

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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IN THE UNITED REPUBLIC OF TANZANIA IN THE HIGH COURT OF TANZANIA IN THE SUB-REGISTRY OF MTWAR A AT MTWARA CRIMINAL APPEAL NO. 38017 OF 2023 {Originating from District Court of Lindi at Lindi in Criminal Case No. 53 of 2022) OMARY MOHAMED HARUNI -----
----- APPELLANT VERSUS THE REPUBLIC..... -----
RESPONDENT

JUDGEMENT

Date of last order: 18.03.2024 Date of Judgement: 24.05.2024 EBRAHIM, J.: The Appellant herein was charged and convicted for the offence of rape contrary to sections 130 (1), (2) (e), and 131 (1.) of the Penal Code, [Cap 16 R.E 2022]. It was alleged by the prosecution that the Appellant on 09.01.2022 at Makumba Village within Lindi District and Lindi Region had carnal knowledge with a girl aged 9 years, who shall be identified as NB. Page 1 of 21 The trial court convicted Omary Mohamed Haruni [the Appellant] with the offence of rape and sentenced him to life imprisonment. He appealed against the conviction and sentence alleging that the prosecution did not prove his guilty beyond reasonable doubt. The Appellant raised five grounds of appeal which climaxed to the following issues;

1. Whether the charge was defective; 2, Whether the trial court relied on the contradictory evidence of a doctor;
3. Whether the defence evidence was considered; and
4. Whether the prosecution proved its case beyond reasonable doubt. At the trial after the Appellant pleaded not guilty to the charge; the prosecution lined up five witnesses. The first witness was the victim (PW1). She was declared by the trial court to be incapable of testifying due to her tender age and mental disability under section 127 fl) of the Evidence Act [CAP. 6 R.E. 2022]. Other witnesses were Mayasa Athuman Makwaila (PW2), Dr. Francis Balilonda (PW3), Rashidi Said Mwambulila (PW4) and Rashid Bakari Mpwili (PW5). Page 2 of 21 PW2 narrated that on 09.01.2022 she called the Appellant at her home wanting him to cut trees at her farm. The Appellant worked until 16- 17hrs. PW2 went to get sesame seeds and left the victim at home while the Appellant was working at the farm. On her way back as she was approaching her PW2 saw the Appellant going inside her house pulling the victim (PW1) inside the house. The door was open, she went in and found the victim (PW1) undressed by

the Appellant. She also found the Appellant naked inserting his penis to the victim's vagina. She raised an alarm and her husband (PW4), his uncle and Binti Mfaume ran to her help. PW2 apprehended the Appellant and took the Appellant to the village office while she remained at home as if was already late. PW4 left the Appellant at the VEO's office. At the same time, the victim was not well as she was bleeding from her vagina. The next morning, they went to the VEO's office where they were told that the Appellant had escaped. They were given a letter and took the victim to Sokoine hospital after passing by Mchinga police station and availed with a PF3. The examination results revealed that the victim had bruises on her vagina. They went back to the police station and issued with. RB for apprehending the Appellant. In October 2022, the Appellant was apprehended by Page 3 of 21 Rajab Nakuwa. PW3, a medical doctor at Sokoine Hospital examined the victim on 10.01.2022 and observed that she was raped. PW3 tendered PF3 as exhibit P] which was admitted without objection from the Appellant. It is noted however that the PF3 was filled on 13.01.2022 as per the handwritten proceedings and not on 03.01.2022 as reflected in the typed proceedings. PW4, the husband of PW2 testified to have heard her wife calling for help as he was near his home. After reaching there he found PW2 fighting with the Appellant. It was about 1800hrs. PW2 told him that she found the Appellant inserting his penis into the victim's vagina. He decided to take the Appellant to the village office at about 2000hrs. The VEO arrested the Appellant and told PW4 that they would talk the next morning PW5, VEO told the court that PW4 took the Appellant to him alleging that he has raped the victim. He arrested the Appellant because it around 2000hrs. The Appellant escaped and in the morning he gave the victim's family a letter to go and report the matter at Mchinga police station. Later on, they went to the hospital and it was confirmed that the victim was raped. He added that the Appellant was apprehended by a militia-man. Page 4 of 21 The Appellant defended himself denying all the allegations. He testified that on the fateful day he was called by PW2 to go and work at her farm. He was thirsty and went inside her house to drink water. The victim followed him and before he could get out of the house, the mother of the victim (PW2) found him inside the house and raised an alarm. Two people who were working at the farm near the house arrived. PW2 told them that he has raped the victim but there were no any signs of rape. The father of the victim (PW4) was called and he took him to the village office. The Appellant raised a question as to why PW2 did not send PW1 to the hospital to on the same day while she said PW1 was bleeding? At the hearing of the appeal the Appellant appeared in person un represented whereas the respondent/Republic was represented by Mr, Jaggard Jilala, learned State Attorney, The Appellant prayed for the State Attorney to begin while reserving his right to rejoin. Submitting against the appeal, the learned State Attorney argued the grounds of appeal in seriatim. As to the 1st ground of appeal, he submitted that PW3 was a doctor and a credible witness because he is an expert in terms of section Page 5 of 21 47 of the Evidence Act Cap 6 R.E 2022. He is also registered by "Baraza la Wauquzi ta Tanzania1'. As for PF3 (Exhibit PI 1 he argue that it is a scientific evidence which can only be challenged by another scientific evidence and not by a mere assertion of disbelief. He added that the oral evidence of a doctor is enough to form a conviction since he explained that after the examination he discovered that the victim has been penetrated. He referred to the

