

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 206 OF 2022 POSIANO S O NTAMABOKO VS THE REPUBLIC

COURT
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IN THE COURT OF APPEAL OF TANZANIA AT TABORA (CORAM: LILA. 3.A., FIKIRINI. J.A., And KENTE, 3.A.) CRIMINAL APPEAL NO. 206 OF 2022 POSIANO S/O NTAMABOKO..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Tabora) f Amour, JT dated the 13th day of August, 2021 in Criminal Appeal No. 81 of 2019 JUDGMENT OF THE COURT 9th August & 17th September, 2024 KENTE, 3.A.: This appeal is against the decision of the High Court of Tanzania, N sitting at Tabora, in the exercise of its appellate jurisdiction, in Criminal Appeal No. 81 of 2019. The appeal is against both the conviction and sentence of thirty years' imprisonment that was originally imposed on the appellant by the Resident Magistrate's Court of Tabora (the trial court) in Criminal Case No. 82 of 2017 and subsequently sustained by the High Court, upon appeal. Before the trial court, the prosecution case was briefly to the following effect: The victim of the alleged offence who was PW1 at the trial, was an old woman aged 102 years at the time. We shall hereinafter simply refer to her as the victim or PW1. Following the death of one of her daughters with whom she used to live and as there was no one who could take care of her, she went to live at Igalula Masawanga Village in Sikonge District under the care of her second daughter one Dina Joshua Ilendu (PW3). It is common ground that PW3 had employed the appellant as a domestic worker. PW1 testified that, on the materia! day, she happened to have gathered some of her fellow members of the congregation and church leaders at her home, to pray for her. Upon their arrival, the appellant who was seemingly indifferent to religious affiliation but a keen drinker of beer, then decided to leave by bicycle and go to a drinking place. A few hours later, he came back. According to PW3, when the appellant returned home, he was very drunk and was in surly moods. PW3 testified that the appellant was shouting, stumbling and sometimes bouncing off the walls. She also testified that, even though, he seemed to have had specifically singled her out for whatever he wanted to do as he would always advance towards her wherever she went. Annoyed by the appellant's indecent and disorderly conducts which included urinating in the wrong places such as upon the fire in the kitchen, and suspecting what would be his next move, PW3 recounted that, before the appellant caught up with her, she got outside and went to sleep at the home of

their neighbour one Mwanzalima. With regard to what transpired thereafter, the following is what PW1 told the trial court: Probably believing that PW3 had gone to call someone who could help them to hold back the appellant, PW1 testified that, she then retired to bed. However, the next thing she saw to her deep chagrin, was the appellant who entered her bed room sometime afterwards completely naked and started doffing her clothes. Having pinned her down, he went on raping and sodomising her until he satisfied his irresistible sexual appetency. According to PW1, the appellant remained there until early in the following morning when he sauntered into his bed room. When PW3 returned from her neighbour's abode where she had fled to and spent the night, and after she got to her mother's room, she found her in floods of tears, absolutely distraughted. On questioning PW1 as to why she was shedding tears, PW1 is on the record as having narrated to PW3 what the appellant had done to her. Quite worried by what her mother had told her but, perhaps because of the fear of seeing her old mother's disturbing nudity, PW3 sought the assistance of another old woman one Asha Rashid (PW2) who checked on PW1 and confirmed that indeed there was a very serious problem with her as all indications were that she had been subjected to a ruthless sexual abuse. After the equally worried neighbours had gathered to see what was happening, the appellant was later apprehended and taken to the Police Station at Sikonge where he made a statement (Exh. P3) confessing to have committed the charged offence. Meanwhile, PW1 was referred to hospital where she was examined by one Doctor Pascal Ndega (PW5) and confirmed as having been raped. Upon the above preliminary findings, the appellant was subsequently charged with the subject offence. The appellant's defence which is remarkable for its brevity, was a general denial of the accusations levelled against him. While not denying the fact that he lived in the same house with the victim and that he harboured no grudge with both the victim and PW3, he told the trial court that, two days before occurrence of the charged offence, he was assigned by one Kessi Mtendaji to carry his bags of cement to his home. Without elaborating, the appellant contended that, to his surprise, sometimes later, he was arrested, apparently in connection with these charges. In his judgment, the learned trial Magistrate found, after analysing evidence that, the prosecution case was anchored on the evidence of the victim and the appellant's confessional statement to the Police. In view of the strength of the prosecution evidence, the trial Magistrate rejected the appellant's defence which was a flat denial of the charge. The learned trial Magistrate took the view that, the evidence of PW1 was very strong as it established not only that she had been raped but also the fact that she was raped by the appellant whom she named to PW2 and PW3 immediately after they went to check on her. As to the appellant's confession of the offence to the Police, the learned trial Magistrate was satisfied that, it showed the appellant's acknowledgment of the commission of the offence. The trial Magistrate then held that, the evidence of the victim and the appellant's confession to the Police was very strong and could support a conviction even without taking into account the evidence of PW2 and PW3 which was basically hearsay. Accordingly, the learned trial Magistrate went on convicting the appellant of the offence of rape and subsequently sentenced him to the mandatory sentence of thirty years' imprisonment. Disconsolate with the conviction and sentence meted out on him by the trial court, the appellant appealed to the High Court complaining that:

