

TANZANIA / JUDGMENT

Sitta Magembe Jely

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The Judiciary of Tanzania IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
SHINYANGA CASE REFERENCE NO. 202411142000032482 SITA MAGEME JELLY

..... APPELLANT Versus REPUBLIC

.....RESPONDENT (Originating from the Decision of
the District Court of Meatu District Court at Mwanhunzi) (Hon. M.M. Mtemi - SRM) Dated the
14th November, 2023 in Criminal Case No. 64 of 2023

JUDGMENT

6th & 27 th February 2025. F.H. MAHIMBALI, J The appellant, 27yrs old man has been convicted by the District Court of Meatu on a statutory rape against a girl of 14 years old and accordingly sentenced to serve a minimum custodial sentence of 30 years' imprisonment. Undaunted with both conviction and sentence, the appellant has preferred this appeal armed with a total of six grounds of appeal, namely: 1

1. THAT; the whole of the trial court proceedings were vitiated with very serious procedural irregularities leading to the miscarriages of justice.
2. THAT: the evidence of PW1 was wrongly admitted as evidence, not fully established well as how they conducted the translation vice versa since the victim was a dumb.
3. THAT, the learned trial court Magistrate erred in law and facts in totally misapprehending the nature and quality of the prosecution evidence against the appellant which did not prove the charge beyond reasonable doubt.
4. THAT, the learned trial court Magistrate erred in law and facts in acting on the unsworn evidence of the prosecution witnesses contrary to section 198 (1) of the Criminal Procedure Act (Cap 20 RE 2019) and inconclusive close relative evidence without warning herself of the danger of adhering to such evidence.
5. THAT, the trial court erred in law and fact in convicting the Appellants based on weak and contradictory evidence. 2

6. THAT; my Lord, the prosecution did not prove their case beyond reasonable doubt During the hearing of the appeal, the appellant was self-represented whereas the respondent who resisted the appeal, was represented by Mr. Kadata, learned state attorney. Submitting in support of his appeal, the appellant had nothing material to argue but just humbly prayed that his grounds of appeal be adopted by the court to form part of his appeal submission. In addition, he submitted that PW1 who is the victim girl, being not a reliable witness. He challenged her evidence on the aspect that if there was blood bleed by the victim, why was there no such evidence before the court. Further, he raised a new issue that he being HIV positive and that there were bruises, it was expected that there should have been transmission of the said HIV to the victim girl. With PW2 and PW4's testimonies, he questioned it as it is unreasonable for one to be denied assistance by that Samaritan. He concluded his submission by saying that he was just wrongly implicated in this matter and thus prayed for the court's indulgence of acquitting him. 3 Opposing the appeal, Mr. Kadata argued that the appeal is of no merit for this court's consideration. In his submission, he condensed the 3 rd, 5th and 6th grounds and argued them jointly as they all boil into one main ground that the evidence of the case did not establish the offence charged. The other three grounds of appeal, he argued them separately in the order. With the first ground of appeal that there were procedural irregularities, Mr. Kadata replied that in his digest to the trial court's proceedings, he has not been able to establish any procedural irregularity on the face of record as raised and that the appellant has not been able to clarify any of such irregularity. However, this being the first appellate court, he invited this court to scrutinize itself the whole trial court's proceedings and satisfy itself if there was any of that procedural irregularity as claimed. These powers of the court can be discerned as directed by the Court of Appeal in the case of Wolde Kaler and 2 Others V. Rep, Criminal Appeal 686 of 2020 at page 7 that the first appellate court has all the powers of entering into the shoes of the trial court and scrutinize the proceedings and evidence thereof so as to reach its own findings as per law. 4 On the second ground of appeal, he submitted that the same is weightless, and that this court should not accord it with any weight as it is not true that PW1's testimony was adduced without an aid of an interpreter. He clarified that the trial court's proceedings, is vividly clear that the sign language expert was involved to translate from the victim's testimony to the Court and appellant and vice versa. He added that the said interpreter was recorded as being Shadrack Kileo - teacher. The records also establish that the said translator had taken oath prior to the assumption of the said duty. Thus, this ground of appeal be disregarded as well. With the 3rd, 5th and 6th grounds of appeal, argued jointly, Mr. Kadata submitted that the message embodied therein is one, that the prosecution failed to establish the charges against him beyond reasonable doubt as per law. He disputed this assertion as the prosecution had established beyond reasonable doubt that the appellant did commit rape. He clarified that, as per section 130(1) (2)(e) of the Penal Code, in establishing the offence of rape, the prosecution was duty bound to establish three things: age of the victim, penetration and that the appellant did commit the said offence. 5 With age, two witnesses had established this ingredient: PW1 and PW2 (the Victim and the parent). The records are clear that PW1 had stated being 14 years old as born in 2009 which is