case of Simon Shauri Awaki @ Dawl vs. R, Criminal Appeal No. 62 of 2020 page 26 where it was held that an oral evidence can prove an offence even in the absence of a document. On the same ground, the Appellant argued about the variation on the dates in the examination report. The report shows that the victim was examined on 03.01.2022 while the incident occurred on 09.01.2022 and PW3 said he received the victim (PW1) on 10.01.2022. Mr. Jilala explained that the date appearing in PF3 is a mere slip of the pen and the same has been well explained by the doctor. As for the complaint that the victim was not escorted by the police when she taken to the hospital Mr. Jilala recanted the complaint as not being a legal requirement. He on the issue of DNA test issued the similar explanation in proving the offence of rape. The learned State Page 6 of 21 Attorney relied on the cose of Salum Nichoiaus Mnyumali vs. The Republic, Criminal Appeal No. 327 of 2020 at page 15 to cement his argument regarding DNA test. On the 2nd ground of appeal concerning the charge sheet, the learned State Attorney stated that the charge sheet contained the statement of offence and the particulars of offence as required by law. Thus> the Republic managed to prove the offence of rape as per the offence charged. He referred to the case of Francis Fabian @ Emmanuel vs. Republic, Criminal Appeal No, 261 of 2021 at page 4. Responding to the complaint by the Appellant that he ought to have been convicted under section 137 of the Penal Code, [Cap. 16 R.E 2022] which is on defilement, he said the doctor only said he saw PW1 mentally challenged but that state was not clinically examined and proved. He argued moreover that it was still correct for the Appellant to be convicted with the offence of rape even if the victim was mentally challenged because fhe prosecution proved the ingredients of the rape offence. He said the most important aspect is penetration which was proved by PW3, a doctor who observed penetration and bruises Page 7 of 21 in the vagina of the victim after examination. To cement his argument he referred to the case of Laurent Julius Mbugi vs Republic, DC Criminal Appeal No. 28 of 2021, where the Appellant raped a victim who was mentally challenged and was still Convicted of rape. He distinguished the cited cases by the Appellant from the circumstances of this case. On the 3rd ground of appeal on the failure to consider defence evidence the learned State Attorney submitted that the trial court analyzed and considered the defense evidence and the Appellant admitted to have been found with the victim. He said at the impugned judgement the trial court also observed that the Appellant had no duty to prove his defense. Regarding the contradictory evidence raised on the 4th ground of appeal; Mr. Jilala argued that the five (5) prosecution witnesses did not give any contradictory evidence. The differences on the dates in exhibit Pl that the examination was conducted on 03.01.2022 is a minor contradiction of which he prayed for the court to ignore it because if was rectified by a doctor in court that the examination was conducted on 10.01.2022. He insisted that PW3 was a credible witness and the court believed him. He referred to the case of Alex Ndeja vs. Page 8 of 21 Republic, Criminal Appeal No 207 of 2018 - in stressing a point that human recollection is not infallible. On the 5th ground of appeal, the learned State Attorney submitted that the offence was proved by five prosecution witnesses and 1 exhibit. He reiterated the testimonies of PW2 and PW3 who proved the age of to have been the victim 9 years old at the occurrence of the offence. He submitted also that penetration was proved by PW3 and exhibit Pl. He said PW2 and PW4 found the

