

TANZANIA / JUDGMENT

sadick so thomson baba sashi baba angela vs republic 2023 tzhc 23738 12 december 2023

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB-REGISTRY AT MBEYA CRIMINAL APPEAL NO. 85 OF 2023 (Originating from the District
Court of Mbeya at Mbeya, in Criminal Case No. 80 of 2022) SADICK S/O THOMSON@BABA
SASHI@BABA ANGELA..... APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 14/08/2023 Date of Judgement: 12/12/2023 NDUNGURU, J. The appellant, SADICK S/O THOMSON@BABA SASHI@BABA ANGELA is challenging the decision of the District Court of Mbeya (the trial Court) in criminal case No. 80 of 2022. In that case the appellant was arraigned, convicted and sentenced for the offence of rape contrary to section section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2022. It was alleged in the particulars of the offence that on 11th day of April, 2022 at Muvwa village within the District and Region of Mbeya the i appellant did have carnal knowledge of EPM (her name withheld to protect her dignity) a girl aged six (6) years old. The appellant denied the charge. After a full trial however, the trial Court was satisfied with the prosecution's evidence it thus convicted and sentenced him for life imprisonment. The facts leading to the conviction as deduced from the prosecution evidence are not complicated. It was alleged that at the time of occurrence of the incident the victim was a kindergarten pupil at Mshewa Primary School. That on the fateful date she was alone from school on her way along the road she met with the appellant whom she knew as baba Angela or baba Shashi cutting grasses. That he dragged her into a coffee farm then took out his male organ (dudu), pulled upward the victim's dress then inserted it into the victim's private part (vagina). That the act caused the victim to feel pain thus, she started raising alarm and she was bleeding. It was also alleged that the appellant after quenching his evil desire he discharged the victim, but he remained in the coffee farm. Thereafter the victim met with one Mama Rostina whom she informed what befallen her, then Mama Rostina told other people. That, in the company of those people, they arrested the appellant while in the coffee 2 farm. Then Mama Rostina helped to take the victim to the police station and to the hospital. At the hospital the examination revealed that

the victim's underpants (skintight) was torn and had blood stain. Then Medical examination revealed that the victim private parts had bruises, swelling, blood oozing, hymen perforated and some wet substances which was found to be sperms. On his defence the appellant shortly denied to have raped the victim he only urged the trial Court to set him free. Nonetheless, the trial Court was satisfied with the prosecution's evidence it thus convicted him and sentenced as above said. Dissatisfied with the conviction, the appellant through his counsel, Hassan Gyunda appealed to this Court upon three grounds of appeal as follows:

1. That, failure by the prosecution to prove the age of the victim.
2. That, failure by the prosecution to call the investigator of the case as the key witness.
3. That, failure by the prosecution to call one Mama Rostina as the key witness. 3 Basing on these grounds the appellant prayed for this Court to quash the decision of the trial Court and release him from the prison. At the hearing, it was Mr. Gyunda, learned advocate represented the appellant while Mr. Rajabu Msemo learned State Attorney appeared for the respondent/Republic. The appeal was orally argued. Mr. Gyunda submitted in support of the appeal about the 1st ground that the appellant was charged and convicted of the offence known as statutory rape. That the age of the victim in such offence is one of the ingredients which the prosecution must prove. According to him the evidence of the Victim (PW1) and her father (PW2) only said that she was six years old without mentioning the date, month and year or by a certificate of birth the same was not a proof of age but merely citation of numbers. To reinforce his argument, he cited the cases of Rutoyo Richard v. Republic, Criminal Appeal No. 114 of 2017 Court of Appeal of Tanzania (CAT) and Robert Andondile Kombo v. DPP Criminal Appeal No. 465 of 2017. The 2nd and 3rd grounds were combined and argued together that, since it was said in the evidence that one Mama Rostina was the first person to meet the victim bleeding and was the one offered assistance on the incident day, she was a key witness to corroborate the victim's 4 evidence. Though Mr. Gyunda admitted that in rape cases the best evidence comes from the victim he held the view that in the absence of Mama Rostina as a key witness had left the evidence of the victim weightless. To buttress his argument about the need of a key witness Mr. Gyunda referred this Court to the case of Samwel Nyerere v. Republic, Criminal Appeal No. 65 of 2020. Also, that the investigator of the case was important witness to connect the evidence of PW1 and PW3. In the conclusion he prayed this Court to allow the appeal quash the conviction, set aside sentence and release the appellant from the prison. In reply, Mr. Msemo resisted the appeal and supported the conviction and sentence passed by the trial Court. While admitting the argument about the prove of the victim's age in the statutory rape cases, he opposed the claim that the prosecution in this case did not prove the age of the victim. Mr. Msemo stated that since the victim's age can be proved by the victim, parents or relative or by producing a certificate of birth as it was held in the case of Shani Chamwela Suleiman v. Republic Criminal Appeal No. 481 of 2021, he was emphatic that PW1 the victim, PW2 the victim's father and PW3 medical officer, all of them told the trial Court that the victim was six years old 5 hence they proved the age. Mr. Msemo distinguished the cases cited by Mr. Gyunda i.e

