

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CRIMINAL APPEAL NO. 31644 OF 2024 (Arising from Criminal Case
000013612 Of 2024 of the Resident Magistrate Court of Mbeya) KULWA
JUMANNE.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

Date: 15 January 2025 & 7 March 2025 SINDA, J.: The appellant was charged with the offence of rape c/s 130 (1) (2), (e) and 131 (1) of the Penal Code, Cap 16 R.E 2022 (the Penal Code). The Resident Magistrate Court of Mbeya at Mbeya (the Trial Court) convicted and sentenced him to serve 30 years imprisonment. 1 The particulars of the offence are that on 6 November 2023 in the Rutundu area, within the District and Region of Mbeya, the appellant did have sexual intercourse with one LL (name withheld), a 23-year-old woman, without her consent. The incident is said to have taken place at the victim's house. The appellant was arrested and arraigned before the Trial Court. After a full trial, he was found guilty of the said offence. Dissatisfied with the decision, the appellant appeals on a number of grounds as hereunder provided:

1. That, having found as a fact that the important and key witnesses were not produced to wit the husband of the called, the victim, the Trial Court erred in law and in facts when held that the prosecution had proved the case beyond reasonable doubt.
2. That, the trial Court Principal Magistrate erred in law and in facts when wrongly and erroneously applied and relied on the principle established in the case of Selemani Makumba versus. Republic while aware that the purported victim had spent night with her husband before going to report to police.
3. That, the trial Principal Magistrate erred in law and in facts when failed properly to analyze the evidence before reaching the decision. 2 At the hearing of the appeal, the appellant was represented by Mr. Philip Mwakilima, learned counsel. The respondent was represented by Mr. Salmin Zuberi, learned State Attorney. Submitting for the appeal, Mr. Mwakilima prayed to consolidate all three grounds of appeal and argue them together. The counsel claimed the offence was not proved beyond reasonable doubt. That, the charge sheet is defective, thus made the appellant unable to defend himself. He continued, that the charge sheet does not

state the time when the offence was committed. The counsel was of the view that the defect goes contrary to Section 132 of Criminal Procedure Act [Cap 20 R.E. 2022] (the CPA). That during trial, the victim and witness PW3 did not state the time of the offence. Supporting his argument, he cited the case of Republic vs. Joseph Jackson @ Manyaki, Criminal Appeal No. 85 of 2022. Mr. Mwakilima agreed that the best evidence in rape cases is that of the victim. However, he was of the view that such evidence cannot simply be believed without comparing it with other witnesses from the prosecution. That at page 9 of the Proceedings, the victim stated after the incident she went to the street leader to complain, one Bahati Mwakyembe. The victim stated that the appellant confessed to Bahati Mwakyembe that he raped her 3 because her husband is sleeping with the wife of the appellant. Mr. Mwakilima argued that the said Bahati Mwakyembe and the victim's husband were not called as witnesses to clear doubts. Further, the republic did not give reasons as to why those witnesses were not brought to court. The counsel was of the opinion that failure to bring a witness who could prove alleged facts, bring an inference that there is an intention to hide the truth. It was the counsel's submission that, the victim went to the police station on 7 November 2023, where she was given a PF3. That is, after she spent the night with her husband at home. Mr. Mwakilima claimed the one who penetrated the victim was her husband and not the appellant. With regard to bruises, the counsel claimed the doctor upon examination observed the victim had bruises. But in the victim's statement she did not state that she was left with bruises. For rape to be proved, Mr. Mwakilima continued, there must be no consent. That on page eight of the Proceedings, the victim said the appellant threatened her with a machete. Later she stated to had being threatened with a knife. He added that such evidence creates doubt as machete and 4 knife are not the same. The counsel was of the view that since that aspect is unclear, the element of lack of consent was not proved. In his reply submission, Mr. Zuberi argued that according to Section 132 of the CPA the time when the offence was committed is not a necessary particular to be included. That in practice, most charges do not show time that an offence was committed. Further, the Court of Appeal has never stated the same to be a default. He cited the case of Republic vs. Joseph Jackson @Manyaki, Criminal Case No. 168 of 2019. In relation to the issue of not bringing witnesses, that is the husband and local leaders. Mr. Zuberi argued that the court should rely on the Judgment of the Trial Court. That the Trial Court stated had the mentioned witnesses been called to testify, their evidence would merely be hearsay as they were not present. The counsel was of the view that according to the case of Selemani Makumba vs. Republic [2006] TLR 379, the victim's evidence is the best. That the victim explained in court how she was raped, reported the matter to the local leaders, and how she attended hospital the next day as the doctors were not present on the material date. 5 Concerning bruises, Mr. Zuberi submitted that after examination it was concluded that the victim was penetrated with a blunt object. Therefore, it was not the victim who was to state she had bruises, but the doctor. He added, that the court is not obliged to follow expert's opinion thus in this case the best evidence is that of the victim. With regards to contradiction on which weapon was used, either machete or knife. Mr. Zuberi argued that the difference is immaterial in the case at hand that needs to prove penetration and lack of

