

TANZANIA / JUDGMENT

final judgment RAMSI WILLIAM MUSHI Tanzlii

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA THE SUB-REGISTRY OF MOSHI AT
MOSHI CRIMINAL APPEAL NO. 21021 OF 2024 (Appeal from the judgment of the district court of
Moshi at Moshi dated 16th day of August 2023 in Criminal Case No 11 of 2023 RAMSI WILLIAM
MUSHI.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

26th November & 23 December 2024. A.P. KILIMI, J.: At the District Court of Moshi at Moshi ‘trial court’, the appellant hereinabove was arraigned for the offence of Rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 R.E 2022]. Upon a full trial, the trial court found that the prosecution proved its case beyond reasonable doubts and proceeded to convict him, thereafter the appellant was sentenced to serve thirty (30) years in prison and ordered to compensate the victim Tshs. 2,000,000/=. According to particulars of the charge at the trial Court states that on 25th day of December 2022 at Msaranga area within the District of Moshi in Kilimanjaro region, the appellant did have carnal knowledge of (XX 1 in pseudonym to conceal her identity) a girl aged 14 years of age without her consent. The accused pleaded not guilty. Brief facts which led to a conviction at the trial court is that; PW1 a girl aged 13 years on 25/12/2022 she was at her grandmother’s house at Msaranga for Christmas celebration. At around 17:00 hours she and her sister xx went out to celebrate Christmas and on their way they met the appellant who solicited to go with them. They went together to several places and at around 21:00 hours at night they returned back. The appellant called upon them to escort him to his home place and upon reaching his house the appellant undressed XX and undressed himself and then inserted his male organs to XX’s female organ. The appellant slept the whole night with XX. The following morning PW1 and her sister went back to their grandmothers’ home and told her the whole story. The grandmother phoned their mother and the appellant was then arrested. The victim was taken to Majengo Health center where PW5 conducted a medical examination on her. A PF3 (Exh. P1) was filled showing that the victim hymen was not intact. PW3 a police officer who investigated the crime questioned the accused who confessed to have committed the offence. 2 In his defence at the trial court, the appellant denied the allegations and said he did not know anything in respect of the commission of the said offence. He defended himself that he was not

in Moshi town on the day of Christmas as he was at Machame homeland. He further said he was falsely accused as the case against him was made on personal hate. Upon a full trial, the trial court was of the view that prosecution proved the case beyond reasonable doubts as the evidence taken as a whole established that the case against the accused person was proved beyond reasonable doubts. The appellant was then convicted and sentenced as said above. Aggrieved with the trial court findings, the appellant is in this court with the following seven grounds praying his appeal be allowed, quash his conviction and set aside the sentence with the following grounds;

1. The learned trial Magistrate strayed into error of law when he failed to adhere to the principles stipulated under section 127(2) of the evidence Act Cap 6 R.E 2022, and furthermore, although it was stated that PW1's evidence will be received on oath, she was never sworn.
2. The learned trial erred in law and factual analysis when he failed to note that the appellant was 18 years old when he (the appellant) testified, thus he (the trial Magistrate) ought to have considered that, in regard to the excessive sentence which was imposed contrary to the law.
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3. The learned trial Magistrate erred in law and factual analysis when he failed to note that PW4's evidence was not only inconsistent with itself, but also with other prosecution witnesses and it was laden with lies.
4. The learned trial Magistrate erred in law and factual analysis when failed to note that the identification made by PW4 was not consistent as PW4 failed to explain how she came to know appellant, under what circumstances and what were the reasons for remembering him furthermore, it is unknown how she (PW4) came and identified the appellant in court.
5. The learned trial Magistrate erred in law and factual analysis when he failed to put the entire evidence under scrutiny in the end he arrived at wrong conclusion and partially considered the defense evidence.
6. The learned trial Magistrate erred in law and factual analysis when he relied on weak inconsistency, contradictory, uncorroborated with material discrepancies prosecution evidence.
7. The learned trial Magistrate erred in law and factual analysis when he failed to note that the charge against the appellant was not proved beyond reasonable doubt. When this appeal came for hearing, the same was heard orally wherein Mr. Makarious Judica learned advocate represented the appellant whereas the respondent was represented by Ms. Bora Mfinanga learned State Attorney. Mr. Judica prayed to abandon grounds number 1 and started directly with ground number 2 and submitted that the trial magistrate failed to note that the appellant was under age at the time of commission of the offence 4 thus, the sentence imposed to him was wrong. He said that the appellant was 17 years old and if the trial court could have taken into consideration of his age the punishment imposed would

