

TANZANIA / JUDGMENT

ocr CRIMINAL APPEAL NO 642 OF 2021 JOHN JAMES ANOTHER VS THE REPUBLIC 2

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IN THE COURT OF APPEAL OF TANZANIA AT SHINYANGA fCORAM: JUMA, C.J.. MWANDAMBO. J.A. And KHAMIS. J.A.'I CRIMINAL APPEAL NO. 642 OF 2021 JOHN JAMES..... ..1st APPELLANT MUSSA MUHINA @MKAZU. 2nd APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the Judgment of the Resident Magistrates' Court of Shinyanga) (Hon. Mbuva. PRM with Extended Jurisdiction^ dated the 11th day of November, 2021 in DC. Criminal Appeal No. 47 & 48 of 2021 JUDGMENT OF THE COURT 22nd & 25th October, 2024 JUMA. C.J.: JOHN JAMES and MUSSA MUHINA @ MKAZU appeared before the District Court of Maswa, where they jointly faced two counts, one of gang rape contrary to section 131A (1) (2) of the Penal Code, Cap 16 R.E. 2019 and a second count of gang robbery contrary to section 287C of the Penal Code, Cap 16 (R.E. 2019). Concerning the first count of gang rape, the prosecution alleged that around 00.30 hrs on 20 July 2020 at Unyanyembe Street in Maswa District (Simiyu Region), the first appellant John James and the second appellant MUSSA MUHINA @ MKAZU raped who we shall protect her real names under pseudonym TDC. Regarding the second count of gang 1 robbery, the prosecution alleged that at the time, place, and date the two appellants gang raped TDC, they jointly stole one mobile phone (TECNO W3) valued at shillings 150,000/=, a jacket valued at shillings 15,000/= and cash, shillings 60,000/- all belonging to TDC. In this second appeal, TDC as the victim of the simultaneous gang rape and gang robbery was the main prosecution witness. When the 22- year-old TDC testified as PW2 against the two appellants on 23 July 2020, she gave her job description as a Bar Attendant. She described the first appellant, John James, as her regular customer at the grocery, where she sold all kinds of liquors. PW2 also knew the second appellant, Musa, the first appellant's friend. Around 00.00 hrs on 20 July 2020, as she was closing her grocery for the night, the two appellants arrived and ordered a strong liquor known as "Shimwaa" After drinking and paying two thousand shillings, the appellants left. Before proceeding home, she decided to first look for food at a place known as "Kill Time" As TDC (PW2) was walking home after eating her food, a person pulled her long hair from her back. She realized two people were accosting her at an old maize market, demanding money. They slapped her when she explained she did not have money. Her attacker pulled off her jacket and took shillings 60,000/= in cash before he pushed her to 2 the ground. The other assailant grabbed her

