

TANZANIA / JUDGMENT

CRIMINAL APPEAL NOUWESU YAHAYA NAJUMU NEWNEWNEW

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MTWARA SUB-REGISTRY AT
MTWARA CRIMINAL APPEAL NO 60 OF 2023 (Originating from Kilwa District Court at Kilwa
Masoko in Criminal Case No. 25 of 2022) UWESU YAHAYA NAJUMUAPPELLANT
VERSUS „v’ - THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 1Cf>: November 2023 .. Date of Judgment: 27th November 2023 ■ = . LALTAIKA, J,
The appellant herein UWESU YAHAYA NAJUMU was arraigned in the District Court of Kilwa at
Masoko charged with one count of Rape contrary to section 130(1) and (2) (e) and 131(1) of the
Penal Code Cap 16 RE 2022. ; ' It was alleged by the prosecution that on the 3rd day of March 2021
at Kilwa Masoko within Kilwa District in Lindi Region the appellant took the Page of the victim
XXD (a girl of 16 years name withheld) and stayed with her as his wife without the consent of her
parents. When the charge was read out and explained to the accused (now appellant) he pleaded
not guilty. This necessitated conducting of a full trial. Having been satisfied that the prosecution
had left no stone unturned in proving the case, the trial court convicted the appellant as charged
and sentenced him to serve 30 years in jail. -, is * Dissatisfied, the appellant has appealed to this
court on seven grounds. I chose not to reproduce them for reasons that will become apparent
soon. When the appeal was called for hearing, the appellant appeared in court under custody
while enjoying the legal services of Mr. Rainery Songea, learned Advocate. The respondent
Republic, on the other hand, appeared through Mr. Melchior Hurubano, learned State Attorney.
r1-. >: 'v. _ Mr. Songea stated that having gone through the grounds of appeal after receiving
instructions, he decided to consolidate them all under the '1 complaint that the case was not
proved beyond reasonable doubt. The learned Advocate proceeded to state that appellant was
arraigned and charged with two counts of abduction and rape. The prosecution Page Z of 11
tendered four exhibits which were all documentary. They also paraded six witnesses. The court
decided that the first count was not proved. It proceeded to convict the appellant on rape and
sentenced him to serve 15 years imprisonment term. Mr. Songea contended that none of the
exhibits were read out after being tendered, which, given that the appellant was tin represented,
warranted the expunging of these exhibits from the court record. He referenced the cases of
Robinson Mwanjisi arid 3 Others v. Republic TLR [2003] 218 and Godfrey Jonathan @ Kitomary v.

Republic [Criminal Appeal No. 237 of 2017, CAT Arusha) to support this position. Mr. Songea further cited the case of *Lukas Nyirenda Karikene v. Republic* (Criminal Appeal No. 81 of 2021, HCT Moshi), where my sister Madam Justice Simfukwe J. expunged all exhibits in a similar Scenario and urged the court to follow the law accordingly. . Turning to the main ground of appeal, which involved the proof of the case, Mr. Songea highlighted several doubts in the evidence, particularly in the testimonies of PW1, the victim, as recorded on pages 3 to 6 of the lower court's proceedings, and PW4, as well as DW3. He suggested that these Page 3 of 11 doubts indicated a potential fabrication of the case. He reminded the court of the position in *Mohamed Said v. Republic* (Criminal Appeal No. 145 of 2017t CAT Iringa), where it was emphasized that even though the best evidence typically comes from the victim, the court must scrutinize the entire evidence to ascertain the truthfulness of the allegations. This principle, he noted, is embedded in section 127(7) of the Tanzanian Evidence Act (TEA) Cap 6 RE 2022. Counsel also referred to a foreign case of *People v. Benson* 6 CAL 221 (1986), which the CAT cited, underscoring that accusations are often easy to make but hard to prove and even harder to defend against. Going even more global albeit for persuasive purposes as such foreign cases are not binding to this court, he further cited the case of *People of the Philippines v. Benjamin A. Elmancil* (G.R.), where basic elements needing proof in such cases were discussed. Mr. Songea questioned the credibility of PW1, noting that her own father, PW4, had testified that she lied to him during interrogation, raising concerns about her truthfulness in court. He argued that this brought her entire testimony into doubt, as discussed in the case of *Mohamed Said* (supra). Page 4 of 11 Additionally, he pointed out inconsistencies in the timeline of the victim's pregnancy, noting that the medical examination conducted by PW6 on 9th March 2021 contradicted the claim that the victim was three weeks pregnant, as the incident was alleged to have occurred on 3rd March 2021. Mr. Songea argued that this discrepancy called for scientific evidence, particularly DNA testing, to ascertain the truth, referencing the cases of *Godfrey Ndumbaro v. Republic* (Criminal Appeal Np.108 of 2020, HCT Mtwara, Ngwembe J. as he then was) and *Ramadhani Jamali Kamkanda @Kibati v. Republic* (Criminal Appeal No.42. of, 2020, HCT Mtwara, Muruke J. as she then was), where additional evidence, including DNA, was crucial in determining the truth. \" The learned Advocate thoughtfully argued this court to critically evaluate the evidence of DW3 in comparison to that of PW4, asserting that the case was riddled with doubts, including the circumstances under which the victim was found and the questionable arrest of the appellant by a Village Executive Officer (VEO) rather than the police. He cited *Abiola Mohamed @Simba v. Republic* (Criminal Appeal No. 291 of 2017, CAT Arusha) as a reference for the proper procedure in criminal investigations. Page 5 of 11 In closing, Mr. Songea questioned the victim's status as a child under the Law of the Child Act, given that she was 16 years old, and referenced the case of *Republic v. Elizabeth Michael Kimemeta @Lulu* (Criminal Session Case No. 125 of 2012, Rumanyika J.) to highlight the implications of such findings. He noted that the testimony of PW2, the victim's. grandfather, suggested that the victim was about to be married, which further complicated her classification as a child. He cited *Robert Kalibara v. Republic* (Criminal Appeal No. 38 of 2020, HCT Bukoba, Kalikamajenga J.) to emphasize the need for caution in convicting individuals based solely on the testimony of the victim, and concluded by praying for the appellant's acquittal, arguing that the case was full of gaps, as seen in *Goodluck Kyando v.*

