

TANZANIA / JUDGMENT

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© THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KJGOMA (CORAM: HON. AUGUSTINE RWIZILE) DC. CRIMINAL APPEAL NO. 23 OF 2023
PHILIBERT KISUBWA COMPLAINANT / APPELLANT I APPLICANT I PLAINTIFF VERSUS
REPUBLIC RESPONDENT/ DEFENDANT

JUDGMENT

Fly Notes

Facts

Ratio Decidendi 11th of July 2024 Hon. RWJZILE.: This appeal originates from Criminal case No. 364 of 2022 of Kibondo district court. The appellant was charged with the offence of rape contrary to sections 130(1)(2) and 131 (I) of Penal Code [cap 16. R.E 2022]. He was alleged to have raped a girl of 20 years. After a hearing, he was found guilty, convicted and sentenced to 30 years imprisonment. Dissatisfied with both conviction and sentence, he has now appealed to this court against conviction and sentence. Four grounds of appeal were advanced as hereunder;

1. That the trial magistrate erred in law and facts by basing his judgment and conviction on weakness of the prosecution side and not strength of defence side whereby the evidence of Dwl was collaborating with the evidence of DW2.
2. That the trial magistrate erred in facts and law as the prosecution side did not prove his case beyond reasonable doubt as there was contradictory evidence of Pwl and Pw2.
3. The appellant erred in facts and law by convicting the accused while there was language barrier at the time of he was making his defence.
4. That the trial magistrate erred in facts and law as the prosecution side did not prove his case beyond reasonable doubt as required by the law. Page. I Hon. AUGUSTINE RWIZILE The appellant was not represented at the hearing before this court, but the respondent, was under the services of Ms. Rehema Mpozemenya, learned state attorney. The appeal was heard by way of written submission. Going by the written submissions, seemingly the appellant argued all grounds together except ground three. In his submission, the appellant stated that the evidence of Pw 1 and Pw2 was in conflict. Pw 1 testified to have informed her

mother-Pw2, that she was raped. Pw2 on the other side, said, she saw Pw1 crying and asked her the reason for crying, and was told, she was raped. According to his submission, the prosecution evidence did not comply with section 110 of the Evidence Act, which casts the onus of proving the charge on the prosecution. The appellant also cited the Book titled The Law of Evidence, 24th Edition by Ratnlal & Dhirajlal to support the interpretation of section 110 of the Act. He insisted that, he had no duty to establish his innocence. Even if his evidence was weak, yet the prosecution side has a duty to prove its case beyond reasonable doubt. And that, it was the duty of the court to consider his defence as it was held in the case of Hussein Iddi and another vs. R (1986] TLR 166. It was the appellant's contention that, given the nature of rape cases, credibility of the complainant becomes the single most important issue. It was his view that, the testimony of the victim of rape must be credible, convincing, and consistent with human nature and that it must be in the normal course of things, that is when the accused may be convicted solely based on her evidence, as held in the case of Mohamed said vs R, Criminal appeal No. 145 of 2017, when quoting the case of the Peoples of the Philippines vs Benjamin A Elmancil GR. 7\JO 234951. It was his point that the evidence of Pw 1 and Pw2 contradicted, and support was also drawn from the evidence of Dwl and Dw2. On the second ground, he argued, when making his defence, he was not given an opportunity to have an interpreter to interpret from Kirundi to Kiswahili and vice versa, as he is not conversant with Kiswahili. He asked this court therefore to allow this appeal. For the respondent, it was submitted on the first ground that the trial court evaluated evidence of both sides and was convinced that the prosecution proved its case beyond reasonable doubt. The respondent was vehement that, the trial court found no fault in the evidence of the victim and that her evidence was supported by Pw2 and Pw3. The respondent argued the 2nd and 4th grounds together. It was argued that, rape is proved by penetration without consent which was done. According to the respondent's submission, Pw1 proved, she was raped by the appellant and that it was supported by the evidence of Pw3, who found bruises and blood in her vagina, suggesting, it was done by a blunt object. It was further argued that corroboration was from independent evidence as held in the case of Mdiu Mande@Mnyambwa Mande vs R [1965] E.A.L.R 193. It was submitted further that, there was contradiction on the evidence of Pw 1 and Pw2 which was immaterial. It was added, what is important is that the essential elements of the offence of rape to include penetration without consent, were proved and Pw3, shown so. The case of Selemani Makumba vs R, [2006] TLR 384 was cited to support the submission. Page.2 Hon. AUGUSTINE RWIZILE II Stressing on lack of the contradictions between Pw 1 and Pw2, it was also stated that, not all the contradictions in the case are material, unless affecting the credibility of the parties as held in the case of Said Ally Ismail vs R, Criminal Appeal No. 241 of 2008. Further, the respondent said, the appellant was identified by the victim because they were familiar and was named immediately to her mother as the perpetrator. Accordingly, supported was rendered from the case of Ahmed Said vs R, Criminal appeal No. 291 of 2015 On the 3rd ground, it was submitted that there was no language barrier, because the appellant cross-examined all the prosecution witnesses and answered all the questions in cross examination. Still, it was argued there was presence of an interpreter

