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. 10329 OF 2024 (Original from Criminal Case No. 94 of 2023 of the District Court of Mbeya at Mbeya) MKUDE DAUD MGOGO.....APPELANT VERSUS THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 13 August 2024 & 1 November 2024 SINDA, J.: The appellant at the District Court of Mbeya at Mbeya (the Trial Court) was charged with five counts. Three were armed robbery contrary to section 287A of the Penal Code [Cap 16. R.E 2022 (the Penal Code). Two counts were in relation to rape contrary to section 130 (1) (2) (a) and 131 of the Penal Code. It was alleged that on 16 June 2023 at Iwambi area within Mbeya, the appellant did steal one mobile phone Make Techno worth of TZS 1 25,000/=, one NMB ATM card under the name of Hidaya Juma, cash money amounting to TZS 520,000/= all worth TZS 545,000/= the property of Hidaya Juma. One NMB ATM card under the name of Zabibu Afoni Mwashitete and cash amounting to TZS 3,000,000/= the property of one Zabibu d/o Afoni Mwashitete. He also stole one mobile phone make Oppo worth TZS 150,000/=, the property of one Mwanahamisi d/o Juma. In course of committing the above offence, he used dangerous weapons to wit a Knife and an iron bar to threat victims and without their consent he raped Hidaya d/o Juma and Mwanahamisi d/o Juma. It was the prosecution evidence that on the material day around 01:00 hours am, the appellant invaded the victims having iron bar and knife. The appellant stole TZS 3,520,000/=, two mobile phone Techno and Oppo, two ATM Cards one of Hidaya Juma another of Zabibu Mwashitete. After that, the appellant raped the victims for about four hours from 1:00hrs am to 05:00hrs am. Then the appellant moved away from the scene of crime. The incident was reported at police station. Then, the victims got PF3 and went to the hospital for checkup and treatment. After the examination it was revealed that the victims were penetrated. The appellant was arrested via phone which he stole and upon interrogation he admitted committing the offences. 2 At the hearing, the appellant in general denied committing all counts charged with. At the end of hearing, the Trial Court found that all counts were proved by the prosecution to the required standard. The appellant was convicted and sentenced to serve 30 for each count. The sentence was to run concurrently. Aggrieved with decision, the appellant filed the petition of appeal before this court with seven grounds as follows;

1. That the trial court erred in law and fact for conviction of the appellant on the offence of armed robbery and rape whereby both offences were not proved beyond reasonable doubt.
2. That the trial court erred in law and facts to convict the appellants on the offence of armed robbery basing on Exhibit PE-2, PE-3, PE-4 and PE- 5 which were tendered to the court where neither evidence of the said an independent witness, two neighbours nor a Street leader called to testify to have found such properties in the house of the Appellant.
3. That the trial court erred in law and fact to convict the appellant based on properties found in the Appellant's house without sufficient evidence to prove the ownership of the stolen properties. 3
4. That the trial court erred in law and facts for conviction of the Appellant o offence of rape despite contradictions in the evidence of the prosecution side.
5. That the trial court erred in law and facts for conviction of the appellant based on the defective charge because the charge sheet stated that the Appellant did steal NMB ATM Card, and cash money and that incident had occurred on 16 June, 2024 contrary to the case fact Preliminary hearing (PH) which stated that the incident occurred on 18 June, 2024.
6. That both cautioned statement and extra judicial statement were illegal obtained to be relied on to convict the appellant.
7. That trial court erred in law and facts for not considering defense side During hearing of appeal, the appellant appeared in person, unrepresented while respondent was represented by Salmin Zuberi, State Attorney. The appellant opted to hear first from State Attorney and reserved right to make rejoinder if any. Mr. Salmin on the first ground of appeal he submitted that in order to prove the offence of armed robbery the prosecution was required to prove three ingredients of the offence of armed robbery that there must be 4 theft. There must be use of a weapon when conducting the theft and the use of the weapon must be against the victim of theft. He argued that PW1 on page 7 of the proceedings of the Trial Court (the Proceedings) told the court that the appellant was holding a knife when he committed the crime. That, the appellant used the knife to force PW1 to give the appellant the money and other things that the appellant wanted. Also, at page 7, 8, 9, 10 and 11of the Proceedings PW1 stated the things which the appellant forced PW1 to give him. At page 11 of the Proceedings, it shows that PW1 told the court that the appellant did steal two mobile phones one make techno, and the other one make oppo, earphones, flash and cash. It was the respondent view that PW1 evidence was enough to prove the offence of armed robbery because the appellant used an offensive weapon which is a knife and iron bar (nondo) which were used against PW1 so that to give the appellant the things he wanted. He referred the case the case of Shaban Said Ali vs. Republic, Criminal Appeal No. 270 of 2018 reported at Tanzlii to support his argument on the ingredients of armed robbery. On the offence of rape, he submitted that the case was proved beyond reasonable doubt and at page 14 of the Proceedings it shows that PW2 5 telling the court that she was forced to have sexual intercourse with the appellant and if not, she would face the consequences. The testimony

