

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 MTWARA AT MTWARA CRIMINAL APPEAL NO. 979 OF 2025 (Arising from the decision of the District Court of Masasi at Masasi in Criminal Case No. 228 of 2022) OMARY SALUMU MASKATI @BABA HASNATH..... APPELLANT VERSUS THE REPUBLIC.....RESPONDENT

JUDGMENT

4h March & 2CFh March 2025. DING'OHI, J; In the District Court of Masasi district at Masasi (the trial court), Omary Salumu Maskati @Baba Hasnath, the appellant herein, was arraigned 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]. Upon conviction, the appellant was sentenced to serve life imprisonment. Undeterred, the appellant has come to this court to challenge the conviction and sentence given to him by the trial court as aforesaid. The background of the appellant's arraignment, conviction, and sentence is not difficult to comprehend. It all started sometime in October Page 1 of 20 2022 when a girl of six (6) years old, whom I shall refer to as PW5 or the victim to hide her identity, told his grandfather (PW3) that 'Baba nina wadudu sehemu za siri'. PW3 replied by telling her to wait for his grandmother, who would inspect her. As soon as the grandmother who was not called to testify before the trial court arrived from the farm, inspected the victim. She could not identify anything wrong allegedly because of her eyesight problem. Then the grandmother told the victim to go to PW4, who is a nun (sister) at the Sisters' Missionary Convent located there in Masasi, where the victim was raised after the demise of her mother. In the same month, October 2022, as usual, when PW4 was bathing the victim, she felt a bad odor coming from the victim's genitals. She also saw a slimy brownish substance discharged from her vagina. She decided to take the victim to the dispensary, knowing that it could be a disease that could have more serious consequences in the future. Upon arrival at the dispensary, the PW4 met PW1 (A medical officer), who for the first time gave her antifungal medicine. According to the PW4, the victim's condition was still not improving. On 18th October 2022, the PW4 decided to take back the victim to the dispensary, where PW1 started to do a physical examination of the victim Page 2 of 20 and asked her some questions. Upon inquiry, the victim told PW1 that two people had raped her, namely Baba Hasnath (the appellant) and Baba Mary. Subsequently, PW1 decided to call PW2, the Village Executive Officer. PW1 and PW2 went to the school where the victim was studying to assist in identifying the people mentioned by the victim. After arriving, they met the victim's teacher

(PW6). The PW6 questioned the victim in private. It is alleged the victim continued to mention the appellant and Baba Mary as her rapists. The appellant was then arrested, but there is nothing in the trial court records to indicate whether the said Baba Mary was also arrested or otherwise. After the appellant was taken to the police station, PW1 was given PF3 for the medical examination of the victim. On 17th November, at the hospital, the victim was attended by PW7 (medical doctor). On examination, it was established that there was no blood, bruises, or semen on the victim's private parts. PW7 opined that a blunt object penetrated the victim's vagina. The PF3 to that effect was admitted as Exhibit P2. In her testimony, the victim (PW5) insisted that it was the appellant who raped her. According to her, on October 2022 she went to a 'ngoma' Page 3 of 20 and the appellant called her to the backyard of the house and took off her underwear, and proceeded to rape her. In defence testimony, the appellant was with only one witness, who was his wife (DW2). The appellant denied having committed the offence. His account was that, on the fateful day of 'unyago ceremony' which the victim alleged that she was raped by him, he was on his farm with his wife (DW2), from morning to evening, for the cashew nut harvest and guarding the farm against the thieves. In its judgment, the trial court found the prosecution's evidence credible and probable and put heavy reliance on the evidence of PW5, supported by that of PW7. It also relied upon the documentary evidence in exhibit P2 (PF3). The appellant was, as said, convicted and sentenced. Unhappy, the appellant has instituted the instant appeal wherein he is faulting the judgment of the trial court on the following grounds, namely;

