

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 352 OF 2023 LUKA MPAGAMA VERSUS THE REPUBLIC

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1 January 2023

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IN THE COURT OF APPEAL OF TANZANIA AT IRINGA (CORAM: KEREFU. 3.A., MGONYA. J.A. And MLACHA. J.A)[^] CRIMINAL APPEAL NO. 352 OF 2023 LUKA MPAGAMA..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the Decision of the High Court of Tanzania at Iringa) (Ka Iunde, 3.) dated the 2nd day of December, 2022 in Criminal Case No. 39 of 2020 JUDGMENT OF THE COURT 18* & 25th March, 2025 KEREFU, J .A .: This is a second appeal by Luka Mpagama, the appellant, who was before the District Court of Mufindi charged with and convicted of the offence of rape contrary to sections 130 (1) (2). (e) and 131 (1) of the Penal Code, Cap. 16 (the Penal Code). It was alleged that, on 14th March, 2019 at Mtwango Village within Mufindi District, in Iringa Region, the appellant had carnal knowledge of "VM" a girl aged ten (10) years. It is on record that, the appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled a total of three (3) witnesses and one documentary evidence namely, the Police Form No. 3 (the P.F.3) (exhibit PI), The appellant relied on his own evidence as he did not summon any witness. In a nutshell, the prosecution case as obtained from the record of appeal indicate that, the appellant and Jane Maundagila (PW2) were husband and wife and have been blessed with two issues. However, the victim, who testified as PW i (name withheld), was not one of the issues of their marriage. That, prior to her marriage with the appellant, PW2 was married to another man whom they had divorced. Therefore, upon being married by the appellant, PW2 lived together with PWI in the new matrimonial home. PWI was thus the appellant's stepdaughter, whom they have been living together since PWI was one year old. Therefore, prior to the incident, PWI had lived with her stepfather for almost nine (9) years. It was the testimony of PWI that, on 14th March, 2019 around 22:00 hours, when her parents went to their bedroom to sleep, she remained at the sitting room to finish her homework by using the solar energy lights. That, having finished her homework, she also proceeded to her bedroom to sleep. That, while was preparing to sleep, suddenly, her stepfather entered into her bedroom, undressed her, took off her pants and his trousers and raped her. PW1 felt pains and screamed for help, but the appellant put his hands on her mouth. PW1 tried to call her mother, but she could not hear her voice. That, after the awful

act, the appellant went back to his room. PW1 stated that, she continued to cry helplessly and her mother (PW2) came to her room and asked her what had happened? PW1 narrated the incident to her. PW2 inspected PW1's private parts and saw some blood, but told her to wait until morning. In the next day, they went to the village government authorities who advised them to report the matter to police. That, having obtained a PF3 from the police, they went to Mafinga Hospital for medical examination, where Jesca Joseph Mbonge (PW3), a clinical officer, conducted an examination and found that, PW1 had bruises in the 'abulum m inora 'parts of her vagina. PW3 filled the PF3 to that effect and the same was tendered in evidence as exhibit PI. In her evidence, PW2 supported the narration by PW1 and added that, on the fateful date, while in their bedroom sleeping with the appellant, he told her that he was going to attend the call of nature. A moment later, he returned and went back to sleep. PW2 stated that, she then heard a voice of PW1 crying for help. PW2 went to her bedroom and found her naked. PW2 said, she asked her what was the matter and she told her that she was raped by her stepfather. PW2 examined PW1's private parts and saw some blood over her vagina. PW2 went back to her bedroom and asked the appellant what has he done? The appellant remained silent. That, later, the appellant was arrested. In his defence, the appellant, who testified as DW1, denied any involvement in the commission of the offence. He challenged the evidence of PW1 and PW2 that they gave untrue story before the trial court. He complained that, the case was framed up against him due to his misunderstandings with PW2. He contended that, on the fateful date, he came back home around 20:00 hours and found PW1 and PW2. Later, his children asked him for a text book. He then went out at the shop to purchase it and came back around 22:00 hours, where he found all children asleep. He went to his bedroom and asked PW2 for a conjugal right, which she refused. Thereafter, PW2 left the bedroom and shifted to PW1's room to ascertain why PW1 was crying in the afternoon soon after she returned from the school. He stated that, PW1 was crying because she was raped by an unknown person when she was on her way from school, but PW2 coached her to mention him as the culprit. He recounted to have been arrested on 15th March, 2019 on the PW1's alleged rape. Dismas Makandawila (DW2), the brother-in-law of the appellant, testified that, on 14th March, 2019 around 23:00 hours, the appellant approached him and complained about his misunderstandings with PW2 and asked him to reconcile them, though, he did not reveal the source of the alleged misunderstandings. DW2 stated further that, he went to the appellant's house at that night and found PW2 asleep. He awakened her but refused to co-operate. Mariam Mahenge (DW3), the mother of the appellant, testified that, on 15th March, 2019 around 14:00 hours, her son was arrested on the alleged rape offence and sent to Kibao Police Station and later was taken to Mafinga Police Station. That, she made a follow up and went to Kibao Police Station to ask for a police bail but was unsuccessful as the appellant was transferred to Mafinga Police Station. DW3 also testified that, she went to Mafinga Hospital and found PW1 together with PW2. It was the testimony of DW3 that, the case against the appellant was fabricated. Aliko Emmanuel (DW4), the Village Executive Officer (VEO), testified that, he received rumors that PW1 was raped. Then, later, after two days, DW3 went to his office complaining that her son (the appellant) had been arrested on rape allegations. DW4 stated that, he advised DW3 to go to Kibao Police Station for further legal steps. After a full trial, the trial court accepted the version of the prosecution's case and specifically placed much reliance on the direct evidence by PW1, the victim and best

