

TANZANIA / JUDGMENT

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't \ f . ~ ~ ' " . . I ' , I 1 \ ' I 1 \ IN THE COURT OF APPEAL-OF TANZANIA AT AR. USHA {CORAM:
RUTAKANGWA. J.A. • LUAN:DA, J.A. And ORIYO, J.A.) , , , \ CRIMINAL APPEAL NO. 3 OF 2009 I . \ \
SANING O MESHUKI MOLLEL ; APPELLANT VERSUS I . THE
REPUBLIC : !. 1 • Ji .., 4; J RESPON DE NT

- - I - \) {Appeal from the Judgment the High Court of Tanzania qf at Moshi} ,, 1: {Ruga~ia. J.)
 \ ,, Dated the 11th day bf November, 2008 {DC) Criminal App~al No. 8 of 2005 i~ I
--:'"----1----- . ' . of. i'~ ' . I JUDGMENT o~., THE COURT ;, 16th & 28th November, 2011 , _.
LUANDA. J.A~: ' : : ; - , A I - i' . I - - The appellant one SANING'O M~SHUKI MOLLEL\ was
charged with rape contrary to "sections l3D and 1~1 of the Penal ode, Cap 16 R.E. f 2002." We
put the inveted commas I because both ~ections contain a number of subsections which
were ~ot cited. The Lbsections create ' i , \ offences showing circumstances un~er which such
offences were " ' I l committed and the relevant sent:nce: ~ught to be imp~sed. We strongly
urge the courts below, in future, to ihdicate in the Jharge sheets the I,, ,, 1 1 , 1, ' . I I : i i l I : I
i I i ; ; I relevant subsections so that the: accused understands clearly what : : I i offence(s) he
is facing and the expected sentences. I i ' I J . I I I I ' I I , I , , , 1 I j , i I : , I In this case that was
not qpne: We don't think that failure to do so ; ; I ; l I had occasioned any injustice. We ~re
saying so · because the appellant :: !I cross-examined the witnesses and g) e his evidence. He
knew the charge ii ' . l laid at his door. II I ' i : i 1, I . \ ' Be that as it may, the trial District Court
was satisfied that the prosecution had proved the case to tr : I standard req11ired. It
accordingly I ' " Ii convicted the appellant as charged ~nd sentenced tm to thirty years / I , I ' I
I I / imprisonment. . I \ ..t : " ' , I : I : i ; I I 1 I Ii I I Aggrieved, the appellant appeale; to High
Court of Tanzania, Moshi · . . : , , ..; ... , I r , ' ' . 11 , I _ , . ' ~ ' I I Registry, where he was not
succ:essfiuL Dissatisfied, he preferred this " ; " " " appeal to this Court. The appellant has
raised four grO:rds in his memolrandum of appeal. I , \ II Essentially the grounds of appeal
raised; can be condensed into two groups l f " il ' ; I ' ! I . ! ' . 2 I 1: II ' I : ' I I ' , 1 namely, evidence
and procedure. As to evidence, the total sum is to the effect that the prosecution did not
prove its case beyond reasonable doubt. As regards to procedure, the appellant complained
that the entire evidence I I at the trial was not taken in camera as per the dictates of Section
186 (3) of the Criminal Procedure Act, Cap. 20 R.E 2002 (the Act). At the hearing of the
appeal, the · appellant appeared in person. The respondent Republic was represented by Ms.
Javelin Rugaihuruza, learned State Attorney. Ms. Rugaihuruza did not support the appeal

and prayed that the appeal be dismissed. Before we go into the merits or otherwise of the appeal, we think it is helpful to give a historical background that led to the appellant's conviction. Indeed most of the facts in this as found by courts below are "not in dispute. The dispute centres" in our view, on whether the 'complainant was raped; if so by whom. We don't think failure to comply with s. 186 (3) of the Act vitiates the proceedings. We shall explain later on in this judgment. 3 I \ ,: _ i . ? I ' T : The undisputed facts as found out by the courts below were that