1. That the trial Magistrate erred in law and facts by convicting and sentencing the Appellant relied on defective charge sheet.
2. That, the trial Magistrate was wrong to reach into conclusion and convict the Appellant on the offence of rape disregarded the Page 4 of 20 penetration which is basic fundamental matter as per the mandatory provisions of sections 130 (4) of the Penal Code Cap 16, RE2002.
3. That the trial Magistrate erred in law and facts in convicting and sentencing the Appellant without considered the defence evidence as stipulated under section 235 (1) of Criminal Procedure Act.
4. That, the trial Magistrate erred in law and facts by convicting and sentencing the Appellant relied on PW6's evidence (the victim) who was on poor identification.
5. That, the trial Magistrate erred in law and facts by convicting and sentencing the appellant based in PW1 's evidence who is a clinical officer by qualification and the law requires a full doctor by profession unless a written permission is given to her by a District Medical Officer (DMO) to do so.
6. That, the trial Magistrate erred in law and facts by convicting and sentencing the Appellant while the prosecution was not proved the case against the Appellant. On the date of the hearing of this appeal, the appellant drove himself, unrepresented, whereas Mr. Jagad Jilala, learned State Attorney, stood for the respondent Republic. When the appellant was invited to elaborate on his Page 5 of 20 grounds of appeal, he prayed that his grounds of appeal be adopted as part of his submissions. In his submissions in rebuttal, Mr. Jilala supported the

conviction and opted to argue together the 2nd and 6th grounds of appeal, and he argued the remaining grounds separately. On the first complaint that the charge was defective, the learned State Attorney defended that the charge sheet presented in the trial court was proper as it was framed in compliance with sections 132 and 135 of the CPA. He added that what is required to be stated in the charge sheet are the statements of the offence, and sections of law in which the accused has contravened. According to Mr. Jagad, in the instant case, the particulars of the offence were made clear, and the charge sheet was properly completed or framed per the law. To support his stance, he cited the case of Francis Fabian © Emmanuel vs. Republic (Criminal Appeal No. 261 of 2021)

[2023] TZCA 17936 (12 December 2023). Regarding the 2nd and 6th complaints that the case was not proved beyond a reasonable doubt, it's Mr. Jagad's submission that the offence on which the appellant was charged was rape. He was of the view that in sexual offences like rape, the republic is required to prove the age of the victim, Page 6 of 20 penetration, and thirdly the person who raped the victim. Mr Jagad added further that the victim's age was proved by the PW3, who is her grandfather. He mentioned the age of the victim to be 6 years old, as reflected on page 15 of the trial court proceedings. On the issue of penetration, according to the learned State Attorney, in this case, penetration was proved by the doctor (PW7), whose testimony was corroborated with the evidence of PW1, who was the medical officer of Makulani dispensary. In furtherance, Mr Jagad added that even the victim herself satisfied the trial court that she was penetrated. On the last ingredient, as to whom committed the act to the victim, the learned State Attorney argued that the victim herself (PW5) told the trial court that it was Baba Asnati, the appellant herein, who raped her. Mr. Jagad emphasizes further that, in sexual offenses, the best evidence is from the victim herself, and according to him, the evidence by the prosecution was smart enough to prove the charge. Thus the charge was proved beyond a reasonable doubt. Therefore, according to the learned state attorney the trial court rightly convicted the appellant as charged after finding that the evidence against him was nothing but the truth. To reinforce his argument, the learned State Attorney cited to me the cases of Selemani Page 7 of 20 Makumba vs. Republic (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006), Director of Public Prosecutions vs. Daniel Wasonga (Criminal Appeal No. 64 of 2018) [2022] TZCA 418 (12 July 2022), Goodluck Kyando vs. Republic [2006] TLR 363, and Paul John vs. Republic, Criminal Appeal no. 420/2017. The complaint in the third ground of appeal was that the Appellant was convicted in contravention of requirements of the provisions of section 235

