the case at the required standard as there is a lot of contradictions on the prosecution's witnesses. Moving forward, learned counsel submitted that the prosecution failed to call material witnesses. Like one Teddy, who purportedly was with the victim on the material date. The prosecution also failed to call teachers to prove that the victim was indeed absent from school at the time of the incident. Mr. Namoto cited the case of Ahmad Salum Hassan @ Chinga vs. Republic, Criminal Appeal No 386 of 2021 that quoted the case of Boniface Kundakira Tarimo vs. Republic, Criminal Appeal No. 350 of 2008. Also submitting in support of the appeal, Mr. Kilanga argued on matters surrounding the age of the victim. That the birth certificate was issued on 19 April 2023, a few days after commission of the crime. Thus, creating doubt, as the appellant already mentioned there is conflict between his family and that of the victim. 5

On the issue of penetration and who penetrated the victim, it was the counsel's submission that the victim was first examined at home by PW4 and PW2 who inserted fingers in her vagina. PW3, the doctor, explained the victim was penetrated by a blunt object. Mr. Kilanga was of the view that even a finger is a blunt object, there is no evidence proving the appellant was the one that penetrated the victim. The counsel continued, that at page five and seven of the Trial Court's judgment (the Judgment), the burden of proof was shifted to the defence. He added, a person is not guilty of a criminal offence if his defense is not believed. Rather is convicted on strength of the prosecution evidence against him. He cited the case of *Nurdin James Kabogo vs. Republic*, Criminal Appeal No. 38 of 2021 that quoted the case of *Galus Kifaya vs. Republic*, Criminal Appeal 199 of 2015. In her reply submission, Ms. Lyimo argued that PW1 said the truth in court because she promised to tell the truth. That, the appellant after commission of the offence he wiped his penis and offered to wipe the victim's private parts but the victim refused as she took the towel and cleaned herself. Due to the pain she felt after being penetrated she screamed, and that is when the appellant threatened to cut her fingers with a machete. 6 With regards to Teddy hearing the victim's scream, Ms. Lyimo was of the view that since they were in the same house it would have been easy for Teddy to hear the victim's screams. Ms. Lyimo submitted that the procedure to record the victim's evidence was followed. She referred to page 7 of the Proceedings where the court asked questions and the victim promised to tell the truth. It was her submission that, the requirements of Section 127(2) of the Evidence Act were adhered to. On the issue of contradictory evidence, Ms. Lyimo termed such contradictions to be minor as they do not interfere with the evidence of the victim. With regard to the examination done to the victim by PW2 and PW4, and later by PW3. At page 29 of the proceedings, PW4 is seen telling PW2 not to insert fingers in the vagina of the victim. However, the two are not experts hence PW3 being a medical practitioner confirmed that the victim was penetrated. Addressing on the failure of the prosecution to call material witnesses. Ms. Lyimo cited the case of *Selemani Makumba vs. Republic* (Supra) and Section 127 (6) of the law of Evidence Act. That, the key witnesses were 7 called including the victim. Therefore, other witnesses were not that important to prove the case. On the issue of age of the victim and how the birth certificate was issued after the incident occurred. Ms. Lyimo contended that the important thing is whether the age of the victim has been proved. The victim's grandmother (PW2), stated the age of the victim to be 10 years. In support, the counsel cited the case of *Isaya Renatus vs. Republic*, the Court of Appeal at Tabora. Concerning the conflict between the appellant and the victim's family, Ms. Lyimo responded that the same was not featured during cross examination of the respective prosecution witnesses. Moving to the last issue, that the burden of proof shifted to the appellant. Ms. Lyimo stated that when given the chance to question PW2 and PW4, the appellant did not do so. Thus, what he stated in his defence is an afterthought. She cited the case of *John Madata vs. Republic*, Criminal Appeal No. 853 of 2017. During rejoinder, Mr. Namoto reiterated most of what they had already submitted in the submission in chief. He nonetheless insisted on the doubt 8 towards the victim's evidence. Adding the promise to say the truth was not taken in accordance to the law. On the issue of PW1 and Teddy being in the same house and that she must have heard the scream.

