

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 373 OF 2022

JOHN THADEI SEBASTIAN VS REPUBLIC

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM: MWARIJA, J.A., LEVIRA. J.A. And MASOUP. J.A.^ CRIMINAL APPEAL NO. 373 OF 2022 JOHN THADEI SEBASTIAN.....APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Arusha) (Philip, 3.) Dated the 28th day of June, 2022 in Criminal Appeal No. 47 of 2021 JUDGMENT OF THE COURT 2nd & 11th December, 2024 MWARIJA. J.A.: John Thadei Sebastian, the appellant herein together with two other persons, Gabriel Loilang'waki and Frank Melayeki Moyo, who are not parties to this appeal, were separately charged in the Resident Magistrate's Court of Arusha at Arusha. The appellant and Gabriel Loilang'waki (the 2nd accused person) were each charged in the first and second counts respectively, with the offence of rape contrary to ss. 130 (1), (2) (a) and 131 (1) of the Penal Code, Chapter 16 of the Revised Laws (the Penal Code). It was alleged that, on unknown date in February 2017 at Muivaro area within Arumeru District in Arusha Region, each of them did have i carnal knowledge of a woman, one SP (name withheld for the purpose of protecting her dignity). On his part, Frank Melayeki Moyo (the 3rd accused person), was charged in the third count with the offence of sexual harassment contrary to section 138D (1) of the Penal Code. That, on unknown date in February 2017 at the same place stated in the first and second counts, he sexually harassed the said SP by inserting his fingers into her vagina and by licking her breasts, the act which was unlawful. The trio denied their respective charges. As a result, the case proceeded to a full trial at which, the trial court heard the evidence of five prosecution witnesses and the appellant together with the 2nd and 3rd accused persons who testified as the only witnesses for the defence. Having considered the oral evidence of the witnesses for both sides, as well as the documentary evidence tendered by the prosecution, the trial court was satisfied that, the case had been proved in all counts. Consequently, whereas the appellant and the 2nd accused person were convicted and sentenced to 30 years imprisonment, the 3rd accused person was sentenced to pay a fine of TZS 200,000.00 or three years imprisonment in default. The appellant was aggrieved by the decision of the trial court and thus appealed to the High Court of Tanzania at Arusha. His appeal was unsuccessful and has therefore, preferred this second appeal. The facts giving rise to the appeal may be briefly stated as follows: The victim (PW4), who had mental illness, was until the material time, a grade II student at Muivaro Primary School, special

education section. Rogathe Mathayo Ayo (PW1) was one of the teachers at that school. At one time, the victim complained to him that, there were four persons who used to follow her whenever she was on her way to and from school and sometimes followed her at home. Sometimes later, PW1 noticed that the victim was not in normal condition. He inquired from her whether she had any problem. The victim informed her that, she was raped by the appellant and the 2nd accused person at different places and further that, the 3rd accused person sexually harassed her in the manner stated in the third count. PW1 reported the matter to Shangarai Village Chairman, Wilfred Kamanani Mollel (PW2) who in-turn informed the victim's father (PW3) and thereafter, caused the arrest of, among others, the appellant. After his arrest, the appellant was taken to police station and was later charged in court. 3 In her evidence, the victim stated that, she had known the appellant before the date of commission of the offence against her. She testified that, the appellant gave her TZS 500/= and raped her in his place of work, which was at a milling machine. In cross examination, the victim stated that she did not remember the date of the incident. According to her, it was a long time ago. She added that, the appellant called and took her into a room and raped her while covering her mouth. On 20/3/2017, the victim was sent to Meru District Hospital for medical examination. She was attended by Dr. Florencia Simba (PW5) whose evidence was to the effect that, the victim was taken to hospital seven days after the date on which she was alleged to have been raped. Her findings after her examination of PW4's private parts were that; she was bleeding, did not have a hymen and did not have any bruises. She tendered the victim's PF3 and the same was admitted in evidence as exhibit PI. The appellant was very brief in his defence evidence. He denied the allegation that she raped the victim, stating that, he knew nothing about the incident. He challenged the evidence of PW5 contending that, her finding that the victim had infection (UTI), as shown in exhibit PI was not a sufficient evidence to link him with the offence. In her judgment, the learned trial Resident Magistrate was of the view that, the prosecution evidence, particularly the victim's testimony as supported by PW5, had sufficiently proved that, she was raped. The trial court relied on the case of Selemani Makumba v. Republic, Criminal Appeal No. 94 of 1999 which decided to the effect that, if believed, the evidence of a victim of a sexual offence is sufficient to prove the charge. It found further that, the appellant and the victim were neighbours who were undisputably known to each other. On the appellant's defence, the trial court found that, the same did not raise any reasonable doubt against the prosecution evidence. As stated above, the High Court upheld the judgment of the trial court. It agreed with the finding that the evidence of PW1, as supported by the expert evidence of PW5, proved the case against the appellant to the required standard. With regard to the date on which the offence was committed, the learned first appellate Judge was of the view that, the uncertainty was due to PW4's mental health status that she could not remember the date of the incident. The learned Judge found however, that from what PW4 narrated before the Court, her evidence was credible and had thus managed to prove that, she was raped by inter alia, the appellant. On the complaint that the age of the victim was not proved, the learned first appellate Judge observed that, since the victim was an adult, the complaint was meritless. She found also that, the variance of the victim's surname in the charge and the one recorded at the time of giving her evidence in court, did not have the effect of rendering her evidence invalid because her identity was not disputed by the defence during her testimony or at the time when her father