1. The trial court did not read or cause the charge to be read over to him. 5
2. The prosecution evidence did not prove the case against him to the required standard.
3. There was no sufficient evidence showing that he was identified by the victim given the unfavourable conditions obtaining at the time of commission of the charged offence.
4. His cautioned statement was wrongly relied on and acted upon to support conviction without ascertaining if it was properly made.
5. The medical report had no evidential value as the author did not mention the scientific methods which he used to arrive at the conclusion that the victim had been raped; and
6. That, his defence version was simply rejected without being evaluated. As already indicated, the appeal to the High Court was dismissed for lack of merit. The learned Judge of the first appellate court took the view that, it was amply established through the evidence of PW1 that, it was none other than the appellant who stormed into her bedroom and molested her on the material night. Relying on our earlier decision in the case of *Marwa Wangiti & Another v. Republic* [2002] T.L.R 30, the learned High Court Judge was satisfied that the ability of PW1 to name the appellant to PW2 and PW3 when they went to check on her in the 6 following morning, was an assurance of her correct identification of the appellant by recognition. He also considered and found no fault in the trial court's reliance on the appellant's confessional statement to PW6 which he found to be truthful. Three grounds have been advanced in support of the present appeal. The first ground of appeal faults the learned Judge of the first appellate court for holding that, familiarity between the victim and the appellant removed the need for the victim to describe the source and intensity of light at the scene of the crime which enabled her to identify the appellant. The second ground of appeal challenges the first appellate court for its finding that the cautioned statement made by the appellant to PW6, was properly made and admitted in evidence. The third ground of appeal challenges the first appellate court and by extension the trial court, for allegedly not assessing the appellant's state of mind at the time of commission of the offence and subsequently their failure to find that the defence of intoxication was available to him. During the hearing of the appeal, the appellant who appeared in person fending for himself, had nothing substantial to expound on the grounds of appeal even after having heard the reply submissions made by Ms. Grace Lwila, learned State Attorney who appeared and strongly resisted the appeal on behalf of the respondent. But what we finally discern from the appellant's general complaint is that, the evidence before the trial court fell short of the requisite standard to warrant his conviction. At the hearing of the appeal, Ms. Lwila made very brief oral submissions conceding that, indeed the learned Judge of the first appellate court was not correct to hold as he did that, familiarity between the victim of the crime relieves the prosecution of the duty to lead evidence showing that the nature and intensity of illumination at the time was favourable for unmistakable identity. We have given due consideration to the brief submission made by the learned State Attorney on that aspect of the appellant's complaint. But for the reasons which we shall hereinafter put across, we are

not prepared to hold as the learned Judge did that, the fact that the appellant was not a stranger to the victim, relieved completely the prosecution with the duty to lead evidence showing that, the circumstances at the time and scene of crime were favourable for unmistakable identity. We say this because, we are aware to the fact that, while identification by recognition is more reliable than that by strangers or by voice, it is settled law that even in recognition cases, mistaken identification may be made. (See Issa s/o Ngara @ Shuka v. Republic, Criminal Appeal No. 37 of 2009, Magwisha Mzee Shija & Paulo v. Republic, Criminal Appeal Nos. 465 & 467 of 2007 (both unreported). In view of the particular circumstances obtaining in this case, the following is in our opinion, what we consider to be an elaborate route which the learned Judge ought to have taken to arrive at his conclusion, and on this point, we entirely agree with Ms. Lwila. One that, in terms of our earlier decision in the case of Selemani Makumba v. Republic

