

TANZANIA / JUDGMENT

Richard Bakilana v R Judgment

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF MWANZA
AT MWANZA CRIMINAL APPEAL NO. 115 OF 2023 (Appeal from the District Court of Ukerewe at
Nansio before (Hon. E.R. Nassary PRM dated 17 th day of July, 2023 in Criminal Case No. 15 of
2023) RICHARD BAKILANA MAZIGOAPPELLANT VERSUS
REPUBLICRESPONDENT

JUDGMENT

15th April & 31st May, 2024. ITEMBA, J. Before the District Court of Ukerewe at Nansio, the appellant Richard Bahilana was charged with the offence of rape contrary to sections 130 (1) (2) (b) and 131 (1) of the Penal Code. It was alleged that on 30/1/2023 at Trust Bar, Nansio area within Ukerewe District, the appellant had unlawful sexual intercourse with XX (name withheld) a woman of 21 years. The said woman will be referred to as the victim. After a full trial, the appellant was convicted, he was sentenced to serve 30 years imprisonment and ordered to pay compensation to the victim amounting to TZS 500,000/=. It is against such court's decision; this appeal has been preferred. 1 The appellant's initial petition of appeal had 3 grounds as follows:

1. That, the court below erred by not properly reevaluate of evidence and thus the conviction was not based on the weight of the evidence.
2. That, the court below erred in failing to consider the defence of alibi raise by the appellant.
3. That, there were contradictions in the prosecution case which ought to have been addressed by the lower court. And there were additional grounds:
4. That, the visual identification of the appellant by PW1 at the scene was not watertight to eliminate all possibilities of mistaken identity.
5. That, the evidence adduced by PW5 was doubtful unreliable and untruthful to mount the appellant's conviction.
6. That, the prosecution case was not proved beyond reasonable doubt. Facts which led to this appeal are explained by the victim who testified as PW1. She told the court that, on the fateful night, she was at Trust bar drinking beer and dancing with her friend named Dotto Msiba (PW2) who is also a motorcyclist. One Magreth who is a barmaid and has finished her shift at Winifrida's mini bar was also around and she told her that there is a man outside who

wants to talk to him. She refused but the 2 barmaid insisted saying the said person is her (Magreth's) friend. The victim went outside and found the appellant. The victim asked the appellant what he wanted but the appellant was quiet. When the victim turned around to leave, suddenly she was hit at her back with a piece of wood. She fell down and lost consciousness, she regained consciousness at the hospital and she was bleeding both from her nose and private parts. It was the police officer who later informed her that she was raped. The victim mentioned the appellant as being responsible with rape and that she identified him at the scene through the aid of her mobile phone's torchlight. At Nansio hospital the victim was attended by a clinical officer Veronica Christopher (PW4). PW4 testified that she noted the victim was raped, she had discharge of bloods and had sperms from her female parts, she had wounds and bruises in different body parts including the head and neck and she smelt alcohol. To support her testimony, PW4 produced a PF3 of the victim (Exhibit P1). PW2 corroborated the testimony of the victim that they were together at the Bar on and off. He added that because he is a motorcyclist so he was transporting people throughout the night but all the time the victim was at the bar with Magreth (PW5). That, when he came back at the bar at around 0100hrs the victim was absent, he asked Magreth who told him not to worry because the victim will come soon. PW2 insisted that Magreth must show him where the victim was. They went together at a nearby rice paddy and found the victim lying down naked and her underwear was torn and she was in unhealthy condition, as explained by the clinical officer PW4. They dressed her and took her to the police and then to the hospital. The manager of Trust Bar named Donant Kipanda Ludomia (PW3) assisted them by arranging transport to the hospital at around 0400hrs. At the police station, the victim was attended by WP 7102 PC Janeth (PW6) who filled the PF3 form and corroborates the testimony of the medical Doctor as to the condition of the victim. PW6 produced the victim's torn underpants and sketch map of the scene as exhibits P2 and P3 respectively showing that force was used against the victim at the scene. Magreth Michael (PW5) corroborated the victim's story. She admitted to have served beers to the victim and PW2 at Winfrida Grocery before they 'moved' at around 2200hrs. That, at around midnight she closed the 'grocery' and went to Trust bar for dancing. She found the victim drinking and dancing. PW5 saw the appellant whom she has met before at Goziba Island, he was outside with his 2 fellows, smoking cigarettes. The appellant asked PW5 to call the victim, she did. PW5 assured the victim not to worry because she (PW5) is familiar with the appellant. The victim agreed to meet with the appellant and left with him to the rice farms for sexual intercourse. That, the victim left her mobile phone and unfinished beer to PW5. That, the victim had not appeared even when PW2 came looking for her at around 0400 hrs where she was later found in the rice paddies. The appellant was arrested at the milling machine in Nakatunguru area by F. 4956 Sgt Mbalya (PW7) and charged as explained hereinabove. He defended himself by raising the defence of alibi. He stated that he is a resident of Nakatunguru village but works at Goziba Island as a peasant and fisherman. That, on 20/12/2022 he was informed by his father that they need him at home in Ukerewe. On 2/2/2023 he went to Nakatunguru in Ukerewe and later he went to the milling machine to grind cassava and he was arrested. He met PW5 at the police who is his ex wife. He also

