

TANZANIA / JUDGMENT

JOSHUA HAMIS BENJAMIN

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DODOMA SUB REGISTRY AT
DODOMA DC. CRIMINAL APPEAL NO. 18940 OF 2024 (C/F Criminal Case No. 4030 of 2024 before
the District Court of Bahi) JOSHUA HAMIS BENJAMINI.....APPELLANT
VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

Last Order: 20th November, 2024 Date of Judgment: 29th November 2024 MASABO, J:- In the District Court of Bahi, the appellant was charged with the offence of rape contrary to section 130(1) (2) (e) of the Penal Code Cap. 16 R.E 2019. According to the particulars of the offence, on 4th February 2024 at Nkhulugano village within Bahi District, Dodoma Region, the appellant unlawfully had carnal knowledge of one HP (name withheld) a girl of 11 years old. After a full trial, the appellant was found guilty of rape, convicted and sentenced to life imprisonment. Aggrieved, the appellant has knocked on the doors of this court with an appeal based on eleven grounds of appeal which I shall summarise as follows: One, the case was not proved beyond reasonable doubt. Two, the trial court had no jurisdiction to hear the case. Three, the credibility of Page 1 of 14 prosecution witnesses was not assessed. Four, the trial court erred in relying on the expert opinion given by PW4 (a doctor who examined the victim). Five, PF3 was improperly admitted. Six, the appellant was not properly identified. Seven, the case was fabricated taking. Eight, the proceedings and judgment are tainted with procedural irregularities. Nine, the age of the victim was not proved. Ten, the appellant was not afforded the right to call witnesses. Lastly, the defence evidence was not considered. On the 20th of November, 2024, the appeal came for viva voce hearing. Ms. Prisca Kipagile, learned State Attorney, represented the respondent Republic whereas the appellant was represented by Mr. Sosteness Mselingwa, learned Advocate. Submitting in support of the appeal, Mr. Mselingwa abandoned the 2nd, 3rd, 4th 5th, 6th, 7th, 8th, and 9th grounds of appeal. Therefore, he submitted on the 1st, 10th and 11th grounds of appeal. On the first ground he submitted that the charge of rape was not proved to the required standard because: one, the examination by the doctor did not show that the victim was raped; two, the offence was committed at night and the victim stated that she identified the appellant through a torch light which was not true as the appellant was not at the scene; three, the report of rape was by the victim's parent and not the victim and last, the caution statement was improperly admitted. The appellant was forced to confess to the offence when he was at the police station. On the 10th ground, it was argued briefly that the trial court denied the appellant the right to call

witnesses because, as per his evidence, he was Page 2 of 14 not at the scene but the court did not inform him of the right to call witnesses. Had he been given such an opportunity he would have summoned the people he was with on the said date to testify in his favour. Regarding the last ground, it was Mr. Mselingwa's submission that it is a trite law that the evidence of the accused should be considered. This rule was offended as the appellant's defence although solid was ignored. The appellant testified that on the fateful day and time, he was watching a football match. He never went to the victim's home. This was strong evidence and ought to have been considered by the trial court but it was not. Resting his submission, Mr. Mselingwa argued that the offence was not proved and he prayed that the appeal be allowed, the conviction and the sentence of life imprisonment be quashed and set aside. Opposing the appeal, Ms. Kipagile submitted that the prosecution proved the case to the required standards. The victim stated how she was raped by the appellant. She also stated how she identified the appellant through torchlight. This evidence was corroborated by PW3, the victim's sibling who was sleeping with her on the same room and witnessed the offence as seen on page 7 to 9 of the proceedings. Further corroboration was from the doctor who examined the victim and found that the victim's vagina had bruises as shown in the medical report (Exhibit PE2). The appellant's submission that he was not at the scene is an afterthought as it was not raised during the trial. It is also inconsistent with section 194(1) of the Criminal Procedure Act which provides the procedure to be followed if the accused is to rely on an alibi. Ms. Kipagile submitted further that the fact that the victim's parent was the one who reported the incident is inconsequential because the victim does Page 3 of 14 not need to be the one to report the incident. As for the caution statement, it was submitted that the lamentation has no merit as the caution statement was neither produced in court nor relied upon by the court. Resting her reply to the first ground of appeal, she cited the case of Denis Frank Tarimo & Another vs Republic, Criminal Appeal No. 140 of 2021 [2024] TZCA 431 TanzLII, the Court of Appeal while referring to the case of Marwa Wangiti Mwita and Another vs Republic [2002] TLR 39 where it was held that the delay in reporting a sexual offence does not affect the credibility of the witness. Therefore, the delay to report the incident and its reporting by the victim is inconsequential. On the 10th ground, it was argued that has no merit because the appellant was addressed in terms of section 231 of the Criminal Procedure Act, Cap 20 R.E 2022. When required to respond, he responded that he would defend himself on oath and that, he did not intend to call any witness. Thus, he was ready to adduce his defence as shown on page 17 of the proceedings. Lastly, on the eleventh ground, it was submitted that it has no merit as the defence was considered. Alternatively, it was submitted that should this court find that the defence was not evaluated well, it can step into the shoes of the trial court and reevaluate the defence to ascertain if it cast any doubt on the prosecution's case as stated in Siaba Mswaki vs Republic, Criminal Appeal No. 401 of 2019 [2021] TZCA 468 TanzLII. In rejoinder, Mr. Mselingwa reiterated his submission in chief that there were fatal irregularities in the proceedings. He prayed that the appeal be allowed and the conviction and sentence be reversed. Page 4 of 14 On my side. I have carefully considered the submission by the parties and the evidence on record which I shall briefly summarize. For the prosecution, there were four witnesses. The victim testified as PW2 and her mother, Annastazia Antony Cosmas testified as PW1. The victim's siblings a child of tender age one J.H (name withheld) testified as PW3 while the doctor who

