

TANZANIA / JUDGMENT

Kadogo Joram vs Republic

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27 August 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB-REGISTRY AT
BUKOKA CRIMINAL APPEAL NO. 5614 OF 2024 (Arising from Criminal Case No. 149 of 2022
District Court of Ngara) KADOGOJoram APPELLANT
VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

20th and 27th August, 2024 BANZL J.: Before the District Court of Ngara, the appellant was charged with the offence of incest by males contrary to section 158 (1) (a) of the Penal Code [Cap.16 R.E. 2022]. It was alleged that, on 20th October, 2022 at Nakatunga village within Ngara District in Kagera Region, the appellant had sexual intercourse with his daughter aged 6 years old (victim). The brief facts leading to the conviction of the appellant reveal that; on 20th October, 2022, Assistant Inspector Hadija Mfinanga (PW1), a police officer specialised on gender-based violence cases, received information from an informer that, there was a child at Nakatunga area who was sexually abused by her biological father. Upon such information, she went to the crime scene, took the victim to Ngara Police Station for interview. She also Page 1 of 7 called the social welfare officer, Anastazia Charles Msilanga (PW2) to witness the interview. During the interview, the victim (PW3) named the appellant as her rapist. The victim was given PF3 and she was taken to Nyamiaga Hospital where she was attended by Juma Abdallah Rusulo (PW5) who, after examination, found that, there were bruises in her genitals and the hymen was not intact. He filled in the PF3 which was admitted as Exhibit P1. In her evidence, the victim claimed that, it was at night when the appellant raped her and that was done in the presence of Joram. She complained to have felt pain. Thereafter, the victim was taken to Nazareth Orphanage Centre for her safety. The appellant was arrested and taken to Ngara Police Station where WP.9015 CPL Upendo interrogated him but he denied the offence. In his defence, the appellant denied to have committed the offence stating that, he cannot have sexual intercourse with his daughter. He prayed for the trial court to set him free. After a full trial, the trial court was satisfied that, the prosecution side proved the case beyond reasonable doubt. It convicted and sentenced the appellant to thirty years imprisonment. Aggrieved with his conviction and sentence, the appellant filed this appeal containing six grounds which boil down into main complaint that, the case against him was not proved beyond reasonable doubt. Page 2 of 7 At the hearing of this appeal/ the appellant appeared In person, unrepresented whereas the respondent Republic was represented by Mr. Erick Mabagala, learned State Attorney. Being a lay person, the appellant had

nothing to elaborate apart from urging this court to consider his grounds and release him from prison. In his reply, Mr. Mabagala supported the appeal on the reason that, the case against the appellant was not proved beyond reasonable doubt. Explaining further, he argued that, the trial magistrate convicted the appellant basing on the evidence of the victim but, according to him, that evidence was not ample enough to prove the charge against the appellant. He added that, the victim's evidence casts doubt on whether it was the appellant who committed the offence considering that, the incident occurred at night under unfavourable condition and the victim did not disclose the source of light and its intensity which assisted her to identify her rapist. In his view, the evidence of identification was not watertight and thus, the possibility of making mistake in identification was very high. He further submitted that, the prosecution side was duty bound to call Joram who was mentioned to eye witness the incident. Hence, failure to call Joram who was the material witness without disclosing any reason cast doubt on prosecution case and he urged this court to draw adverse inference on the prosecution Page 3 of 7 side. He cited the case of Azizi Abdallah vs Republic [1991] TLR 71 to support his stance. He concluded his submission with a prayer for this appeal to be allowed. The appellant had nothing to rejoin. Having thoroughly examined the evidence on record and after considering the submission of Mr. Mabagala, the issue for determination is whether the appeal has merit. Considering that the respondent did not oppose the appeal, it is pertinent to determine whether there was enough evidence to prove the case against the appellant. In her evidence, PW1 contended that, she was informed by the informer of what had befallen the victim and after examination by PW5, it was revealed that, the victim was penetrated as she had bruises and hymen was not there. With such results, there is no doubt that the victim was penetrated. Thus, the remaining issue is whether it was the appellant who penetrated the victim. Mr. Mabagala was of the view that, there was no such proof because the incident took place at night under unfavourable condition, hence, the evidence of identification was not watertight. Looking closely at the evidence on record, it is undisputed that, the alleged offence was committed at night. However, the victim, in her evidence, did not state how she managed to identify the appellant as the one who penetrated her. Likewise, she did not disclose the source of light Page 4 of 7 and its intensity which was in the room she where she was sleeping. It is settled law that, identification by recognition is more reliable than that by strangers or by voice; although even in recognition cases mistaken identification may be made. See the case of Issa Mgara @ Shuka vs Republic, Criminal Appeal No. 37 of 2009 CAT (unreported). In another case of in the case of Potian Joseph vs Republic (Criminal Appeal No. 200 of 2015) [2015] TZCA 325 TanzLII it was stated that: "...even in recognition cases where such evidence may be more reliable than Identification of a stranger, dear evidence of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognise someone whom he knows, as was the case here, mistakes in recognition of close relatives and friend are often made." (Emphasis supplied). Apart from glaring weaknesses on the evidence of the victim concerning identification of the appellant, it is apparent that, the prosecution evidence as a whole is not clear about circumstances surrounding the crime scene so as to eliminate the possibility of another person other than the appellant to have access to the victim's room. Besides, the victim contended that, Joram was present when the appellant had sexual intercourse with her. As it was argued by Mr. Mabagala,

the said Joram was the material witness Page 5 of 7 to corroborate the evidence of the victim however, for the reasons best known to the prosecution side, the said Joram was not called to testify. His evidence was crucial in order to corroborate the evidence of the victim concerning identification of the appellant which in my considered opinion, was very weak. Moreover, the allegation by PW4 about the informer used to hear the victim crying on every evening is not a conclusive proof that, it was the appellant who perpetrated the alleged offence. Under the prevailing circumstances, where the material witness was not called to testify, an adverse inference can be drawn against the prosecution side as it was held in the case of Azizi Abdallah vs Republic (supra) that; "The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution." Since the incident occurred at night and the victim did not disclose the source of light and its intensity which assisted her to recognise the appellant, it was unsafe for the trial court to rely on uncorroborated evidence of the victim to convict the appellant as it was stated in the case of Baya Lu san a vs Republic (Criminal Appeal No. 593 of 2017) [2021] TZCA 16 TanzLIL In Page 6 of 7 my view, the victim ought to have given clear evidence which left no doubt that, the recognition was correct and reliable. In that regard, it is the finding of this court that, the case against the appellant was not proved beyond reasonable doubt. Thus, I find the appeal with merit and I hereby allow it by quashing the conviction and setting aside sentence meted against the appellant. I order his immediate release from custody unless otherwise held for other lawful causes. It is so ordered. I. K. BANZI JUDGE 27/08/2024 Delivered this 27th day of August, 2024 in the presence of Mr. Erick Mabagala, learned State Attorney for the respondent, the appellant in person, Hon. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala, RMA. Right of appeal duly explained. I. K. BANZI JUDGE 27/08/2024 Page 7 of 7

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