

TANZANIA / JUDGMENT

SURU MOHAMED HATIBU Vs

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IN THE HIGH COURT OF TANZANIA (DODOMA SUB REGISTRY) AT DODOMA DC CRIMINAL
APPEAL NO. 6232 OF 2024 (Arising from the decision of the District Court of Kondoa at Kondoa
dated 22/11/2023 in Criminal Case No. 63 of 2021 before Hon. F.A. Kahamba, SRM) SURU
MOHAMED HATIBU..... APPELLANT Versus REPUBLIC
..... RESPONDENT

JUDGMENT

Date of last order: 22nd July, 2024. Date of Judgment: 09th August, 2024. E.E. KAKOLAKI, J. The appellant herein who was charged with the offence of Rape; contrary to sections 130(1)(a) and 131(1) of the Penal Code, [Cap. 16 R.E 2022], found guilty as charged, convicted and sentenced to twenty (20) years imprisonment by the District Court of Kondoa in its decision handed down on 22 nd November, 2023, is discontented with the decision hence challenging it by way of appeal. He has expressed his grievances in five grounds of appeal going thus:

1. That the learned trial magistrate erred both in fact and law when ruled the prosecution proved the offence of rape against the appellant beyond reasonable doubt.
2. That, the learned trial magistrate erred both in fact and law when ruled out that the PF3 produced during the trial was sufficient enough to convict the appellant. 1
3. That, the learned trial magistrate erred both in fact and law when ruled that the age of the victim of rape was proved before the trial court.
4. That, the proceedings and judgment of the court is tainted with illegality.
5. That, in totality the appellant defence was not considered by the trial court. It was prosecution's case that, the appellant on 21/09/2023 at Kiteo village within Kondoa District in Dodoma Region, did have sexual intercourse with the victim (PW1), a girl of 15 years of age. That, on the fateful date at about 15.00 hours the appellant found the victim and her two fellow pupils within the school premises before he gave her Tshs. 5,000 and asked her to buy cigarettes for him at the nearest shop of Nkosi whereby she found the same closed. On returning back to hand over the money to him could not find the appellant at the place had left him instead had gone to valley (korongoni) where she decided to follow him. It is alleged, that is where the appellant took advantage of being alone and proceeded to undress

her while stripping off his clothes and started raping her before he was found on top of her by the victim's fellow pupils PW2 and another and took to his heels, the result of which the matter was reported to their teacher one Masenga (PW5) who summoned the victim's mother (PW3) and notified her. It is said, PW3 confirmed that PW1 was raped after inspecting her and asked her not to wash her vagina until the next day when she was taken to Pahi Dispensary and 2 attended by Dr. Said (PW4) who found sperms, blood and bruises in her vagina hence conclusion that she was raped as also exhibited in the PF3 filled by him and admitted as exhibit P1. The appellant was arrested and indicted before the District Court of Kondoa in Criminal case No. 29 of 2023 facing the above mentioned charge, which charge he returned the plea of not guilty when placed on his shoulders while raising a defence of alibi. Following his denial of accusations levelled in his head, the prosecution lined six (6) witnesses who were the victim (PW1), victim's classmate (PW2), victim's mother (PW3), her teacher (PW5), the doctor who attended her (PW4) and the investigator (PW6) while relying on a PF3 exhibit P1. On his side the appellant testified as DW1 and called his uncle (DW2) to corroborate his defence of alibi without any exhibit to tender. At the hearing of his appeal the appellant hired the services of Mr. Denis Odhiambo, learned advocate while the respondent represented by Ms. Rachel Cosmas, learned State Attorney and both parties were heard viva voce. Addressing the Court on the grounds of appeal Mr. Odhiambo, prayed to abandon the third ground and argue the rest on merit. On the first ground it was his contention that, the prosecution failed to prove the case against the appellant beyond reasonable doubt as the evidence adduced left a lot of doubts and was full of contradictions. While appreciating the settled principle as enunciated in the case of Selemani Makumba Vs. R, (2006) TLR 379, that the best evidence in sexual offences comes from the victim, he stressed 3 the same must be reliable as held in the case of Hamis Halfan Dauda Vs. R, Criminal Appeal No. 231 of 2019 (CAT-unreported) which is referred in the case of Barnaba Barnaba Vs. R, DC Criminal Appeal No. 39710 of 2023 (HC- unreported DOM) at page 12. According to him victim's evidence (PW1) was doubtful as she failed to mention the appellant's name whom she alleged raped her despite of claiming to be known to her before nor was it mentioned by PW2 and PW3 in their testimonies. And that, her evidence that, she reported the incident to teacher Masenga (PW5) contradicts the evidence PW2 (fellow pupil) and PW5 herself who said it was PW2 and her colleague who reported the same to her. He added that, PW1 never testified to have bruised or bled or remain with sperms but PW5 who called victim's mother (PW3) who allegedly observed said the victim (PW1) to the contrary told the Court that, PW3 confirmed to her that PW1 was raped as her underpants had sperms and blood, the evidence which created even more doubts. Evidence of the doctor (PW4) who examined PW1 could not also be spared by Mr. Odhiambo who attacked it accusing him for not explaining the cause of sperms, bruises and blood allegedly found in the victim's vagina as he examined her at 11.00 hours on the following day which is 22 hours after the alleged raped which as per the evidence was perpetrated at 15.00 hours, the discrepancies which he submitted proved that the offence was not proved beyond reasonable doubt. In response Ms. Cosmas contested the merits of the appeal and in particular first ground of appeal contending that, the prosecution case was proved 4 beyond

