

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 629 OF 2021

JOHN LUCAS MALIMA VS THE REPUBLIC

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT MUSOMA fCORAM: SEHEL. J.A.. KAIRO. 3.A. And
KHAMIS. J.A.'l CRIMINAL APPEAL NO. 629 OF 2021 JOHN LUCAS @ M A LIM

A APPELLANT VERSUS THE R EPU B

LIC.....RESPONDENT (Appeal from the Judgment of
the High Court of Tanzania at Musoma) (Mahimbali, J.) dated the 28th day of September, 2021 in
fDC^ Criminal Appeal No. 80 of 2021 JUDGMENT OF THE COURT 21st February & 3rd March,
2025 KHAMIS, J.A.: The appellant, John Lucas Malima is appealing against the decision of the
High Court of Tanzania at Musoma which upheld his conviction and sentence meted out by the
District Court of Musoma, the trial court. He was tried and convicted on a charge of rape contrary
to section 130 (1)

- (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2019, now R.E. 2022. Upon his conviction, the appellant was sentenced to a term of thirty years' imprisonment. Following his conviction and sentence, the appellant unsuccessfully appealed to the High Court which on 28th September, 2021 found no merits in the appeal and confirmed his conviction and sentence. Aggrieved, the appellant brought this second appeal centred on the conviction only. Before scanning through the appeal, we find it apposite to highlight the facts of the case, albeit in brief. The victim "XY" was a standard six pupil aged 13 years old. Her true name is withheld to preserve her identity. She testified at the trial court as PW1 after promising to tell the truth in terms of section 127 (2) and (3) of the Tanzania Evidence Act, Cap 6 R,E 2019 (now R.E 2022) (the TEA). For purposes of this judgment, she will be referred to as "XY", the victim or PW1. Sometimes in May 2020 the victim was doing domestic chores at home when a respected neighbour, popularly known as "Baba Love", the appellant herein called her. The appellant dragged her to his nearby house where he undressed her blouse, skirt and underwear. He laid her on a sofa and then had carnal knowledge of her to his satisfaction. She felt severe pains in her genitals but the appellant closed her mouth to prevent screaming. He also threatened to kill her if she ever screamed or disclosed the incident to anyone. A week later, the victim was playing "kombolela" with fellow children, "NM" and "SL" when the appellant sent her to buy airtime for TZS 500 from a nearby shop. When the victim delivered the airtime (voucher) to him, the appellant dragged her to a bedroom, closed her mouth and had her carnal knowledge. She was equally warned not to disclose the incident to

anyone. Three days later, the appellant obstructed the victim from playing "kombolela" with "NM" and "SL" and sent her to buy local buns. When the victim consigned the buns to his house, the appellant dragged her inside and chased her fellow children away. He then had carnal knowledge of the victim for the third time. "NM" and "SL" were suspicious of the conduct between the two and therefore, when the victim re-joined them, they queried on what was going on with "Baba Love" inside the house. The victim disclosed that, she was raped. Thereafter, the victim reported the incident to her father who testified as PW4 and an aunt (PW3). PW4 decided to can his daughter together with "NM" and "SL" allegedly for playing in other people's houses. "NM" a girl of 11 years old testified as PW2. She also testified after promising to tell the truth. This witness confirmed that the victim was dragged inside the appellant's house and raped three times in the manner that PW1 stated. PW2 stated that, when the appellant locked the victim inside the house and chased her and "SL" they decided to dig the truth of what was happening. As such, PW2 and "SL" peeped through the window and saw the victim laid on a bed with her face covered with a piece of cloth. The appellant was on top of her making love. She also confirmed that when the incident was reported to PW4, he canned them. PW4 testified that the victim was born on 4th day of August, 2007 and tendered her clinic card that was admitted in evidence as exhibit PE1. PW3 told the trial court that she was informed by her brother, PW4 that the victim was raped by the appellant. She knew the appellant very well as a neighbour and family friend. PW3 spoke to the victim who disclosed that, indeed the appellant had raped her three times but she did not disclose before for fear of being beaten. PW3 escorted the victim to a police station where the incident was reported and a PF3 was issued. The victim was eventually examined by Dr. Annie Kisiri (PW5), a clinical officer at Nyasho Health Centre who filled in the PF3 (exhibit PE2) and established that, she was raped. Examined on how she arrived at her findings, PW4 said the victim was found with sperms and bruises in and around the genitals. She was also short of a hymen but had vaginal discharge. PW5 scientifically concluded that the victim was penetrated by a blunt object. When placed on defence, the appellant strongly refuted the claims and testifying under oath, stated that, he used to be a close friend of the victim's family whose house was close to his. He recalled that sometimes back PW4 travelled to Dar es Salaam to work as a mason and entrusted him to take care of the family. Initially, he used to give money to the mother of the victim but problems started when he opted to buy food stuffs for them. He maintained that the victim's mother was unhappy as she wanted money to buy her own foodstuff. He suggested that the case was fabricated by the family due to that misunderstanding. On cross examination, DW1 said the misunderstanding was neither stated in his cautioned statement nor put across to the prosecution witnesses at the time of cross examination. On further cross examination, he admitted that the quarrel between the two families was never reported to any local or Government leader. Kizito Majumbi (DW2), the street chairman, was brought to testify in favour of the appellant but ended up confusing his line of defence. He testified that between 16th and 18th June, 2021 the appellant reported to him that, he had a misunderstanding with PW4. He summoned both of them for purposes of ironing out their differences. When they eventually went to his office no meaningful discussions were conducted as PW4 5 complained that the appellant