examined the victim testified as PW4. It is gathered from these testimonies that PW2 was living with her grandmother and was sleeping in the same bedroom as PW3. On the feteful day, the appellant raped her but she was not able to shout because he threatened her. PW3 eye witnessed the incidents as they used to sleep together with the victim in one room. Their bedroom has no door. Therefore, it was easy for the appellant to enter during night hours. Later on, after being asked by her mother and grandmother, the victim narrated the story of how the appellant used to rape her. She narrated that when the appellant entered the room removed his clothes and the underpants of the victim. He then lifted the victim's leg and inserted his penis into the victim's vagina. Following this narration, the victim was taken to the police and later on to the hospital where she was examined by PW3. The examination results showed that the victim was raped. The medical report PF3 was tendered and admitted as exhibit P2. The appellant denied having committed the offence. He raised the defence of alibi. Having given this summary, I will now proceed to the merit of the appeal. From the three grounds of appeal submitted by Mr. Mselingwa in support of the appeal, there are three issues for determination. One, whether the prosecution proved the case beyond reasonable doubt. Two, whether the appellant was addressed in terms of section 231 of the Penal Code and lastly whether the appellant's defence of alibi was considered. Page 5 of 14 I will start with the second issue through which the appellant has lamented that after the closure of the prosecution case, he was not addressed in terms of section 231 of the Criminal Procedure Act. The section provides that at the closure of the prosecution case and after the court has ruled that a *prima facie* case has been established against the accused, it shall explain to him the substance of the charge and inform him of his right to give evidence whether or not on oath or affirmation and to call witnesses in his defence if he so wishes. After explaining to him this right, the court is obliged to ask him if intends to exercise his rights above and record his answer before calling him to enter on his defence. The omission constitutes a fatal error and vitiates the proceedings and the conviction and sentence thereto as held in *Simaitoni Patsori @ Toshi vs Republic*, Criminal Appeal No. 167 of 2016 [2019] 1ZCA 605 (TanzLII). In the present case, what transpired in court after the court ruled that a *prima facie* case against the accused had been established was as follows:- COURT: Section 231 of the Criminal Procedure Act (Cap 20 R.E

2022) is stated to the accused person who is required to reply thereto. A.M MSANGI-RM 19/3/2024 ACCUSED I will testify on oath. I have no witness I have no exhibit I am ready to testify today. A.M MSANGI-RM 19/3/2024 Page 6 of 14 This record is loud and clear that there was a full compliance with the provision of section 231 as the appellant was well addressed on his right and exercised by opting to defend himself on oath with no additional witnesses and he did so. The court bears no blame on his choice not call a witness. A blame if any should go to no other person than the appellant himself. His lamentation is, therefore, with no merit and unmentionable. The next complaint I that, the appellant's defence, including his alibi, was ignored. It is indeed a principle of law that in determining whether or not the accused person is guilty of the offence charged, the court must thoroughly assess and evaluate the prosecution case and the accused's defence. Omission to consider the accused's defence is a fatal anomaly with stern consequences as