witness, whose evidence was found to have been corroborated by the evidence of PW2 and PW3. Thus, the appellant was found guilty, convicted and sentenced to life imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Undaunted and still protesting his innocence, the appellant has approached this Court on a second appeal. In the memorandum of appeal, the appellant raised eight (8) grounds of appeal which can be conveniently paraphrased as follows: First, that, the memorandum of undisputed facts was signed without being read and explained to the appellant contrary to section 192 (3) of the Criminal Procedure Act, Cap. 20 (the CPA); second, that, the prosecution's evidence was contradictory and uncorroborated; third, the first appellate court erred in law for failing to find that the appellant was not given the opportunity to cross examine PW2 as required by the law; fourth, failure to consider the defence evidence; fifth, that exhibits PI was unprocedurally admitted in evidence; sixth, failure by the first appellate court to find that the trial court misapprehended the evidence adduced before it; seventh, failure by the prosecution to summon material witness; and eighth, that the prosecution case was not proved beyond reasonable doubt. At the hearing of the appeal, the appellant appeared in person whereas, the respondent Republic was represented by Mr. Yahaya Misango, learned Senior State Attorney. When given an opportunity to amplify on his grounds of appeal, the appellant adopted his grounds of appeal and preferred to let the learned Senior State Attorney to respond first but he reserved his right to rejoin, if need to do so would arise. We respected his choice and we thus invited Mr. Misango to commence his response on the grounds of appeal. At the outset, Mr. Misango declared the respondent Republic's stance of supporting the appeal. He intimated that he would only submit on the second and eighth grounds of appeal, which according to him, if upheld, disposes of the appeal. Responding to the second and eighth grounds, Mr. Misango conceded that the prosecution's case was not proved beyond reasonable doubt, as the identification of the appellant by PW1 at the scene of crime was not watertight to eliminate the possibility of any mistaken identity. He argued that, although, PW1 testified that her stepfather raped her, she did not explain on how she managed to identify him. She did not offer adequate description of him and or explain the source and intensity of the light which assisted her to identify him. That, PW1 did not, as well, explain the size of the room illuminated by the said light and the time she spent with the appellant inside the room. To support his argument, Mr. Misango referred us to pages 9 to 10 of the record of appeal. He added that, PW2 also testified that, at some point, during the night, the appellant went out to attend to the call of nature, thus, there was a possibility of someone else to have entered into the victim's room and raped her. He emphasized that, since the incident happened at night under unfavorable conditions, all conditions of visual identification ought to have been complied with. To buttress his proposition, he cited the case of *Maige Isaack @ Magembe*

