

TANZANIA / JUDGMENT

twinogone mwambela vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA fCORAM: NDIKA, J.A., SEHEL 3.A. And KENTE, J.A.^ CRIMINAL APPEAL NO. 388 OF 2018 TWINOGONE MWAMBELA.....APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Judgment of the Resident Magistrate's Court at Mbeya) (Mutaki -SRM-Extended Jurisdiction.) dated the 15th day of October, 2018 in Criminal Appeal No. 29 of 2018 JUDGMENT OF THE COURT 20th& 24th Sptember,2021 KENTE, JA.: This appeal emanates from the decision of the Court of the Resident Magistrate at Mbeya (Mutaki-SRM) (Ext. 1), in Criminal Appeal No. 29 of

2018. In that decision, the learned Senior Resident Magistrate dismissed the appeal by Twinogone Mwambela (henceforth the appellant) who was challenging the conviction and sentence to thirty years imprisonment imposed on him by the Rungwe District Court (at Tukuyu) which had convicted him of rape c/ss 130 (2) (c) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). The particulars of the offence alleged that, on 22nd June, 2017 at about 7.30 pm, the appellant had the carnal knowledge of a young girl aged twelve years. In concealment of her identify we shall hereinafter in this judgment refer to the said girl as PW1. The charged offence was alleged to have been committed at Ibhighi Village, within the District of Rungwe in Mbeya Region. Despite denial of the charge, upon a full trial, the appellant was convicted by the trial court and sentenced to the aforementioned mandatory custodial sentence. The appellant's appeal to the High Court which was later on transferred to the Resident Magistrate's Court and heard by a Senior Resident Magistrate with Extended Jurisdiction, was dismissed for lack of merit hence the present appeal. In the memorandum of appeal the appellant is faulting the first appellate court for allegedly:

1. Dismissing the appeal without considering the contradiction between the oral evidence of PW1 and Exhibit PI regarding the actual day on which PW1 was admitted to hospital.
2. Dismissing the appeal notwithstanding that the charge was not read and explained to the appellant.
3. Ignoring the appellant's defence and

4. Dismissing the appeal while the charged offence was not proved to the required standard. During the trial, the evidence led by the prosecution was briefly as follows. The appellant and PW1 were at the material time respectively living in the villages of Katumba and Ibhigi in Rungwe District, Mbeya Region. PW1 who was born in 2005 was living with her mother and grandmother and she was then a standard VII pupil at Ibhigi Primary School. On the day of the rape incident, at about 6.00 pm, the appellant allegedly went to PW1's home and told her that their neighbour one Zahara had asked her to go and collect his (Zahara's) money from his father who lived at Katumba village. PW1 hesitated for a while but she later on agreed to go after she was persuaded by the appellant. However, after they came to the house from where the money was supposed to be collected, the appellant allegedly told PW1 that, that was not the very place where the money was kept. Instead, he led her astray to the place where there were no houses and eventually undressed and raped her. After the incident, the appellant vanished leaving PW1 behind. After sometime, PW1 raised from agony and went back home where she informed her parents of what had befallen her. The incident was thereafter reported to the police at Tukuyu where PW1 was issued with a police form referring her to Tukuyu District Hospital for medical examination. A medical examination which was conducted by Aliko Mwakasole (PW5), a Clinical Officer revealed that PW1 had blood oozing from her private parts which were also perforated and had raw bruises. PW5 tendered a medical examination report and the same was admitted in evidence as exhibit PI. Following a report to the police, the appellant was pursued, arrested, and charged in court as aforesaid. During the trial, the appellant denied to have raped PW1. Without specifically telling the trial court whether or not he went to the home of PW1 on the day of the incident, he maintained that he was just arrested at Katumba Village and taken to court on a charge of rape. He then went on to challenge the evidence of PW1 and PW5 for allegedly being contradictory of each other. He also challenged the testimony of PW3 on the grounds that it was false evidence as he was a close relative of the complainant. With regard to the evidence of Hawa Kalundwa (PW2) who is the complainant's mother, the appellant told the trial court that, her evidence was nothing but a bundle of hearsay. However, the learned trial Magistrate was of the different view. He found the prosecution witnesses, particularly PW1 and PW5 credible. On the basis of their evidence, the appellant's defence was consequently rejected and he was convicted as earlier stated. In dismissing the appeal before him, Mutaki - Senior Resident Magistrate (Ext. Jur.), was equally satisfied that the appellant's guilt was proven to the hilt as having raped PW1 (the complainant) on the material day. He also credited PW1 for having mentioned the appellant when the earliest opportunity presented itself. Relying on *Selemani Makumba v. R* [2006] TLR 379, the learned Senior Resident Magistrate was convinced that, being the victim of the charged offence, PW1 had given evidence which was sufficient for him not to overturn the decision of the trial District Court. In the end, he dismissed the appeal before him for being unfounded. Before us in this appeal, the appellant appeared in person to argue his case while Mr. Basilius Namkambe, learned Senior State Attorney appeared for the respondent Republic. The appellant adopted his grounds of appeal and thereafter, he requested for the Senior State Attorney to submit in reply thereto after which he would make a rejoinder, in case of

