

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI (Arising from the judgment of Criminal Case No. 174/ 2023 of the District
Court of Babati at Babati) PHILIPO DANIELAPPELLANT
VERSUS REPUBLICRESPONDENT

JUDGMENT

16th October & 18th December, 2024 Kahyoza, J.: Philipo Daniel (Philipo), the appellant, is serving a sentence of 30 years imprisonment for having sexual intercourse with a girl aged 12 years old. Aggrieved, Philipo appealed contending that the victim's evidence was recorded in contravention of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2022], that the trial court relied on the weak defence evidence to convict, that the trial court grounded conviction on unreliable, uncorroborated and contradictory evidence, that the trial court did not take time to consider the evidence, that the judgment was in contravention of section 312 (4) of the Criminal Procedure Act [Cap. 20 R. E. 2022] (the CPA), and that prosecution did not prove the offence beyond reasonable doubt. 1|Page The issue for determination is whether the prosecution proved the offence beyond reasonable doubts. Philipo was charged with the offence of rape contrary to section 130 (1) (2) (e) of the Penal Code [Cap. 16 R. E. 2022]. It was alleged that on 3rd December, 2023 at Ari village within Babati District. Philipo Daniel did have sexual intercourse with one girl (the victim) aged 12 years old. The appellant pleaded not guilty and the prosecution summoned four witnesses to prove the appellant guilty. Did the prosecution prove the offence beyond reasonable doubt? A brief background is that on 3 November, 2023 while the victim was going to fetch water met Philipo who pulled her to the abandoned house and ravished her. Mary Faustine (Pw3) a dumb witnessed and testified. Mary Faustine (Pw3) gave evidence by signs which Ms. Beather Faustine interpreted to the effect that she saw Philipo pulling the victim to the abandoned house. She saw him throwing her on the floor and lying on top of her. She went to the scene and raised alarm. She rescued the victim and took to her sister in-law at around 10:00hrs. Paskali Hamisi (Pw2), the victim's brother was at home. He deposed that Mary Faustine (Pw3) arrived 2|Page with the victim at their home spoke by sign language to Paskali (Pw2)'s wife explaining that the victim was raped. Paskali (Pw2)'s wife notified him that his sister, the victim had been raped. Then, Mary Faustine (Pw3) held Paskali (Pw2)'s hand, took him to the scene of the crime, which was an abandoned house. He saw indications that a person was being dragged and foot prints. From the crime scene, Mary Faustine (Pw3) led Paskali Hamisi (Pw2) up to the culprit who raped the

victim. She pointed Paskali Hamisi (Pw2) to a person who raped the victim. The culprit was in the banana farm which is not very far from the scene of the crime. Mary Faustine (Pw2) using signs showed Paskali (Pw3) a person who raped his sister. Paskali (Pw2) identified that person to be Philipo. Paskali (Pw2) called hamlet chairman and reported the incident. Philipo was arrested at 15:00hrs and taken to Babati police station. Paskali (Pw2) took the victim to police station and later to hospital. Faraja Nhomi Bernard (Pw4) examined the victim and found that the young girl was 12 years old. The doctor discovered that the victim was mentally sick. She examined the victim who had no bruises on her body and no blood stains. She examined her vagina and anus. She did not find bruises on any foreign material or dirty. She saw bruises in the inner part of the 3|Page vagina, Labia minora but the outer part, Labia majora had no bruises. She deposed that bruises on Labia minora could have been caused by a blunt object or infections caused by bacteria and fungus. She deposed that a blunt object may include a penis. She tested further that, she examined the victim to find out if she was infected with HIV, or whether she was pregnant. The results of both tests were negative. She had no infection. She tendered a P.F 3 as exhibit P.1. Exhibit P.1, depicted that the victim was penetrated because of presence of bruises in the labia minora. But there were no sperms or any discharge seen. The appellant opted not to defend himself. It is against the above evidence the court convicted the appellant. The appellant was charged with the offence commonly referred to as statutory rape under section 130(1) (2)