- v. Republic, Criminal Appeal No. 130 of 2022 [2025] TZCA 56: [21 February 2025: TanzLII] and implored us to find that PW1 and PW2 were incredible and unreliable witnesses. Mr. Misango also faulted the first appellate court for upholding the appellant's conviction while the evidence by the prosecution was tainted with contradictions on when exactly PW1 was taken to the hospital for examination. To amplify on this point, Mr. Misango referred us to

the evidence of PW1 and PW2, who testified that, they reported the matter to the village government authorities on 15th March, 2019 and advised to report the same to the police where they were issued with the PF3 (exhibit PI) and went to the hospital on the same day. However, PW3 testified that, she received PW1 and her parents on 14th May, 2019 and examined her and signed exhibit PI on 15th May, 2019. It was the argument of Mr. Misango that, since PW1 was medically examined in May, 2019 and in her observations, PW3, at page 33 of the record of appeal, indicated that she found PW1's vagina with blood stains and sperms, it is clear that the same were not from the appellant who was alleged to have raped her in March, 2019. Mr. Misango also referred us to the evidence of DW2 at page 26 of the record of appeal and argued that, DW2 testified that, on 14th March, 2019 around 23:00 hours, the appellant requested him to reconcile him (the appellant) with PW2. That, DW2 went to the appellant's home, but PW2 did not report to DW2 any occurrence of the rape incident. That, DW4 also did not state that PW1 and PW2 reported the matter to his office. According to him, the pointed-out contradictions had created doubts in the prosecution case which was supposed to be resolved in the favour of the appellant. Based on his submission, Mr. Misango concluded that, the prosecution case was not proved to the required standard and urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the appellant and set him at liberty. In a brief rejoinder, the appellant did not have much to say other than welcoming the concession to the second and eighth grounds of appeal by Mr. Misango and also urged us to allow the appeal and set him at liberty. Having carefully considered the submissions made by the parties before us and after having examined the record, we should now be in a position to determine the grounds of appeal. Before doing so, we wish to state that, we are not losing sight that, this being the second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there are no mis- directions or non-directions on evidence. However, where there are mis- directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See for example *Director of Public Prosecutions v. Jaffari Mfaume Kawawa* [1981] TLR 149 and *Salum Mhando v. Republic* [1993] TLR

170. We shall be guided by the above principle in disposing this appeal. On the basis of the stance taken by the respondent and the appellant in arguing the grounds of appeal, the determination of this appeal turns on the second and eighth grounds, where the main issues for our determination are whether the appellant was positively identified at the scene of crime and whether the prosecution proved the case to the required standard. Starting with the appellant's visual identification at the scene of crime, we have revisited and re-evaluated the evidence of PW1, PW2 and the appellant and find that, in their evidence, the said witnesses clearly indicated on how they knew each other for a long time prior to the incident. For instance, in her evidence found at page 9 of the record of appeal, PW1 testified that: "I know the accused, his name is Lucas Mpagama, he is my stepfather. I have been living with the accused (stepfather) for almost nine years now. I lived together with my mother and stepfather for the whole duration. I am studying at Itedeto Primary School, now I