reasonable doubt against the appellant. It was her submission that, the provisions of sections 130(1) and (2)(e) and 131 (1) of the Penal Code [Cap. 16 R.E 2022], in which the appellant was charged under provide for three elements in proving the offence of rape as the prosecution has to prove age of the victim, that there was penetration and that, is it the accused person who perpetrated the offence. On the age she argued, PW1 at page 5 of the proceedings proved to the Court that she was 15 year old, the evidence which was corroborated by her mother PW3 who confirmed that she was 15 years old. To buttress her submission she referred the Court to the case of Isaya Renatus Vs. R, Criminal Appeal No. 542 of 2015 (CAT-unreported) where the Court of Appeal observed that, age can be proved by victim, her parent, relative, medical practitioner and when available birth certificate. On the second ingredient she voiced, evidence on penetration was rendered by Dr. Omary Mhina Said (PW4), who examined PW1 and found that she had blood, bruises and sperms in her vagina. And further that, his finger could easily penetrate in her vagina as PW1 also had pains during examination. According to her, since PW4's finger was penetrating easily and PW1 had lost her hymen plus the contents of PF3 (Exh. P1) corroborating his evidence, it is patent clear that penetration of PW1 in her vagina was proved. On the third ingredient as to who committed the offence Ms. Cosmas submitted that, it was the appellant. She stressed it was so as the trial court considered his defence and found it not to have shaken prosecution case. She however invited the Court 5 to re-evaluate evidence should it find that his defence was not considered and come up with its own findings for having such powers as it was held in the case of Staba Mswaki Vs. R, Criminal Appeal No. 401 of 2019 (CAT - unreported). In view of that submission the Court was prayed to dismiss the ground of appeal and the entire appeal for being devoid of merit. In his rejoinder Mr. Odhiambo, reiterated his submission in chief and had almost nothing new to add apart from insisting that, PW3 was duty bound to mention the birth date of PW1 to prove her age and that, PW4 was also bound to state or explain the cause of bruises and blood in PW1's vagina. He therefore pressed the Court to allow the appeal by quashing appellant's conviction, set aside his sentence and compensation order while ordering for his release from prison. I have taken considerable time to visit the record and the impugned judgment of the District Court of Kondoa handed down on 22/11/2023 as well as considering the contending submissions by the parties with thirsty of satisfying myself as to the merit of appellant's complaint that, the prosecution failed to prove its case beyond reasonable doubt. Now the issue for determination is whether the trial court was justified to find the prosecution case was proved against the appellant beyond reasonable doubt which is a standard of proof set by the law under section 3(2)(a) of the Evidence Act [Cap. 6 R.E 2022]. See also the cases of Mohamed Said Matula Vs. R 6