1. ' I i Marget Kiwelu (PW2), who is married to Edward Kiwelu, a brother to Rose Kiwelu (PW1) the victim of rape, operated a grocery at Majengo Old Bus Stand. The said grocery was run by Rose (PW1) her sister in law. PW1, I \ I . I I , PW2 and Edward Kiwelu were living at Rau, a few kilometers from the I I {Pi / .1.. : \ grocery. PW1 normally opened the grocery in the morning and closed, I around 10:00 p.m. - 11:00 p.m. when she closed the grocery, the ' . , I i appellant who was employed by, PW: a sl watchman to guard the grocery ; > I I ,; ' 1 1 : i escorted her to Rau on payment of Tshs. 300/= which he was paid daily. I i i . : Over and above that he was also given food and on completion he went " I I 1 back to the grocery to guard. . \ . I ' ! 1 ! i j, On the fateful day i.e 19/7-2002~ PW1 opened the grocery as usual ; i I . -illt 5.. , ' . : I and closed around 11:00 p.m. and the appellant escorted her towards ' I home. Alas! On the way, according to PW1, the appellant knocked her i' \ down, he grabbed her neck and told her that he was going to rape her. He I':, ' ordered her not to raise any alarm lest she be killed. The appellant, I I I according to PW1 forced his penis in her vagina. She said the appellant did ' I i . ' ' ~ i it thrice and in the process Tshs. 35,000/= the day's salary and keys of the 1 1: I . ' I I ! 4
- I grocery got lost. While this incident was happening, PW2 was at home worried as to what had befallen PW1. According to PW2 around 03:00 hrs (20/7/2002) PW1 returned home and saw PW1 was soiled, blood was coming from her neck and she could talk with difficulty, while trembling and crying. PW1 narrated the story to . , i PW2. Edward Kiwelu was awakened, he was also told the saga. The three went to Majengo police station where they reported. In company with PC / I I , , Zephirini (PW3) they first went to the grocery. The grocery was wide opened; there was nobody and a number of items which were for sale were missing. Through police efforts, the appellant was arrested in an unofficial guest house. The appellant is said to have admitted to steal from the grocery but denied raping PW1, though he had love affairs with her on four previous occasions. , , 'J' The appellant denied to have raped PW1 on that day. He said on the fateful day he reported for duty as usual (He met PW1 with a certain youth drinking beer. He was offered a soft drink by that youth. Then that youth told him that he had agreed with PW1 to have love affair. Around 9:00 5 1, i, I I p.m. on the instructions of that youth, I . . the grocery was closed and the trio I . . 11. , . . r: i left towards the homestead of PW1. At a juncture, the appellant left the I , duo and returned to the grocery. He guarded the grocery till 6:00 a.m. when he went to Kilimanjaro Hotel to take a nap. At 07:00 a.m. he was arrested and queried about having raped PW1 and stealing. He I I 11 , , denied. , I , i I 11 ~ I \ 11 11 I We wish first to deal with the question of non compliance with 1,1 section 186 (3) of the Act. , ! : ; " 1, I ~ = ; ! 11 : n \ . I : 1 ' , Ms.

Rugaihuruzza conceded to that ground that the trial court did not conduct the trial in camera. However, she was quick to point out that the omission is curable under Section 388 of the Act. PW1 was free when she gave her evidence, she submitted. Section 186 (3) reads, "Notwithstanding the provisions of any other law, the evidence of persons in all trials involving sexual offences shall be received by the Court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or for any person." (Emphasis ours) The issue now is whether the word "shall" appearing above is mandatory. In *Bahati Makeja v. R.*, Criminal Appeal No. 118 of 2006 (unreported) the Court (Full Bench) was convened to discuss and resolve whether the word "shall" appearing in Section 293 (2) of the Act as it was interpreted by the Court (Full Bench) in *Melkizedeki Mkuta v. R.*, Criminal Appeal No. 164 of 2005 (unreported) to be mandatory was correct. In *Bahati* case cited supra, the High Court learned judge appeared not to have addressed the accused person, who was facing a charge of murder, his rights of giving evidence and calling witnesses after the close of the prosecution case, though his advocate stated how the accused (his client) would give his evidence and that they had no witness apart from the accused. The full Bench after revisiting a number of cases including *Herman Henjewe v. R.*, Criminal Appeal No. 164 of 2005 (unreported) was of the settled view that the word "shall" is not always mandatory; it depended on the circumstances of each case. The Court then resolved whether such omission is curable under section 388 of the Act. The court said: "... There are a number of innocuous omissions in trials so if the word 'shall' is every time taken to be imperative then any proceedings and decisions will be nullified, and reversed. We have no flicker of doubt in our minds that the criminal law system would be utterly crippled without the protective provision of s. 388. The Full Bench went on to say: "... the definition of the word 'shall' to be imperative where a function is imposed does not apply to the Criminal Procedure Act in view of s. 388 which subjects all mandatory provisions in the Act to the test of whether or not injustice has been occasioned. To put it differently, the use of the word 'shall' per se does not suggest that it is mandatory. In case the function imposed had been performed contrary to the mandatory requirement, the test is whether the omission had occasioned any injustice. In our case, it is true that, the Proceedings were not conducted in camera. Ms. Rugaihuruzza informed us that PW1 was free when she was testifying. In any case, she said the omission is curable under s. 388 of the Act. We entirely agree with her. In actual fact they are not complaining at all. On the other hand the appellant did not attempt to say whether failure to comply with section 186 (3) of the Act had occasioned any failure of justice on his part. So, in view of the above explanation and the ratio decidendi in *Bahati Makeja* case, we find this ground to have no merit. We now turn to the main ground of appeal whether PW1 was raped; if so by whom. Ms. Rugaihuruzza submitted that the prosecution had proved its case beyond reasonable doubt. She said there is evidence on the record that PW1 was raped. She said PW1 explained how the appellant fell PW1 down and