am in standard four. I remember on 14/3/2019 around 22:00 hours, I was doing my class homework by using solar energy lights, my parents went to bed and I remained at seating room finishing homework. After I finished, I proceeded to bed, but eventually, my stepfather (accused), happened to my bedroom and started taking-off my under panties and he took off his trouser and his "Mdudu" (penis) out. Then, he took his penis and inserted into my private party; I felt pain and I raised an alarm but he put his hands over my mouth." Again, PW2 at page 10 of the same record of appeal, testified that: "I know the accused, he is my husband. I know the victim, she is my daughter (child). The victim is 10 years old, the victim's biological father., lives at Mbeya, currently. I have divorced with him, then I decided to get married with the accused. I started living with the accused as my husband since 2010. At that time, my daughter was 1 year old ...I remember on 14/3/2019, around 22:00 hours, the victim was doing her class homework, I and my husband left victim studying and proceeded to sleep. While we were sleeping, the accused left the bed and proceeded to the seating room, he told me that he wanted to attend his call of nature. After some time, he returned back and sleep. Eventually, I heard a voice of my child (victim) crying for assistance ..I asked her what has happened? And she replied that she was raped by her stepfather. I inspected her private parts and saw some blood over her vagina. I returned to my husband and asked him, what has he done? He replied nothing . " On his part, the appellant, at pages 18 to 19 of the same record, testified that: "...I returned from shopping around 22:00 hours and found all children asleep. I slept and asked for a conjugal to my wife but she denied. My wife shifted to children room and asked the victim why in the afternoon after returning from school she was crying. Then, the victim told her mother that when she was returning from school, she met with a person who ambushed and raped her. Then, my wife sent the victim to her grandmother. " From the above extracts, there is no dispute that PW1 was familiar to the appellant as her stepfather married to her mother and they have lived together for almost nine (9) years. The appellant himself, in his evidence, did not dispute the said facts, as he clearly admitted that, he was living in the same house with PW2, his wife and PW1, his stepdaughter. In the circumstances, we find the argument by Mr. Misango, on this aspect to be misconceived and not supported by the record. It is our settled view that, the appellant, having resided with PW1 at his home for a long time and taking care of her, from her childhood when she was 1 year old, he was positively recognized by PW1. In *Nicholaus James Urrio v. Republic*, Criminal Appeal No. 224 of 2010 [2025] TZCA 56: [21 February 2025: TanzLII], when we considered an akin situation, we quoted with approval the decision of the Court of Appeal of Kenya in *Kenga Chea Thoya v. Republic*, Criminal Appeal No. 375 of 2006 (un reported) where it was stated that: "On our own evaluation of the evidence, we find this to be a straightforward case in which the appellant was recognized by witness PW1 who knew him. This was clearly a case of recognition rather than identification. It has been observed severally by this Court that recognition is more satisfactory, more assuring, and more reliable than identification of a stranger." We made corresponding remarks in *Athumani Hamis @ Athuman*

- v. Republic, Criminal Appeal No. 288 of 2009 [2012] TZCA 303: [29 February 2012: TanzLII] and *Revocatus Luhega Kisandu v. Republic*, Criminal Appeal No. 195 of 2019 [2022] TZCA 409: [11 July 2022: TanzLII]. Similarly, in the instant appeal, in view of the evidence of PW1 which was corroborated by PW2 and the appellant himself, we are settled that, this is a clear case of recognition rather than identification as both, PW1 and the appellant knew each other very well prior to the incident. This fact is further cemented by the fact that, PW1 mentioned the appellant to PW2, at the very night, upon being asked what had happened. There is no doubt that, the act of mentioning the appellant at the earliest opportunity, adds credence to the reliability and assurance of PW1's evidence. On this point, we wish to refer to our earlier decision in *Marwa Wangiti Mwita & Another v. Republic* [2002] T.L.R 39, where we observed that: "The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry." We are however mindful of the fact that, when challenging the visual identification of the appellant, Mr. Misango relied on our previous decision in *Maige Isaack @ Magembe (supra)*, in which we reiterated the principle on the quality of the evidence of visual identification required to ground an accused person's conviction. We agree with him on that principle. However, and with profound respect, we are unable to go along with his argument that, in this appeal, the appellant's visual identification was not watertight. Having made our finding that, the appellant was positively recognized by PW1 at the scene, we see no reason to fault the lower courts on that aspect. It is most significant that, during the trial, PW1's evidence on visual identification was not controverted, as the appellant shield away from cross-examining her on that aspect. It is trite law that failure to cross-examine a witness on an important matter implies the acceptance of the truthfulness of the witness's evidence - see *Cyprian Athanas Kibogoyo v. Republic*, Criminal Appeal No. 88 of 1992 [1992] TZCA 35: [17 August 1992: TanzLII] and *Ismail Selemati Nole v. Republic*, Criminal Appeal No. 117 of 2013 [2014] TZCA 285: [24 November 2014: TanzLII]. We are increasingly of the view that, even the case relied upon by Mr. Misango above, is distinguishable with the facts of this appeal. In that case, the Court, having expunged the evidence of the victim (the best witness), for being taken contrary to section 198 (1) of the CPA, it found that the remaining evidence was not watertight, which is not the case herein. In addition, and having considered the contradictions complained of, we do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of the evidence of PW1 and PW2. It is on record that, PW1 and PW2, both stated that the incident was committed on 14th March, 2019 at 22:00 hours, That, in the following day, they reported the matter to the village government where they were advised to report the same to police, where they went and obtained PF3 (exhibit PI). The said exhibit is dated 15th March, 2019, the same date mentioned by PW1 and PW2. The said fact was also supported by DW3 at page 27 of the same record, who testified that, on 15th March, 2019, she went to Mafinga Hospital and found PW1 and PW2 at the hospital. Though, it is also on record that, at page 33, it is indicated that, exhibit PI was signed on 15th May, 2019. On that aspect, we agree with Mr. Misango, that there is a contradiction. However, since the said exhibit also contains the date mentioned by PW1, PW2 and DW3, we still find the said