underwear and pulled it down. Her resistance was to no avail. One assailant slapped her again when she tried to hold off one of the assailant's penis away from sexual penetration, as the other boxed her face to melt her resistance. TDC could not continue her resistance any further as one assailant enabled the other to have sexual intercourse, and they took turns to have sexual intercourse with her. When the two attackers completed their sexual acts, they ran from the scene, with one taking TCD's jacket. PW2 told the trial court as the two attackers were assaulting and raping her, she was raising an alarm. Soon, PW2 saw a police patrol car approaching. After learning what had happened to her, the police went after the escaping culprits and succeeded in arresting one. At the Police Station, the police gave PW2 Police Form No. 3 to refer her to the hospital for treatment. As the bandits were assaulting PW2, a police team in a patrol car heard cries for help rending the night. Police detective Corporal Maulid (PW3) was in the patrol vehicle that heeded PW2's alarms. PW3 informed the trial court how, as they were driving towards the source of cries for help, their vehicle lights enabled them to see from 60 to 70 metres away figures of a woman under assault and a male person 3 running away from the scene. PW2 told the patrolling police the direction her assailants had taken in their escape. PW3 followed up on the escaping culprits and caught up with one near a place called "Sun Siro," returning him to the crime scene, where PW2 identified him as one of her two assailants. Later that same morning on 20 July 2020, around 11:00 hrs, Dr. Kitula Joseph Michael (PW1), a medical doctor at Maswa District Hospital, received PW2 for treatment. PW1 informed the trial court that PW2's face showed signs of assault, which PW2 confirmed to the medical officer. PW1 took vaginal swabs on PW2 and found spermatozoa. PW2's underpants had dried sperms. The swabs confirmed to PW1 that PW2 was a victim of rape. The first appellant, a pagan, testified in his defence as DW1 after the affirmation. The second appellant, a Christian, testified as DW2 after taking an oath. The second appellant brought his grandfather, Benedict Joseph Muhina (DW3), his then 35-year-old mother, Devota Richard (DW5), and his 19-year-old Anna Joseph Muhina (DW4) to testify to support his defence. In his defence, the first appellant informed the trial court that he did not know PW2, and neither was he responsible for her rape. He explained that he had attended a disco music concert at "Ki/i Timd" place, and the police on patrol arrested him as he was walking back home. He complained about how police beat him to force him to identify his supposedly colleague-in-crime and had to lie to ease off police beatings. He denied committing the two offences of gang rape and armed gang robbery. Police arrested the second appellant (DW2) three days after the victim's rape. After arresting the second appellant on 23 July 2020 at around 09:00 hrs, the police briefly took him to the police station and straight to the District Court of Maswa. At the district court, the prosecution read the two counts of gang rape and gang robbery. After both appellants pleaded not guilty that same day, the trial court heard the evidence of two prosecution witnesses: the medical officer (PW1) and the victim (PW2). The trial magistrate of the District Court of Maswa (F.R. Lukuna- SRM) believed the victim's evidence on how she was able to identify the two appellants as they struggled during the attack. He convicted the two appellants of gang rape contrary to section 131A (1) (2) and gang robbery contrary to section 287C, both of the Penal Code. In the first count of gang rape, he sentenced the appellants to life imprisonment, 5 while in the second count of gang robbery, the trial court sentenced them to a term of thirty years imprisonment. The trial magistrate ordered their respective sentences to run concurrently. In

their petition of appeal to the High Court, the aggrieved appellants contested the trial court's decision on seven broad areas. Three areas of complaints stand out. The appellants complained that the prosecution did not prove the two counts of gang rape and gang robbery beyond reasonable doubt. Secondly, they wondered why the prosecution did not carry out a DNA test to link their sperm and blood groups to the victim scientifically. Thirdly, the appellants took exception to the failure of the trial court to evaluate contradictions between the evidence of the victim (PW2) and that of the arresting officer (PW3) on the source and intensity of lights used to identify the appellants at the crime scene. The High Court at Shinyanga transferred the hearing of the appeal to the Resident Magistrates' Court of Shinyanga (Extended Jurisdiction). In the Resident Magistrates' Court of Shinyanga, the learned Principal Resident Magistrate (R.M. Mbuya) heard the appellants' first appeal on extended jurisdiction. The Principal Resident Magistrate dismissed the appeal after agreeing with the conviction and sentence that the trial court had imposed. He added that PW2, the victim of gang rape and gang robbery, sufficiently and unmistakably identified both appellants as her assailants. The Principal Resident Magistrate saw no need to confirm the sentence of life imprisonment which the trial magistrate of the rank of a Senior Resident Magistrate imposed for gang rape. At the date of hearing of this second appeal on 22/10/2024, Mr. Anesius Kainunura, Senior State Attorney, assisted by Ms. Susan Masule, Senior State Attorney, Ms. Violeth Mushumbusi, Senior State Attorney, and Ms. Mboneke Ndimubenya, State Attorney, represented the respondent Republic. The first appellant, John James, and the second, Mussa Muhina @ MKAZU, appeared in person. The appellants preferred first to hear the Senior State Attorney's submissions on their eight grounds of appeal, and they will later make their replies. From the outset of her submission, Ms. Susan Masule opposed the appellants' appeal and supported their conviction and sentence. She submitted on the eight grounds seriatim. Ms. Masule addressed grounds one and six, where the appellants faulted the victim's credibility. She also responded to the complaint that the victim's identification evidence was weak and that the victim failed to name her assailants at the earliest moment. Ms. Masule referred to the victim's evidence on pages 10 and 11 and submitted that contrary to what the two appellants claim, the victim mentioned the names of the appellants to the police who arrived at the scene. Placing reliance in the case of *MARWA WANGITI MWITA AND ANOTHER VS THE REPUBLIC* [2003] TLR 271, Ms. Masule submitted that the credibility of the victim (PW2) is not in any doubt because she mentioned the two appellants to the police who arrived at the scene of her rape. Ms. Masule also addressed another limb of the first ground of appeal where the appellants question their identification by the victim. She referred to the testimony of the victim on page 11. She submitted that where assailants attacked her, there was an electricity light which enabled the victim to identify the appellants correctly. This victim's testimony, Ms. Masule submitted, was sufficient identification evidence. The learned Senior State Attorney urged us to compare the victim in this appeal (PW2), who spent thirty minutes struggling near her assailants, with the victim in the case of *MUSSA SAGUDA V. R*, CRIMINAL APPEAL NO. 440 OF 2017 (unreported), who spent fifteen minutes relying on torchlight. Ms. Masule submitted that the thirty 8 minutes under electricity lights helped the victim identify the appellants in the present appeal. She further stated that, apart from electricity lights and the thirty minutes of proximity, the two appellants were PW1's regular customers at her grocery store, and she recognized them. Ms.

