

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. 9180 OF 2024 (Arising from the decision of the District Court of Newaia at Newaia in Criminal Case No. 49 of 2023) RAHIMU HAMAD MNALA..... APPELLANT versus THE REPUBLIC.....RESPONDENT

JUDGMENT

Iffh May & 20h June 2024 DING'OHI, J; The appellant, Rahimu Hamad Mnala, was arraigned in the District Court of Newaia district at Newaia for the charge of rape contrary to sections 130(1)(2) (e) and 131(1) of the Penal Code, Cap. 16 R.E 2022. It was alleged that, on diverse occasions between October 2022 and May 2023 at Luchingu Street within Newaia town council in Mtwara region the appellant did have sexual intercourse with a girl aged 17 years old. The appellant pleaded not guilty to the charge. Page 1 of 17 It is not irrelevant to mention here that in this judgment, the girl alleged to have been raped shall be referred to as the victim or PW2 interchangeably, to hide her identity. In an attempt to prove the charge, the prosecution side, at the trial, paraded three witnesses: Zainabu Mohamedi Lihindambi (PW1), the victim (PW2), and the PW3, Sadam Mohamed Madai. They also tendered the birth certificate of the victim (exhibit Pl), and the Medical examination report(exhibit P2). The appellant who drove himself unrepresented, had no other witness to call. Upon a full trial, the appellant was found guilty as charged. He was convicted and sentenced to serve 30 years imprisonment. He was also ordered to pay a fine of TZS 100,000/= and compensate the victim at TZS 50,000/=. Being aggrieved by the said decision, the appellant lodged this appeal with ten grounds of appeal as follows:

1. That, the prosecution side didn't prove its case beyond reasonable doubt.
2. That the manner in which the proceedings at the trial Court were conducted, was irregular or/and improper. Page 2 of 17
3. That, the name of the appellant named by the witnesses when testifying before the court does not tally with the names appearing in the charge sheet and nowhere the trial court addressed these contradictions and inconsistencies on the name of the appellant and determined if went to the root of the matter.

4. That, the trial Court having failed properly to examine, evaluate and analyze evidence on record.
5. That, the facts of the case doesn't disclose the offence charged.
6. That, the corroborative evidence used by the trial court to find conviction was not concrete.
7. That, the trial Magistrate didn't direct his mind to the contradiction and inconsistency among the witnesses regarding the date in which the victim was examined by the doctor.
8. That, there was no proof of penetration in respect of the alleged offence.
9. That, the father of PW1 who arrest the appellant was not summoned to support the evidence testified by PW1 and PW2 despite being a material witness in this case.
10. That evidence adduced by the prosecution side is totally fabrication for the purpose of connecting appellant to the crime. Page 3 of 17 Brief facts of the case as per the trial court's record are to the effect that on an unknown date, on May 2023 at night hours, the victim (PW2) was in the toilet cum bathroom taking a bath. Then the person named by the victim as Mavoko entered the bathroom and compelled her to have sexual intercourse. The victim alleged that she first inclined but, ultimately she agreed. Immediately after he satisfied himself the appellant fled. It is in evidence that when the said Mavoko was moving from the toilet the victim's grandmother, Zainabu Mohamed Lihindambi (PW1), saw him escaping. When PW2 was asked by the PW1 who moved from the toilet the victim refused to mention any. Then the victim's father who was not called to give his evidence in the trial court, was called. Before her father, it is alleged, the victim revealed that the one who was with her on that fateful night and who fled from the toilet was Mavoko. The victim directed where Mavoko would be found. On the next morning, the victim's father took Mavoko to the victim. It is alleged, that after she saw him, the victim endorsed that he was the very one who entered the toilet and had sexual intercourse with her. Mavoko was taken to the police station and charged as he stood. As to how it started, it is alleged that Mavoko seduced the victim on October 2023 and before the incident which resulted in the charge subject to this appeal, they had sexual intercourse four times. Page 4 of 17 In her evidence, PW1 testified that on the fateful day, she saw a person moving from the toilet. She did not identify that person. The PW1 asked the victim who fled from the toilet but the victim did not respond. Later, the victim mentioned Mavoko when the father of the victim came after he was called. PW1 tendered a birth certificate of the victim to prove her age which, as said, was admitted as an exhibit. The doctor, Sadam Mohamed Madai (PW3) who examined the victim testified that she examined the victim's vagina and observed that she had no bruises and no hymen meaning, she was penetrated. PW3, along with his testimony, tendered PF3 which was admitted as aforesaid. During the hearing of this appeal, the appellant appeared himself unrepresented. Mr. Steven Kondoro learned State Attorney, appeared for the respondent. In support of his appeal, the appellant submitted that he was not satisfied with the decision of the trial court. He denied having been identified by PW1 and PW2 at the night of darkness. He argued that there were contradictions in the prosecution evidence in that at first the