(PW3) was testifying. Dissatisfied with the decision of the High Court, the appellant has, in this appeal, raised a total of eight (8) grounds of appeal in his memorandum of appeal filed on 28/7/2023. Because of the reasons to be apparent shortly herein, we did not find it necessary to state the substance of each of the grounds raised by the appellant. At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Eliainenyi Njiro assisted by Ms. Rose Sulle and Neema Mbwana, all learned Senior State Attorneys. When the appellant was called upon to argue his grounds of appeal, he sought the leave of the Court to present his written arguments in lieu of making oral submissions. Since Ms. Njiro did not have any objection, we granted the appellant's prayer under rule 4 (2) (a) and (b) of the Tanzania 6 Court of Appeal Rules, 2009 bearing into consideration that he was not represented by a counsel. On the part of the respondent, Ms. Mbwana informed the Court, at the outset, that she was supporting the appeal. She took that stance upon consideration of the 1st and 8th grounds of appeal. Conceding to the 1st ground of appeal, the learned Senior State Attorney submitted that, there was a variance of date of commission of the offence stated in the charge and that which was stated in the evidence adduced by the prosecution witnesses. She clarified that, whereas in the charge the offence with which the appellant was charged is shown to have been committed on unknown date in February 2017, in his evidence, PW5 stated that, the victim was taken to her on 20/3/2017, seven days after the offence had allegedly committed. According to the learned Senior State Attorney, since there was a variance between the charge and the evidence as regards the date of commission of the offence, the charge ought to have been amended and because that was not done, the same was rendered defective. With regard to the 8th ground of appeal, Ms. Mbwana submitted that, as contended by the appellant, the charge was not proved beyond reasonable doubt. Her support of that ground of appeal was based on two 7 factors, first, that the testimony of the victim was interpreted by a person who was not competent to do so and secondly, that one of the ingredients of the offence of rape was not proved. Regarding the interpretation of the evidence of the victim who, as stated above, was a mentally retarded person and who, according to the trial court, was inarticulate in her speech thus requiring an interpreter. Ms. Mbwana argued that the interpreter, Rogathe Ayo, the victim's teacher was not competent because he was also one of the witnesses for the prosecution (PW1). For that reason, the learned Senior State Attorney argued, the interpreter should not have been taken to be a competent interpreter and the evidence of PW4 which was interpreted by him should be expunged from the record. She cited the case of Shimbi Daudi @ Kulwa and 4 Others v. Republic (Criminal Appeal No. 660 of 2020) [2023] TZCA 17900 (30 November 2023) to bolster her argument. Another weakness in the prosecution evidence, which was relied upon by Ms. Mbwana in supporting the 8th ground of appeal, was that, the adduced evidence did not prove that the victim was penetrated. Referring the Court to the evidence of the victim (PW4) and the expert evidence of PW5, the learned Senior State Attorney submitted that, whereas in her 8 evidence PW4 merely stated that the appellant raped her but used the word "alinilalia", PW5 stated that, upon her examination, she found that the victim, who was taken to her seven days after the date of the alleged offence, did not have bruises on her private parts. That, she was bleeding and did not have hymen, indicating that she had already been having sexual intercourse. According to the learned Senior State Attorney that evidence did not establish