Masule urged us to dismiss the appellants' first ground of appeal. Ms. Masule next urged us to dismiss ground number two, where the appellants blame the prosecution for failing to conduct an identification parade. She submitted that the identification parade was inappropriate because the victim knew the two appellants, her regular customers at her grocery. Ms. Masule referred us to the case of MUSSA SAGUDA V. R (supra), where we emphasized that when the appellant was not a stranger to the victim, identification parades serve no helpful purpose because the victim and the suspect are known to each other. Ms. Masule moved on and urged us to dismiss ground number three, where the appellants complained about the failure of the trial court to comply with section 52 (4) of the Criminal Procedure Act Cap 20 (the CPA), which empowers the police to question or interrogate suspects and proceed to charge the person where there is sufficient evidence. She submitted that because the prosecution did not tender any caution statement resulting from police interrogations, the appellants have no justification to complain. Ms. Masule also urged us to dismiss the appellants' ground number four, describing it as a misplaced complaint over the trial court's mentioning one Fumbuka as a victim, who was neither a party nor testified in the criminal case against them. Ms. Masule referred us to page 32 of the appeal record. She explained how the learned trial magistrate adopted the pseudonym "Fumbuka" to conceal the actual name of the victim, PW2, as directed under the Chief Justice's Circular No. 2 of 2018. The learned Senior State Attorney urged us to dismiss ground number five, where the appellants disparaged the evidence of the medical officer, PW1, describing the medical examination report (Exhibit PI) as too general and contradictory and failing to disclose sexual penetration. Ms. Masule disagrees with the appellants' complaint. She referred us to page 8 of the record, where PW1, a medical officer based at Maswa District Hospital, gave evidence that sufficiently corroborated the victim's evidence. PW1 explained how, before concluding that PW1 was a victim of rape, he tested samples from the victim's vagina, saw spermatozoa, and the victim's underpants had dried sperms. 10 Concerning the complaint in their ground number seven that the police did not find the appellants in possession of recently stolen items, Ms. Masule retorted that not every time prosecution must tender in court stolen items. She submitted that in this appeal, both appellants escaped when police arrived and had ample time to throw or hide what they had stolen from PW2. This ground need not detain us for long. The essence of the appellants' grievance is that the prosecution did not prove the charge of gang robbery because the police did not find them in possession of what allegedly had been stolen. Ms. Masule concluded her submissions by urging us to dismiss ground number eight, where the appellants faulted the first appellate court for upholding their sentences, which the High Court did not confirm. When we asked the appellants to respond to Ms. Masule's submissions, the first appellant, John James, said he had nothing to add. We must point out the first appellant looked frail, restless, and confused, and he murmured to himself with a distanced look throughout the hearing. On his part, Mussa Muhina (the second appellant) urged us to allow his grounds of appeal, which he insisted had merit. He complained that 11 the police arrested him around 09:00 hrs on 23/07/2020, took him to the police station, and, without any investigation, took him to court that same morning, where the prosecutor read a charge against him. He complained that the way the prosecution arrested him and hurriedly took him to court without proper investigations denied him a fair hearing. He urged us to consider the rush and haste that police

used to take him to court without investigations, leading to police wrongly indicating his age as 19, the same age as his elder sister, Anna Joseph Muhina (DW4). He insisted that he was below 18 when charged and convicted by the trial court. The mandate of the Court when hearing a second criminal appeal flows from section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 RE