contradiction to be a minor defect, as even if the PF3 is expunged from the record, the remaining evidence on record, sufficiently proved the offence against the appellant. This is so because, in rape cases, the PF3 is not the only evidence to prove rape, other evidence on the record can as well prove it. In *Ally Mohamed Mkupa v. Republic*, Criminal Appeal No. 2 of 2008

[2010] TZCA 24: [13 October 2010: TanzLII], we stated that: "/if- Is true that PF3 (E xh .P l) would have supported the com m ission o f the offence but rape is not proved by m edical evidence alone. Some other evidence m ay also prove it " Similarly, in the case at hand, we hasten to remark that, even without the PF3, the testimony of PW2, is quite sufficient to prove that PW1 was raped, as in her evidence found at page 11 of the record of appeal, PW2 clearly testified that, on the fateful date, when she examined PW l's vagina, she saw some blood over her vagina an indication that her hymen was torn. It is also on record that, in convicting the appellant, the trial court relied mostly on the evidence of PW1 which was corroborated by PW2, PW3 and the appellant himself. Having carefully scanned the entire evidence on the record, we are satisfied that, both courts below properly evaluated the evidence and were satisfied that the case against the appellant was proved beyond reasonable doubts. We have specifically revisited the testimony of PW1 who dearly explained on how the incident occurred. PW l, in particular, at page 9 of the record of appeal, narrated on how the appellant entered into her bedroom, undressed her under panties and took off his trousers. PW l also clearly demonstrated on how the appellant, inserted his penis into her vagina and on how she felt pains and raised an alarm but the appellant covered her mount with his hands. In cases involving sexual offences the best evidence is that of the victim. The sole evidence of the victim can be safely relied upon by the court to sustain a conviction, See for instance the cases of *Selemani Makumba v. Republic* [2006] T.L.R. 379 and *Rashidi Abdailah Mtungwe v. Republic*, Criminal Appeal No. 91 of 2011 [2012] TZCA 413: [25 June 2012: TanzLII], among others. In the instant appeal, the testimony of PW l, the best evidence in this case, was ably corroborated by the testimonies of PW2, PW3, the appellant himself and DW3. As such, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair conclusion. It is therefore, our settled view that there is no fault in the factual findings of the two courts below for this Court to interfere. In conclusion, we do not find any cogent reasons to disturb the concurrent findings of the lower courts, as we are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. In the event, we find the second and eighth grounds of appeal devoid of merit. Consequently, we find the appeal devoid of merit and hereby dismissed it in its entirety. DATED at IRINGA this 24th day of March, 2025. R. J. KEREFU JUSTICE OF APPEAL L. E. MGONYA JUSTICE OF APPEAL L. M. MLACHA JUSTICE OF APPEAL The Judgment delivered this 25th day of March, 2025 in the presence of the appellant in person and Mr. Herbert Ishengoma, learned State Attorney for the Respondent/Republic; is hereby certified as a true copy of the original. A*. / DC ^ V DEPUTY REGISTRAR ° U COURT OF APPEAL

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Prepared on 14 October 2026 · Esheria