of PW2 was supported by the testimony of PW5 and PW7 and the Exhibit PF3. A medical doctor (PW5) at page 35 the Proceedings told the court that after examining the PW1 who was also pregnant. He found that the PW1 had bruises, and she was penetrated with a blunt object. At page 36, PF3 was admitted in court and the appellant did not object. It is clear that the appellant penetrated both PW1 and PW2 without their consent. The ingredients to prove the offence of rape that is penetration and without consent was proved. He prayed that this court to dismiss the first ground of appeal because the offences were proved beyond reasonable doubt. On the second ground of appeal, he submitted that the court did not rely only on Exhibit PE-2, PE-3, PE-4 and PE-5 to convict the appellant. The Court also relied on Exhibit PE-1 to reach its decision. He did not object to the Exhibit PE-1 which was enough to convict him. On the third ground he submitted that when PW1 asked the court to tender the Exhibits and the appellant was asked if he had any objection, he said he did not have. Therefore, the appellant to bring back the ground at this stage is an afterthought because he had the right to object the 6 Exhibits tendered. Also, PW1 when giving his testimony he explained on the ownership status of the properties which were stolen. On page 11 of the typed proceedings, PW1 stated the serial number and value of the phones to prove that they belonged to her. Also, no other person showed an interest of the properties since 10 August 2023 when PW1 gave her testimony until to date. On the fourth ground he argued that there is no any contradiction for the court not to convict the appellant on the offence of rape. One of the victims was 7 months pregnant and another victim was the relative. He insisted that the evidence on the offence of rape was sufficient and there was no any contradiction. On the fifth ground he submitted that he has reviewed the charge sheet and confirm that the charge sheet is not defective because it follows section 132 and 135 of the Criminal Procedure Act, Cap 20 R.E 2022. The appellant also stated that the charge sheet contradicts the PH, they rely on the case of Barnard Masumbuko Shio & Another vs. Republic, Criminal Appeal No. 213 of 2007, CAT at Arusha (Tanzilii) and the case of DPP vs. Jaba John, Criminal Case No. 206 of 2020, CAT at Mwanza. In both cases the CAT stated that, Generally, a Preliminary Hearing is a mandatory procedure in trial of criminal cases. However, 7 failure by the court to hold a preliminary hearing doesn't vitiate the proceedings of the trial if the accused person was not prejudiced. He argued that the appellant would have been affected if he had raised a defence of alibi. That he was not present when the offence was committed like the charge sheet and the preliminary hearing is stating. There is no notable any legal defence e.g. of alibi, Bonafede claim of right and cruelty of spouse etc. He prayed the ground also be dismissed. On the sixth ground, he submitted that at page 56 of the Proceedings, it shows that PW10, told the court how all the procedures were followed when he took the cautioned statement of the appellant. At page 56, 57and 58 shows how he was given all his rights. Also, PW10 prayed to tender the cautioned statement the appellant did not object. To bring this issue now is also an afterthought. Also, at page 48 and 49 of the Proceedings shows that PW8, gave her testimony on how she took the extra judicial statement of the appellant. Further, the appellant did not object for the extra judicial statement to be tendered and admitted in court. He had such right to object the cautioned statement and the extra judicial statement. He prayed this ground also be dismissed. On the

