

TANZANIA / JUDGMENT

mohamed salum said vs republic

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY) AT MTWARA CRIMINAL APPEAL NO 73 OF 2022 (Originating
from Criminal Case No 34 of 2022 Kiiwa District Court at Kiiwa) MOHAMED SALUM
SAID ^...;.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGEMENT

09/& 26/06/2023 LALTAIKA, J. The appellant herein MOHAMED SALUM SAID (the appellant) was arraigned in the District Court of Kiiwa at Kiiwa Masoko charged with two counts of to wit(\) Rape c/s 130(1) and (2) (e) of the Penal Code and (ii) Impregnating a schoolgirl c/s 60A (3) of the Education Act. The appellant pleaded not guilty to both counts. In proving the allegations, the prosecution paraded four witnesses and tendered in 4 exhibits. The appellant had three defence witnesses. On completion of the Page 1 of 13 trial, the appellant was convicted for rape and acquitted for impregnating a schoolgirl. Having been convicted and sentenced to serve a 20 years' imprisonment term, he is dissatisfied. He appealed to this court on 6 grounds. I take the liberty to reproduce them hereunder:

1. That there was no best evidence that could implicate the appellant in the commission of the allegation offence since no one had seen or heard perceived by his sense that the appellant has committed the crime in question.
2. That, the trial court erred in law and in fact to convict and sentence the appellant while the PW4 (Doctor) failed to identify which blunt object penetrated into her vagina because at the evidence. I quoted 'the absence of virginity implies that her vagina was penetrated by blunt object like finger or penis' so in this statement the evidence left dilemma,
3. That, PW2 testimony that known's the accused they have been in sexual relationship in November 2021 with appellant before the incident, why did they wait from November 2021 up to March 2022 without arresting the appellant consider thatPW1 was the school girl.

4. That, the trial court erred in law and fact to convict and sentence the appellant without considering that in cross examination the victim herself testified that have been done sexual intercourse with other man namely SHEW.
5. That, the trial court erred in law and fact to convict and sentence the appellant without considering that the case was planted to appellant, because the victim was impregnated schoolgirl.
6. That, the trial court erred in law and fact in convicting and sentencing the appellant while the prosecution side failed to prove the case beyond reasonable doubt as required by the law of evidence. At a later stage, the appellant filed 2 additional grounds making them 8 in total. For reasons that will become obvious soon, I choose not to reproduce the additional grounds. When the appeal was called on for hearing, the appellant appeared in custody while enjoying the skillful services of Mr. Emanuel Ngongi, Page 2 of 13 learned Advocate. The respondent Republic, on the other hand fended through Ms. Atuganile Nsajigwa, learned State Attorney (SA). Before arguing in support of the grounds of appeal, Mr. Ngongi avowed that having gone through both the original and additional grounds of appeal, he noted repetitions and inconsistencies. To assist both the court and his client, he proposed two grounds that would summarize the entire complaint. Those two grounds, it turned out, happened to be the additional grounds as reproduced hereunder:
 - (i) That the trial magistrate erred in law by convicting and sentencing the appellant relying on the evidence of PW2 without observing the requirement of section 127(2) of the Evidence Act Cap 6 RE 2019 (H) That the trial court erred in law and fact in convicting and sentencing the appellant while the prosecution side failed to prove the case beyond reasonable doubt as required by the evidence act The learned Advocate received a nod of approval from this court, and all was set for hearing of the appeal. Arguing in support of the first ground, Mr. Ngongi averred that there was no dispute that PW2 was a child of tender age. In the impugned judgement, the learned Counsel stressed, the trial court Was convinced on the age of the victim, a thirteen- year-old girl child. Mr. Ngongi stated further that PW1 had produced the birth certificate of PW2, the victim in the matter at hand. Having settled on the age of the victim, Mr. Ngongi argued, it was the position of the law of Evidence Act specifically section 127(2) that courts of law adducing evidence of a child of tender age needed to observe several conditions including ensuring that the victim promised to tell the truth and not tell lies. The learned Advocate cited the Court of Appeal of Tanzania's decision in the case of Masoud Mgosiv. Republic Page 3 of 13 Criminal Appeal Mo 195 of 2018 (Unreported) to buttress his argument. It was Mr. Ngongi's submission further that the evidence adduced in the trial court did not meet the legal requirements as per section 127(2) of the Evidence Act. Since PW2's evidence was the only evidence used by the court to convict the appellant, Mr. Ngongi reasoned, it was his prayer that this court finds that such an omission could NOT be cured under section 388 of the Criminal Procedure Act Cap 20 RE 2019. Should this court expunge the evidence in question, Mr. Ngongi asserted, there would be nothing left capable of sustaining conviction because the best evidence in rape cases