The counsel believed that the prosecution misdirected itself on that part as it seems to be making assumptions. The learned counsel termed prosecution witnesses weak, as they could not prove the offence of rape. Where he insisted that Teddy should have been called as a witness. Concluding his rejoinder, Mr. Namoto argued that the shift of burden of proof to the appellant is not an afterthought. I have carefully considered the Trial Court records, arguments, laws and case laws put before me. I will now deliberate on whether I find this appeal with merit. To begin, it is worth noting that the elements to be proved in this offence, statutory rape, are more or less the same as those in ordinary rape. But contrary to ordinary rape, in statutory rape the victim's consent is immaterial and the age of the victim should be proved to be below eighteen (18) years of age. The same is provided under Section 130 (2) (e) of the Penal code. 9 Also in the case of Joshua Chipahna Kidyani vs. Republic, Criminal Appeal No. 336 of 2020, the Court of Appeal stated: "...our determination of this second appeal centres on sections 130 (1)(2)

- (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. Under these provisions, sexual intercourse with a girl under the age of eighteen is statutory rape, and it is immaterial whether the girl in question consented to the sexual act or did not." It is trite law that in sexual offences, the best evidence is that of the victim. This is seen in a number of decided cases, most famously in the case of Selemani Makumba vs Republic (Supra). And the same, once proved at the required standard, is enough to secure conviction without being corroborated by any other evidence. The appellant herein raised concerns on the credibility of the victim's evidence. Insisting, the victim's testimony should not be treated as "gospel truth". That, the victim's evidence should be supported by other prosecution evidence. The grounds he relied on: first, the procedure in obtaining the testimony of the victim who is child, was tainted. Also, the victim lied in her testimony. 10 Beginning with the former, I wish to reproduce the provision of Section 127
- (2) of the Evidence Act, to wit: " 127 (2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies." Revisiting the Proceedings, at page 7, the Trial Court conducted a test to the victim to ascertain whether she understood the meaning of telling the truth. Hereunder is what transpired in the Trial court: INTERVIEW QUESTION Question: Do you understand the meaning of lying? Answer: Yes, It is bad habit 2nd Questions: Do you understand meaning of speaking truth? Answer PW1: Yes speaking truth is not speaking lies. 3rd Question: Do you promise to speak truth and not lies? Answer: I will speak truth only. Court: Section 127 (2) of the evidence Act [CAP. 20 R.E 2022] c/w Soon after the interview, the victim started giving her testimony. That being the case I believe the procedure was followed and the provision of Section 127(2) of the Evidence Act was complied with. Because the victim gave her 11 testimony after she promised to say the truth. The section does not provide the manner in which the inquiry is to be conducted or the amount of questions to be asked. It only requires the court to ascertain whether a child of tender age understands the meaning of telling the truth and promises to tell the truth. In all honesty, that is what was done by the Trial Court, thus I find this argument by Mr. Namoto to be rather futile. See:

Joseph Damian @ Savel vs. Republic, Criminal Appeal No. 294 of 2018. Moving to the latter, it was argued during the appellant's submission that the victim lied concerning where she lives. In doing so, it is uncertain whether she told the truth on other aspects surrounding the case. I tried to look at this argument from the appellant's counsel perspective. Indeed, the lie raises an eyebrow. Nonetheless, with due respect, it is my hope the learned counsel did not expect the victim's entire evidence to be disregarded based on the so called lie. A lie that after all, does not go to the root of the matter. In my opinion, the lie was overshadowed by other available evidence by the prosecution. Hence secured conviction against the appellant. 12 As I address the issue of witnesses. It was mentioned the prosecution failed to call material witnesses in proving their case. For instance, one Teddy, who was apparently with the victim at the crime scene on the material date. The defence counsel was of the view, this was an important witness and failure to call her drew an inference against the prosecution. In my analysis, I measured the importance of the said witness and whether her testimony could have added anything potential to the already available evidence. Or whether her testimony would have helped in proving the elements of the offence. Allegedly, Teddy was present when the victim entered the room of the appellant. Needless to say, her testimony could not prove penetration or age of the victim. Which are the key ingredients in this offence, since consent is immaterial as mentioned above. Although I agree, her testimony could have added a thing or two. I also have to admit; in its absence the available evidence was enough to incriminate the appellant. Saying so, I do not agree with the appellant's counsel that Teddy was a material witness. It was mentioned, that after leaving the victim's house, the appellant alone took the victim and his granddaughter to school. Conversely, the appellant 13 argued, in that moment he was accompanied by the victim's uncle, one Ashley. Thus, was never alone with the children. In this regard, I agree with the findings of the trial magistrate. The appellant was the one that alleged this fact and the burden of proof was shifted to him. The same is provided under Section 112 of the Evidence Act, that reads: "112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person." The appellant was the one who claimed to be in the accompany of Ashley. He also claimed the prosecution failed to bring the teachers at the victim's school to prove otherwise. How I see it, the teachers could have helped the appellant's case way more than they could have strengthened the prosecution's case. Saying this, I am aware an accused is convicted on the strength of the prosecution's evidence. But had the appellant brought the teachers as witnesses, that he was not alone with the children around the time of the offence. It could have created doubt and ultimately shaken the prosecution's case. The same goes to alleged conflict between the appellant and the victim's family. That the case was fabricated against the appellant as a result of that 14 conflict. One would wonder, who would benefit once the issue of conflict has been proved in affirmative. Certainly, the appellant. That being the case, the defence had the duty to prove this aspect as well. I will not let the issue of contradiction in the prosecution's evidence detain me from addressing more pressing matters. Mainly because most of the contradictions raised do not go to the root of the matter subject to this appeal. And even if I decide to disregard them, the