victim stated that nothing wrong was done to her but later she mentioned him as the person who had sexual intercourse with her. It is the appellant's case that why the victim did Page 5 of 17 not mention his name earlier. According to the appellant, since the evidence of the prosecution side revealed that he lives with the victim in one street but the victim does not know his name that is the proof that the appellant and victim do not know each other. It is the appellant's submission that the names mentioned in evidence by the prosecution witnesses are not his. He wonders as to why the victim's father who is alleged to have arrested him was not called to testify. The appellant rested his submission by praying this court to adopt his grounds of appeal to form part of his submission and ensure that justice is done. In response, Mr. Kondoro argued together the first, fourth, fifth, sixth, seventh, eighth, and tenth grounds of appeal relating to the proof of the criminal charge to the standard of beyond a reasonable doubt. He further argued the second, third, and ninth grounds of appeal separately. Mr Kondoro submitted that the prosecution side through PW1 managed to prove the happening of rape incident. He contended that, on page 11 of the trial court typed proceedings, PW1 stated that on May 2023 at 21:00 hrs she heard footsteps from her toilet. Then she saw someone running from the toilet and when she entered the toilet she found the victim washing her body. Page 6 of 17 PW1 asked the victim who was in the toilet but the victim said she did not know. She disclosed the name of the person who was in the toilet when her father was called. That person turned out to be known as Mavoko. It is Mr. Kondoro's submission that PW1 proved the age of the victim she was 17 years old at the time of the incident. She produced the birth certificate as reflected on page 12 of the trial court typed proceedings. The appellant did not object to the admissibility of the exhibit. Again, according to the learned State Attorney, PW2 (the victim) on pages 13 and 14 of the trial court-typed proceedings proved without doubt the penetration and identification of the appellant. The victim testified that she started sexual intercourse with Mavoko in October 2022 where they had sexual intercourse four times, and in May 2023 Mavoko entered the toilet and had sexual intercourse with her. That, the victim virtually identified Mavoko who is the appellant herein. He supported his stance with the case of Waziri Aman vs. Republic (1980) TLR 250 where ingredients to prove visual identification made at unfavorable conditions were established. On penetration, according to the learned state attorney, the victim managed to prove penetration through her testimony as reflected on pages 13 and 14 of the trial court-typed proceedings. Mr. Kondoro cemented his argument with Page 7 of 17 the case of Seleman Makumba vs. Republic [2006] TLR 379 where it was held that the evidence of the victim alone is sufficient to prove the offence of rape. It was his view therefore that the prosecution side had managed to prove the rape charge against the appellant through exhibits. On the second ground of appeal, Mr Kondoro submitted that he found nothing wrong with the proceedings as the same was conducted according to the law and procedures. On the third ground of appeal, Mr Kondoro agreed that witnesses did not use the names appearing on the charge sheet to identify the appellant. He argued however that Mavoko is the known name of the appellant in his locality. According to the learned State Attorney, it was unfortunate only that in the preparation of the charge sheet the appellant's nickname (Mavoko) did not appear. However, the learned State Attorney held the