comes from the victim. Mr. Ngongi went on to argue that he was alive to the settled legal position that there is no particular number of witnesses required to prove a case. However, the learned Advocate reasoned, for rape cases as per the decision of the Court of Appeal in the case of MOHAMED SAID V. REPUBLIC Criminal Appeal No 145 of 2017 (Unreported), the moral aptitude of a witness could be questioned. Mr. Ngongi asserted that in the apex Court's decision he had cited, particularly on page 11 to 14 the apex Court asked itself one main question: "Was PW1 a girl of moral standing?" and the finding was to the negative based on the words uttered by the victim during her testimony. In the instant matter, Mr. Ngongi asserted, PW2 was a person with multiple relationships. For the trial court to believe her that the appellant was the one who raped and impregnated her while the records indicated Page 4 of 13 that there was some else, Mr. Ngongi reasoned, it overlooked the victim's questionable moral standard. To support his argument, Mr. Ngongi went through his records to page 15 of the trial court's proceedings where the victim had stated: "Yes I know Shebi in sexual relationship, I had sexual intercourse with him." The learned counsel is of a firm belief that such words indicated that the victim had more sexual relationships, not just the appellant. Moving on to the second ground, Mr. Ngongi argued that the prosecution case was not proved beyond reasonable doubt. He averred that the doubt started where the victim stated that she started a sexual relationship with the appellant on 5/11/ 2021. Nevertheless, Mr. Ngongi argued, there was an alibi evidence of the appellant that throughout November, till 5/12/2021 he was taking care of his sister at Kivinje Hospital till 29/11/2021 when his sister passed away. The learned counsel insisted that as per the records, the appellant went back to Mavuji village on 5/12/2021. Pocking even further holes in the prosecution case, Mr. Ngongi argued that since the victim had stated that the relationship began in November when the appellant was not there, the cloud of doubt could not be hidden. He emphasized that such a contradiction was a very serious doubt on the entire evidence of the victim. In conclusion, Mr. Ngongi averred that there being no corroborative evidence to show that the appellant had carnal knowledge with the victim; the offence of rape was not proved beyond doubt. The learned Advocate Page 5 of 13 emphasized that the evidence of the doctor indicated that he went to test pregnancy and not rape. As a result, Mr. Ngongi reasoned, the trial court acquitted the appellant on the count of impregnating a schoolgirl. He prayed that this court would allow the appeal, quash the conviction and set his client free. Announcing outright that the respondent Republic supported both conviction and the sentence, Ms. Nsajigwa positioned herself to counter the arguments advanced by her learned colleague. On the first ground, the learned State Attorney prayed to read out loud the section of the Evidence Act relied by Mr. Ngongi namely section 127(2) in the 2022 edition of TEA thus: "A child of a tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence promise to tell the truth in court and not tell any lies." Anchoring on the above provision, Ms. Nsajigwa averred that the trial magistrate was supposed to test the ability of the child to find if she was capable of understanding the proceedings. The learned State Attorney argued that not every child is unable to understand and that the age of the child in the matter at hand, 13 years, showed that she could understand the matters. Referring to the trial court's proceedings, Ms.