knows PW1 because they had a land dispute. He tendered a bus tickets (Exhibits D1 and D2 collectively) from Kakukuru to Nansio and Goziba to Kakukuru showing that on the fateful 5 night, he was not at the scene. The appellant had one witness, his father, who corroborated his alibi. When the appeal was scheduled for hearing, the appellant was present, he was also represented by Mr. Remidius Mainde learned counsel while the respondent had the services of Mr. George Ngemera and Evans Kaiza both learned state attorneys. Earlier on, the appellant told the court that there is an inconsistency in the name of the appellant is it Richard Bakilana and Richard Bahilana but his formal name is Richard Bahilana. At the outset, Mr. Mainde prayed for leave to amend the petition of appeal and add the 4th to 6th grounds. Arguing in support of his appeal, he abandoned the 1st and 3rd grounds of appeal. Mr. Mainde told the court that the trial court did not consider the appellant's defence of alibi claiming that it was raised in the wrong time. He also grumbled that the trial court should have considered that the appellant was not represented and he did not understand criminal procedures on when to raise his defence, therefore, the trial magistrate should have used the court's wisdom. 6 In respect of the second ground, the learned counsel challenged the visual identification of the appellant at the scene of crime. That, the victim did not know the appellant before. That, identification was done through a torch light, at night. That, there is a contradiction between PW5 and the victim on how the victim left the Bar. He stressed that the while victim says she asked the accused what he wanted and since he did not respond and she decided to leave and was suddenly she was hit by a heavy object, PW5 had a different story that both PW1 and the appellant went straight to the rice farm for sexual intercourse. That, this contradiction leaves doubt on whether PW1 identified the appellant. He pointed out that according to PW5 there were other people at the scene with the appellant it is possible that those people are the assailants. He also submitted that it was not made clear during trial if the torch light was intense enough to support identification. He relied on the case of John Nicomed Geay v R criminal appeal 73/ 2010 CAT Arusha insisting that visual identification is of the weakest kind, the court should not act on it unless all possibilities of mistaken identity are eliminated. The learned counsel also cited the landmark case of Waziri Amani V R (1980) TLR 250 arguing that the witnesses were supposed to name 7 and describe the appellant at the earliest opportunity. He probed the appellant's description given by the victim that he had long hair and wearing a hat, questioning how can a person with long hair wear a hat? He insisted that, the court could have considered that if the appellant had sexual relation with PW5 it is possible PW5 mentioned the appellant due to their past grudges. Moving to the 3rd ground, he submitted that, the person who knew the appellant is PW5 due to her evidence that she was doing business in Goziba and not PW1. In the last ground, he insisted that all evidence show that the appellant was not at the scene and that the appeal to be allowed. In reply, the learned state attorney opposed the appeal. In respect of the first ground, he stated that the defence of alibi was brought contrary to section 194(4) of the CPA. That, despite that the trial court considered the said defence and found that there was contradictions. That, the appellant says he was in Ukerewe on 2/2/23 but the incidence occurred on 30/1/23. That, according to Abel Orua Matiku and 2 others v R Criminal Appeal No. 441/2020, CAT Mwanza when there is