Republic TLR [2003] 363 and Geoffrey James Mahali v. DPP (Criminal Appeal No. 332 of 2018). Mr. Kondoro, on his part, boldly indicated his stern opposition to the entire appeal. Citing section 3(2) (a) of the Evidence Act Cap 6 RE 2022, he asserted that the prosecution case had been proved beyond reasonable doubt. According to section 130(2)(e) of the Penal Code Cap 16 RE 2022, Mr. Kondoro argued, essential elements to prove that there was rape are (i) Page 6 of 11 sexual intercourse (ii) a woman or girl who is under 18 years old (iii) not the Wife of the accused (iv) it is immaterial whether she consented or otherwise. On the first element, Mr. Kondoro averred, PW1 the victim had testified that she had sexual intercourse with the appellant in Somanga. He cited the case of HASSAN BAKARI @MAMAJICHO v. R. Crim Appeal No 103 of 2012 CAT, Mtwara where penetration was defined and qualified as however slight. Moreover, Mr. Kondoro argued, PW3 in his,,evidence pp 13 and 14 towards p 15 testified how she took the testimony of PW1 and that she mentioned the appellant by name as the person she had sex with. On age of the victim, Mr. Kondoro argued that PW1 had also stated that her age was

16. 'CV On the third element, Mr. Kondoro argued that the victim was not the Wife of the appellant. He emphasized that nowhere did DW1, the current -i appellant, nor less other witnesses, claimed that the victim was anyone's wife.. PW1however, admitted the learned State Attorney, had indicated that there were plans for her to get married to the appellant. Page 7of 11 Mr. Kondoro argued forcefully that it was immaterial whether the victim consented or otherwise. Since PW1 did not consent the sexual intercourse, Mr. Kondoro reasoned, it was logical to conclude that she was tricked for purposes of fulfilling sexual lusts of the appellant. 1 >-4 *,. Mr. Kondoro referenced section 127(6) of the Evidence" Act "(supra) arguing that the evidence of a victim of rape especially that of a girl offender age is sufficient to ground conviction. Nevertheless, he asserted, in this case the victim's evidence was corroborated with a PF3 that was tendered in court. To buttress his argument, he cited the case of SAIDI BAKARI v. R. Crim Appeal Case No 295 of 2021 CAT, Mtwara where a PF3 was considered corroborative evidence to the testimony of a victim of tender age. He prayed for the dismissal of the entire appeal. In a brief rejoinder Mr. Songea maintained that credibility of PW1 was questionable. He prayed that the appeal is allowed, and the appellant is set free. 's i have dispassionately considered the grounds of appeal, examined the lower court's records, and carefully attended to the rival Page 8 of 11 submissions of the learned counsel for both parties. It is apparent that this is not a typical rape case. Iam inclined to emphasize that in the pursuit of justice, the role of law enforcement officers is to uphold the law impartially and fairly. However, when a police officer insists on pursuing rape charges in cases where the facts indicate awareness of parents for both parties to a future marriage, it can lead to a miscarriage of justice. Such an approach not only undermines the integrity of the legal system but also disregards the nuances of the situation that may have led to the allegations. It appears to me that the learned trial Magistrate deliberately avoided facing the context of the case. Not all cases are the same. ■ \ 1 -J?,-,. When law enforcement Insists on prosecuting such a relationship as rape, it can have devastating consequences for the individuals involved. The accused may face severe legal penalties, social stigma, and lasting damage to their reputation. For the alleged victim, being portrayed as a victim of rape when

she had intended to marry the accused can lead to emotional distress and a sense of betrayal by the legal system. I am not saying that rapists masquerading as future husbands should not be prosecuted, but Page 9 of 11 justice requires a careful and nuanced understanding of the facts and context surrounding each case. Finally, I want to register my sincere appreciation to Mr. Songea who has managed to open the eyes of this court to appreciate the broader dimension of the case. My interpretation is that the anger of the victim's parents, for reasons that remain unclear, suddenly boiled on the appellant. Not only was there total failure to prove the charge of abduction as correctly stated by the learned trial Magistrate but also the second count of rape was obviously an after thought and equally unproved. In the upshot, I allow the appeal. I hereby quash conviction and set aside the sentence. Further, I order that the appellant UWESU YAHAYA NAJUMU be released from prison forthwith unless he is being held for any other lawful cause. It is so ordered. Page 10 of 11 Court Judgement delivered under my hand and the seal of this court this 27th day of November 2023 in the presence of Mr. Melchior Hurubano, learned state Attorney for the respondent and the appellant who has appeared in person, The Right to appeal to the Court of Appeal of Tanzania is fully explained. Page 11 of 11

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