[1995] T.L.R. 3 (CA) and Nathaniel Alphonse Mapunda and Benjamin Mapunda Vs. R [2006] TLR 395. As correctly stated by Ms. Cosmas this Court is seized with powers of rehearing the case at this stage of appeal being the first appellate court and come up with its own findings, more so where it is established there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of

the evidence. See the cases of Staba Mswaki (supra), Demaay Daati Vs. Republic, Criminal Appeal No. 80 of 1994, Siza Patrice Vs. R, Criminal Appeal No. 19 of 2010 and Kaimu Said Vs. R, Criminal Appeal No. 391 of 2019 (both CAT- unreported). In this case since the complaint is general that prosecution case was not proved beyond reasonable doubt, I find it imperative to invoke such powers and proceed to re-evaluate the evidence and see whether there was misdirection and non-direction on the evidence or the lower court misapprehended the substance, nature and quality of the evidence. As submitted by Ms. Cosmas, the submission which I embrace for the offence of Rape to be proved under section 130(1) and (2)(e) and 131 (1) of the Penal Code, in which the charge against the appellant was preferred under, the prosecution ought to prove the following, one, victim's age, two, penetration into her female sexual organ and third that, it is the accused person who perpetrated the offence. To start with the first element of age Mr. Odhiambo 7 says it was not established as witnesses ought to have mentioned specifically the date and month in which PW1 was born while Ms. Cosmas relying on the celebrated case of Isaya Renatus (supra) maintained that it was proved by PW1 herself and her mother (PW3) when specified that, she was 15 years also. I agree with Ms. Cosmas that, PW1's age was proved through her evidence corroborated by that of PW3 (her mother) and the doctor (PW4) when stated she was 15 years old as the settled law as spelt in the case of Isaya Renatus (supra) is that, age is provable by evidence from the victim, parent, relative, medical practitioner or birth certificate if available. See also the case of Adrea Francis Vs. R, Criminal Appeal No. 173 of 2014 (CAT- unreported). Such evidence on PW1's age it is noted was never questioned by the appellant during cross-examination of three witnesses above mentioned hence admission of what was stated by them as it was also held in the cases of Sebastian Michael & Another Vs. The Director of Public Prosecutions, Criminal Appeal No. 145 of 2018 and Jaspini s/o Daniel @Sizakwe Vs. DPP, Criminal No. 519 of 2019 and Hatari Masharubu @Babu Ayubu Vs. R, Criminal appeal No. 590 of 2017[2021]TZCA 41 www.tanzlii.org/tz/judgment. In Sebastian Michael & Another (supra) the Court of Appeal of Tanzania stated thus: It is trite law that failure to cross examine a witness on material evidence amounts to acceptance of it. 8 The contention by Mr. Odhiambo that, PW1 and PW3 ought to have specified PW1's birth date and month, I find does not have any legal backing as what was important to be established to the Court is victim's age that she was under 18 years old which in this case was satisfactorily established. Had it been contested by the appellant that she was above 18 years old when raped her, I find that is when proof of PW1's birth date and month would be called into question, which is not the case here. Next for determination is whether the victim had her female organ penetrated in which Mr. Odhiambo complains the element was not proved as in her evidence (PW1) never stated to have sperms, bruises and blood, given the settled principle that, best evidence in sexual offences comes from the victim. It is true as PW1 evidence leads she never mentioned to have left with sperms, bruises and blood in her vagina after being raped. However, I do not buy Mr. Odhiambo's proposition that, in absence of such evidence the element of penetration was never proved. I so disagree with him for three good reasons, one that, the law under section 130(4) of the Penal Code is very clear that, penetration

