

TANZANIA / JUDGMENT

ramadhani rajabu kules vs the republic

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY) AT MTWARA CRIMINAL APPEAL NO. 123 OF 2020 (Originating
from Criminal Case No. 127 of 2019 at Masasi District Court at Masasi) Ramadhani Rajabu
Kules APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 17.07.2023 Date of Judgment: 15.08.2023 Ebrahim, J. The Appellant herein was charged and convicted of the offences of Burglary c/s 294(1)(a) of the Penal Code Cap 16 RE 2019; and Unnatural offence c/s 154(1)(a) of the Penal Code Cap 16 RE 2019. He was sentenced to serve 12 months' imprisonment for the offence Page 1 of 15 of burglary and 30 years' imprisonment for the offence of unnatural offence. He unsuccessfully appealed at the High Court in December 2020 after this court on 05th October 2021 dismissed his appeal for being time barred. He lodged an appeal at the Court of Appeal where the Court on 24th March 2023 remitted the file to this court with the directions that the appeal be heard on merits. Hence, this

judgement.

The Appellant initially filed eight grounds of appeal complaining that the visual identification by PW1 and PW2 was not reliable; the victim's age (16 years) was not proved; the mandatory provisions of section 210(1)(a) and (3) of the CPA were not complied with; and that the conviction based on the defective charge. The appellant complained further that the decision based on the exhibits which were admitted un-procedurally as they were not read out loud in court; and the conviction based on the evidence of co-accused and that the case was presided by two Magistrates. He Page 2 of 15 concluded on his grounds of appeal that prosecution side did not prove the case beyond reasonable doubt. On 18th January 2021, the Appellant added three supplementary grounds of appeal claiming that PW2 and PW5 adduced evidence without being sworn; and that the trial court did not warn itself before entering conviction. When the appeal was called for hearing, the Appellant appeared in person un-represented and the Respondent had the representation of Ms. Farida Muhsin Ki o by a, learned State Attorney. The Appellant adopted his grounds of appeal and prayed for the court to consider them in challenging the decision of Masasi District Court. Challenging the appeal, Ms. Kiobya referred to the case of

Waziri Amani V R, [1980] TLR responded on the 1st ground of appeal on identification that PW2 identified the appellant before he was taken to court and in court. On the second ground of appeal on the age of the victim, she said the issue was to prove penetration against the order of nature which Page 3 of 15 was proved by the victim and corroborated by the testimony of PW4 (Doctor - exhibit 1). She referred to Selemani Makumba V R, Criminal Appeal No. 94 of 1999 on the jurisprudential position that in sexual offences the best evidence comes from the victim. Referring to the proceedings on record at page 15, 16, 21, 26 and 32, Ms. Kiobya contended that the trial court complied with the provisions of section 210 of the CPA. She argued further that ground 4 of appeal is baseless because the charge sheet complied with section 135 of the CPA as it contains the particulars of the offence, section of the offence and details. She contended also that the records are clear that all exhibits were read out loud in court and that the trial magistrate did not depend on the sole evidence of the co-accused in reaching her decision but on the testimonies of other prosecution witnesses. Ms. Kiobya argued also that the trial magistrate did not rely on the decision of the previous magistrate but rather on the evidence and her own reasoning. She concluded on the initial grounds of appeal that prosecution proved the case beyond reasonable doubt basing Page 4 of 15 on the testimonies of PW2, PW4 and exhibit P1 that appellant was the one who unnaturally sodomised the victim. On the supplementary grounds of appeal, Ms. Kiobya told the court that the handwritten records show that both PW2 and PW5 were sworn in before adducing evidence. She responded on the second ground of supplementary grounds of appeal that at page 9 of the judgement, the trial magistrate asked herself as to whether prosecution proved the case beyond reasonable doubt and reached a point of determination. She concluded by praying to the court to dismiss the appeal. In rejoinder, the Appellant added that the PW2 did not explain extent of light and that there was contradiction on prosecution witnesses evidence. He insisted that the charge sheet was defective. He said he could not have done four offences that he was charged with hence he should be set free. I have carefully considered the adopted grounds of appeal and additional grounds of appeal and the submissions by the learned State Attorney for the Respondent. Page 5 of 15 In this appeal I am mindful of the fact that as the first appellate court, I am obliged without fail to subject the entire evidence into objective scrutiny cognizant of the fact that the trial court had an opportunity to observe the demeanor of the witnesses; see Charles Mato Isangala and 2 Others v The Republic, Criminal Appeal No. 308 of 2013, Page 5 of 17. Before I begin to address the grounds of appeal, I find it apt to revisit the evidence on record albeit briefly. The first prosecution witness (PW1) is the mother of the victim. Literally she was only informed of what happened as she was not present on the incident day. PW2 who is the victim however availed the detailed explanation of the event that in the dawn of 19.12.2019 at around 0400hrs while sleeping at home with his brother (PW3) the Appellant woke up from the phone torch light in her room. She said her room was also well lit from the moonlight from the window. She was flashed with a light by a person holding a panga and that person whom she later came to identify as the appellant told her to get up from the bed and cover Page 6 of 15 her face. She covered her face and the person took her outside at the back of their house and sodomised her. She said when the assailant took her outside she took off the sheet from her face and he mistakenly faced the torch on his face and it was when PW1 managed to recognize him as the appellant. She said she recognized him because she had seen him before