- (1) of the Criminal Procedure Act, the trial court did not consider defence evidence in its decision. Mr. Jilala argued that this complaint has no merit either because, on pages 4 and 5 of the trial court Judgment, the evidence of the appellant was well considered. The trial court did not only show that the evidence by the appellant was considered, but it proceeded to evaluate the same as well. He thus urged me to dismiss this ground of appeal. The complaint that the trial court relied on the testimony of PW5, whose evidence was based on poor identification, was the subject of ground four of the petition of appeal. The learned

State Attorney submitted that the victim on page 23 of the trial court proceedings stated that she was raped during daytime when normally there is enough sunlight thus it would not be difficult to identify the appellant. To bolster his position, Mr Jagad puts Page 8 of 20 reliance on the cases of Shomari Athumani © Mwanja & Another vs. Republic (Criminal Appeal No. 650 of 2021) [2024] TZCA 46 (16 February 2024), and Director of Public Prosecutions vs. Daniel Wasonga (Criminal Appeal No. 64 of 2018) [2022] TZCA 418 (12 July 2022). He thus invited me to dismiss this ground of appeal as well. Ground five seeks to fault the trial court for convicting the appellant based on the testimony of the PW1 (clinical officer), who was not qualified to take an examination unless written permission was given to her by a District Medical Officer (DMO). Mr Jagad argued that the person who filled in the PF3 is not PW1 but PW7 (registered medical officer). It is Mr. Jilala's submission that even assuming that PW1 would have filled in the PF3 (Exhibit P2), it would not be against the law. According to him, the clinical officer, as in the case of the doctor, may examine the patient and fill the examination result in the PF3. He may even fill out a death report. He referred me to the decision in Charles Bode vs. Republic (Criminal Appeal No 46 of 2016)

[2019] TZCA 578 (6 March 2019). He thus urged me to dismiss this ground of appeal as well. The appellant had not much to rejoin, he pressed his wonder in the case had an investigator, but the prosecution failed to mention the exact date the Page 9 of 20 offence is alleged to have been committed if at all it was committed. He believed that the case was only fabricated against him. He referred this court to the case of Republic versus Emmanuel Danstan Chiote criminal case no. 230/2022. The appellant contended it is stated that the victim was penetrated by two people, and if that is the case, she would have been found with bruises, ruptures, serious pains, and bleeding. Failure of the evidence to that effect, according to the appellant, there is no evidence which suggests that the alleged victim was penetrated. It was thus wrong for the trial Magistrate to convict him of the offence of rape. In arguing further, the appellant submitted that the identification was not sufficient because the victim knows him as at his home there is a shop where she used to come to shop to buy whatever. He then believed that the victim was not penetrated, she was arranged and directed to give untrue evidence against him. He was of the view that even the evidence by the clinical officer (PW1) was not reliable as the officer was not the one who examined the victim and she did not tender any document which authorized him to examine the victim. According to him, the Clinical Officer believed that the victim was penetrated. But in law, that witness was not supposed to come to give Page 10 of 20 evidence without permission from the District Medical officer. The appellant prayed that his appeal be allowed. From the above rival submissions from both parties, I find the main issue for the determination of this appeal is whether the charge of rape was proved against the appellant to the required standard; that is beyond reasonable doubt. It is a cardinal principle of our criminal jurisprudence that in criminal cases the burden is on the prosecution to prove its case beyond a reasonable doubt. However, the accused has no duty to prove his innocence. See; Director of Public Prosecutions vs. Philipo Joseph Ntonda (Criminal Appeal No. 68 of 2023) [2024] TZCA 298 (3 May 2024), and Godfrey