when he made his defence. Having heard submissions of the parties, I think as first appellate court, I have the duty to re-evaluate the evidence in order to see if the main issue, the guilty of the appellant was proved and I find that the grounds hinge on two issues; I. That the trial court relied on the weak and contradicting evidence of Pw1 and Pw2, and therefore the case was not proved beyond reasonable doubt.

2. That the trial court erred in convicting the appellant while there was a language barrier when making his defence. In terms of records, the prosecution case was made by three witnesses. The victim -Pw 1, her mother -Pw2 and the doctor, -Pw3. The appellant testified and had one witness, they testified as Dw1 and Dw2. To start with, the second ground, is on the spotlight. The appellant argued, he was not afforded services of an interpreter when doing his defence. It means, he alleged was not afforded a fair trial due to language barrier. The record has it that, on 21st November 2022 the appellant was arraigned and one Raymond as an interpreter made services of interpretation. The same person is recorded to appear on the 6th of February 2023 at preliminary hearing, and on 16th February when Pw1 and Pw2 testified. But when Pw3 came to testify on 14th March 2023, the record shows as follows; Date: 14.03.2023 Coram: M.M. Makonya-SRM Public Prosecutor: Insp. Luvanda Accused: Present Court Clerk: Happiness Interpreter: Raymond. Page. 3 Hon. AUGUSTINE RWIZILE It depicts from the above, in my view that the record is silent on whether Raymond was present. But if he was present, then he did his duty without being sworn. In other previous days, the same person was present, and the record showed he was sworn. Therefore, the evidence of Pw3 was taken without services of an interpreter. The rest of the time when the case was called for hearing, it is Raymond and Jonathan who properly did what was the required, they were admitted and sworn to make interpretation which was on 24th April and 4th May 2023. But on 15th May when the judgement was read to him, still, it shows, the coram was more or less similar to that of 14th March 2023 as shown hereunder; Date: 15.05.2023 Coram: M.M. Makonya-SRM Public Prosecutor: Insp. Henry Accused: Present Court Clerk: Happiness Interpreter: Raymond. This court is not sure if the same person was present and if he indeed appeared, he was not sworn to do his duty properly. The appellant has complained that when making his defence, he was not afforded services of the interpreter and it is clear from the record that his defence was made on 24th April 2023 and Mr. Raymond was present and was properly sworn. I have no doubt that the record presents the picture of what transpired in the proceedings before the trial court. This ground has no merit. What I think, is the problem is not his defence case but the evidence of Pw3, which was recorded without as the record presents, services of the interpreter. The evidence of Pw3, cannot be left to stand. It is mandatory that an interpreter must take oath before acting on the instructions of the court to make interpretation. Failure to do so, contradicts mandatory provisions of section 4 of The Oaths and Statutory Declarations Act [CAP. 34 R.E. 2019], which explicitly provides: -
4. Subject to any provision to the contrary contained in any written law, an oath shall be made by-