last ground of appeal that the Trial Court erred in law and facts for not considering the defence side. He submitted that it was the 8 appellant defence that it was not true that he committed the first, second, third, fourth and fifth defence. He had no notable any legal defence e.g. of alibi, Bonafede claim of right and cruelty of spouse in the proceedings. at page 18,19, 20 of the Judgement of the Trial Court the court explained on the defence given by the appellant and after weighing the evidence the court convicted the appellant. He prayed this ground also be dismissed, and the court upheld the decision of the Trial Court. The appellant in rejoinder stated that there was no search warrant to show that he was found with the stolen properties. The victims told the court that they were three people in the house when he entered. PW1 said she was raped and PW2 said she was raped. They both said they were raped at the same time. Therefore, when he was raping PW1, PW2 was sitting there. He added why didn't she make any noise. Also, PW1 said that he went to shower with her. Her sister did not go to seek for help. PW1 and PW2 said the incident took place on 16 June 2023. The police who arrested him said the incident took place on 18 June 2023. He prayed that the court to consider his grounds of appeal. 9 I have gone through court records, grounds of appeal and submission of parties. I will deliberate first and seventh grounds together on the issue of whether this case was proved to the required standard and the appellant defence was considered. It is a position of law that the standard of proof in criminal cases that is required by law is proof beyond a reasonable doubt. The Court of Appeal of Tanzania on several occasions insisted on that, one of it the case of Mohamed Haruna@ Mtupeni & Another vs. R, Criminal Appeal No. 25 of 2007 (unreported) where it was held that: "Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence." Discussing the above issue of whether this case was proved by prosecution to the required standard at the Trial Court and the appellant defence was considered. This court being the first appellate court I wish to evaluate the evidence on record afresh. In this case the appellant at the trial court was charged with five counts, three were counts of armed robbery and two were counts of rape. 10 The important element which was required to be proved by prosecution side on counts of armed robbery was that the appellant used force/weapons against victims for the purposes of stealing or retaining the property before or after stealing the same as stated in the case of Yosiala Nicolaus Marwa and Others vs. Republic, Criminal Appeal No. 193 of 2016. Also, it is an offence for male person to have sextual intercourse with a girl or women without her consent as provided under section 130 (1) (2)

(a) of [CAP. 16 R.E. 2022] and penetration however slight suffice to prove offence of rape, this was stated in section 130 (4) (a) of Penal Code, for the purposes of proving the offence of rape- "Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence" To prove the case, it was evidence from victims that on the material day while sleeping they were awaken by being beaten with unknown person while holding knife and iron. He threatened them using that weapon and stole ATM Cards, mobile phones, two

flash disks, earphones, USB type C, ID cards and money. Then he raped victims. The matter was reported at the police station and victims were treated. As per evidence of PW5 a doctor, she examined PW1 11 and found that her virgina had bruises. PW5 also examined PW2, upon examination she found her with bruises on virgina. The appellant through the victim stolen mobile phone was arrested and interrogated. On his cautioned statement and extra judicial statement, he admitted committing offences charged and narrated on how he committed the offences. He stated that he used iron bar and knife to threaten them when he stole their properties. Also, he stated that he raped them. The extra judicial statement was tendered and received in court as exhibit PE7. The cautioned statement was tendered and received as exhibit PE8 without any objection from the appellant. In the case of Mohamed Haruna Mtupeni and Another vs. Republic (supra), the Court observed that: "The very best of the witnesses in any criminal trial is an accused person who freely confesses his guilt." In the line of the above authority, I find that prosecution side managed to prove their case to the required standard because the appellant did not challenge the admission of those two statements during hearing on the ground of voluntariness. The appellant admitted to committing the offences. Also, the evidence of the appellant on those two statements 12 resemble with the evidence of victims on how the offence was committed. The appellant on his defence he denied committing offence. He alleged that he admitted committing the offence after being tortured. That, even when he was sent to justice of piece on the way he was beaten and threatened. I find that his defence has no weight because both cautioned statement and extra judicial statement was tendered in court without any objection from the appellant on the ground that was not reordered voluntarily in order the Trial Court to conduct inquiry. Therefore, to raise that ground during cross examination of defence is an afterthought. On the complaint that the Trial Court erred in law and facts to convict the appellants on the offence of armed robbery basing on Exhibit PE-2, PE-3, PE-4 and PE-5 which were tendered to the court. That the said exhibits where neither evidence of an independent witness, two neighbours nor a street leader called to testify to have found such properties in the house of the appellant. It is settled law that during search and seizure there should be an independent witness. The rationale behind having an independent witness is to provide independent evidence, as was emphasized in the case of Jibril Okash Ahmed Vs. Republic, Criminal Appeal No. 331 of 2017, the CAT 13 I have gone through the court records. As correctly stated by the appellant in this case the independent witnesses who witnessed the seizure of the stolen property which were found with the appellant were not called to testify during hearing though it was evidence from prosecution side that the search and seizure were witnessed by independent witness. In the case Baya Lusana vs. Republic, Criminal Appeal No. 593 of 2017; Court of Appeal of Tanzania, in which it was held that: “.... Failure to call material witness entitles this court to draw an inference adverse to the prosecution...” In this case the independent witness who was not called to testify during hearing was material witness. This leave doubt on prosecution side concerning search and seized property at the appellant house. That, if the witness was called to testify would testify on something else contrary to what was stated by the prosecution witness on regarding to search. Based on that circumstance, I expunge exhibit PE1, PE2, PE3, PE4 and PE5 from