available evidence would still suffice. All said and done, I believe the prosecution proved their case beyond reasonable doubt based on the evidence on record. The age of the victim was undoubtedly proved. It was Mr. Kilanga's contention that the birth certificate was obtained few days after the incident. A fact which was admitted by PW2, victim's grandmother on page 22 of the Proceedings. I wish to remind the counsel, it is not mandatory for the age of the victim who is a child to be proved by documentary evidence. Even an oral account could serve the purpose. Besides, before tendering the birth certificate, PW2 had already stated that the victim is ten (10) years of age. Being a guardian of the victim, that alone is enough as proof of age. The same was discussed in the case of Makende Simon vs. Republic, Criminal Appeal No. 412 of 2017 (unreported), that states: "... Of course, we are mindful that in the offence of statutory rape, the victim must be under the age of eighteen years. In which case, the proof of the age of the victim must be given by either the victim, relative, parent, medical practitioner or through proof by a birth certificate, if available." Also see: Section 114(2) of the Law of the Child Act [Cap 13 R.E 2019] On the issue of penetration. It is a settled principle that in rape cases, proof of penetration is of utmost importance. However, slight the penetration is. As provided in the case of Paulo John vs. Republic, Criminal Appeal No. 420 of 2017, where the Court of Appeal stated: "In addition, it is trite law, in terms of section 130 (4) (a) of the Penal Code, that in proving rape, evidence establishing penetration of the male organ into the female organ is necessary and such penetration, however slight is sufficient to constitute sexual intercourse, the ingredient necessary to prove the offence." PW3 a Medical Doctor on page 26 of the Proceedings, stated: "I examine her private parts and found she had no hymen, her inner part of vagina (introitus) had bruises there was watery fluid with bloodI formed opinion after examination that the child was penetrated by a blunt object." 16 The doctor, also tendered before the Trial Court a PF3 in support of his findings. Which was marked as Exhibit PE2. Because of that, the victim was indeed penetrated. Mr. Kilanga submitted to the effect, that the victim's grandparents had inserted finger into the victim's vagina prior being taken to that doctor. As I revisit the testimony of PW4, victim's grandfather. In the Proceedings, particularly at page 29, PW4 stated and I quote: "Her grandmother told Catherine to remove her pants, I told her not to insert her fingers in the vagina because it was dangerous. The grandmother opened her outer space of child's vagina without inserting the fingers...." From the above, it is obvious Mr. Kilanga's contention is the absolute opposite of what really happened. Respectfully, I believe the blunt object referred to by PW3 was the appellant's male organ and not fingers as argued by the learned counsel. As I conclude, also addressing the fifth ground of appeal individually. The appellant is of the opinion that the Trial Court entered conviction relying on evidence from family member. The Court of Appeal in the case of Paulo John vs Republic (Supra) was faced with a similar situation, and had this to say: 17 "There is actually no law which prohibits evidence from family members as under section 127 of the Evidence Act every person is a competent witness. In the case of Mustapha Ramadhani Kihio vs. Republic,

[2006] T.L.R.323 and Festo Mgimwa vs. Republic, Criminal Appeal No. 378 of 2016 (unreported) the Court held that the evidence of relatives cannot be discredited so long as their evidence does not exhibit untruthful story. Therefore, what is required is the credibility of the witness and nothing else.” Consequently, I find no need to depart from the findings of the Trial Court. The conviction and sentence of the Trial Court is hereby upheld. I find the entire appeal devoid of merit and is hereby dismissed. It is so ordered. Right of Appeal explained. DATED at MBEYA on this 1 day of November 2024. A. A. SINDA JUDGE 18

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