

TANZANIA / JUDGMENT

SELEMANI ZUBERI SENGO

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA THE SUB REGISTRY OF
TABORA DC. CRIMINAL APPEAL NO 33 OF 2023 (Originating from Criminal Case No. 22 of 2022
in the District Court of Tabora.) SELEMANI S/O ZUBERI @ SENGOAPPELLANT
VERSUS THE REPUBLIC..... .. .RESPONDENT

JUDGMENT

Date:04/09/2023 & 29/9/2023 BAHATI, J,: The appellant herein Selemani s/o Zuberi @ Sengo was arraigned and charged before the District Court of Tabora for the offence of Rape contrary to section 130(l)(2)(e) and 131(1) of the Penal Code, Cap. 16 [R.E 2019], It was alleged that on the 5th May 2022 at Kariakoo area, Kitete ward within Tabora Municipality, the appellant did have carnal knowledge of the victim, an 11-year-old girl, and a student of standard five who was identified as A to hide her identity. Upon full trial, the appellant was convicted of rape and sentenced to serve a custodial term of 30 years imprisonment. Aggrieved by the said impugned conviction and sentence, the appellant has appealed to this Court with seven grounds which were drawn in a layman's manner bringing out one major complaint that the prosecution case was not proved beyond reasonable doubt. At the hearing of this appeal, the appellant was present in person while the respondent was represented by Mr.Charles Magonza, Mr.Dickson Swai and Ms. Wivina Rwebangira, learned State Attorneys. "The appellant had nothing to say other than praying for his grounds of appeal to be allowed. On the other hand, the learned State Attorney supported the conviction and sentence and further submitted that there is no difference between putting and inserting because they all have the same meaning hence penetration was proved despite using the word putting instead of inserting. He added that the evidence of PW1 (the victim) was corroborated by the evidence of PW3, the doctor who examined her. In regards to the complaint that there is variance between PW1 and PW2 on how the incident occurred, the learned State Attorney averred that the evidence given by the victim (PW1) on page 10 was sufficient to convict the appellant and no other reasons. The presence of PW2 was to testify the age of the victim and how the appellant was arrested. Buttressing his stance, the learned State Attorney referred this court to the case of Emmanuel Kibona and Another vs. Republic, 1995 TLR. 241, in which the Court held that the evidence of the mother is more reliable on age. Although the appellant explained that he had a conflict with the mother, he failed to show how the case was framed against him. Lastly, the learned State Attorney asserted that the appellant was convicted based on the evidence of the victim as stated in various cases that the best evidence of rape comes from

the victim herself. 2 After thorough consideration of submissions from both sides and going through the records of this appeal; what is left of me is to determine whether the appeal is meritorious. Primarily, this court finds it pertinent to restate the cardinal principle of our law that the burden is on the prosecution to prove its case, no duty is cast on the accused person to prove his innocence *John Makune vs. Republic* (1986) TLR 44. The appellant's complaint is premised on the ground that the case was not proved against him beyond reasonable doubt. The testimonies of both PW1 and PW2 avail that PW1 (the victim) was watching television at one EBLA's home when the appellant came and told her to go and buy samosa "sambusa", and actually escorted her to one woman "mama" who sells samosa and after that, he took her to his home where he had carnal knowledge of her. It was also PW2's testimony that her neighbour informed her that the victim was sent to buy samosa for him. However, according to the evidence of the witnesses these people were never brought to testify before the trial Court. It is the settled principle that *Mashimba Dotto @ Lukubaniya v. Republic*, Criminal Appeal No. 317 of 2013 and *CRDB Bank PLC v. Africhick Hatchers Ltd & Another*, High Court Commercial Case No. 97 of 2017, In these two cases, it was held that, "Where a party fails to call a material witness without any justification, the court should draw an adverse inference against the party who failed to do so". In the absence of evidence of both the woman who sold samosa and the neighbour who saw the victim being sent by the appellant makes me draw an adverse inference against the prosecution case for failure to bring in 3 evidence of these witnesses who were material to contradict the appellant's defence. Failure to arraign them in the witness dock denied the appellant an opportunity to cross-examine them on the fact which would have assisted the trial court in determining the real scenario of the matter of whether or not the victim and the appellant bought samosa as testified by PW1 and PW2. Likewise, as held in the case of *Aziz Abdalla vs. Republic*, [1991] T.L.R 71, the court speaking on the fate of the failure of the party to call a material witness held that; "The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, can testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution." I find that the woman who sold samosa was a material witness and failure to call her left doubt to the prosecution case. I am aware that under section 143 of the Evidence Act, Cap. 6 [R.E 2019] the prosecution is not under any legal obligation to call every witness to testify but may choose only those whom they think suffice to prove their case. It is however the law that the prosecution cannot take refuge under such provision to avoid calling the material witnesses. This is the position in various cases including that of *Samwel Japhet Kahaya versus Republic*, Criminal Appeal No. 40 of 2017 in which the Court of Appeal of Tanzania at Arusha held; 4 "Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since if a party to a case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act". The testimonies of PW1 and PW2 also contradict each other as PW1 stated that after leaving the appellant's home, she returned home and her mother asked her where she was, but on the other hand the mother, PW2 testified that after being told that the victim had left with the appellant, she went to the appellant's home and flashed a

torch then she saw the victim running and she followed her and found her at home. It is a principle of law that where there are inconsistencies, the Court must consider them and determine whether they are minor not affecting the prosecution case or they go to the root of the matter. That was said by the Court in the case of Sahoba Benjuda vs. The Republic, Criminal Appeal No.96 of 1989, it was held that: - "Contradiction in the evidence of a witness's effects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching 9on the particular point unless it is supported by some other evidence.'1 (emphasize is mine) In the case at hand, failure to arraign the material witnesses and the inconsistencies found in the witnesses' evidence brings doubt to the prosecution's case. Also, the fact PW3 the doctor testified that he found the victim, without virgin, and the PF3 which was admitted as exhibit "PI" indicates that there 5 were no spermatozoa despite that the vagina was open and the child has signs of vagina penetration with candidiasis. It is my considered view that the report itself does not give the answer whether she was raped or not, since it states that there is a sign of penetration. Since the PF3 also indicates that the victim had candidiasis then if she was raped by the appellant, the appellant would have been scientifically examined to find out whether he had candidiasis and hence transferred it to the victim after raping her. To that effect, with the above-explained shortcomings, I find that the prosecution case against the appellant was not proved beyond reasonable doubt. I therefore quash the conviction and set aside the sentence meted against him. Let the appellant be released from custody unless otherwise lawfully held. Order accordingly. A. BAHATI SALEMA JUDGE 29/9/2023 Court: Judgment delivered in presence of Ms. Wivina Rwebangira for Republic learned State Attorney and accused in person. A. BAHATI SALEMA JUDGE 29/9/2023 6 Right of Appeal fully explained. A. BAHATI SALEMA JUDGE 29/9/2023 7

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