stated in the case of Rajabu Abdallah @Mselemu vs. Republic, Criminal Appeal No. 134 of 2014, [2014] TZCATANZLII where the Court of Appeal held that: As this Court has stated in different cases time and again, such omission constitutes a fatal error. To reiterate what has always been insisted in this regard, both courts below ought to have observed the well-established principle of law that in writing a judgment, a court has to consider not only the evidence in support of one party's in a case and completely ignore the evidence for the other party, however worthless it may appear. (Emphasis supplied) Thus, as correctly submitted by Mr. Mselingwa, the appellant's defence ought to have been considered. Was it considered? The answer is definitely in the Page 7 of 14 negative. The trial court record show that, the appellant had a very short defence. He just stated that on the fateful day he was at Kigwe and he was arrested while there. He did not know why he was arrested and he did not commit the offence. The court did not consider this defense. It was only mentioned in the passing as seen on page 14 of the judgment. On this page, it was just stated that the magistrate has considered the prosecution case and the defence. However, as correctly argued by Ms. Kipagile, it is not uncorrectable. This court being the first appellate court is enjoined to do what the trial court ought to do by stepping into its shoes and reevaluating the defence to ascertain if it has cast reasonable doubts to the prosecution's case (see Paulina Samson Ndawavya vs Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 [2019] TZCA 453 TanzLII). That said, I will first determine the first ground of appeal and revert to this point later. The appellant has submitted in support of the first ground of appeal that, the prosecution did not prove its case and has advanced four grounds in support. Granted, the burden of proof in criminal cases in our jurisdiction lies on the prosecution and the standard thereof is proof beyond reasonable doubt. As well stated in Leonce Evarist Maro vs Republic (Criminal Appeal No. 458 of 2020) [2024] TZCA 341 TanzLII, "it is acknowledged that always the burden of proof in criminal trials rests on the shoulders of the prosecutor and the standard is beyond reasonable doubt. For clarity, see sections 3 (2)(a) of the Evidence Act and the decisions of the Court in Makolobela Kulwa Makolobela and Eric Juma alias Tanganyika Vs. R, [2002] T.L.R. 296 and Akwino Malata vs. R (Criminal Appeal No. 438 of 2019) [2021] TZCA 506 (21st September, 2021, TANZLII), among many. In Page 8 of 14 Samson Matiga vs. R, Criminal Appeal No. 205 of 2007 (unreported) which was followed in the case of Daimu Daimu Rashid @ Double D vs. R, (Criminal Appeal No.5 of 2018), [2019] TZCA 366 (4th November, 2019, TANZLII), the Court held: "A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence." Also see Magendo Paul & Another vs. Republic

[1993] T.L.R. 219 Clarifying the prosecution's burden of proof in Nyanchobe Ryoki @ Gunza vs Republic (Criminal Appeal 250 of 2019) [2023] TZCA 220, the Court of Appeal held that: We wish to reaffirm the elementary principle of law that in criminal cases the duty of the prosecution is twofold. One, to prove that the offence was committed, and two, that the