the incident day accompanied by his friend whom she knows. She mentioned him as Ramso as famously known in the street. She testified also that the appellant sodomised her then took her back inside the house. Explaining further about identifying the appellant she said when mama Tumaini and other neighbors responded to their alarm, she described the appellant that he stutters when he talks on describing him to the people on how he looks like they said the assailant name is Ramso. PW1 also identified the appellant in court as the person who sodomised him. When she was taken back inside she went to her brother's room which was locked from outside and told him about the ordeal. The victim's brother PW3 confirmed to have heard his sister knocking at of 19.12.2019. He could not get out as his door was locked from outside. After his sister opened the door their neighbor came. It was then that they recognized that the TV and his phone is stolen. He said his sister said she does not know her assailant but she can recognize him. She mentioned the features of the assailant that he is bruised on his head and short. He said they went to the police then hospital. After investigation it was discovered that PW1's assailant was called Rama. PW4, the doctor testified to the court confirming that he examined the PW1 and observed that the victim had bruises and her anus was swollen making the victim unable to walk properly. He said there was indication that there was penetration in victim's anus which could have been done by a penis. He tendered PF3 (exhibit P1) into evidence. PW5, the investigator told the court that upon being assigned the file on 20.12.2019 the complainant told him that the assailant name is Rama whose friend is Madangilo and they are neighbors. He said he also recorded the cautioned statement of the appellant which was admitted as exhibit P2 without objection. PW5 said he arrested the appellant around 2300hrs of 20.12.2019 and interrogated him where eventually recorded his statement at 0150hrs of 21.12.2019 and finished at 0254hrs. Page 8 of 15 In his defence the appellant said that he was forcefully arrested around 2100hrs of 19.12.2019 while he was at his house. He said he was arrested with other people and the 2nd accused but others suspects were released. He claimed to have been tortured and asked to pay Tshs. 300,000/- to be released as well. He did not have any and in the afternoon of 21.12.2019 he was given a pen to sign on a printed paper. He said the scar mentioned by the victim was a result of the beating he sustained at the police. From the above brief evidence produced during the trial, the question is whether prosecution managed to prove its case beyond reasonable doubt. I shall begin with the ground of appeal that the trial court did not comply with the provisions of section 210(1) (a) and (3) of the CPA which requires the trial magistrate to record the proceedings in the language of the court and signed. Also that the same be read over to the accused. In going through the proceedings in record, the trial magistrate conspicuously recorded to have complied with section 210(3) of the CPA after each witness testimony and signed at the Page 9 of 15 end of recording such testimony. Therefore, the 3rd ground of appeal is baseless and accordingly dismissed. As for the defective charge, I hasten to agree with the counsel for the respondent that the charge sheet complied with the requirement of section 135 of the CPA as all the counts are mentioned with the relevant provisions of the law forming the charged offence. The charge sheet also describes the particulars of each offence which state the ingredients forming the offence. The fourth ground of appeal is also baseless. As for the 1st and 5th supplementary ground of appeal, I visited the original records and observed that all prosecution witnesses were either sworn in or affirmed before adducing their evidence. These grounds are