raped his daughter when he was away. The mediation failed. On cross examination, DW2 stated that he could not certainly say whether or not the appellant raped the victim. On these facts, the appellant was convicted and sentenced as stated earlier. Aggrieved by the High Court decision, the appellant sought tranquillity from this Court. He presented a memorandum of appeal containing six (6) grounds of appeal that faulted the second appellate court for: one, failure to subject the entire evidence into an objective and fair scrutiny and consider the defence evidence; two, failure to find that ingredients of the offence of rape were not proved due to the contradictory and uncorroborated prosecution evidence; three, failure to consider that the case against the appellant was fabricated; four, failure to observe that the medical officer (PW5) omitted to lead her qualifications to entitle her examine the victim; five, failure to find that the alleged rape incident was concocted by PW1, PW2 and PW3 and not sufficiently proved by the prosecution; and; six, failure to find that the prosecution did not prove its case beyond reasonable doubt. At the hearing of this appeal, the appellant appeared in person, unrepresented, while the respondent Republic had the services of Mses. Grace Michael Madikenya and Beatrice Timothy Mgumba, learned Senior 6 State Attorney and State Attorney, respectively. As a lay person, the appellant preferred to respond to the submissions by the Republic. At the outset, Ms. Mgumba successfully sought leave of the Court to consolidate the grounds of appeal under one theme, whether the prosecution proved the charge of rape against the appellant beyond reasonable doubt. In keeping up with the consolidated grounds, she opposed the appeal and supported the conviction and the sentence meted out to the appellant. On conviction, Ms. Mgumba submitted that the three ingredients of statutory rape, namely: penetration, age of the victim and whether the offence was committed by the accused, were all proved to the required standard. She submitted that there was ample evidence to corroborate the evidence of the victim and to that end, she referred us to the evidence of PW1 at pages 15 to 16 of the record, PW2 at page 18 of the record, PW5 at page 22 and 26 of the record and PW4 at page 22 and 23 of the record. The learned State Attorney cited *Selemani Makumba v. Republic*, [2006] T.L.R 379 for the proposition that, in rape cases the best evidence comes from a victim. Regarding qualification of the medical doctor, the learned counsel referred us to *Charels Bode v. Republic*, Criminal Appeal No. 46 of 2016 [2019] TZCA 70 (6 March 2010, TanzLII) and submitted that, PW5 was qualified medical personnel to examine the victim and that, prior to her testimony, she led evidence on her qualifications. On age of the victim, she asserted that PW1 was born on 4th August, 2007 as testified by PW4 and shown in the clinic card (exhibit PEI). On whether the appellant raped the victim, the learned counsel submitted that, the evidence on record pointed to no other person than the appellant. She strongly refuted claim that the case was fabricated and asserted that, the appellant failed to cross examine the prosecution witnesses on that allegation. She buttressed her reasoning with the case of *Mohamed Makwinja v. Republic*, Criminal Appeal No. 183 of 2021