necessity. On behalf of the Republic, Mr. Namkambe submitted in respect of the first ground of appeal that, the evidence of Hawa Kalundwa (PW2), the complainant's mother and PW3 who saw the appellant in the company of the complainant on one hand, and on another hand, the evidence of PW5 the doctor who attended the complainant was at one that, the incident occurred on 22nd June, 2017. The learned Senior State Attorney submitted that, the evidence of PW1 who told the trial court that the incident occurred on 21st June, 2017 might have been the result of a simple lapse of memory or ignorance given that she was still a child of tender age then aged twelve years. Assuming that there was such a contradiction between the evidence of PW1 and PW5, Mr. Namkambe maintained that, it was of the quality that would not reasonably be said to have introduced any doubt in the prosecution case and that, the alleged contradiction was considered and finally resolved by the first appellate court as reflected on page 40 of the record of appeal. The learned Senior State Attorney concluded his submission on the first ground by urging us to adopt a wholistic approach on this question and find that there was nothing material in the alleged contradictions. He prayed for the first ground of appeal to be dismissed on the account that it has no merit. Moving forward to the second ground in which the appellant is complaining that the charge was not read over and explained to him before the commencement of trial, Mr. Namkambe was diametrically opposed to the position taken by the appellant. He submitted that the charge was read over and explained to the appellant when he appeared for the first time before the trial court and that, in any event, it was not necessary for the appellant, subsequently thereafter, to be reminded of the charges facing him on every occasion when the case was called on either for hearing or for necessary orders. The learned Senior State Attorney referred us to the case of Kubezya John v. Republic, Criminal Appeal No. 488 of 2015 (unreported) in which, upon a similar complaint by the appellant, the Court took the view that, the initial plea taken by the appellant after the charge was substituted was enough and that, there was neither prejudice nor a miscarriage of justice that was occasioned by the failure or omission to take another plea before the witnesses for the prosecution testified. On the strength of what the Court observed in the above cited case, Mr. Namkambe prayed for the dismissal of the second ground of the appeal saying that it has no backup from the record of appeal. The third ground of appeal is the complaint by the appellant that his defence evidence was totally ignored. As to this complaint, Mr. Namkambe briefly submitted that, while it is true that the learned Senior Resident Magistrate of the first appellate court did not consider the appellant's defence version, the same was canvassed by the trial Magistrate and rejected, in view of the strength of the prosecution case. Taking into account that the appellant's defence evidence was essentially not ignored by the two courts below, the learned Senior State Attorney was of the view and he accordingly urged that the omission by the first appellate court was not fatal as to introduce any doubt in the prosecution case or to add credence to the appellant's generalised complaints. In the alternative, Mr. Namkambe submitted that, even if the first appellate court had considered the appellant's defence evidence, it would have come to the same conclusion as that of the trial court, that in the end, the prosecution case would still carry the day. Likewise, the learned State 8 Attorney implored us to dismiss the third ground