Anthony @ Sengeri @ Nyachange @ Andrea vs. Republic (Criminal Appeal No. 536 of 2020) [2024] TZCA 589 (18 July 2024). Coming to the instant case, it is evident from the charge sheet of the trial court that the appellant was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [CAP. 16 R.E. 2022]. For the prosecution to establish the above offence, it has to prove beyond a reasonable doubt three ingredients; one, that, the victim of rape is underage; two, that the accused's manhood has penetrated the victim's Page 11 of 20 sexual parts; and three, that, the perpetrator is the accused and not anybody else. See; Yusufu Ismail Akandu vs. Republic (Criminal Appeal No. 623 of 2021) [2024] TZCA 485 (13 June 2024). On the first ingredient, there is no dispute that the victim was under the age of eighteen (18) years old. This has also been proved by the testimony of PW3 (the victim's grandfather) who asserted that at the time of the commission of the offence, the victim was 6 years of age as she was born on 15th February 2016. In proving his assertion, PW3 tendered a birth certificate (Exhibit P1) which was admitted without any objection from the appellant. The law is settled that, parents/guardians of the victim, the victim, and a medical doctor are amongst those who are mandated to prove the age of the victims of sexual offences. See; Miraji Mussa Rashid vs Republic (Criminal Appeal No. 651 of 2022) [2024] TZCA 667 (31 July 2024). On the second ingredient, I will be straightforward. One of the essential ingredients of the offence of rape is penetration, it can be proved by direct evidence as much as it can be also proved by circumstantial evidence. In the instant case, PW7 who is a medical doctor avowed that after the examination of the victim, she found that the victim's vagina had no blood, or bruises, and did not have sperm. However, she clarified further that the victim's Page 12 of 20 vagina was wide compared to her age. She, however, opined that a blunt object might penetrate the victim's vagina. PW7 tendered PF3 which was also admitted in court as Exhibit P2 without an objection from the appellant. From the above reasoning, and taking into account that there is no evidence on the record rebutting the proposition that the victim was penetrated, the evidence in exhibit P2 as amplified by the oral testimony of PW7 in my view, would be sufficient to establish the second element of penetration. In the event, I would agree with the learned State Attorney that the penetration being the second element has been proved. The last ingredient which is the most difficult part of the instant appeal, is to whether the evidence of the victim on recognition of the appellant as the one who committed the offence is sufficient. To start with, it is certain in this case, no person witnessed the appellant having sexual intercourse with PW5 apart from the victim (PW5) herself. Undoubtedly, in the present case, the learned trial court magistrate seems to have placed reliance on the testimony PW5 to prove the role of the appellant in the commission of the offence. I might agree with the learned trial magistrate because the Court of Appeal of Tanzania has pronounced Page 13 of 20 itself on many occasions that a fact may be proved by the testimony of a single witness. See; Yohanis Msigwa vs. R [1990] TLR 148. A similar position was also held by the Court of Appeal in Magai Manyama vs. Republic (Criminal Appeal 198 of 2014) [2015] TZCA 102 (1 December 2015) where the Court observed inter alia that the best evidence of sexual offence comes from the victim, that is to say, a conviction for a sexual offence may be, in a