8 contradiction is the defence of alibi and there is evidence of visual identification, the defence of alibi becomes irrelevant. In the second ground regarding the identification, he argued that the appellant was identified by PW1 at the scene by the aid of the torch light and she described his clothes which he was wearing. That, this evidence is corroborated by PW5 who actually knew the appellant by his name is Richard. That, PW5's identification by recognition adds more weight to the victim's evidence. He insisted that, the victim mentioned the appellant upon waking up and the court should consider the ability of witness at the earliest stage. He also submitted that every witness is entitled to credence as per *Goodluck Kyando v R Criminal TLR 2006 363* and he finalised by stating that in rape cases, it is a legal principle that the best evidence of rape comes from the victim. In respect of the 3rd ground, he stated that, PW5 was reliable witness because she could identify the appellant and she is the one who went to call the victim and said 'anayekuita ni Richard'. That, her evidence is corroborated by PW1 on how the appellant was wearing and how the appellant left them. That, the contradiction on how the victim left the bar, does not go to the root of the case if there were 2 or 3 more 9 people and the appellant was also present among them. On whether there was a relationship between the appellant and PW5 he submitted that those were mere submissions from the bar and cannot be considered by the court as they are not reflected anywhere in the proceedings. In the last ground, he submitted that, the republic proved its' case based on all the prosecution's witnesses without leaving any doubt and the central story is that the victim was raped by the appellant and he was identified by PW5 being the last person to be seen with the victim. That, it is a legal principle that not all contradictions affect the case but only material contradiction according to *XG 2434 PC George v R Criminal Appeal 8/2018 CAT Moshi*. In his brief rejoinder, the counsel for the appellant reiterated that the appellant was not legally represented therefore, he did not know at what stage he should bring his defence. He insisted that the evidence of visual identification was not water tight as the appellant was unknown to the victim. That, the appellant was identified after 2 days the clothes might have changed, and there can be many people with the same clothes. As it should be noted, there are detailed facts behind this appeal. I have passionately considered the evidence, record of appeal and both 10 parties' rivalry arguments, the issue is whether the prosecution has established the offence of rape against the appellant. Sections 130 (1) (2) (b) and 131 (1) of the of the Penal Code the offence of rape. They provide thus: '130. (1) It is an offence for a male person to rape a girl or a woman.

- (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any establishes of the following descriptions
 - (e) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;
- 131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the

court, to the person in respect of whom the offence was committed for the injuries caused to such person.’ (emphasis supplied). Going back to the grounds of appeal, I have noted that the appellant raised the defence of alibi. But as correctly submitted by the learned state attorney, the said defence was raised contrary to section 194 (4) and (5) of the Criminal Procedure Act (CPA), because no 11 notice was given either to the court or to the prosecution as regards to such alibi. The defence was raised for the first time in the court. It might be true that the appellant did not know the right time to raise this defence however, ignorance of law is not an excuse. He should know the procedure. Under the circumstances, in terms of section 194(6) of the CPA, the trial court had discretion not to consider the said defence. Moreso, even after considering the defence, the trial court found that due to the distance from Ukerewe to Goziba Island where the appellant claims to have been, it is possible for a person to commit an offence at Ukerewe and go back to Goziba. Therefore, the defence of alibi has no weight and cannot be considered. The 1st ground fails. Because the 2nd to 4th grounds challenge the identification of the appellant at the scene, they will be treated jointly. To start with, it is worth noting that the evidence against the appellant is more circumstantial. It is also in record that the victim lost conscious after being beaten by a heavy object, she did not know what happened to her later on. I am also alive to the settled legal principle that in sexual offences case the best evidence comes from the victim. See *Selemani Makumba vs R*, [2006] TLR 379. 12 In this case, the evidence of the victim against the appellant is only to the stage where the two met outside Trust Bar at midnight. From there, the victim is found unconscious, raped, bruised and injured in the nearby rice paddies at around past midnight. The chain of events are that; PW5 closed her pub at 2400hrs and went to Trust Bar where he met the appellant. No one is telling the time when the appellant called the victim but PW2 states that at 0100hrs he went to Trust Bar and the victim was missing. That, at around 0400hrs they had found her took her to the hospital. PW4 received her at 0500hrs. Therefore, the incidence must have taken place between past midnight and 0400hrs. I have assessed the sketch map of the scene, the distance between Trust Bar and the rice paddies where the victim was found is 125 steps. I find this distance very short to allow any other incidence to have happened without the appellant knowing or being involved. And, time interval between past midnight and 0400hrs is not considerable long for a third party to intervene and attack the victim. Regarding whether the appellant was properly identified at the scene, the identification was done by the victim and PW5. Without using many words, there is no dispute that PW5 knew the appellant before, by name. That, the two knew each other as from Goziba Island. In essence, 13 PW5 is the one who linked the appellant to the victim shortly before she was raped. She told the victim that the appellant wants to see him. Therefore, what linked the appellant to this case, is not just identification at the scene but recognition made by PW5. The condition for supporting visual identification as stated in the renowned case of *Waziri Amani v R* (supra) in which the Court of Appeal of Tanzania held at page 252 as follows: “If at the end of his examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, we think, he