consent. Hence, he was of the view that the ingredients of rape were proved. In his rejoinder submission, Mr. Mwakilima mainly reiterated most of what he stated during his submission in chief. I have gone through submission from both sides, together with the records of the Trial court. I will now deliberate on whether I find this appeal with merit. I too will discuss all grounds of appeal together as so done by both counsels herein above. As I returned to his submission in chief, Mr. Mwakilima claimed that the charge sheet was defective. For reasons that the charge sheet did not specify 6 the time when the offence took place. To cement his argument, he cited Section 132 of the CPA, which I wish to reproduce hereunder:

132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. From the above, time was not particularly mentioned as necessary information. However, I acknowledge that specification of time is important. Nonetheless, I believe the available information in the charge was enough to inform the appellant of the offence leveled against him. The charge reads: STATE OF OFFENCE RAPE, Contrary to Section 130(1)(2)(a) and 131(1) of the Penal Code [Cap 16 R.E 2022]. PARTICULARS OF OFFENCE KULWA S/O JUMANNE, on the 6th day of November 2023, at Rutundu area, within the District and Region of Mbeya did have sexual intercourse with one LIGHTNESS D/O LUCAS, a woman of 23 years old without her consent. 7 After the said charge was read to the appellant, he pleaded not guilty to the offence. That being the case, it is my opinion that the omission of time in this case was not fatal, neither did it prejudice the appellant in any way. The best evidence in rape cases, is that of the victim. The same has been discussed in the case of Selemani Makumba vs. Republic (Supra), as mentioned by the counsels during their submissions. I agree with Mr. Mwakilima that the victim's evidence must not be treated as gospel truth. The same should be analyzed against other pieces of evidence adduced before the court. As provided in the case of Meedrage Mohamed Naheka vs. Republic, Criminal Appeal No. 391 of 2022. To wit: "However, we are also mindful of the legal principle which poses an exception to the rule in Selemani Mkumba (supra), that the rule cannot apply whole sale, ignoring credibility and reliability of the prosecution witnesses and the obtaining circumstances." In his argument, Mr. Mwakilima faulted the Trial Court for reaching its decision by solely depending on the prosecution's evidence. Which in his opinion, was lacking. First, he was of the view that the prosecution failed to call material witnesses. Second, the victim spent the night at home with her husband after the incident and went to the police station the next day on 7 November 2023, where she was given a PF3 and later examined by a medical 8 doctor. As such, Mr. Mwakilima claimed that it is not clear who penetrated the victim was her husband and not the appellant. Therefore, the prosecution evidence is full of doubts. Third, there is a conundrum on the weapon used by the appellant to threaten the victim. Whether it was a knife or a machete. Beginning with the first aspect, Mr. Mwakilima argued that the prosecution did not bring the victim's husband nor the local leader, Bahati Mwakyembe. The latter, who was apparently present when the appellant confessed to having raped the victim. Yet, I join hands with Mr. Zuberi