[2006] T.L.R 379, it is now settled law that, except for any sufficient reason which must be stated in the judgment, the best evidence in sexual offences is the evidence of the victim. Put in other words, the best person to identify an assailant in a sexual offence, is the victim. The reason for the foregoing position of the law which is not farfetched is that, by and large, sexual offences are not committed in public places and the hidden nature of the commission of the offence means that ordinarily there are no eyewitnesses. According to the Court of Appeal of Uganda whose holding we take the liberty to interpolate, the basis of the general assumption that the victim is the best witness results from the fact, of which we also take keen cognizance, that, "the assailant and victim are close to each other during the assault, and almost invariably in assaults against women and girls, the assailant has no choice of style except to face the victim in order to have sexual intercourse with her" {See Aluelo Mike v. Uganda, Criminal Appeal No. 823 of 2024, ulii.org [visited on 23rd August, 2024]. Two, that, in the context of the instant case, the appellant and the victim were not strangers to each other as prior to the occurrence of the incident, they lived together in one house; and three, that the appellant was the only male person in the house on that night and there was no report that someone else had broken into and entered the house. Upon the above evidence, only one inference could be drawn; and that is that, on that night, the appellant was the one who raped the victim in a gruesome manner at their own home. It ought to be emphasized here and this is common knowledge among the legal fraternity that, a court can draw an inference of guilty if that is the only irresistible inference on the facts before it. Moreover, according to PW1, after committing the offence, the appellant remained in her bedroom apparently having fallen asleep after sex, until the following morning when he finally went back to his room. To add credence to her testimony, the victim went on naming the appellant to PW2 and PW3 in the following morning when they went to check on her. These facts which were not materially controverted by the appellant, when taken together, they have the cumulative effect of showing that indeed, the appellant's recognition by PW1 which was the crux of the matter, could not have been mistaken. What is more, the appellant could neither tell nor impress upon the trial court the reason why would PW1 and PW3 with whom he had

all along lived in peace and harmony want to implicate him in such a serious crime, for no apparent reason. Upon the above discussion, it follows in our judgment that, though for a slightly different reason, the first appellate Judge's acceptance of the victim's evidence of identification of the appellant as her ravisher, remains virtually unassailable. Coming to the fourth ground of appeal which faults the High Court for relying on the appellant's cautioned statement to support the conviction without ascertaining if it was properly recorded according to law, Ms. Lwila submitted very briefly that, indeed the said statement was wrongly admitted in evidence as it was not established that it was recorded within four hours after the appellant was taken into restraint by the Police as required under section 50 (1) (a) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA). According to Ms. Lwila, since the impugned cautioned statement does not answer the question as to when was the appellant taken under restraint, his statement cannot be said, with any degree of certainty that, it was recorded within four hours of his arrest. Because of the above shortcomings, the learned li State Attorney beseeched us to expunge the said statement from the record for having been recorded contrary to the mandatory requirements of the law. We have addressed ourselves to the submission made by the learned State Attorney. The requirement for a statement of a criminal suspect to be recorded within four hours of his arrest is provided for in section 50(1) of the CPA and aptly articulated in various authorities such as in the case of Shilonga Bunzali v. Republic, Criminal Appeal No. 413 of 2018. In the instant case, the record indicates that, PW6 begun recording the appellant's statement at 3:18 ending at 3:56 pm on 25th April, 2017. There is no indication as to the time when the appellant was taken into restraint by the Police and, on that account, it is not easy to ascertain whether or not the recording of the said statement commenced immediately after he was taken under restraint in respect of the charged offence. It must be stated that, while in terms of section 51(1) (a) of the CPA, the basic period stipulated for interrogating a criminal suspect is four hours reckoned from the time when he was taken under restraint, it is of course axiomatic that the said period of four hours cannot be determined if the time of his restraint is not specifically indicated in the statement. It follows therefore that, in terms 12 of section 50 (1) (a) of the CPA, the recording of a statement of a criminal suspect must be made as soon as he is taken under restraint. It is needless to say that the purpose of the law is to avoid the danger of the suspect being kept in a needlessly prolonged restraint and thereby coerced or otherwise stressed as not be a free agent when making his statement. In the unreported case of Christopher Chengula v. Republic, Criminal Appeal No. 215 of 2010, we held that, a cautioned statement taken without adhering to the procedure laid down in sections 50 and 51 of the CPA is inadmissible. As to the, instant case, since there is no proof that the appellant's cautioned statement was taken within four hours of his arrest, this irregularity makes the said statement inadmissible and, for that reason, we allow the second ground of appeal and proceed to expunge it from the record. Taking into consideration the fact that the third ground of appeal which criticises the High Court Judge for not finding that the defence of intoxication was available to the appellant, is based on his cautioned statement which we have just expunged from the record, we entirely agree with Ms. Lwila