baseless. On the failure to prove the age of the victim, the same was not an issue during the trial. The issue was whether it was the appellant who sodomised the victim; However, when PW2 was adducing evidence she said she was 16 years old and the appellant did not question Page 10 of 15 about the age of the victim during the trial. Questioning it now is an afterthought deserving to be dismissed. The appellant has insisted in his submission that the victim did not explain the extent of light and on the first ground of appeal that the visual identification was reliable. In this case the only eye witness was PW2, the victim. She told the court that she did not know the appellant's name but managed to mention the name of his friend and that he saw the appellant earlier on the day. She said she identified the appellant after he mistakenly turned a torch to his face when he took her out and she had taken the sheet out of her face. She described the appellant to the gathered crowd that he stutters and has a scar on his head. The crowd mentioned the appellant and the victim recognized him when she saw him in court. If is the victim's description that caused the arrest of the appellant. It is the position of the law that mentioning the accused at the earliest stage confirms the witness credibility - *Marwa Wangiti Mwita v. Republic*, [2002] TLR 39. Page 11 of 15 The defence by the appellant he got the scar after being beaten at the police does hold water since PW1 mentioned the scar before the appellant was even arrested. If at all it means that the appellant admits to have a scar on his head. Again, the appellant did not dispute that he is stuttering. The evidence of PW2 on identifying the appellant was corroborated by exhibit P2, the cautioned statement which was admitted without objection. The defence of the victim that he was beaten to sign the cautioned statement is equally an afterthought as he did not say anything or even indicate the objection when the same was admitted never mind cross examining pertaining to his admission. The appellant has explicitly stated in his cautioned statement on how together with his friend went to the victim's home where they used a window to get into house and stole the TV and the victim brother's phone. Thereafter, he sodomised the victim. After all, there is no better witness for the prosecution than an accused who confesses to his own guilty as stated in the case of *Juma Magori@ Patrick and 4 Others v R*, Criminal Appeal No. 328 of 2014. Page 12 of 15 Thus:, from the evidence of the victim in recognizing the appellant corroborated with the appellant's own cautioned statement, this court agrees with the trial court that the identification was water fight-see the cited case of *Waziri Amani (supra)*. The appellant complained also that the admitted exhibits were not read in court. Out-rightly is dismiss that ground of appeal because the handwritten proceedings are clear that both exhibits P1 and P2 were read out in court after their admission. Further, I have read the judgement of the trial court, the trial Magistrate found the appellant guilty from the victim's evidence particularly on identification and immediate description of the appellant. The trial court believed the victim and sought reliance in the case of *Seleman Makumba Vs Republic* [2006] 379 on the position that the best evidence on sexual offences comes from the victim where it was stated that: 'Evidence of sexual offences must come from the victim'. Page 13 of 15 Thus, the trial court did not rely on the evidence of the co-accused to convict the appellant but the evidence of the victim. As for the case was concluded by two magistrates, the same is not true because at the initial stage the appellant pleaded guilty before honourable Kashusha, RM. However, the preliminary hearing and the trial proceeded before hon. Rehema Idd. Again, it is not true that the trial court based her decision from the other magistrate. The first magistrate did not conduct the hearing of the case at all. The

seventh ground of appeal also flops. As for the magistrate warning herself, she clearly identified the points of determination and clearly evaluated the evidence presented before her before reaching to a decision. More-so, in going through the evidence presented before the trial court and considering the defence of the appellant I find that his evidence does not raise any doubt to the strong evidence of prosecution. All in all, prosecution evidence is supported the appellant's own cautioned statement on the admission of the offence which was recorded within the prescribed time and without Page 14 of 15 any objection. As alluded earlier the complaint by the appellant that he was tortured is not substantiated by any solid or viable evidence hence found to be an afterthought. All said and done, I find this appeal to be devoid of merits and I dismiss it in its entirety. Ordered accordingly. R.A Ebrahim JUDGE Mtwara 15.08.2023 Page 15 of 15

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