corroborated by PW2's evidence that the victim is her daughter born on 21st September 2009 and tendered birth certificate of the victim girl - P1 exhibit). Thus, as per records available, until the date of giving her testimony in court, she was still a minor of 14 years old and 19 days. With penetration ingredient, he submitted that the testimony of PW1 (victim) which was corroborated by the testimony of PW3 (Examining doctor

- exhibit P2) who had well established that the victim was carnally known and had her vagina bruised and hymen perforated and recovered some sperms mixed with blood stains. Mr. Kadata was of the view that, this was the reliable testimony from a competent person. In addition, PW4 had witnessed the manner she saw the appellant at fragrento delicto knowing the victim carnally. Since this PW4 had stated all, how the appellant was inserting his penis into the victim's vagina, in law, that was nothing but corroboration of the fact that there was penetration of the appellant's male organ into the victim's vagina. 6 On the third ingredient whether the appellant was the one who did the said act, Mr. Kadata was of the firm view that PW1 almost said it all in her testimony and she also identified the said appellant at dock. Additionally, there was PW4 who was the eye witness and told the court how she had seen him knowing the victim carnally and she too did dock identification. Furthermore, Mr. Kadata submitted that the appellant neither in his defense nor in cross examination had been able to shake any of prosecution's witnesses (PW1 and PW4). Thus, failure to cross-examine the PW1 makes the prosecution's case remain unchallenged. Assessing all the prosecution's case, there was nothing of contradiction encountered. And if any, then it is so minor that does not affect the root of the case. To cement his submission, made implored this court to be guided by the case of Mohamed Said Matumla V. Rep, [1995] TLR 03. With the fourth ground of appeal, that there was unsworn evidence in record, he pondered it as being bankrupt in merit since all of the prosecution's witnesses seemed to have taken the oath before they had given their testimonies. On the fact that there was inconclusive evidence of relatives, Mr. Kadata submitted that out of the five witnesses, only PW2 was the victim's father, the rest were non- related. Even if the PW2' evidence is 7 disregarded, yet the remaining evidence is intact and incriminating against the appellant. With this submission, Mr. Kadata concluded that, the issue raised by the appellant that he is HIV positive is a new fact and an afterthought and has just been raised today in which was not raised during trial. Having said all this, he humbly prayed that the appeal be dismissed for want of merit. In winding up his appeal, the appellant had nothing material to add, but just maintained that his grounds of appeal are destructive to the trial court's findings and thus reiterate them all. He prayed that this Court not to hesitate acquitting him as he is innocent of the charges. Having heard the submissions from both parties, the important question this Court is going to determine is whether the appeal is brought with sufficient cause to warrant it being allowed. In arriving at that end, as per grounds of appeal preferred, two issues will be discussed: firstly, whether there are legal issues involved in the proceedings by the trial court. Secondly, is on question of fact, whether the evidence in record suffices proof of the case beyond reasonable doubt. 8 Having heard the submissions from both parties, it is now high time to determine this appeal, and the crucial question to ask is whether the appeal is