proper case, grounded solely on the uncorroborated evidence of the victim. However, for the court to rely on independent evidence of the victim, it must first satisfy itself that the witness is telling nothing but the truth because the word of the victim of a sexual offence should not be taken as gospel truth but her or his testimony should pass the test of truthfulness. This position of law is provided under section 127 (6) of the Evidence Act [CAP. 6 R.E. 2022] which provides that; 'Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender age or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of Page 14 of 20 the evidence of the child of tender years or of a victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age or the victim of the sexual offence is telling nothing but the truth.' The question which I have to determine now is whether the evidence of PW5 is satisfactorily credible to justify the conviction of the appellant in the absence of another independent testimony. Before determining the above-posed question, I am aware and understand the position of the law that the trial court had the advantage of observing the demeanor of the witnesses because the credibility of witnesses is within the monopoly of trial courts. However, the exception to the above general rule has been highlighted by the Court of Appeal in the case of Suleiman Dago @Swalehe vs. Republic (Criminal Appeal No. 59 of 2022) [2024] TZCA 280 (29 April 2024), where the Court stated that; 'What we discern from the above authorities is that credibility of witnesses is the monopoly of a trial court but only in so far as demeanour is Page 15 of 20 concerned. An appellate court may determine credibility of witnesses when assessing the coherence of the testimony of witnesses as well as when the testimony of a witness is weighed against the testimonies of other witnesses, including the accused person's.' In the matter before me, the records suggest that the victim was raped by the appellant and another person known as Baba Mary at different times. That is per the evidence of the PW1 and PW2. For example, in their evidence, the PW1 and PW2 the VEO is recorded to have told the trial court inter alia; PW1 was quoted saying; 'The child told me that there are two people who penetrated into her vagina. She called those people by the names of their children. I only remember one name of Baba Mary.' PW2 was also quoted saying; 'I called one person from SUMAUJATA who deals with Social Waifare matters. He came and we informed him of the incidence, we followed the child in her school. He interrogated her, she explained every thing for him. She said Page 16 of 20 that she was raped by people known as one Baba Mary and Baba Asnat.' On page 23 of the trial court typed proceedings the victim was recorded saying; 'In October, 20221 was to going to a ngoma, baba Asnati called me, Akanivua Chupi akanibaka. He took me on the back yard "Nyuma ya Nyumba" Baba Asnati aiiingiza Mdudu huku..... He then left me, I went home but baba Asnati told me to not say anything. Baba Asnati raped me only once. I then told my father what happened...' Again, when the victim was cross-examined, she stated that; I quote; 'I felt bad when I was raped Mdudu aliingia kabisa. NHisikia maumivu. NHijikazia nikatembea. I cried when the 'mdudu' entered. Mama asked me what is wrong I told her

that 'Nimebakwa na baba Asnati... Mama is my grandmother' On another different occasion, the PW3 (the victim's grandfather) was quoted saying; 'The victim was raped in October 2022. I was informed by the Village Executive Officer (VEO). One day, the victim told me Page 17 of 20 that 'Baba nina wadudu sehemu za siri' I told her to wait for her grandmother who will inspect her. When her grandmother (My wife) came she inspected the victim. She could not found out what is wrong due to her weak eye sight' From the above extract, two things make me doubt the victim's evidence, firstly, the victim stated that immediately after being raped by the appellant she told her grandfather (PW3) what had happened to her. PW3 on his testimony as shown herein above clarified that the victim did not tell him anything other than telling him that there were insects in her vagina. The records further show that PW3 who is the victim's grandfather knew about the incident after being informed by the VEO and not by the victim herself. Also, as per the victim's testimony during the cross-examination, she said that she told her mother, who is her grandmother, that she was raped by the appellant. In my view, the said testimony is completely different from what PW3 testified. Surprisingly, the said grandmother was not one of the witnesses who was called to the trial court to clarify the immediate information she received from her granddaughter on the act. Perhaps, the evidence of the said grandmother would have given some insights on this Page 18 of 20 aspect. Unluckily, as said, she was not called as a witness and no reason for the omission has been assigned. Another thing that creates doubt is that, according to the victim's testimony, as stated somewhere herein above, she was carnally known by two different men including the appellant (at the same time?); another person is not known as to what was done against him and as to why the appellant was charged alone. It is for that basis, I am of the view that the prosecution side was required to prove that the appellant is the only person who raped the victim. The evidence is given by the victim herself which as I have shown is contradictive. Given the discussion above, it is my considered view that the appeal has merit. It is hereby allowed. The conviction and the life imprisonment sentence imposed by the trial court against the appellant are hereby quashed and set aside. I proceed to order the immediate release of the appellant, Omary Salumu Maskati @Baba Hasnath, forthwith from the prison unless held thereat.in connection with another case. COURT: Judgment delivered this 20th day of March 2025 in the presence of Ms. Atuganile Nsajigwa, the learned State Attorney for the Respondent, and the Appellant in person. \ Page 20 of 20

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