Appellant at the crime scene hence the offence was proved beyond reasonable doubt in terms of section 3 (2) (a) of the Evidence Act [Cap. 6 R.E

20221. He thus prayed for the appeal to be dismissed in its entirety. In his rejoinder, the Appellant prayed to adopt his grounds of appeal and be set free. In going through the evidence, proceedings on the record and both parties' contentious arguments; I find the main issue is whether the prosecution has established the offence of rape against the Appellant. It is trite law that the first appeal is in the form of rehearing. In that regard, the first appellate court is charged with a duty of re- Page 9 of 21 evaluating the entire evidence on record, subjecting it to a critical analysis and arriving at a decision that may either confirm or reverse the trial court's decision. In *Siza Price vs. R* Criminal Appeal No 19 of 2010, the Court of Appeal held that; "We understand that it is settled law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the evidence in an objective manner and arrive at its own findings of fact, if necessary." The general rule in criminal cases is that the burden of proof rests with the prosecution (the state) *Ali Ahmed Saleh Amgara v R* [1959] EA 654.... Thus, The Republic has the primary duty of proving that the accused committed the actus reus elements of the offence charged with the mens rea required for that offence. The Court of Appeal in *Christian s/o Kaale and Rwekizid s/o Bernard vs. R* [1992] TLR 302 stated that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case. Starting with the first issue of whether the charge was defective. Section 130 (1) (2) (e) of the Penal Code Cap 16 R.E, 2022 establishes the offence of rape that: Page 10 of 21 "130 (1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a Woman under circumstances falling under any of the following descriptions: first with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man." [Emphasize added] The issue of the victim's mental condition was relied on by the Appellant as one of the grounds of appeal. Looking at the trial court's records there was a piece of evidence from PW3 (doctor) who merely made observation that the victim appears to have mental problems. That assertion without further examination or observation does not conclusively prove that the victim was mentally unsound. Thus, the issue as to whether the appellant was properly charged is answered in affirmative regardless of whether PW1 was mentally fit or not. The reasons for my findings are fortified by the position illustrated in the case of *Fadhili Makanga vs Republic* (Criminal Appeal 458 of 2017)

[2020] TZCA 270 (3 April 2020) it was held that; Page 11 of 21 "On whether the charge was defective or not, we are of the view since, the victim being under eighteen years of age, the charge preferred against the appellant under the circumstances was proper, since the said provision, that is section 130(1) (2) (e) and 131(1) of the Penal Code, specifically addresses raping a girl under the age of eighteen (18) years regardless of her mental status