brought with sufficient cause for this court to interfere with the trial court's findings. This being a criminal charge, it is the trite law that the prosecution in the Common wealth jurisdictions (Tanzania inclusive) is placed with a heavier burden to prove their case than that of the accused. See Mohamed Saidi Matela V. Rep, (1995) T.L.R 3 and John Makolobela & 20Others V. Rep, (2002)T.L.R 296. See also Joseph John Makune vs. Republic [1986] TLR 44 at page 49 and Mohamed Haruna@ Mtupeni & Another v Republic, Criminal Appeal No. 25 of 2007. The first long-established principle in criminal justice is that of onus of proof in criminal cases, that the accused committed the offence for which he is charged with is always on the side of the prosecution and not on the accused person. This is reflected under Section 110 and Section 112 of the Evidence Act Cap.6 [R.E 2022] (The evidence Act). Secondly, is the principle that the proof of the said charge is beyond reasonable doubt (See section 3(2) (a) of the Tanzania Evidence Act, Cap 6. 9 On the legal aspect, the appellant has posed two issues: procedural irregularity and non-translation of the victim's evidence – dumb witness. On the issue of procedural irregularity, I have followed the whole trial court's records, I have found none. The appellant having failed to clarify or make elaboration in court on the said procedural irregularity, I have equally failed to find any relevant procedural irregularity in it. On the question of interpreter, the trial court's proceedings reveal that the victim girl being a dumb person. In her testimony before the court, was aided by a dully sworn interpreter as well submitted by Mr. Kadata, learned state attorney that the said interpreter is recorded being Shadrack Kileo – teacher whose proceedings is dated 10th October 2023 is very clear how both the PW1 – victim girl (dumb witness) and the said interpreter were first sworn before their testimonies were recorded and formed court's records. The requirement of the interpreter to the accused who does not understand the evidence given in a language not understood by him is governed by section 211(1) of the CPA. The said section stipulates as follows: 10 "211(1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language understood by him." The above cited provision makes a mandatory requirement for the accused to whom it appears to the court that he does not understand the evidence given in a language not understandable to him to be provided with an interpreter who will assist him/her to understand the proceedings of his case in the language he understands. The provisions of section 211 (1) of the CPA were interpreted in the case of Dastan Makwaya and Another versus Republic, Criminal Appeal No. 179 of 2017 (unreported), where the Court stated that: "Section 211(1) o f the CPA requires that whenever it appears an accused person does not understand the language spoken during the proceedings of the case, an accused person should be provided with an interpreter so as to enable him understand the proceedings of his case" 11 The omission not to comply with the requirements o f section 211(1) of the CPA renders the proceedings of the case null and void. See also Joachim Ikwechukwu Ike versus Republic, Criminal Appeal No. 272 of 2016 (unreported) while citing the case of Mpemba Mponeja versus Republic, Criminal Appeal No, 256 of 2009 (unreported) where it was observed that: "We have perused the record and noted with concern that at times an interpreter was provided and at times not We consider this to be fundamental breach of the appellant's right to understand and follow up

proceedings of the case against him. It was a fatal omission." See also *Lekani Lokondorotu and Another versus Republic*, Criminal Appeal No. 338 of 2015 (unreported). In the current case, that is not the situation. Thus, the appellant's contention that there was a procedural irregularity stands unfounded. The issues of law in this appeal arise from ingredients of the offence of rape (contrary to sections 130 (1), (2) (e), and 131 (1) of the Penal Code) for which the trial court convicted the appellant: 12 130.-(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 of the following descriptions: -(a) - (d)
- (e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man. That the charge was not established beyond reasonable doubt, is a question of fact. It being a statutory rape, it is a strict liability offence in (*See Chaba Shelembe vs Republic* (Criminal Appeal No. 658 of 2021) [2024] TZCA 988 (25 October 2024) which the prosecution is only duty bound to establish three things: age of the victim (being below 18 yrs old), fact of penetration and thirdly that the appellant is the one responsible. All these have been clearly established by PW1, PW2, PW3 and PW4's testimony in which I have no any slight hesitation to disbelieve it. As the victim girl (PW1) had clearly established how she was raped by the appellant and that the same was witnessed by PW4, the victim being 14 13 yrs old (PW2) and that she was carnally known as her vagina bruised and found with remains of recent male spermatozoa mixed with blood stains, suggests nothing but corroboration that the victim girl was carnally known as testified by the victim herself, PW3 and PW4. By the way, the best evidence in sexual offences comes the victim herself. See *Seleman Makumba vs. Republic*, Criminal Appeal 94 OF 1999 (unreported) to the effect that: "True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. In the case under consideration the victim -PW 1- said the appellant inserted his male organ into her female organ. That was penetration." All this said and considered, I find this appeal being brought without any sufficient cause and it is hereby dismissed for want of merits. Conviction and sentence meted out by the trial court are hereby upheld. Right to a further appeal fully explained to any aggrieved party. DATED at SHINYANGA this 27th February, 2025. 14 F.H. Mahimbali Judge 15

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