[2023] TZCA 17509 (21 August 2023) where we took the view that, failure to cross examine a witness on an important matter implies acceptance by that person of all the allegations made to be correct. Further, the learned State Attorney cited section 143 of the TEA for the

proposition that no minimum number of witnesses is required to prove a fact in issue and Goodluck Kyando v. Republic [2006] 363 in asserting that, the prosecution witnesses led sufficient and corroborated evidence and thus entitled to credence. She capped up that the charge against the appellant was proved beyond reasonable doubt. s When afforded the opportunity to respond to the submissions by the learned State Attorney, the appellant moved the Court to revisit the evidence on record and find that he did not rape the victim. He urged us to release him from prison. We have examined the record, considered the grounds of appeal and the parties' rival submissions made before us. The main issue for determination as rightly proposed by the learned State Attorney is whether the learned first appellate Judge erred in law and fact by failing to find that the offence of rape was not proved beyond reasonable doubt. On the onset, we wish to observe that, this is a second appeal where the law is trite that, we can only interfere with the concurrent findings of facts by the lower courts where there has been misapprehension of the nature and quality of the evidence. See: Mussa Mwaikunda v. Republic [2006] T.L.R. 387; and; Raymond Mwinuka

- v. Republic, Criminal Appeal No. 366 of 2017 (unreported). The appellant's central complaint was that the prosecution case was manufactured hence the evidence was inconsistent, unreliable and contradictory. He did not cite relevant pieces of evidence that suggests the alleged inconsistency and or contradictions. Responding to this claim, 9 the learned State Attorney contended that no contradictions existed in the proceedings as alleged or at all. The law on sexual offences is now very certain. In order to prove the guilt of an accused charged under section 130 (1) (2) (e) and 131 of the Penal Code, the prosecution is required to prove that the appellant had a carnal knowledge of the victim, there was penetration and that the victim was below the age of 18 years. The evidence to prove that the appellant had carnal knowledge of the victim on the three incidents prior to his being charged could not be overemphasised. It is equally trite law that, the true evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in case of a minor, that there was penetration. In the present appeal, the evidence of PW1, the victim, was very clear. She detailed how the appellant used to drag her inside his house and engaged her in acts of sexual intercourse. She specifically stated that, the incidents were repeated in three different occasions. On the last occasion however, the incident was witnessed by PW2 whose testimony matched with the details given by PW1. The incident was reported to PW3 and PW4 who presented the victim to a police station and reported the incident. Exhibit PE2, the PF3 10 show the incident was reported at Musoma Central Police Station on 22nd day of June, 2020. It was PW3 who escorted the victim to a police station and then to the hospital. The victim was eventually medically examined by PW5, qualified medical personnel, who established presence of sperms and bruises in her genitals and lack of a hymen. She opined that, the victim was penetrated by a blunt object hence raped. Our close scrutiny of the record did not establish any contradiction, inconsistency, fabrication or inadequacy of the prosecution evidence as alleged by the appellant or at all. We have also considered the legal position restated in Shah & Another v. Shah & Others [2003] 1 E.A 290 thus, as a rule of

practice, an expert witness should always be qualified in court, by asking him various questions before giving his evidence and that, failure to qualify an expert may result to exclusion of his testimony. We have also considered our stance in *Charels Bode v. Republic* (supra) that, a clinical officer is a qualified medical personnel to perform medical examinations as such, his report is admissible in evidence. In this case, the prosecution sufficiently examined PW5 to disclose her credentials as a clinical officer who worked at Nyasho Health Care Institute and held a diploma in clinical medicine from the Health Care Institute, Iringa. In the circumstances, we are satisfied that PW5 as a clinical officer was a qualified medical officer to examine the victim as she did. Having resolved all the concerns raised in the grounds of appeal to the negative, we find no merits in this appeal which is accordingly dismissed in its entirety. DATED at MUSOMA this 28th day of February, 2025. B. M. A. SEHEL JUSTICE OF APPEAL L. G. KAIRO JUSTICE OF APPEAL A. S. KHAMIS JUSTICE OF APPEAL The Judgment delivered this 3rd day of March, 2025 in the presence of the appellant in person and Mr. Isihaka Ibrahim Mohamed, learned State Attorney for the respondent/Republic via virtual court from Musoma; is hereby certified as a true copy of the original.

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