of appeal for being barren of merit. As for the final ground of appeal which is couched in general terms that the charged offence was not proven to the required standard, Mr. Namkambe was very brief. He submitted that, given the evidence on the record, the appellant's complaint is rather unfounded as his guilt was proven beyond doubt. All in all, the learned Senior State Attorney was of the view that, in their wholeness, the appellant's grounds of complaint were legally unfounded. He thus prayed for the dismissal of the appeal in its entirety. Starting with the first ground of appeal, we agree and it is correct that indeed, there was a contradiction regarding the date when the victim was admitted in hospital for medical examination and treatment and the date when the form requesting for her medical examination was issued by the police. While on her part, PW5 told the Court that she received the victim on 22nd June, 2017 at about 11.00 pm, the form requesting for the victim's examination which was issued by police (Exh. PI) is dated 23rd June, 2017. As if that was not bad enough, whereas the testimony of PW1 (at page 5 of the record) shows that the rape incident occurred on 21st 9 June, 2017 sometimes after 6.00 pm, the particulars of the offence given in the charge sheet were to the effect that the incident occurred on 22nd June, 2017 at about 7.30 pm. Going by the appellant's complaint in the first ground of appeal, it is apparent that he seems to suggest that the evidence of the prosecution witnesses regarding the actual date of the rape incident, was not worthy of belief. With due respect, we do not subscribe to the appellant's argument. The main issue before the trial court which was also considered and determined by the first appellate court is whether, on the 22nd June, 2017 at about 7.30 pm PW1 was raped and, if the answer to the above - posed question is in the affirmative, the follow up question would be on the identity of the culprit. Having resolved the first question in the affirmative, the two courts below proceeded to canvass the second question by making a concurrent finding of fact that the perpetrator of the charged offence was none other than the appellant. The two lower courts would not buy the appellant's story that he was just arrested at his home village for no apparent reason and subsequently charged with the said offence. Both the court of trial and the first appellate court arrived at the conclusion that the culprit was none other than the appellant after taking into account 10 mainly, the evidence of PW1 who was the victim and the only eye witness to the charged offence and PW5 a Clinical officer who examined PW1 on 22nd June, 2017 at about midnight and confirmed her complaints of having been raped on the material day. They also had in mind the evidence of PW3 who saw the appellant in the company of PW1 immediately before the occurrence of the rape incident. We are mindful that, whereas PW1 told the trial court that the rape incident occurred on 21st June, 2017, the particulars outlined in the charge alleged the 22nd June, 2017 to be the day of the said incident and yet, while PW5 told the trial court that she received and attended PW1 on 22nd June, 2017 the form requesting for her medical examination appears to have been issued by the police on 23rd June, 2017. However, we think that the above-stated discrepancies were, by any standards, in the minor category and that they did not go to the root of the matter. The main question before the first appellate court being whether or not PW1 was raped on 22nd June, 2017 and if she was raped then, by who, we are of the respectful view that, on the strength of the evidence led by PW1 and PW5 before the trial court, the learned Senior Resident Magistrate of the first appellate

court was fully entitled to hold the same view as that of the ii trial Magistrate that indeed the appellant's guilt had been proven beyond doubt. As for the appellant's complaint that there was a contradiction between the evidence of PW1 and PW2 and what was reflected on the medical examination report, we would but quote what we observed in Dickson Elia Nshambwa Shapwata & Another v. Republic, Criminal Appeal No. 92 of 2007 (unreported) that: "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter." In the abovesited case, the Court went on citing the learned authors of Sarkar, The Law of Evidence, 16th Edition, 2007 at page 48 thus:

11 Normal discrepancies in evidence are those which are , due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Courts have to label the category to which a discrepancy may be categorised. 12 While normal discrepancies do not corrode credibility of a parties' case, material discrepancies do." For our part, we go along with the insightful comments by the learned authors and, as correctly submitted by Mr. Namkambe, we find the discrepancies in the testimony of PW1 and PW5 not to have been corrosive to the prosecution case. Rather, the said were normal discrepancies which can be easily and justifiably explained away in the circumstance of this case. It seems that, whereas PW1 might have appeared to testify in court while she was still under the influence of shock and horror which resulted from the horrendous act of rape to which she was subjected; given her young age, both PW5 and the police might have acted under a mistake of fact wrongly indicating the 23rd June, 2017 as the date when the form requesting for medical examination of PW1 was issued while the 22nd June, 2017 was the date on which PW1 was subsequently examined by PW5. It is very elementary but important to note here that, dates do change at midnight. In the light of the foregoing observation, it occurs to us that, when the police issued PW1, with the form requesting for her medical examination, they might have been labouring under a 13 misapprehension that it was already past midnight hence the 23rd day of June, 2017 which appears on exhibits PI. All in all, we are of the view that the, discrepancies in the evidence of PW1 and PW5 were so minor as not to shake their basic account of what transpired on the material day which was the 22nd June, 2017. We therefore reject and dismiss the first ground of appeal. As for the second ground of appeal, with respect to the appellant, we are not in the least persuaded that the charge was not read and explained to him throughout the trial. The truth of the matter as borne out by the court record at pages 2 and 3 is that, the charge was read over and explained to him whereupon, he entered a plea of "not guilty" to the charged offence. The said plea was accordingly recorded by the learned trial Magistrate as required by law, after which the prosecution case commenced. In these circumstances, we are satisfied, as argued by Mr. Namkambe that, the appellant's complaint in the second ground of appeal that the charge was not read over and explained to him is devoid of merit. We accordingly dismiss it. 14 Next is the complaint by the appellant in the third ground of appeal that, his defence version was consigned into oblivion by the two lower courts. The

question before us therefore is whether or not the appellant's defence was considered. Without hesitation, we are in agreement with Mr. Namkambe that indeed, the learned Senior Resident Magistrate of the first appellate court did not take trouble to evaluate the appellant's defence evidence as against the prosecution evidence. However, we find that the appellant complaint in this regard to have no strong basis. A look at the judgment of the trial court on page 25 of the record, will show that, the appellant's defence version which is remarkable of its criticism of the prosecution evidence instead of raising and steering a formidable defence which would have probably placed him away from the scene of the crime, was in fact considered but rejected, correctly so in our opinion, by the learned trial Magistrate. It follows therefore that, if the first appellate court properly guided, had reconsidered the appellant's defence version, the overall results of the case would still be the same. For, we are of the view that, the evidence led by the prosecution before the trial court, was so watertight as to leave no reasonable doubt with regard to the appellant's guilt in this case. 15 In saying so, we are not shifting the burden of proof onto the appellant. Rather, we are alive to the position of the law that, an accused person in a criminal trial, can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence (see the case of Mwita and others v. Republic [1977] LRT. 54). But in this case, we are increasingly of the settled mind that, in the aftermath of the inculpatory evidence given by the prosecution witnesses laying blame at the appellant's feet, it does not hold water to argue today that his defence was not considered while, in the first place, he had not led any evidence worth of consideration by the court. Perhaps this provides the reason why the learned Senior Resident Magistrate on the first appeal, proceeded to determine the appeal before him, seemingly oblivious of the appellant's fragile and inconspicuous defence version. For, there having been no defence properly so called, the learned Senior Resident Magistrate was left with nothing to consider. His judgment therefore cannot be faulted. In view of what we have discussed so far, we are of the decided opinion that, the learned Senior Resident Magistrate on the first appeal, had properly considered the appeal before him and finally come to the 16 conclusion that it had no merit. Without recourse to the fourth and last ground of appeal in which the appellant is complaining that the charge against him was not proved beyond reasonable doubt, we are satisfied that the appellant's conviction and sentence by the trial court which was subsequently sustained by the first appellate court, was sound and so, his appeal is hereby dismissed. We order accordingly. DATED at MBEYA this 23rd day of September, 2021. G. A. M. NDIKA JUSTICE OF APPEAL B. M. A. SEHEL JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL The Judgment delivered on this 24th day September, 2021, in the presence of the appellant in person and Ms. Safi Kashindi Amani, learned State Attorney for the Respondent/Republic, is hereby certified as a true

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