of the victim. The age of the victim was proved by the testimony of PW1, her mother. At the same time we have failed to find any specific provision addressing raping a girl of unsound mind under the age of eighteen years. Section 130(2)(c) criminalizes raping a woman of unsound mind and section 137 of the CPA addresses defiling of idiots and imbeciles but do not specify the age factor." Deriving from the above and in considering the facts of this case that the victim was a young girl of 9 years, I find this grounds of appeal to have no merits and I dismiss it. The second issue is whether the trial court relied on the contradictory evidence of a doctor. PW3, a doctor who examined the victim testified that on 10.01.2022 he received the victim at the hospital accompanied by PW-2 and they had PF3 from the police station. He examined the victim and Page 12 of 21 confirmed that the victim was penetrated as the hymen was perforated and there were bruises but no blood. There after he filled the PF3 on 13.01.2022 as reflected on the handwritten proceedings of the trial court and not on 03.01.2022 as per the typed proceedings. It follows therefore that the typed date of 03.01.2022 is a typographical error. On the complaint that the victim was not escorted by the police when taken to the hospital; I hold hands with the learned State Attorney that it is not the requirement of the law that a victim must be escorted to the hospital by a police officer. Also, DNA test is not a legal requirement to prove an offence of rape. Therefore, these issues should not detain me much. From the evidence of PW3, there arises a question as to why he examined the victim on 10.01.2022 and filled PF3 on 13.01.2022. While it might be the practice to fill in the report after passage of days, still upon going through exhibit PI (PF3) it shows that the PF3 was issued by Mchinga police station on 12.01.2022 for the examination on the offence of rape. How could PW3 then examine the victim on 10.01.2022? PW3 on his testimony at page 10 of the typed proceedings that: Page 13 of 21 "On 10.01.2022, Twas in normal duties when came a woman with a girl 9 years. They (sic) mother told me that she had PF.3 which was from the police station requiring me to examine if the girl was raped or not. After examining the victim, I filled the finding in the PF.3 and signed and stamped it and directed that it be taken to the police station" Speaking on the same sequence of events, PW2 at pg 8 of the proce eding s wa s re c o r d e d sta tin g th at " ... we went to Mchinga Police Station. We reported the matter and they give us another paper to go to the Hospital at Sokoine. They also ordered lab examination and eventually gave me some paper which I took to the police station Mchinga" From the said pieces of evidence from PW2 and PW3, it is clear that the PF.3 was given to PW2 on 10.01,2022 and presented to PW3 on the same date of which he filled in the result and returned to PW2 who took it back to the police. There goes a question which raises doubt to the authenticity of exhibit PI as to why does it show that it was issued on 12.01.2022? Again PW3 said he filled PF.3 and returned to PW2; then why does it read that it was filled in on 13.01,2022. PW3 did not state that he filled in PF,3 days iatter after examining the victim. Consequently it raises doubt to the credibility of PW3 as well. Page 14 of 21 Moving to the third issue as to whether the defense evidence was considered. The Respondent submitted that the trial court considered the defense evidence as shown at page 10 of the typed judgement. He said also, that at pages 11 and 13 of the impugned judgement the trial magistrate observed that the Appellant admitted

being found with the victim. It was the Appellant's defense (DW1} before the trial court that he did not rape PW1. He challenged PW2's evidence as to why she did not take the victim to the hospital on the same day because she alleged that she was bleeding. I have given the Appellant's evidence the weight it deserves. It is the law that in criminal cases the accused does not have to prove his innocence but rather to raise reasonable doubt on prosecution's evidence. Now the issue here is whether the defense raised by the Appellant poses any reasonable doubt to the prosecution case. In my considered opinion it does. To begin with under normal circumstances, it sounds shocking for someone to see the victim bleeding and just let her be without any Page 15 of 21 medical attention until the next day. It was expected that her parents would have taken her to the police station and thereafter to the hospital. To the contrary, PW1 was not medically attended on the same day and no explanation has been given as to why the victim was not taken to the hospital instantly. Again, PW2 said that as she was approaching her home she saw the Appellant entering her house with the victim. I asked myself how far was she from her house to the extent that she went home and found the Appellant raping the victim?: Her story leaves a lot to be desired. The pointed anomalies put a big dent to prosecution's case. As a result this court finds it just to resolve the anomalies in favour of the Appellant. The Court of Appeal had in the case of Daimu Daimu Rashid @ Double D vs Republic (Criminal Appeal 5 of 2018) [2019] TZCA 366 [4 November