- (e) of the Penal Code. To prove the offence of statutory rape, the prosecution is required to prove three elements; one, the age of victim; two, that the victim was penetrated; and three, that it is the appellant who penetrated the victim. During the hearing, the appellant appeared in person. He did not elaborate his grounds of appeal. The respondent was represented by Mr. Bizimana and Mr. Ndibalema, learned State Attorneys, who opposed the 4|Page appeal. The state attorneys submitted that the prosecution proved the offence beyond reasonable doubts as the victim's evidence was sufficient to ground conviction. Given the record and the nature of the evidence, I wish to commence the evaluation of the prosecution's evidence. It is on record that the victim was suffering from intellectual disability. The fact that the victim was capable of fetching water was sufficient evidence that she had enough intelligence to identify what is bad and good or right and wrong, thus, she was capable to identify the culprit. She told the trial court that she knew Pascal (Pw2) her brother and Philipo Daniel, the accused person who a resident of Kampala, their village. She deposed that the appellant was her village mate and that she used to see him in the village. She was intelligent enough to testify and to do competently. The victim deposed that on 3.11.2023 when she was going to fetch water, she met the appellant who pulled her to the abandoned house and raped her. In her own words, she deposed that the appellant put off his clothes and "alinifanyia tabia mbaya." Her evidence was that she was penetrated was corroborated by Dr. Faraja Mhomi Bernard, (Pw4). The victim identified properly the appellant as he knew him very well as she used 5|Page to see him in their village. The offence was committed during the day. There was no possibility for mistaken identity. The victim did properly identify the victim. It is trite law that in sexual offences the best evidence is that of the victim, as per this Court of Appeal decision in Selemani Makumba v.

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[2006] T.L.R. 379. It is also settled that the evidence of the victim of sexual offences should not be scrutinized to test the witness' credibility. See *Akwino Malata vs Republic* (Criminal Appeal No. 438 of 2019) [2021] TZCA 506 (21 September 2021) where the Court of Appeal observed that- "This is a principle of law to the effect that the evidence of sexual offence has to come from the victim and if the court is satisfied that the victim is telling the truth it can convict without requiring any corroborative evidence." (Emphasis added) I am satisfied that the victim's evidence was such that, the court may convict without any corroborative evidence as shown above. However, the Dr. Faraja Mhomi Bernard, (Pw4) corroborated the victim's evidence. The doctor's evidence was that the victim was penetrated as there were bruises in the labia minora. The appellant sought to discredit the doctor's evidence it did not prove penetration as she deposed that the bruises could have also been caused by disease. I considered that evidence and came to the 6|Page conclusion that in the present case the bruises in the labia minora was a result of penetration and not disease as the victim deposed that she was penetrated. The victim's evidence ruled out the possibility that disease may have caused the bruises in her labia minora. I had an opportunity to look at the exhibit which depicted that the bruises in the victim's labia minora were a result of penetration. Was the victim of Mary Faustine Hilunga (Pw3) a deaf-dumb person properly recorded? Another witness who collaborated the victim's evidence was Mary Faustine Hilunga (Pw3). Mary Faustine Hilunga (Pw3) was a deaf-dumb person. She saw the appellant drugging the victim to the abandoned house. She followed and raised alarm. She rescued the victim. She took victim's bucket and lead her to Pascal (Pw2). Using signs narrated to Pascal (Pw2) and his wife what had happened. She then according to Pascal (Pw2) held him and took him to the scene of the crime. From the scene of the crime she led Pascal (Pw2) to the place where Phillip was. Pascal (Pw2) deposed that Philip was in the banana farm not very far away from the crime scene. The trial court recorded the evidence of Mary Faustine Hilunga (Pw3) who used signs language to testify by using the sign language interpreter 7|Page Beatha Faustine. The record showed that the interpreter took oath but when it came to Mary Faustine Hilunga (Pw3) it recorded the following- "Court: witness being a dumb person can take oath" It is not clear whether Mary Faustine Hilunga (Pw3) took oath before she testified using signs. I asked myself was whether Mary Faustine Hilunga (Pw3) a dumb person required to take oath before she testified. The Evidence Act states that every person is competent to testify and it makes it mandatory that witnesses must take oath or affirmation before testifying. Oath or affirmation is a formal declaration that their testimony will be truthful. It serves as moral and religious reminder of the importance of honesty and the potential consequences of lying under oath. The Evidence Act, however, has a special section directing on how to take the dumb evidence must be taken. Section 128 of the Evidence Act, states that- 128.-(1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, such as by writing or by signs; but such writing must be written, and the signs made, in open court.