2019. On the second appeal, the Court concerns itself with matters of law only, not matters of fact. But, as we have restated in several decisions, including GABRIEL LUCAS VS REPUBLIC [2021] TZCA 703 TANZLII, the Court can intervene on matters of fact where the courts below misapprehended the evidence, where there were misdirection or non-directions on the evidence or where there was a miscarriage of justice or a violation of some principle of law or practice. 12 At the outset, we agree with the learned Senior State Attorney that the two appellants' complaint over failure to conduct the identification parade lacks merit. Identification parades invariably target strangers, but not in the circumstances of this appeal, the two appellants who were familiar to the victim. PW2 testified that she knew the appellants, her regular customers at her grocery. Even if the appellants were strangers to PW2, the identification parade could still not take place because PW2 did not describe the persons she saw on the incident night before being taken to the identification parades. In the case of HAMISI ALLY & OTHERS VS REPUBLIC, Criminal Appeal No. 596 of 2015 (unreported), we reiterated that before police arrange an identification parade, they must have had details from the victim of the description of the suspect, which would enable the victim to single out the suspect at the identification parade. After looking at the record of this appeal, we agree with Ms. Masule's submissions on ground number three to the effect that the appellants have no cause to complain that the prosecution failed to comply with section 52 (4) of the CPA, which relates to the admissibility of the evidence of cautioned statements which the prosecution did not, in the first place, tender in court. Section 54 of the CPA requires the police officer to give the accused the right to communicate with a lawyer, relative, or friend. However, there is no explanation from the appellants on how the prosecution failed to comply with section 52 (4) of the CPA to affect their rights as accused persons adversely. The complaint is misplaced. The appellants took issue with the victim's name, "Fumbuka," in their ground number four. We agree with Ms. Masule that the trial court made no mistake by adopting the pseudonym "Fumbuka" to conceal the victim's actual name for the sake of her privacy. As a result, we dismiss ground number three for lack of merit. The appellants' ground number eight raises the issue of law whether sentences imposed by the subordinate courts following convictions for gang rape (section 131A (1) and (2) of the Penal Code) and gang robbery (section 287C of the Penal Code) require confirmation by the High Court. In JOSHUA MLINDWA VS REPUBLIC [2016] TZCA 664 (TANZLII), the Court had the opportunity to address the scope of section 170 of the CPA concerning sentences that subordinate courts can pass and whether they require confirmation. The Court restated that section 170 of the CPA empowers subordinate courts to impose 14 minimum sentences scheduled under the Minimum Sentences Act Cap 90 R.E. 2019 without the need for confirmation: "170 (1) A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences-