court records, however, even after to expunge those exhibits from the courts records still I find that there was available evidence in records to sustain conviction as stated in ground number one above. On the third complaint that the Trial Court erred in law and fact to convict the appellant based on properties found in the appellant's house without 14 sufficient evidence to prove the ownership of the stolen properties, in the line of what I have already discussed on ground number two above, I find no need to discuss this ground because those exhibits have already been expunged from court records. On ground number four, it was the appellant complain that the Trial Court erred in law and facts for convicting the appellant on offence of rape despite contradictions in the evidence of the prosecution side. It is settled law that where prosecution witnesses give conflicting evidence, it is the duty of the court to resolve the contradictions arising out of the conflicting evidence, this was stated in the case of Mohamed Said Matula vs. The Republic (supra). In this case the appellant stated that there was contradiction on prosecution side on the offence of rape, but appellant did not point out those complained contradictions. However, I have gone through evidence on records and find that no contradiction existed on the evidence of prosecution side. The ground lacks merit. On the fifth ground the appellant complained that the conviction was based on the defective charge because the charge sheet stated that the Appellant did steal NMB ATM Card and cash money and that incident had 15 occurred on 16 June 2024 contrary to the case fact Preliminary hearing (PH) which stated that the incident occurred on 18 June, 2024. It is a settled position of law that failure or erroneous preliminary hearing does not vitiate the proceedings of the trial. This was stated in the case of Kapten Mwaipungu vs. Republic, Criminal Appeal No. 87 of 2007, Mwita Nyamhanga Mangure vs. Republic, Criminal Appeal No. 130 of 2015 and Hassan Said Twalib vs. Republic, Criminal Appeal No. 95 of 2019 (all unreported). For Instance, In the latter case where the trial court neither read over the undisputed facts of the case nor signed by the appellant, the Court held thus: "This was contrary to section 192 (3) of the Criminal Procedure Act [CAP 20 R.E 2002], However, the infraction did not vitiate the proceedings considering that, the trial was fully conducted as the prosecution paraded witnesses who testified at the trial and the appellant had the opportunity to give his defence to counter the prosecution case. Thus, the infraction did not prejudice the appellant in any manner and no injustice was occasioned." The appellant in this case has not stated on how he was prejudiced for variation of date in charge sheet and preliminary hearing, also it was my opinion that the appellant was not prejudiced because the trial was full 16 conducted, and appellant was accorded with right to make his defence as stated in the above authority. On the sixth ground that the cautioned statement and extra judicial statement were illegal obtained to be relied to convict the appellant. The appellant in this ground also failed to point out the irregularities committed on the whole process on obtaining cautioned statement and extra judicial statement. However, I have gone through complained cautioned statement and extra judicial, I find no any irregularities committed during hearing. I find no reason to fault with decision of the Trial Court, the whole appeal lack merit and is dismissed. Right to appeal is explained Dated at Mbeya on this 1 day of November 2024. A. A. SINDA JUDGE 17

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