have been different. The learned advocate then prayed to argue grounds No. 3,4,5,6 and 7 jointly and submitted that the prosecution failed to prove its case beyond reasonable doubts. Mr. Judica was of the view that prosecution witnesses contradicted themselves at trial when for instance PW1 testified to be at his grandmother's house at Msaranga area for Christmas celebration on the date of 25/12/2022 while at the same time said she was with her sister PW4. The counsel further argued that PW2 who in his statement pleaded to have left her child (PW4) at home and later found her missing. The counsel argued that there was nowhere PW2 at the trial court testified to have gone to his mother's house at Msaranga. Further Mr. Judica submitted that since PW1 testified to be with victim before and after the incident and that he entered the room and saw his sister being raped, such admission was different to the explanation of victim who insisted that she was alone on the date of incident as was not accompanied by her brother but surprisingly during examination victim said there was another person one Evance. The learned counsel also remarked 5 that if the volume of the radio was higher how the victim was able to hear Evance knocking the door and then breaking it, but also questioned why the said Evance was not brought as a witness. Still protesting the appellant conviction, Mr. Judica contended that the offence of rape under section 130(1)(2)(e) of the Penal Code needs a proof of penetration as an important element. He prayed for this court to evaluate the evidence of the trial court on seeing whether penetration was proved. He emphasized his stance with the decision of Godi Kasenegela vs. Republic, Criminal Appeal No. 10 of 2022. The learned counsel was of the view that the case against the appellant was never proved beyond reasonable doubts and prayed for the appeal to be allowed and the trial court decision be set aside and the appellant to be set free. In reply to the above grounds, Ms. Bora Mfinanga conceded with the appellant appeal and submitted that she had no objection with the prayers sought by the appellant. She only argued for ground number 2 concerning the age of the appellant. She said as per page No. 22 of the trial court proceedings the appellant testified to be of 18 years old. The learned state attorney submitted further that the Child Act identify a child as a person who is under 18 years but the penal code Cap 16 in section 131(2)(a)(b) 6 and (c) provides punishments to be given to an offender whose age is from 18 and below. She added that as per the said provision for the first offender if found guilty and they are under 18 years old, then corporal punishment was a proper punishment. She suggested that since the appellant was 18 years old and being the first offender as per page 23 of the trial proceedings then a corporal punishment ought to have been awarded by the trial court and not a 30 years' imprisonment. To fortify her stance, she referred to the decision of Jumanne Mzange vs. The Republic Criminal Appeal No. 601 of 2021 at page 19. The learned state attorney submitted that this court had powers under section 160B of the Penal Code to review the sentence passed by the subordinate court and give a proper sentence, she thus prayed the trial court sentence be reviewed and be set as per the law. Having gone through the trial court record, the impugned decision and the submission of the learned counsels, the point for determination is whether the appeal before me has merits, in my view this point raises one issue which is whether the case at the trial court were proved beyond reasonable doubts. 7 Before I turn to the above issue, I wish to point out that this being the first appellate court its duty is to re-