- (2) Evidence given in accordance with subsection (1) shall be deemed to be oral evidence.” 8| Page It is obvious that the deaf- dumb witness is competent and may testify by writing or by sign language. The signs must be made in court and of course interpreted by a person with sign language knowledge or experience. However, before allowing a deaf-dumb to testify, the court must ascertain before he is examined that he possesses the required amount of intelligence and understands the nature of an oath. The Court of Appeal had an opportunity to consider on the how the evidence of deaf- dumb person may be recorded in *Sinu Lishini V R.*, Criminal Appeal No. 260 of 2009, (TCA unreported) where it stated that- “What it means, and according to our understanding of the law governing the subject, is the following-
1. That dumb person may be a competent witness, capable of testifying, in terms of section 127 of Cap.6.
 2. But given the said handicap, a dumb person’s evidence may be taken in a manner which is intelligible, that is by way of writing or by signs but both must be made in court. If the option is the use of signs, as in the instant case, then an expert in the field or some other person who is very familiar with the would be witness sign language, must be used.
 3. Such expert or person must be sworn by the court, before he helps the witness to take oath/ affirmation. 9|Page
 4. If the witness opts to use the sign language, such signs must be recorded by the court together with their interpretation in the language of the court.
 5. The interpreter should not be a person with an interest in the matter before the court. (See *Darshan Singh @ Darshan Lal vs. The State of Rajasthan*, 2006 (4) WLC 82).” In the present case, given the name of the sign language interpreter it is clear that she was related to the deaf-dumb witness. The trial court did not indicate the relationship or the qualification of the sign language interpreter. The sign language interpreter took oath but it is not clear whether Mary Faustine Hilunga (Pw3), the deaf-dumb took oath. The procedure elaborated in above case Mary Faustine Hilunga (Pw3) was required to take oath or affirmation. After the sign language interpreter has taken oath or affirmation, he must assist the witness to take oath and then interprets the witness’ sign language. The Court of Appeal added that “if the witness opts to use the sign language, such signs must be recorded by the court together with their interpretation in the language of the court.” I pondered on the condition that when a deaf-dumb witness opts to use signs, the court must record the sign language and formed an opinion that such a condition should be left to 10 | P a g e judges and magistrate who are capable to record signs. It is difficult or not hard to record signs language. I will not fault the trial magistrate for not recording Mary Faustine Hilunga (Pw3)’s sign language. I wish the Court of Appeal will have opportune to reconsider whether it is necessary for the trial court to record sign language of the deaf-dumb witness. Section 119 of the India Evidence Act is *pari materia* to section 128 of the Evidence Act but it has a proviso which provides that if signs language is used, the court shall use assistance of the interpreter or

special educator such evidence will be videographed but not that shall be written. I am of the view that it is time we go the Indian way. The proviso to section 119 of the Indian Evidence Act provides that- “Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be video graphed.” In the present case, much as the trial court did not put it clear that Mary Faustine Hilunga (Pw3) took oath or record the sign language she used still, I am of the firm view that she told the truth. I will not discard her testimony as her evidence was truthful and there was no chance of influencing her. But even if Mary Faustine Hilunga (Pw3)’s evidence is discarded, still Pascal 11 | P a g e (Pw2)’s evidence that Mary Faustine Hilunga (Pw3) held him and took him to scene of the crime from the scene of the crime he took him to Philipo and pointed out that he is the one who raped the victim. The victim deposed that Mary Faustine Hilunga (Pw3) the deaf-dumb person saw Philipo raping her. The victim deposed that after Philipo finished raping her he ordered her to proceed to fetch water but Mary Faustine Hilunga (Pw3) held her and took her home as she was crying. I find the evidence of Mary Faustine Hilunga (Pw3) and Pascal (Pw2) with corroborative value. It corroborated the victim’s evidence that the appellant penetrated her. Was section 127 (2) of the Evidence Act violated? The appellant complained that the victim’s evidence was recorded in violation of section 127(2) of the Evidence Act. Section 127(2) states that- “A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.” It is true that the trial court’s record did not show that the victim promised to tell the truth and not lies but the court reported that she promises to tell the truth. The record reads- 12 | P a g e “PW1 MARTHA HAMSI, 12YRS, CHRISTIAN Court: the child is of tender age, young but she is above the age of 10 years, she hasn’t gone to school hence illiterate, but she admits to go to church and understands telling lies is a sin and promises to speak the truth at all times while in court. Hence the witness is able and capable to testify.” Much as the trial court did not record the victim’s promise and her own words it is clear that she promised to tell the truth. However even if her promise did not meet the requirement it is not fatal. Section 127(7) as amended by the Legal Sector Laws (Miscellaneous Amendments) Act No. 11 of 2023 to the effect that failure of the child of tender age to make a promise shall not render her evidence in admissible. It states- “(7) Notwithstanding any other law to the contrary, failure by a child of tender age to meet the provisions of subsection (2) shall not render the evidence of such child inadmissible.” The victim’s evidence was recorded after the above named law had become effective. It was recorded on 9.4.2024. I find no merit in the complaint. I find that the evidence of the victim a child of tender age was properly recorded. Was the appellant convicted on his failure to give defence? 13 | P a g e The appellant’s complaint is that he was convicted for his failure to give defence. The respondent opposed that appellant’s complaint and submitted that the prosecution proved the case beyond reasonable doubts. I am of the view that the prosecution proved its case as shown above. The trial drew adverse inference and that is the position of the law as provided by section 198(2) of the CPA. Section 198(2) of the CPA provides that- “Where an accused person, upon being examined, elects to keep silent, the