Nsajigwa stated that on cross examination at page 15 the victim had replied by identifying the people she had a sexual relationship with. Ms. Nsajigwa emphasized that Page 6 of 13 the victim had pointed out that she had sexual intercourse with the appellant several times. On the case cited by Mr. Ngongi namely MOHAMED SAID v. R. (supra) Ms. Nsajigwa argued that the same was distinguishable with the matter at hand. In the matter at hand, Ms. Nsajigwa reasoned, the victim was a student who got pregnant while living with her brother. The place she was living, averred Ms. Nsajigwa, made her vulnerable hence she could not refuse sexual intercourse. Ms. Nsajigwa strongly objected to the argument by Ms. Ngongi seeking to discredit the victim on the ground that she was morally questionable. She stated that every witness deserved credence from the court. To buttress her arguments, Ms. Nsajigwa referred this court to the Court of Appeal decision in the case of GOODLUCK KYANDO V.: REPUBLIC [2006] TLR 367. It was Ms. Nsajigwa's submission that the evidence of PW2 was essential as in rape cases the best evidence is that of the victim. She referred to the case of SELEMANI MAKUMBA V. REPUBLIC [2006] TLR 384 and prayed that the evidence of PW2 be maintained. Considering that was not a onetime rape, Ms. Nsajigwa insisted, it was not a requirement for the victim to specify the venue that the incident took place. She prayed that the ground be dismissed for lack of merit. . Moving on to the second ground of appeal, Ms. Nsajigwa stated that on the dates the relationship began, reference should be made to page 14 of the trial court's proceedings. She mentioned that PW2, during Page 7 of 13 examination in chief, stated that she had a sexual relationship with the appellant since November, although the exact date was not specified. Ms. Nsajigwa further highlighted that the defense of alibi was invoked by the appellant, as asserted by the learned counsel. She expressed her agreement with the learned magistrate's decision to reject the alibi, emphasizing that relationships can commence without physical presence and that communication can suffice. Additionally, she pointed out that no supporting documents, not even a bus ticket, were presented. Ms. Nsajigwa averred that according to the record, the appellant had returned to the village in December and the relationship continued until March when the victim was discovered to be pregnant. To prove the case at the required standard, Ms. Nsajigwa reasoned, the prosecution had presented several witnesses, including PW1, the victim's sister, PW3, the victim's teacher, and Dr. John Julius (PW4). Ms. Nsajigwa stated that all these witnesses were able to establish that the victim was a student and was pregnant. The learned State Attorney submitted further that the victim's teacher had mentioned their practice of conducting pregnancy tests on students, and on March 25, 2022, the victim underwent a pregnancy test at the hospital, which confirmed her pregnancy. Ms. Nsajigwa expressed confidence that the prosecution had successfully proven the victim's age and pregnancy. In support of her argument, she referred to the Court of Appeal of Kenya's decision in the case of JANE WANJIRU V. REPUBLIC

[2006] eKLR p. 27. In conclusion, Ms. Nsajigwa prayed for the dismissal of the two grounds of appeal and the appeal in its entirety for lack of merit. Page 8 of 13 In rejoinder Mr. Ngongi stated that the case of JANE WANJIRU (Supra), referred to by Ms. Nsajigwa was merely persuasive in our jurisdiction as it came from another country. Nevertheless, Mr. Ngongi