view that the issue of whether the appellant committed the rape had already been proved. On the fourth ground of appeal, Mr Kondoro submitted that the issue of the choice of proper witnesses is mandated by the prosecution side as it was held in the case of Yohanise Msigwa vs. Republic (1990) TLR. In the end, Mr Kondoro prayed that this appeal be dismissed; and the conviction and sentence be upheld. Page 8 of 17 The appellant had a short rejoinder. He stated that PW1 and PW2 in cross- examination mentioned him as Mavoko but that's not his name. He further insisted that he was arrested at the market area and not at home as stated by the prosecution witnesses. Having considered the rival submission of the parties, the relevant issue to be considered now is whether the appeal has merit. I will start with the third ground of appeal. The appellant's major complaint here is that the names in the charge sheet which was made against him at the trial court are different from the names mentioned by the prosecution witnesses referring to the accused person in the trial court during the trial. It is the appellant's submission that since prosecution witnesses stated that they identified the assailant at the scene of the crime as Mavoko and he is not called Mavoko it means that he was not properly identified. On the other side, Mr. Kandoro conceded that the prosecution witnesses identified a person allegedly raped the victim by the name of Mavoko. According to the learned state attorney though the name of Mavoko is not reflected in the charge sheet but that is the famous name of the appellant at his locality, and the victim, PW2 proved that he was the one who committed the rape to her. I have considered whether a person who is not Page 9 of 17 named in the charge sheet as the accused person may be convicted of the offence he is charged with. The law is long settled that the charge sheet is the cornerstone of any criminal trial. The Court of Appeal in the case of Francis Fabian @ Emmanuel vs. Republic (Criminal Appeal No. 261 of 2021) [2023] TZCA 17936 emphasized the crucial role of the charge sheet as follows; "I/l/e presuppose, that it is an elementary knowledge of criminal justice that, the cornerstone of any criminal trial is the charge sheet. The charge sheet is a heart, brain and blood of criminal justice and fair trial. It plays a duo role of informing the accused person on the nature of his accusation and allow him to prepare his proper defense. Apart from that, the charge sheet notifies the trial court on the subject matter with a view to determining its jurisdiction and prepare the proper procedure to be applied during trial. Therefore, the charge Page 10 of 17 sheet is the most important document in any criminal trial." The law is very clear that, where there is a variance or uncertainty between the charge sheet and evidence on the record, the charge cannot be said to have been proven beyond a reasonable doubt to warrant the conviction of the accused. See the cases Frenk Onesmo vs. Republic (Criminal Appeal No. 476 of 2020) [2024] TZCA 41 and Joseph Sypriano vs. Republic (Criminal Appeal 158 of 2011) [2012] TZCA 46. The prosecution side must see to it that throughout the trial there is a consistency between the complaint laid down against the accused person per the charge sheet and the evidence of all witnesses who are to prove the charge. In case of any anomaly material to the case, the prosecution side may wish to amend the charge at any time before the judgment to cure the anomaly between the charge and the evidence on record by invoking Section 234 of the Criminal Procedure Act, Cap. 20 RE 2022. Where the charge sheet is not amended till the case goes to a full trial, there will be no chance to play with it at the appellate stage. The