court shall have the right to draw an adverse inference against him and the court and the prosecution may comment on the failure by the accused to give evidence.” Further, Section 231(3) of the CPA- “Where the accused person, after he has been informed in terms of subsection (1), elects to remain silent, the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused person to give evidence.” The record shows that the appellant opted to remain silent after the court addressed him in terms of section 231(3) of the CPA. The record reads- “Accused: I will remain silent and I won’t testify 14 | P a g e P/P: We pray this court to proceed with the pronouncement of the judgment since the accused person has chosen to forsake his right to mount a defence and remain silent.” There is nothing wrong for trial court to draw adverse inference. However given the evidence on record it is obvious that there was ample evidence to lead to the appellant’s conviction. I find that his conviction was not merely based on his failure to give defence. Was the prosecution evidence contradictory, unreliable and uncorroborated? The appellant complained that the trial court relied on the prosecution contradictory, uncorroborated and unreliable evidence to convict. He argued that the evidence of Dr. Faraja Mhomi Bernard, the doctor (Pw4) and the victim contradicted each other. He contended that the doctor deposed that he did not find anything in the labia majora and he did not know the causes of the bruises in the labia minora. He stated that the evidence of other witnesses was hearsay evidence. It is true that the doctor deposed that the labia majora of the victim’s vagina was intact but the labia minora, the inside part had bruises. he said the bruises may have been caused by disease due to bacteria or fungus infection or by penetration. He described that penetration of blunt object 15 | P a g e including man’s penis may have caused bruises. He made his findings which he recorded in the PF.3. The doctor indicated in the PF. 3 that bruises in the labia minora were caused by penetrating a blunt object. I find no contradictions between the doctor and the victim’s evidence but the doctor’s evidence corroborated the victim’s evidence. It is a settled principle that that an expert opinion is not a binding and conclusive evidence before the court of law as to suffice a conviction of accused person unless it is corroborated by other evidences. See section 47 of the Evidence Act and *Godi Kasenegala v. The Republic*, Criminal Appeal No.10 of 2008 at the Court of Appeal of Tanzania- *Iringa(Tanzlii)*, where it was observed that- “since experts only gives opinions courts are not bound to accept them if they have a good reasons for doing so.” Did the trial magistrate violated section 312(1) of the CPA when he composed the judgement? The appellant complained that the trial court failed to adjourn the case to evaluate the evidence. After parties closed their case, the court has to compose the judgment meeting the requirements of section 321(1) of the CPA. The court may deliver the judgment immediately after the closure of the case as it was in 16 | P a g e this case or adjourn. If the Court adjourns the judgment it should deliver it with 90 days. There is nothing wrong for the court to deliver the judgment the same day after closure of the evidence. In the end, I find that the prosecution established beyond reasonable doubt that the appellant knew the victim carnally and the victim was below 18 years old, thus he committed the offence of rape contrary to section 130

- (1) (2) (e) of the Penal Code [Cap. 16 R. E. 2022]. I dismiss the appeal, uphold the conviction and the sentence, which is the minimum sentence provided by law. I order accordingly. Dated at Babati this 18th day of December, 2024. John R. Kahyoza Judge Court: Judgment delivered in the presence of the appellant and Mr. Jackson Mayeka, the state attorney for the Respondent. Right to further appeal explained. B/C. Mr. Damas (RMA) present. John R. Kahyoza, J.

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