that such witnesses' evidence could not overshadow the adduced evidence before the Trial Court. The victim's husband testimony would merely be hearsay as he was not present during the commission of the offence. This was well discussed in the case of Charles Haule vs Republic, Criminal Appeal No. 250 of 2018 that cited the case of Leonard Joseph @ Nyanda vs. Republic, Criminal Appeal No. 186 of 2017. The case stated: "Since it was not suggested at the trial that the two persons were at the crime scene at the material time, we do not see them as material witnesses. They had not direct evidence of their own on the case apart from whatever facts they might have gathered from their conversation with or interrogation of the eye witnesses" ⁹ Likewise, the local leader's evidence would have aligned with that of PW3, H4298 DCPL Octavian. Who among other things stated, that the appellant orally admitted to him that he committed the offence. PW3 also mentioned that the appellant committed the act as revenge towards the victim's husband for sleeping with his wife. This is allegedly the same thing that the appellant confessed to Bahati Mwakyembe. With that, I find that the absence of the said witnesses did not shake the credibility of the prosecution's case. Moving to the contradiction pertaining the weapon, I succumb to the argument by Mr. Zuberi. That, proof of weapon in this case is rather immaterial. This being a rape case, the prosecution was duty bound to prove penetration and lack of consent of the victim. See the case of Sebastian Michael & Another vs. DPP, Criminal Appeal No. 145 of 2018. As a result, I am afraid if I task myself with looking for evidence concerning the weapon, I will go astray and drift from the key ingredients of the offence. Mr. Mwakilima argued that the victim spent the night at home with her husband after the alleged incident and went to the police station where she was given PF3 and the next day on 7 November 2023 examined by a medical doctor. As such, Mr. Mwakilima claimed that it is not clear who penetrated ¹⁰ the victim, whether it was her husband or the appellant. Therefore, the prosecution's evidence is full of doubts. I agree with Mr. Mwakilima that this brings a lot of questions as from the Proceedings the victim reported to the police station that she was raped and was given PF3 on 6 November 2023. She went to the hospital with her husband and did not find any doctors. The victim was examined by a medical doctor on 7 November 2023. Therefore, it is evident that the victim went home with her husband. As such, I do agree that it is not very clear who penetrated the victim between the appellant and the victim husband. Therefore, I find that the prosecution evidence was not water tight enough to secure a conviction against the appellant and was definitely full of doubts. Therefore, the prosecution has failed to prove its case beyond a reasonable doubt. Sections 110(1) and (2) and 112 of Evidence Act Cap. 6 R.E 2022 (the TEA) states that, he who alleges must prove and the burden of so proving lies on him. See also the cases of Abdul Karim Haji vs. Raymond Nchimbi Alois and Another, Civil Appeal No. 99 of 2004, Nathaniel Alphonse Mapunda and Benjamin Mapunda vs. Republic [2006] TLR 395 and Zombo Rashid vs. Republic, Criminal Appeal No. 7 of 2012 (CAT- unreported). ¹¹ Evidence must therefore be led by the prosecution in proving that, the offence was actually committed and so committed by the accused person. It is also trite law that, in all criminal matters the standard of proof is that of beyond reasonable doubt as provided under section 3(2)(a) of the TEA, as conviction cannot be grounded on mere suspicion. The standard was considered in the case of Nathaniel Alphonse Mapunda and

Another (supra), when the Court observed thus:

- i) “As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of Mohamed Said vs. Republic this court reiterated the principle by stating that in a murder charge the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt. ii) Where circumstantial evidence is relied on, the principle has always been that facts which an inference of guilt is drawn must be proved beyond reasonable doubt. iii) In criminal charge, suspicion alone, however grave it maybe it is not enough to sustain a conviction, all the more so, in a serious charge of murder.” 12
- Consequently, I allow the appeal, quash and set aside the conviction and sentence and order the immediate release of the appellant from prison unless held for another lawful cause. The right of appeal was explained. DATED at MBEYA on this 7 Day of March 2025. A. A. SINDA JUDGE 13

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