penetration. On those submissions, Ms. Mbwana urged us to find that, the case was not proved beyond reasonable doubt and thus allow the appeal. The appellant did not have any substantial arguments to make in rejoinder. He supported the submissions made by the learned Senior State Attorney and prayed that his appeal be allowed and be released from prison. We have duly considered the submissions of the learned Senior State Attorney and appellant. We shall begin with the arguments on insufficiency of evidence. Before doing so, we find it instructive to restate the principle that, in a second appeal, the Court would not normally interfere with the findings of the two courts below on matters of facts unless there are sufficient reasons to do so. - See for instance the case of Ramadhani 9 Hamisi Mwenda v. Republic (Criminal Appeal No. 116 of 2008) [2013] TZCA 460 (23 April 2013). In that case, the Court observed that. 'We are minded that this is a second appeal where the court's jurisdiction to interfere with the findings of fact of the two lower courts is limited to mis- directions and non-directions leading to miscarriage of justice. See the case of Emmanuel Mdendeni v. Republic, Criminal Appeal No. 86 of 2007, Musa Mwaikunda v. Republic' Criminal Appeal No. 174 of 2006 and Dickson Joseph Lyana v. Republic ' Criminal Appeal No. 1 of 2005 (all unreported).' The issue which arises from the submissions made in respect of the 8th ground of appeal is therefore, whether the High Court erred in upholding the decision of the trial court while the learned trial Resident Magistrate had acted on misapprehension of the evidence of PW4, which was interpreted by an incompetent interpreter. It is not in-dispute that, the evidence of PW4 was interpreted by her teacher, Rogathe Ayo who had previously testified in this case as a prosecution witness (PW1). It is also not disputed; first, that his appearance as an interpreter was procured by the prosecution, not the Court, secondly, that the appellant was not given the opportunity to be heard on the suitability or otherwise of the said person to be an interpreter and thirdly, that he was not informed of his role as the interpreter of PW4's evidence. In the case of Shimbi Daud @ Kulwa and Others (Supra) cited by the learned Senior State Attorney, in which a similar situation occurred, the Court observed as follows: "... the issue of procuring the interpreter is a responsibility of the court under s. 211 of the CPA.

- See also Kigundu Francis and Another v. Republic' Criminal Appeal No. 314 of 2010 (unreported) in which the Court placed the duty to the trial court in criminal matters, if it appears that an interpreter is required' to arrange for the provision of an interpreter to interpret the evidence of the accused person or from witnesses...." The Court went on to state that, the accused person must be given the opportunity to object to the procured interpreter and when his appointment is not objected to, he should be informed of his role in the performance of that duty. It was held that, failure by the court to comply with those requirements vitiated the interpreted evidence. Reliance was also placed on the cases of Mpemba Mponeja v. Republic, Criminal Appeal No. 256 of 2009, Dastan Makway and Another v. Republic, Criminal Appeal No. 179 of 2017 and KaJyehu Kadama @ Madaha and Another v. Republic, Criminal Appeal No. 403 of 2021 (all unreported). In the case at hand, none of the above stated conditions were complied with in the appointment of the interpreter. Worse enough, the interpreter was a witness in the case, the effect of which, as argued by Ms. Mbwana, put his impartiality to doubt because, being a prosecution witness,

had an interest to serve. We are thus certain that, had the learned first appellate Judge addressed her mind to the above stated irregularities, she would have found that the evidence of PW4, which was interpreted by PW1, was inadmissible. In the circumstances, we agree with the learned Senior State Attorney that such evidence should be expunged from the record as we hereby do. After the evidence of PW4 has been expunged from the record, it is obvious that, the remaining evidence cannot sustain the appellant's conviction. It is trite principle that, the evidence of a victim is most crucial in proving a sexual offence. - See the case of Selemani Makumba (supra). We are supported further, by the fact that, the evidence of PW5, which was intended to corroborate the victim's evidence, has shortfalls as far as proof of penetration, one of the ingredients of the offence of rape, is concerned. 12 On the basis of the reasons stated above, we find merit in the 8th ground of appeal. Since the finding on that ground suffices to dispose of the appeal, the need for considering the other grounds of appeal does not arise. In the event, we allow the appeal, quash the appellant's conviction and set aside the sentence. We consequently order his immediate release from prison unless he is held for other lawful cause. DATED at ARUSHA this 10th day of December, 2024. A. G. MWARIJA JUSTICE OF APPEAL M. C. LEVIRA JUSTICE OF APPEAL B. S. MASOUD JUSTICE OF APPEAL The Judgment delivered this 11th day of December, 2024 in the presence of the appellant in person and Ms. Tobieta Chang'a, learned State Attorney for the Republic/respondent; is hereby certified as a true

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