

TANZANIA / JUDGMENT

ramadhani rasiri shekeli vs the republic 2024 tzhc 504 23 february 2024

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23 February 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (BUKOBIA SUB- REGISTRY) AT
BUKOBIA CRIMINAL APPEAL NO. 68 OF 2023 (Arising from Muleba District Court at Muleba in
Criminal Case No. 195 of 2022) RAMADHAN RASIRI@SHEKELI..... ..APPELLANT VERSUS
THE REPUBLIC..... ..RESPONDENT

JUDGMENT

12th February & 23rd February 2024 A.Y. Mwenda, J Under Section 132(1) &. (2) (a) of the Penal Code, Cap 16 R. E 2022 the appellant was charged for Attempted rape before Muleba District Court. The prosecution alleged that on 12th day of November,2022, at Ngenge village within Muleba District, in Kagera Region, with intent to procure prohibited sexual intercourse, the appellant attempted to rape the victim (name withheld) by use of threats. The appellant pleaded not guilty to said count as such, the hearing commenced where the prosecution paraded four witnesses, the victim inclusive. In the cause of trial, the prosecution also tendered time documentary exhibits, the appellant's cautioned statement which was admitted as Exhibit PW4A. On his part, the appellant entered his defence and had neither a witness to call nor exhibit to tender. 1. At the end of the judicial day, the court analysed the evidence and convicted the appellant. He was then sentenced to serve life imprisonment. He was also ordered to pay compensation to a tune of Tanzanian Shillings One Million (TZS 1^000,000) only. Aggrieved, he preferred the present appeal with Nine (9) grounds. In essence he attempt to challenge the failure by the prosecution to prove its case beyond reasonable doubt. At the hearing of this appeal, the appellant was in attendance without any legal representation whilst the respondent (the republic) was represented by Mr. Elias Subi and Gloria Rugeye, learned State Attorneys. When he was invited to submit in support of the grounds of appeal, the appellant had nothing to say. He merely prayed the said grounds to be adopted to form part of his oral submissions. Otherwise, he prayed this appeal to be allowed and an order releasing him from prison to be issued. On his part, Mr. Elias Subi did not oppose this appeal. To begin with, the learned State Attorney submitted that although under Section 27 (2) of the Evidence Act [CAP 6 R.E 2022] as amended by Misc. Amendments No.11/2023, failure of the child witness to promise to tell the truth and not lies before commencing her testimony does not render the evidence in question inadmissible, the Hon. trial Magistrate recorded the victim's promise to tell the truth and not lies

In the form of an indirect speech which, according to him was not proper, 2 Further to that, he submitted that the witnesses' testimony is not recorded properly, thus the whole proceedings, according to him, is a nullity. The learned State Attorney was of the opinion that such irregularity would lead this matter to be remitted before the trial Court for retrial. However, he said, since the available evidence on record does not sufficiently support conviction, the remitting of the records before the trial court is unnecessary. While submitting about merits of this appeal, Mr. Subi opined that the victim's evidence is self-contradictory. He said that at page 8 and 9 of the typed proceedings, the victim gave contradicting versions on what befell her. He said that in examination in chief, the victim said that the appellant attempted to rape her but during cross examination she changed her story in that the appellant inserted his genitalia into hers and later, in re-examination she reverted to her previous story that the appellant attempted to rape her. With such contradiction, the learned State attorney opined that her(victim's) credibility is questionable. Regarding the cautioned statement which was admitted as PW-4 A', the learned state attorney submitted that it was improperly admitted. He said that in an attempt by the PW.4 to tender the same as exhibit, the appellant objected but the Hon. trial magistrate admitted it without conducting an inquiry. In support to this point, the learned State Attorney cited the case of AWADH GAITAN@MBOWE V. R, CRIMINAL APPEAL NO.288 OF 2017. In conclusion he prayed this appeal to allowed. 3 Based on the submissions above, what is pending before me is to determine the fate of the appellant's appeal. To do so, the crucial issue for determination is whether the prosecution proved its case beyond reasonable doubt. Before going any further, it is apposite to comment, albeit briefly on the manner the witnesses' evidence was recorded. From the record, the prosecution called four witnesses. However the way their particulars appear, it is doubtful as to whether they appeared to testify. It is the practice of the Court that when the witness is called on to testify, his/her particulars should be recorded in the proceedings. In doing so the court is obliged to record the sequence under which the witness stood in the proceedings (i.e. witness number such as PW1, PW2 etc). Also, the witness who is about to testify is required to tell the court in his or her own words, in first person singular, names, age, residence and religion before being sworn or affirmed. In this matter, the Hon. Trial Magistrate did not observe that format. He recorded the witnesses' particulars in a reported speech as if their particulars were already stated by themselves first. For example, when the victim was called into the witness box, the Hon. Magistrate recorded as follows and I quote: - " Court: Hearing proceed by getting testimony from Ester Emmanuel aged 10 years old, standard two at Ngenge Primary School, muleba under the promise to tell the truth, she testified that; "(sic). 4 This format would be meaningful if it was recorded after the witness has said her name, age, residence before swearing. As said before, this is not the proper format/style of recording the witnesses' particulars and their oaths/affirmation because it is not known if witnesses were in attendance and were sworn. For easy of reference, the particulars of the witness ought to be recorded as follow: - "PW1: MWAJUMA JUMANNE, 12-YEAR-OLD, RESIDENT OF KASHAI, MUSLIM, affirm and state as follows..." As it was rightly submitted by the learned state attorney, the said anomaly would lead to remission of the file before the trial court for retrial. However, the court is obliged to firstly consider if it is in the interest of justice to do so. The backup to this position is the case of FRED JOHN V THE REPUBLIC, CRIMINAL APPEAL NO. 17 OF 2018, CAT (Unreported) where