evaluate the evidence of the trial court and come into its own findings. I have passed through the trial court record; the testimonies seem to be contradictory as rightly argued by Mr. Judica. The prosecution witnesses as per the records reveals that PW1 on 25/12/2022 was with her sister one XX going to celebrate X-mass at around 17:00hrs. At around 21:00hrs at night the appellant took them both to his room and raped his sister where they all slept in the said house until the next morning where they returned home at their grandmother's Msaranga area. (See pages 8-9 of the trial court proceedings). But in other side of the prosecution evidence of XX as it is revealed at pages 17 and 18 of the trial court proceedings, XX 'the victim' said on the same date of 25/12/2022 while being at her home, she was seduced by one Rehema to escort her and that one Rehema took her to the house of the appellant, she then disguised she was going to call her aunt but instead the appellant entered the said house and raped her, it was until one Evance interfered and did break the door and found them. I have considered the testimonies of the two eye witnesses above, PW1 and the victim, though both talks about direct evidence of rape of the 8 victim, but in my view their evidence cannot make the prosecution remain unshaken due to its inconsistency. I am saying this because while PW1 said was with the victim the whole night and slept on the floor witnessing raping of her sister, the victim supported nothing on PW1 testimony but instead said when appellant raped her she was alone. It is trite law in evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements, the court has to decide whether the discrepancies and contradictions are only minor and whether they go to the root of the matter. (See Dickson Elia Nsamba Shapwata and Another vs Republic, Criminal Appeal No. 28 of 2009, Ally Kinanda and Others vs. The Republic, Criminal Appeal No. 206 of 2007; Samson Matiga vs. The Republic, Criminal Appeal No. 205 of 2007; Omari Kasenga vs. The Republic, Criminal Appeal No. 84 of 2011 (all unreported). In my view of the above contradictions, it is my finding are material which did go to the root of the matter in the sense that they left out questions of knowing who had right testimony between the two, thus in the premises affect the credibility of both PW1 and the victim. I am mindful 9 the best evidence comes from the victim, but such principle presupposes that the victim's evidence must be credible. See: Abiola Mohamed @ Simba vs. Republic (Criminal Appeal No. 291 of 2017) [2021] TZCA 632 (TANZLII) and Mohamed Said Rais vs. Republic (Criminal Appeal No. 167 of 2020) [2022] TZCA 479 (20 July 2022). Nevertheless, the said mentioned persons by the victim Rehema and Evance were not called as witnesses and the prosecution did not disclose any reasons for not doing so. In my view if could have been called to testify this court could have been in a better position to gauge who among the above two contradicting witnesses was right hence ignoring the wrong part. Thus, it is my finding I should draw adverse inference to the prosecution for their failure to bring them to explain the said missed links. (see: Aziz Abdallah vs. Republic [1991] T.L.R 71 and Boniface Kundakira Tarimo vs. Republic [2011] TZCA 194 (TANZLII). On the premises and from what I have endeavored to discuss above, I am of firm view the said contradictions and failure to bring other witnesses who could have resolved it renders the prosecution case nugatory in proving the offence charged. 10 On the other hand, I concede with the argument by the learned state Attorney in respect

to the sentence imposed to the appellant was not in accordance to the law since he was alleged to commit the offence while having 18 years. (see section 131(2) of the Penal code). But this contention cannot stand because the charge against the appellant was not proved beyond reasonable doubts as alluded above. In the upshot, I find and hold that the appeal is meritorious and I allow it. Consequently, I order that the conviction entered and the sentence passed against the appellant by the trial Court is hereby quashed and set aside. I also order that the appellant be immediately released from prison unless he is held for other lawful reasons. It is so ordered. DATED at MOSHI this 23rd day of December, 2024. X Signed by: A. P. KILIMI 11 Court: Judgment delivered today on 23rd day of December, 2024 in the presence of Mr. Kambarage Samson Learned State Attorney for the respondent and appellant present in person. Sgd; A. P. KILIMI JUDGE 23/12/2024 Court: Right of Appeal duly explained. Sgd; A. P. KILIMI JUDGE 23/12/2024 12

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