reasoned, the case was in support of his argument that the prosecution had the obligation to counter the defense of alibi. Furthermore, Mr. Ngongi addressed section 127(2), which was mentioned by the learned state attorney and contained some difficult-to-understand words. The section states that the witness "shall" promise to tell the truth before giving evidence. Mr. Ngongi emphasized that the word "shall" is mandatory. If the magistrate did not specifically use those words, he objected to the interpretation presented by the learned State Attorney. He argued that the interpretation lacked legal support and it was merely from the bar. Mr. Ngongi suggested that if the law intended to convey that particular interpretation, it should have been explicitly stated. He also expressed doubts about the credibility of the evidence given by a tender-age child, noting that the wisdom of the court against regarding such evidence was in line with the Court of Appeal of Tanzania's approach. He referred to the case of GOODLUCK KYANDO (supra), which includes the statement "unless there is a cogent reason for not believing the witness." Mr. Ngongi contended that this supported his argument that the victim's testimony should not be believed, especially since she claimed that the relationship began in November, while the appellant was not present. He strongly argued that the court should discredit the evidence provided by Page 9 of 13 PW2, aligning with the case of MOHAMED SAID (Supra) and the more recent case of MOHAMED SAID V. REPUBLIC (Supra). In conclusion/ Mr. Ngongi prayed for the court to disregard the evidence of PW2 based on the grounds mentioned. He further prayed for the appeal to be allowed and for the appellant to be set free. I have dispassionately considered the rival submissions by both sets of counsel. One thing comes to my mind immediately. The lower court records indicate that the appellant invoked the defence of alibi. The learned trial Magistrate acknowledged that such a defence was "strong" as it was supported by all defence witnesses. Surprisingly/ the learned trial magistrate still proceeds to believe that such a defense was not feasible. As the counsel argued/ the accused had no duty to prove his alibi beyond reasonable doubt. That was the duty of the prosecution. The case of JANE WANJIRU (Supra), though indeed merely persuasive in our jurisdiction/ discussed in some considerable details the onus of proof of the defence of alibi. It is my considered view that the learned trial magistrate allowed himself to slip into error by ignoring such an overwhelming evidence of alibi corroborated by death of a loved one. In a small town or village as in the present case/ it was not difficult to realize that all witnesses were consistent that the appellant was indeed away taking care of his ailing sister and came back only after the sister had passed away. It is also interesting to note the argument of the learned State Attorney that even if this court was to accept the defence of alibi, the relationships could commence without physical presence and that Page 10 of 13. communication can suffice. I assume that Ms. Nsajigwa meant that the cyber/virtual world that include WhatsApp calls can sustain communication. I partly agree. There used to be a saying barua ni nusu ya kuonana meaning exchanging letters was halfway through meeting physically. Video calls and exchange of images could probably be ni robo tatu ya kuonana. Without prejudice to the above, I think a schoolgirl cannot be said to have been raped and impregnated through WhatsApp. That would be contrary to the standard of proof required for criminal cases in

our country and elsewhere where tenets Of fair trial are cherished. I am still in the proof beyond reasonable doubt boat. I must say that I appreciated the clarity employed by the trial magistrate in taking proceedings. How else could I have acquired the mental picture I am using for this analysis? Picture this: a schoolgirl is discovered pregnant. Her sister (I assume she was the guardian) tries very hard to ask her to disclose the perpetrator. The schoolgirl sternly refuses. The sister decides to take her to a nearby police station and after interrogation she mentions the appellant. That isn't the problem. During cross-examination, the victim can hardly pinpoint the date or even place she met the appellant. The blanket statement "we made love several times" is too general to warrant conviction. Mr. Ngongi had also flagged this court on the possibilities that the victim had engaged in sexual intercourse with more men than the appellant. Referring to 15 of the trial court's proceedings where the victim had stated: "Yes I know Shebi in sexual relationship, X had sexual Page 11 of 13 intercourse with him" the learned counsel invited this court not to take the evidence of the victim seriously for her questionable moral aptitude. I think this court cannot judge the moral standing of a witness though one sentence recorded by the trial court. The trial court had the privilege of observing the demeanor of the witness and there is nothing in the proceedings to suggest that it questioned her morality. Nevertheless, her uprightness notwithstanding, criminal cases must be proved beyond reasonable doubt. Premised on the above, I allow the appeal. I order that MOHAMED SALUM SAID be released from prison forthwith unless he is being held for any other lawful cause. 26th day of June 2023 in the presence of Mr. Melchior Hurubano, learned State Attorney and the appellant. E.kLALTAIKA JUDGE 26/6/2023 Page 12 of 13 Court Right to appeal to the Court of Appeal of Tanzania fully explained. 26/6/2023 Page 13 of 13

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