defect, if any, goes to the root of the entire case. In this present case, as observed herein above, there is a variance of names of the accused person that appear on the charge sheet and names Page 11 of 17 mentioned by the prosecution witnesses in their respective evidence referring to the same accused person. Nowhere in the trial court proceedings the difference was recognized and clarified. The record remains that the accused person per the charge sheet is named Rahim Hamad Mnala. There is nothing in the trial court record that suggests that Mavoko is the nickname of the appellant herein. Knowing that the incident is alleged to have been committed during the night, in the darkness, the possibility of mistaken identity can not be dismissed altogether. As the appellant has complained about that and there is nothing on record that suggests that those two names mean one person, I find that anomaly goes to the root of the case, and it is not correctable at this stage. Even assuming that Mavoko is the real nickname of the appellant, was the evidence of his identification proper? I don't think so. The law is settled that when the evidence over-identification arises, and if the court wants to rely on that kind of evidence, it must be sure that such evidence is watertight and leaves no possibility of mistaken identity. The Court of Appeal in the case of Faraji Ally Likenge vs. Republic (Criminal Appeal 381 of 2016) [2020] TZCA 1854 emphasized that; Page 12 of 17 "I/l/e wish to remark that, a proper identification of an accused person is crucial in proving criminal charge in order to ensure that any possibility of mistaken identification is eliminated." The Court has established guidelines to ascertain the reliability of identification evidence in the landmark case of Wazir Amani vs. Republic

[1980] T.L.R 250, in that; "...before a court can found conviction basing on visual identification, such evidence must be watertight so as to remove the possibility of honesty but mistaken identity. In such cases the court is required to consider, among others, the following matters; one, the time the witness had the accused under observation; two, the distance at he observed him, three, the conditions in which such observation occurred, for instance whether it was day time or night time, whether there was Page 13 of 17 good or poor lighting at the scene; four, whether the witness knew or had seen the accused before or not; and five, all factors on identification considered, it should be also be plain that were any material impediment or discrepancies affecting the correct identification of the accused person by the witness." In the present case, the incident took place in the night per the evidence of PW1, and the victim. There is no dispute that PW1 did not identify the appellant at the scene of the crime as reflected in her testimony. Her evidence is hearsay since she alleged she was told by the victim that Mavoko was the one who fled from the toilet. Besides that, the remaining evidence regarding the identification of the accused person is the evidence of the victim herself. I also find her evidence cannot be relied upon to eliminate possibilities of mistaken identity. The reasons for that are, First the victim did not mention the names of the appellant at the earliest opportunity. According to the PW1, at first, the victim refused to mention who was in the toilet with her. The fact that the victim mentioned a person who is alleged to have been with her in the toilet after the arrival of her father builds a Page 14 of 17 possibility that she mentioned a person

(Mavoko) after being threatened. There is a great possibility therefore that the PW2 could not be reliable at that state of threat. The Court of Appeal in the case of Marwa Wangiti Mwita and Another vs. Republic (Criminal Appeal 6 of 1995) [2000] TZCA 23 emphasized the importance of a witness to name a suspect at the earliest opportunity, and had this to say; "The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or 14 complete failures to do so should put a prudent court to inquiry." It follows therefore that, the failure of the victim to properly name the appellant the moment she was asked by PW1 creates a doubt as to whether it was the present appellant who was with her in the toilet during the night of the incident. I am aware that, the victim testified that Mavoko seduced her and they had sexual intercourse four times. I have considered that but it is my view that under normal circumstances, a girl who is aged 17 years like the victim would Page 15 of 17 have been expected to identify the real name of the said Mavoko who allegedly was sexually playing with her. As observed herein above that was not done. That being the situation it is not irrelevant to observe that the whole evidence against the appellant in the trial court's records turned out to be doubtful. It is for the foregoing reasons I find that the third ground of appeal sounds. As that ground disposes of the whole appeal, I find nothing beneficial to proceed with the remaining grounds. In the upshot, I find that the appeal has merit. The same is hereby allowed. The conviction and sentence of 30 years imprisonment imposed on the appellant by the trial court are hereby quashed and set aside. Equally, the order for payment of compensation and fine is hereby quashed and set aside. The appellant is to be released immediately from custody unless otherwise lawfully held. Page 16 of 17 Court: Judgment delivered this 16th day of June 2024 in the presence of Mr. Edson Laurence Mwapili, the learned State Attorney, and the Appellant in 16/06/2024 Page 17 of 17

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