accused is the one who committed it. See, for instance, the case of Maliki George Ngendakumana vs. Republic, Criminal Appeal No. 353 of 2014 in which while deliberating on the evidence of the victim of rape we emphasized that it is not enough to establish rape but rather the prosecution has to be able to prove beyond reasonable doubt that it is the accused who committed the offence and no one else." Thus, in the present case, the prosecution had to prove that there was rape and that, the person who committed it was none than the appellant herein. Page 9 of 14 Since the victim was aged below 18 years, proof of rape entailed proof that there was penetration and the victim was below the age of majority. The age of the victim is uncontested and so is penetration. The victim narrated eloquently how she was penetrated and as correctly submitted by the learned State Attorney, her evidence was corroborated by her sibling, PW3 who eye witnessed the offense as they were sleeping on the same bed. Further corroboration came from PW4 and Exhibit P2. These evidences were to the effect that, when PW4 examined PW2 she found bruises in her vagina. The argument by Mr. Mselingwa that the PW4 did not establish penetration is lucidly misconceived and with no merit. Needless to stress that even in absence of these corroboration, there was sufficient evidence that rape was committed. The narration by PW2 which is treated by law as the best evidence in sexual offences sufficed. Thus, there is no fault in the trial court's finding that PW2 was carnally known as such fact was credibly established and since her age was below 18, there is no doubt the offence of statutory rape was committed. Mr. Mwelingwa's second point in support of the first ground is on the evidence implicating the appellant. His line of argument is that, the appellant was not sufficiently implicated because, the evidence implicating him was predominantly based on visual identification, which in his view, was not free from mistakes considering that the offence happened at night. The trial court judgment was not oblivious to this fact. In page 12 of the judgment, the trial magistrate cited the case of Waziri Aman v Republic (1980) TLR 250. Guided by this decision she concluded that the identification was water tight. Page 10 of 14 I also had the opportunity to examine the evidence on record in the light of the principle in Waziri Aman v R(supra). Before I venture into it, it is apposite to state at this outset that the law on evidence of visual identification as propounded in the landmark case of Waziri Amani vs Republic (supra) and followed in a plethora of subsequent decision of the apex court and this court is now very well settled (see for example, the James Kisabo © Mirango and Another vs Republic Criminal Appeal No. 216 of 2006 [2011] "TZCA 106 TanzLII (unreported); Christopher Chacha @ Msabi & Others vs Republic (Criminal Appeal No. 235 of 2009) [2016] TZCA 792 TanzLII and Rajabu s/o Issa Ngure vs Republic Criminal Appeal No. 164 of 2013) [2013] TZCA 461 TanzLII, Alfredy Kwezi @ Alfonse v. Republic, (Criminal Appeal No. 216 of 2021) [2022] TZCA 355 TanzLII and Eliapenda Zephania Zakaria @ Kicheche vs Republic (Criminal Appeal No. 675 of 2021) [2024] TZCA 728 TanzLII. From these and many other authorities, it is now cardinal that, where the sole evidence implicating the accused person is visual identification, no conviction should be entered unless the possibility of mistaken identity has been eliminated. In Waziri Amani v Republic (supra) the Court instructively held that: "... evidence of visual identification, as Courts in East Africa and

England have warned in a number of cases; is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is folly satisfied that the evidence before it is absolutely watertight. Page 11 of 14 Cementing this position further in *Alfredy Kwezi @ Alfonce v. Republic* (supra), the Court underscored the importance of ensuring that the conditions for identification are favourable. It stated that: "...before a court can found conviction basing on visual identification, such evidence must be watertight so as to remove the possibility of honesty but mistaken identity. In such cases the court is required to consider, among others, the following matters; one, the time the witness had the accused under observation; two, the distance at he observed him, three, the conditions in which such observation occurred, for instance whether it was day time or night time, whether there was good or poor lighting at the scene; four, whether the witness knew or had seen the accused before or not; and five, all factors on identification considered, it should be also be plain that were any material impediment or discrepancies affecting the correct identification of the accused person by the witness". Where the offence was committed in the night such as in the present case, the law requires that the source and the intensity of the light by which the accused was identified be disclosed. In *Byamtonzi John @ Buyoya vs Republic* (Criminal Appeal No. 289 of 2019) [2021] TZCA 385 TanzLJI, the Court of Appeal while citing its previous decision in *Hassan Said v. Republic*, Criminal Appeal No. 264 of 2015 (unreported) stated that; "It is however, now settled, that if a witness is relying on some source of light as an aid to visual identification such witness must describe the source and intensity of such light in details. The Court has repeatedly in its various decisions in this respect, emphasized on the importance of describing the Page 12 of 14 source and the intensity of the light which facilitated a correct identification of the appellants at the scene of crimes (Emphasis supplied). In the present case, the offence was committed at night. According to PW2 and PW3, on the fateful night, the accused had carried a torch. He switched it on to illuminate and through it, they recognized him. The intensity of the light coming from the torch was unexplained. Also, although PW1's evidence implies that the appellant and the victims lived in one area, PW2's and PW3's evidence were conspicuously silent on their familiarity with the accused person. They did not state whether the appellant was known to them before the incident. The appellant's physique and the attire he had put on the fateful night were also not described. Considered conjointly, these omissions watered down the reliability of the virtual identification as the possibilities for mistaken identity were not fully eliminated. Thus, it cannot be said with precision that the appellant was properly identified as the threshold set in the authorities above was not satisfied. The argument by Mr. Mselingwa that the appellant was not properly identified is, therefore, with merit. As the evidence of visual identification was the sole evidence implicating the appellant, I am constrained to agree with the learned counsel that the appellant was not sufficiently implicated. Having found merit on this point which resolves the appeal, I see no need to proceed to the remaining points. Accordingly, the appeal is allowed. The conviction and sentence passed by the trial court are quashed and set aside. Page 13 of 14 It is ordered that the appellant be

discharged unless he is otherwise held for a lawful reason. DATED at DODOMA this 29th day of November 2024. Page 14 of 14

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