- 2019) cited with approval the case of Samson Matiga w R, Criminal Appeal No. 205 of 2007(unreported) at page 5 where it was observed that; " A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused Page 16 of 21 person, and not any other, as the one who committed the offence. (See also Yusuf Abdallah Allyv. Republic, Criminal Appeal No. 300 of 2009, (unreported)). The said proof does not depend on the number of witnesses but rather, to their credibility (See section 143 of the Tanzania Evidence Act Cap 6 R. E 2002 and the case of Goodluck Kyando v. Republic, Criminal Appeal No, 118 of 2003/ and Majaliwa Guze v. Republic/ Criminal Appeal No. 213 of 2004 (both unreported})." I thus tend to agree with the Appellant that the trial court did not analytically consider the defence case. Coming to the last issue as to whether the prosecution side proved its case beyond reasonable doubt. In sexual offences like one under consideration, the best evidence is that of the victim of offence. This is in accordance to section 127 (6) of the Evidence Act [Cap. 6 R.E 2022] and the CAT decisions in a number of cases including Selemani Makumba vs Republic (Criminal Appeal 94 of] 999) [2006] TZCA 96 (21 August 2006). Nevertheless, it all falls down to a crucial issue of credibility and truthfulness of such evidence/ witness. In this case the victim was incapable to testify as Page 17 of 21 or section 127 (1) of the Evidence Act fCap. 6 R.E 2022. In convicting the Appellant the trial court relied squarely on the evidence of PW2, PW3, PW4, and PW5. As alluded earlier, PW2 (the victim's mother) told the trial Court that, she saw the appellant going to her house, pulling the victim inside her house. Naturally at the time

when PW2 saw the Appellant pulling the victim she was expected to raise an alarm immediately to rescue the victim. She did not do so until the Appellant inserted his penis into the victim's vagina. PW2's inaction raises doubt. Again, it was PW2 only who testified before the trial court that the victim was bleeding, PW4 only testified to have been told by PW2 (his wife) that she found the Appellant inserting his penis into the victim's vagina and then he decided to take the Appellant to the village office. PW4 did not tell the trial court in what condition he found the victim? Looking at the evidence of PW4, it is apparent that his testimony is based on hearsay. Further, PW2 said that her uncle and Binti Mfaume went to witness the incident but were not called to testify before the trial court. The above two named people mentioned were important witnesses as they would have given evidence to confirm and collaborate the evidence of PW2 on the condition the victim at Page 18 of 21 the crime scene. They could also prove that indeed the victim was bleeding from her vagina on the fateful day in proving the alleged rape by the Appellant. Therefore, the failure by prosecution to call those two important witnesses leaves much to be desired. It creates doubt as to the allegation of rape by the Appellant to the victim. It is also doubtful if as to the allegation of on the material date, the victim was found bleeding from her vagina. In considering the defense by the Appellant de-associating himself with the offence, he raised a reasonable doubt as to why didn't they take the victim to the hospital on the same day instead of waiting until the next day. For real, such reasonable doubt would have been cleared by the crucial evidence of the said uncle and Binti Mfaume. Moreso, it is the law that failure by the prosecution to call a material witness, entitles the court to draw an adverse inference against the prosecution. The principle of adverse inference finds its basis on an assumption that the evidence which could be and is not produced would if produced be unfavorable to the person who withholds it. The Court of Appeal of Tanzania had an occasion to elaborate on the Page 19 of 21 circumstances under which the principle applies in the case of Aziz Abdalla V. Republic [1991] TLR 71 where it was observed that: "Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution side." In the instant case, the prosecution did not state that the said uncle and Binti Mfaume were out of reach. Another evidence of the prosecution side was that of PW3 (doctor). Coupled with the contradictions from PW3's testimony concerning the date of issue which appears in exhibit P1 and date as to when PW3 conducted the examination to PW1; it is my finding that the prosecution evidence has gaps. Consequently I have come to a different view with the trial court and find that the prosecution did not prove the case against the Appellant beyond reasonable doubt. In the end, the doubts in the prosecution evidence should benefit the Appellant. Therefore, the appeal is allowed, the conviction of the Appellant is quashed and the sentence is set aside. The Appellant should be released from custody forthwith unless otherwise lawfully held. Page 20 of 21 Ordered accordingly. R.A Ebrahim JUDGE
24.05.2024. Page 21 of 21

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