the court held inter alia that: "We have taken that position considering the settled law in relation to ordering a retrial. A retrial would only be ordered if it is in the best interest of justice." Further to that, the court went a step further, While citing the case of FATEHALI MANJI V. R [1966] E.A 343 and held that: 5 "In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial. Each case must depend on its own facts and an order for retrial should only be made where the interest of justice require it". In the present appeal, the court have put the evidence under scrutiny and noted the following. Firstly, as it was rightly submitted by the learned state attorney, the victim's evidence is self-contradictory. In her examination in chief, the record shows she testified that the appellant attempted to rape her. However, in cross examination, she changed the story in that the appellant inserted his male organ into her female organ meaning she was raped. In re-examination she again reiterated on what she said in examination in chief in that the appellant attempted to rape her. With such evidence, it is clear that the victim is not coherent which affects her credibility. Faced with similar scenario, the court of appeal in TOYIDOTO KOSIMA V THE REPUBLIC, CRIMINAL APPEAL No. 525 of 2021 held: "Credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of the witness can also be determined in two 6 other ways. One, when assessing the coherence of the testimony of that witness and two, when the: testimony of that witnesses is considered in relation to the evidence of other witness including that of the accused person. In those two occasions, the credibility of a witness can be determined even by the second appellate court when examining the findings of the first appellate court." Based on the authority above, it is this court's view that the victim gave contradictory evidence which affected her credibility. Regarding the Appellant's cautioned statement which was admitted as exhibit PW4 A' the same, as it was correctly pointed out by Mr. SUBI was admitted improperly. Firstly, it was not cleared for admission and secondly the appellant objected to its tendering. Despite objections towards its tendering the trial magistrate did not bother to conduct an inquiry. It is trite law that when accused person retracts or repudiate a confession, the court is obliged to conduct an inquiry (for subordinate court) and a trial within a trial for the High court. This position was stated in the case of NYERERE NYAGUE VS THE REPUBLIC, CRIMINAL APPEAL NO. 67 OF 2010 (CAT) that; "Where objection is taken under the Evidence Act, the trial court, has to conduct a trial within trial (in a trial with 7 assessors) or an inquiry (in a subordinate court) to determine its admissibility." That said, since exhibit PW4-A was improperly admitted the same is hereby disregarded. From the foregoing reasoning, since the prosecution's case hinged on the victim's evidence and the appellant's cautioned statement exhibit PW4 A, the remaining evidence is weak to support the prosecution's case. On that basis, this appeal succeeds. I hereby allow it, quash the conviction meted and set aside the sentence and a compensation order pronounced in respect of both counts. I also order for an immediate release of the appellant from prison unless he is lawfully held. It is so ordered. Judgment delivered in chamber under the seal of this court in the presence of Mr. Ramadhan Rasiri @ Shekeli the appellant and in the presence of Ms. Gloria 8

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