could, in those circumstances, safely convict on the evidence of identification. On the other hand, where the quality of identification evidence is poor, for example, where it depended on a fleeting glance or on a longer observation made in difficult conditions such as a visual identification made in a poorly lighted street, we are of the considered view that in such cases the judge would be perfectly entitled to acquit". Additionally, in the succeeding case of Scapu John and another

- v. Republic, Criminal Appeal No. 197 of 2008 (Unreported) the Court in 14 agreement with the decision in Waziri Amani, expounded the conditions for ensuring there is no mistake of identity and I will list them:
 - i. For how long the witness had the accused under observation? ii. What was the estimated distance between the two? iii. If the offence took place at night which kind of light did exist and what was its intensity? iv. Whether the accused was known to the witness before the incident?
- v. Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the latter's concentration? In the present case, PW5 knew the appellant before, both PW5 and the victim were at the same Trust Bar with the appellant they even exchanged some words, there was light of the mobile phone's torch used by the victim. As to the light intensity. I will consider the torch from the mobile phone strong enough to support identification. The torch cannot be compared with the moonlight or lamp which might have significant difference in light intensity. Under these circumstances, PW5 could not have possibly mistaken the identity of the appellant. 15 The possibility of grudges between the appellant and PW5 is not supported by evidence, it is the counsels' speculations and as rightly stated by the respondent's counsel, it cannot be entertained. The issue of a person with long hair could not wear a hat this is also counsels' speculations because it depends with several other external factors which we do not have information about. Regarding the contradiction of how the victim left the bar, I find it minor and it does not go to the root of the case because both versions still place the appellant at the scene as the last person to be seen leaving Trust Bar with the victim. There is no dispute that the victim was raped based on the testimony of the clinical officer on the presence of blood and sperms in the victim's private parts. That there was force as her underpants were torn and she was bruised and injured. As to who is responsible, all the evidence links the appellant because for some reasons, he called the appellant in the midst of night and disappeared with her in the rice paddies a short time before the incidence. There are a number of case laws which talks about being the last person to be seen with the deceased, in this case the victim, and I think these cases are applicable in the present situation. In Mathayo 16 Mwalimu and another v R criminal appeal no. 147 of 2008 the Court held that: "..... If an accused person is alleged to have been the last person to be seen with the deceased, in the absence of plausible explanation to explain the circumstances leading to the death, he or she will be presumed to be the killer" In this case, I do not find any alternative explanation on who is responsible to have sexually abused

the victim. Based on the testimony of the victim herself and PW5, the circumstantial evidence around, there is an unbroken chain of events within the span of less than 3 hours, from the moment when the victim was called by the appellant and went to rice paddies to the moment when the victim was found lying in the same rice paddies. The evidence against the appellant leads to the conclusion that he was the last person to be seen with the victim and there is no other rational explanation apart from that he is the one who raped the victim. There might be other people involved, but so far there is no tangible evidence against them as to their identities and level of involvement and this does not exonerate the appellant from liability. 17 All said and done, I cannot disagree with the trial magistrate. Both conviction and sentence and orders against the appellant are sustained. The appeal has no merit and it is hereby dismissed. It is so ordered. Dated at MWANZA this 31st day of May 2024. L.K.J. ITEMBA JUDGE 31/5/2024 Judgement delivered in the presence of the appellant and his father Bahilana Mazigo Mr. George Ngemera State Attorney for respondent and Ms. Gladys Mnjari, RMA. L.K.J. ITEMBA JUDGE 31/5/2024 18

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