- (a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment; [Emphasis added] We agree with the learned Senior State Attorney that the punishments for gang rape and gang robbery, which the trial court imposed, were the minimum sentence which, according to section 170
- (1) of the CPA, did not require confirmation by the High Court. The appellants, through ground number six, invited us to consider matters of fact concerning the contradicting evidence between the evidence of the victim (PW2) and that of the first police officer at the scene (PW3) regarding the circumstances that led the victim to identify the appellants. The trial court concluded that "the appellants were well identified at the crime scene." The appellants raised similar concerns in their first appeal. They raised concern over contradictions in the evidence of the victim (PW2) and the first police officer at the crime scene (PW3) regarding light and its intensity for proper identification. The first appellate court, for unknown reasons, failed to address this complaint. The contradiction between the evidence of the victim (PW2) and the first police officer at the scene (PW3) was not minor, as Ms. Masule suggested. When the police patrol car arrived, PW2 gave the police the directions her assailants ran to; then the police went after them. PW2 testified that after a short while, police returned to the crime scene with the first appellant. It was at that moment PW2 told the police that the first appellant was the very person who raped her. PW3, the police officer who arrived at the scene, on the other hand, gave a different account. According to PW3, it was PW2 (the victim) who showed the police the way the culprits took to escape. The police put the victim in their patrol car and drove with her towards where the bandits had fled. Near the SUN SIRO area, the police in the patrol car arrested the first appellant. According to PW3, police arrested the second appellant on the third day (23/07/2020). PW3 testified that the 16 victim (PW2) identified the first appellant that night. Now, let's go along with PW3's account. It is unclear if the victim (PW2) identified the first appellant while riding in the police patrol car or if the victim's version prevailed; the victim identified the first appellant when police brought him back to the crime scene. As this Court said in FRANK MAGANGA VS REPUBLIC [2021] TZCA 105 (TANZLII), where we referred to our earlier decision in MOHAMED SAID MATULA V. REPUBLIC [1995] TLR 3, we must not only address and resolve inconsistencies in the testimonies of witnesses but to also decide whether they are minor, or they go to the root of the matters. Assuming PW2 and PW3 were in the vehicle following up on the bandits, they should, at the very least, have explained how the victim recognized the first appellant and how PW3 arrested him. PW2 and PW3 also differed in the source and intensity of light. While PW2 testified that in the area of her attack, there were electricity lights that enabled her to identify her attackers, PW3 testified that the police relied on motor vehicle light to see a man wearing white clothes and a lady lying down crying. PW2 did not say anything about the intensity of electricity lights and how that intensity helped her to identify 17 the two appellants. In ISSA MGARA @ SHUKA V. REPUBLIC, Criminal Appeal No. 37 of 2005 (unreported), the Court restated that even in cases relying on recognition

evidence, source and intensity of light to enable recognition is essential. Although recognition evidence is invariably more reliable than identification evidence, the light source and its intensity are still crucial in recognition evidence. Back to the appeal before us, it was not enough for PW2 to say she recognized the two appellants at night with the help of electricity lights; she should have also indicated the intensity of this source of light and how it helped her recognize the appellants. As this Court stated in ELIPAFULA TIMOTHEO VS REPUBLIC

[2015] TZCA 310 (TANZLII), whenever prosecution relies on evidence of visual identification or evidence of recognition, courts should only act on such evidence after eliminating all the possibilities of mistaken identity and the potential of a miscarriage of justice. Whether the victim mentioned the names of the appellant at the earliest possible opportunity touches on the victim's credibility. We entirely subscribe to what we said in MARWA WANGITI MWITA (supra), that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability. 18 We looked at pages 10 and 11 of the record to determine whether, as Ms. Masule submitted, PW2 mentioned to the police (PW3) the names of the two appellants as her assailants. With due respect, the appellants are correct in complaining that PW2 did not mention their names to the police at this earliest opportunity. On page 11, PW2 testified what transpired when police arrived. Apart from giving the police the directions her assailants had escaped to, PW2 never mentioned the names of the appellants as her assailants who had escaped. We conclude that PW2 did not name the two appellants at the earliest opportunity to assure us of her reliability. We have evaluated the evidence of PW2 and PW3 in light of Ms. Masule's submissions, and find contradictions and discrepancies in the evidence of the victim (PW2) and that of the first police officer at the scene of gang rape and gang robbery (PW3), go to the root of the prosecution case. Contradictions and discrepancies create doubt about whether the appellants gang-raped and gang-robbed the victim or a different pair of assailants committed the offences. The appellants are entitled to get the benefit of the doubt. 19 In the upshot, we allow this appeal, quash the appellants' convictions of gang rape and gang robbery, and set aside the sentences of life imprisonment and thirty years in prison, respectively. We order immediate release of the two appellants unless otherwise lawfully held. DATED at SHINYANGA this 25th day of October, 2024. I. H. JUMA CHIEF JUSTICE L. J. S. MWANDAMBO JUSTICE OF APPEAL A. S. KHAMIS JUSTICE OF APPEAL The Judgment delivered this 25th day of October, 2024 in the presence of the Appellants in person - unrepresented and Ms. Mboneke Ndimubenya State Attorney for the Respondent/ Republic, is hereby certified as a true copy of the original. <Wh A. L. KALEGEYA DEPUTY REGISTRAR COURT OF APPEAL 20

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