Rutoyo Richard case (supra) and Robert Andondile (supra) that, in those cases the age was just cited in the PF3 and in the particulars of the witness of which are not part of evidence. About the 2nd and 3rd ground Mr. Msemo was straight that there is no number of witnesses required to prove a certain fact as per the case of Aziz Abdalla v. R (1991) TLR 71 and that in rape cases best evidence is that of the victim as in the case of Seleman Makumba v. R. [2006] TLR 379 thus, that PW1 proved the offence of rape as she was able to explain what the appellant did to her. In his view, failure to call Mama Rostina and the investigator did not render the case unproved. He thus prayed for the appeal to be dismissed. I have considered the rival arguments by counsel for the parties. The issue for determination is whether the appeal is meritorious. Starting with the first ground of appeal which is the complaint that the victim's age was not proved. I am at one with counsels for both sides on the importance of proving the age of the victim in statutory rape cases like the one at hand. The essence is, in statutory rape consent is immaterial but age is. Also, age of the victim determines the 6 sentence to be meted to the convict. This is according to sections 130

- (1) (e) and 131 (1) of the Penal Code. Indeed, as correctly argued by the counsel for the appellant and the cited cases of Rutoyo Richard (supra) and Robert Andondile (supra) it is most desirable that, evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by production of a birth certificate. And that citation of the victim's age in the particulars or before giving evidence or in a PF is not a proof of age. In that same position see also Kazimili Samwel v. Republic, Criminal Appeal No. 570 of 2016, CAT at Shinyanga (unreported) Issaya Renatus v. Republic, Criminal Appeal No. 542 of 2015 (unreported) Shani Chamwela Suleiman v. R. (supra) to cite but view. In the instant matter the victim who testified as PW1 said that she was six years old, the same was testified by PW2, the victim's father and PW3, medical officer. Mr. Gyunda held the view that only stating that the victim was six years was not a proof as it was supposed to mention the date, month and the year of birth. I think, this is mere view of Mr. Gyunda because I have found no provision of the law which requires the same. Also, the cited cases by Mr. Gyunda have not stated so. In my view, the suggestion by Mr. Gyunda might be a good practice when 7 date, month and year of birth is mentioned. Nonetheless, it is not a law and it is in my view, that, should that being the position might have led to defeating justice when parents might have in their memories about a number of years their children are than remembering the date, month and year of birth. In the parity of thinking, I am of concerted view that it is not always necessarily that proof of the victim's age must be derived from evidence of the victim, parent, relative etc. but can also be proved by deducing or infer from other evidence or circumstances of the case. This is in accordance with section 122 of the Evidence Act Cap. 6 R.E 2022. See also the cases of Kazimili Samwel v. Republic, (supra) and Issaya Renatus v. Republic, (supra). To be precise, section 122 of the Evidence Act provides that: '722. A court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case./z In this case apart from the evidence mentioning the number of the victim's age, there is another evidence that the victim was a 8

kindergarten pupil. This evidence was not controverted. For this evidence I do infer that a kindergarten pupil cannot be of above the age 14 or 18 years. In the premises, I find the victim's age was proved. The first ground is thus dismissed. As regard to the 2nd and 3rd grounds. The contention by Mr. Gyunda was that one Mama Rostina and the investigator of the case were key witnesses. Mr. Msemo was of the different view that the evidence of the victim of rape offence proved the case. Indeed, it is the law that in sexual offences the best evidence is that of the victim of offence if the same is believed to be true and a witness is credible. And only that may lead to conviction of the accused without being corroborated. This is according to section 127 (6) of the Evidence Act and the decision in a number of cases like the Selemani Makumba v Republic [2006] TLR 379. Edward Nzabuga v. Republic, Criminal Appeal No. 136 of 2008, Court of Appeal of Tanzania at Mbeya (unreported). In this case, I have revisited the evidence of the victim (PW1) and found it to be true and she was credible witness since there was no any contradicting evidence nor inconsistency in her testimony. Also Mr. 9 Gyunda did not complain about the victim's evidence. In that regard, I also dismiss these grounds of appeal. In the end, I find the entire appeal without merit, therefore, I dismiss it. It is so ordered. D.B. NDUNGUR^U? JUDGE 12/12/2023 10

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