however slight is sufficient to constitute the sexual intercourse to prove the offence. Second, her failure to mention presence of those three signs in her female organ does not necessarily render incompetent other evidence such as evidence of the doctor (PW4) who examined her as well as the PF3 exhibit P1, proving that the victim's vagina was found with sperms, blood and bruises. As to the presence of sperms in PW1's vagina 9 despite of examination being conducted after 22 hours of the alleged rape, explanation was given by PW3 who stated she asked PW1 not to wash her private parts until when examined and when cross-examined by the appellant PW4 confirmed that, it was possible for the victim to remain with sperms after being rape. Third, there is PW1's evidence as obtained at page 6 of the typed proceedings to the effect that, a penis was penetrated into her vagina. To appreciate what the witness told the trial Court I find it sweet to reproduce the excerpt from her version at page 6 of the typed proceedings: "I followed him at the valley but after I gave him money he started to undress me after that he undressed his clothes and took out his penis which he penetrated into my vagina." What is gathered from the above PW1's evidence is an unambiguous and uncontroverted version that a penis was penetrated into her vagina which in terms of the provisions of 130(4) of the Penal Code sufficiently proves sexual intercourse. This Court is therefore satisfied that, the element of penetration was proved beyond reasonable doubt hence barren of any ground to fault the trial court on such findings. Lastly is the third element as to whether it is the appellant who committed the offence or raped the victim (PW1). Mr. Odhiambo, laments that the victim (PW1) never disclosed the name of the person who raped her as there was contradiction between her evidence and that of PW5 on that fact, hence the element remained unproved while Ms. Cosmas submitting that it was the 10 appellant who raped the victim after the trial court had considered his defence and dismiss it. Normally the best evidence as to who committed the offence in sexual offence as correctly submitted by Mr. Odhiambo, comes from the victim herself or himself, as well spelt in the cases of Selemani Makumba (*supra*) and Hamisi Halfan Dauda (*supra*), the reason being that she/he is the one who encounters the abuser face to face hence able to tell what happened, how did it happen and who caused it to happen. However, the law demands that such evidence of victim should not be accepted and believed in wholesale as it should be revisited to remove the danger of a witness to utilize the opportunity to victimize innocent person as it was held in the case of Hamisi Halfan Dauda (*supra*), where the Court of Appeal had the following observation to make: "We are alive to the settled position of the law that the best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed in wholesale. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s)." (Emphasis is mine). Applying the above cited principle of law to the circumstances of this case I find the trial court did not discharge its duty properly for considering reliability of the victim's evidence before concluding that, it was the appellant who had actually raped her. I hold that view as throughout her evidence apart from 11 claiming that she was known to the appellant before as her neighbour PW1 never mentioned his name in court nor gave his description to anybody including her

mother (PW3), her teacher (PW5) and even the police officer when the matter was reported at Police before she rendered her testimony in Court, leave alone the fact that neither her (PW1) nor any other prosecution witness identified the appellant in court as perpetrator of the alleged rape. Similarly PW2 who alleged together with other classmate found the appellant in flagrante delicto, when said he was found on top of PW1 never mentioned his name nor gave his descriptions to anybody part from PW5 who asserts to have been informed of the rapist name by PW2 in company of her other classmate when specifically mention him to be one Suru, though such fact is not supported by PW2 in her evidence. While I am alive to the principle that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reason not believing a witness as held in the cases of Aloyce Maridadi Vs. Republic, Criminal Appeal No. 208 of 2016 (CAT-unreported) and the trite law that, the privilege of assessing the demeanor of the witness is not in the domain of the appellate court rather resides in the trial court which had the advantage of seeing and observing any such witness testify as stated in the cases of Rashid Issa Vs. R, Criminal Appeal No. 280 of 2010 and Salum Ally Vs. R, Criminal Appeal No. 106 of 2013 (CAT-unreported), I believe in the circumstances of this case 12 there is a need to re-assess credibility of evidence of PW1 and PW2 who claimed to have identified the appellant. It was held in the case of Both PW1 and PW2 in their evidence were recorded to have told the Court that, they were known to the appellant before the incident of rape and that on the fateful day when the appellant was sending PW1 to buy him cigarette both were together with their other colleague before PW1 went to the valley to return appellant's money after she found the shop closed where the later raped her. And that, later on PW2 and her colleague who was in their company before followed PW1 to the valley where they found the appellant on top of PW1 naked before he took to his heels after seeing them. Both PW1 and PW2 claim in their evidence to have reported the incident to their teacher PW5 but in her testimony PW5 says it was PW2 and the other colleague and not PW1 who mentioned the appellant's name to her as Suru. If this Court is to believe PW5's story that it is PW2 and the other child who mentioned the rapist by name then it was expected of them to so mention his name(s) to the court and to the police officer whom I believe recorded their statement before giving their testimonies in Court so that the investigator (PW6) would be in position to tell the court on why arrest of the appellant and how was he arrested. It is settled law that ability of a witness to name a suspect at the earliest opportunity is an assurance of his reliability, as in the same way unexplained delay or complete failure to do so must bring a prudent court to enquiry. See the case of Marwa Wangiti Mwita and Another Vs. R, 13