(a) NIA

(b) any person acting as interpreter of questions put to and evidence given by a person being examined by or giving evidence before a court... " Therefore, the evidence of Pw3 is expunged from the record. On the judgement day, as shown before, there was no proper services of an interpreter. This means, he was convicted and sentenced without proper mitigation. But in my view, the offence being that under the minimum sentence, I do not think, he was prejudiced because even in the best type of mitigation he could not have fetched the sentence below the minimum as the it is a legal Hon. AUGUSTINE RWIZILE • Page.4 requirement. Having dismissed the second ground, I turn to the first one, which is based on the contradiction of the evidence of Pw1 and Pw2. As submitted by the defence, the evidence of both Pw1 and Pw2 was given on the same transaction. Pw1 said, upon being raped, she went home. Her mother found her crying in the kitchen and when interrogated, she said, she was raped by the appellant. Pw2 said it in the similar way. She said, she found her daughter crying in the kitchen, and when asked what happened, she was told, she was raped by the appellant. From their evidence, I find nothing material that contradicts. The second part of the first ground, is that the case was not proved beyond reasonable doubt. My determination on this point is that the record shows, the victim and the appellant went to the house of Dw2 together. Pw1 said, from that house, on the instructions of appellant, she was taken by someone to the other house of the appellant's cousin. Pw1 further said, in that house two people were watching a TV and as the appellant appeared, the two left. This is the time, she was raped. On the defence, the appellant does not deny meeting the victim. He said he met her and went to the house of Dw2 where they found him and his wife. They then left for the football match and the victim went away. Dw2, admits seeing the appellant with a woman he did not know. He did not say, on his part that he was found in the same house with his wife and that they were watching the TV. He said, he ordered drinks for them but Dw1 did not say he was ordered drinks by Dw2. He said, they all left together to the football. That means, if that is true, the wife of Dw2, the appellant and the victim went together to watch the football. I find conflict in the statements of Dw2 and Dw1. I therefore doubt their test of the story. It is cardinal that the prosecution is cast with the duty of proving the charge beyond reasonable. The evidence of Pw1 and Pw2 only subsists after expunging that of Pw3. Pw2 did not see, her child being raped. She alleged to get it all from Pw1-the victim. All she said, upon seeing her crying in the kitchen, was told, it is the appellant that raped her. What she said, she witnessed, is blood from the vagina of the victim and then reported the matter. This corroborates the evidence of Pw1 who also said, she was bleeding. I have keenly examined the evidence of Pw1. I do not find such material contradictions, even if, she said on cross-examination, by the appellant that, they were escorted by the owner of the house, perhaps after being raped and that she did not tell him that it is the appellant who raped her. There is no doubt that the appellant was a choir master as he testified and the victim sings in the same choir. They are believers in the same church and therefore family to each other. The two had no conflict whatsoever. But the appellant said, he had a church conflict with her father and second that they frame-up this case in order for them to be taken to the third

country. Page. 5 Hon. AUGUSTINE RWIZILE I have taken seriously this allegation, my re-evaluation of the defence evidence finds, apart from the contradictions, I have shown I find two versions of why, the appellant believes the case was framed-up. They are going to the third country or the conflict that the appellant had with her father. It is from this point, I do not find it plausible to hold that there was a serious doubt raised in this case. As I said, I have found the evidence of Pwl credible and consisted with proof of the case. It is clear that, the testimony of the victim is credible, convincing, and consistent with human nature and does not depart from the normal course of things. It can be used to convict as the held in the case of Mohamed said vs R, Criminal appeal No. 145 of 2017. For the foregoing reasons, I find no merit in the appeal. It is dismissed Dated at KIGOMA ZONE this 11th of July 2024.

AUGUSTINE RWIZILE JUDGE OF THE HIGH COURT Hon. AUGUSTINE RWIZILE • Page.6

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