who correctly submitted that, with the expungement of the said statement, whatever is contained therein, crumbles away. For, the appellant cannot be heard to rely on a defence 13 version which is built on his cautioned statement which he has himself successfully argued that it was recorded in contravention of the law. As the adage goes, you cannot eat your cake and have it too. We must as well point out here that the defence that the appellant might have been intoxicated at the time of commission of the crime, does not feature anywhere in the proceedings of the trial court and as such, it occurs to us that it is being raised as an afterthought. For the purposes of completeness, it would also be pertinent to observe here that, if the defence of intoxication was pressed to us, having carefully gone through the record of appeal and reflected on the matter, we would have held that the said defence which is provided under section 14 (1) of the Penal Code, Chapter 16 of the Revised Laws, was not available to the appellant and this is mainly because of the following two reasons: One, that intoxication was not raised as a defence when the proceedings were commenced or subsequently thereafter. In the case of Modestus Raphael Mbavumbili v. Republic, Criminal Appeal No. 62 of 1999 (unreported), we guided that: "If the defence based on intoxication was anticipated\ ordinarily, it would have been indicated at the stage of preliminary hearing". 14 Two, in the circumstances of the present case, there was absolutely no evidence upon which the defence of intoxication could be sustained. As stated earlier, there is every indication that throughout the episode, though drunk, the appellant appeared to understand well the nature of his actions or, to put it in other words, he knew what he was doing, According to PW3, the appellant was able to pick and choose the particular person whom he wanted to have sex with. To that end, he had decided to concentrate exclusively on her before she failed to come to terms with his unbearable behaviour and decided to flee to their neighbour. Moreover, the evidence of PW1 shows that, in the course of the sexual abuse and after she screamed for help, the appellant who was aware that PW1 had earlier, on the same day, invited her fellow members of the congregation and church leaders to pray for her, he told her, apparently in the expression of all the good stuff he was feeling, that, even if she was battling personal demons, she was so sweet such that he could hardly leave her without satisfying his sexual urge. The above behaviour and conduct were in our view, incompatible with the conducts of a person who was so drunk as not to know the nature of his actions. To the contrary, what the appellant did and remarked to both PW1 and PW3, are suggestive that, though seemingly 15 very drunk, he was sufficiently competent as to understand very well the nature and implication of his actions. It follows therefore that, for the foregoing reasons, even if the appellant had raised the defence of intoxication at the appropriate time, it would not be available to him. Premised on the above discourse, we find no merit in the appeal which we accordingly dismiss in its entirety. DATED at DAR ES SALAAM this 13th day of September, 2024. S. A. LILA JUSTICE OF APPEAL P. S. FIKIRINI JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL judgment delivered this 17th day of September, 2024 in presence of Appellant in person and Mr. Nurdin Mmari, learned State Attorney for the Respondent/Republic linked via video conference from High Court Tabora is hereby certified as a true copy of the original.

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