raped her. Immediately, after the incident PW1 informed PW2 11 1', ' II ,. who in turn checked her and found bruises on the neck. It is her li I I contention that force was used. I' I' I 1, ' This is a second appeal. We are alive to the well known principle of law that generally this Court is precluded from interfering with the I fl ·I' 11 concurrent findings of fact of lower courts unless it is shown there is misdirection or non-direction then it can interfere (see D.P.P. v. Laffari 11 I I , Mfaume Kawawa [1981] TLR 1149; ' . Salum .ii. Mhando v. ' R., [1983] TLR I' I I 170). 1, ' 10 I I I I 11 I I I I i When convicting the appellant, the trial court said:- 1\ I i, I II Ii1 I i i\ I "The only issue is whether it is the accused who ,: \I i had raped the complainant 1/2t Accused admitted (sic) \I I that it was part of his : duty to escort home 1 \ I 1 complainant after the offence. He told the trial court that he had escorted complainant half way and I I left her with a certain youth he could not name or I I produce. Why should he leave complainant half way, abandoned his wage of shs. 300/- and food for I I. if he was not a culprit (sic) offence. Accused was , \I I' found with keys of grocery and other tools/en ! property from grocery. This shows that after he had raped complainant/1/he went to grocery store I and he intended to go into hiding at Arusha as he I I i told police at the time of arrest. If one piece \ : (sic) the evidence given by prosecution I and i \ march it against story of accused it is crystal clear

- , , . \ II that accused committed this violence of rape. I' 11 I I \: I \ I \ f I 11 1'. I \ 1, ! \ I , !, ' ·I' .; J ~, , 11 ,r' . i1 I 1: I ·1: \ '!' · , 11/ I I I I I', I , , I I find the case of rape against accused proved I , beyond reasonable doubt and he is accordingly , I I I' convicted " ' j 1, I: I I' I' I' 11 I' The first appellate court in upholding the finding of the trial court, it said:- , I I' "The evidence as laid down before the court does I I \ I 11 not leave me with doubt that the appellant did indeed perpetrate the abhorrent act. I find no I, , 1, Ii reason to upset the trial court's verdict Which I I 1, , , , uphold. " , 1 I' \ ' \ ' , , , ' I, I' Having critically examined the evidence on the record, we are far from I \ I I' being persuaded that the prosecution has proved its case to the standard II II required. We will demonstrate. } : 1-/: : . 11 ·tl \ · I , , , 11, ' I I I
- 11 , Before we start re-evaluating the evidence, it is not out of place to I' I , remind ourselves that in a criminal case, like this one, the burden of proof 1, 1: I 12 I I I I I , 1: : ' , ' \ .. it ~ . I i \ I II I " I lies on the shoulders of the prosecution; and that the standard is beyond \ I : I any reasonable doubt. i \ : \ I \ I It is the evidence of PW1 that when the appellant escorted her, she I , ' : , 1 . ! said, suddenly the appellant knocked her down, held her neck tightly tore I I \: I her pajamas and inserted his penis. The appellant did that three times. I I \! I I \ I This is what she said:- , 1 \ I I \; I 'f; ' : I , ,. Let I • , 1, • I : I II I "Accused penetrated his penis in my vagina. He did the act three times by force. He then said to I \ I me "nenda ukamweze mama yako." There is I II I bush in area and there is house of people if , I , I around Accused grabbed , her tightly in the neck 1 I I I I I while doing the act. I could not rescue myself. I I I I lost consciousness., , , ,; When I gained '(sic) consciousness accused had vanished. " 1 I I I 1, \ I \ I . , \ I , I \! 1.1 I On reading the above passage, we are of the considered opinion that the 1 I \ I information contained therein does not come out clearly as to what really , 11 II \ I ,: I \ I 13 I I i ~ . ' t, i I \ \ I I I \ ~ 1 \ I I , Iii, I' li I' I , had taken place.

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