[2002] TLR 39. In this case since PW1 and PW2 claimed to have identified the appellant whom they use to see before but failed to mention his names or give his descriptions to either PW3 or the police officer when reporting the matter and given the fact that they even failed to identify him in court without assigning any reason, I hold their reliability on that issue of identification of rapist remain questionable. That aside, when cross-examined as to why did she fail to report the incident on 21/09/2023 when allegedly was committed and

waited till next day PW3 said and I quote: "We did not report you on the same day because the investigation was still on" With the above answers from PW3 without further explanation as what kind of investigation delayed the report of the matter and disclosure of rapist name to police at the earliest possible time, one would confirm without scintilla of doubt that, the alleged perpetrator of the alleged rape was not known yet on the incident day, that is why the incident was reported on the next day. As there is no evidence from the prosecution through PW6 on how the appellant was arrested and what moved his arrest, I find PW1 and PW2's credibility regarding identification of the rapist is shaken and therefore their evidence on that pertinent aspect ought not to have been believe and relied on by the trial court to convict the appellant. Had the trial court considered all those facts discussed above, I believed would not have arrived to conclusion 14 reached of convicting the appellant believing that was identified by PW1 and PW2 to be the perpetrator of the alleged rape. As appellant's identification remained questionable his defence of alibi I find ought to be believed by the trial court, in that on the 21/09/2023 was at his uncle's restaurant assisting him to attend his client until 15.40 hours when the two went to watch football match up to 19.00 hours the defence which was corroborated by DW2 (his uncle). I so view as Ms. Cosmas' submission that, the trial court proved it was the appellant who perpetrated the said rape after disregarding his defence is not premised on principles of law since the settled law is that, conviction will never base on weakness of defence case but rather strength of prosecution case since the accused person is under no duty to prove his innocence rather cast doubt on prosecution case. See the cases of Aburaham Daniel Vs. R, Criminal Appeal No. 6 of 2007 and Mohamed Haruna @ Mtupeni and Another, Criminal Appeal No. 259 of 2007 (Both CAT-unreported). In this matter since the prosecution failed to prove identity of the person who allegedly raped PW1, I find the third element was not established to the required standard of proof in criminal matters. In view of the above discussion and findings, I endorse it as meritorious the first ground of appeal in that, the prosecution failed to prove its case beyond reasonable doubt. As the ground is sufficient to dispose of the appeal I will not west court's time to dwell onto other grounds which exercise I find to be academic one. 15 In the end I find the appeal to be meritorious and proceed to allow the same. Appellant's conviction is therefore quashed and the sentence and compensation order imposed on him set aside. I hereby order his immediate release from prison unless otherwise lawfully held. It is so ordered. Dated at Dodoma this 09th August, 2024. E. E. KAKOLAKI JUGDE 09/08/2024. Court: The Judgment has been delivered at Dodoma today on 09 th day of August, 2024, in the presence of the Mr. Denis Othiambo, advocate for the appellant, the appellant in person, Ms. Mwilongo Tenge, State Attorney for the respondent and Ms. Veradina Matikila, Court clerk. Right of appeal explained. E. E. KAKOLAKI JUGDE 09/08/2024. 16

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