

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB - REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 2637 OF 2024

(Originating from District Court of Momba, Criminal Case No. 83/2023)

IBRAHIM ASHIMU SALUMU @ ABUU.....APPELANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 28 March 2024 and 09 April 2024

SINDA, J.:

The appellant Ibrahim Ashimu Salumu @Abuu was charged with and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1), (3) of the Penal Code [Cap 16 R.E 2022] (the **Penal Code**). The District Court of Momba at Chapwa (the **Trial Court**) sentenced him to life imprisonment.

The particulars of the offence are that on 21 January 2023, about 14:00, at Maporomoko Street, Tunduma, within Momba District in Songwe

Region, the appellant unlawfully had carnal knowledge of XYZ, a child aged seven (7) years.

Against that decision, the appellant appeals on the following grounds that:

1. That, the Trial Court erred in fact and law for giving a sentence basing on weak and contradictory evidence adduced by the respondent;
2. That, the Trial Court erred in law and fact by giving its decision when it found that all the issues were framed in the affirmative while they were not proved by the respondent;
3. That, the Trial Court erred in law and fact as there was a clear failure by the trial court to analyze and accurately assess the evidence before arriving at the decision;
4. That, the Trial Court erred in law and fact as it didn't consider the criteria in assessment of general damages resulting to the so said action; and
5. The Trial Court erred in fact and law for failing to handle the case in time, as there were symptoms of gross irregularities in the Trial Court proceedings.

During the hearing, the appellant was represented by Mr. Felix Kapinga, learned counsel and the respondent was represented by Prosista Paul, the

learned State Attorney. The appellant's counsel dropped the fourth and fifth grounds of appeal.

Submitting on the first ground of appeal, the appellant's counsel averred that there was a contradiction between the evidence adduced by the victim (**PW1**) and the doctor (**PW3**). PW1 stated that on the material day, she returned home and noticed that her daughter XYZ (**PW2**) had a wound and failed to walk properly. PW1 said that the victim also had blood on her body and clothes. This evidence contradicted the evidence of the doctor (PW3), who said that he found the victim with semen and did not see bruises or blood.

The appellant's counsel further argued that the second contradiction is on the names. PW1 and PW2, said that the rape was committed by Abdul. WP 4463 S/SGT Teresia (**PW4**) said the statement of the victim mentioned Robin and Abuu as the persons who raped the victim. The victim never mentioned the name of Ibrahim Ashimu Salum. In police documents the name Abuu was not mentioned as an a.k.a. The appellant's counsel referred to the case of ***Toyidoto s/o Kosima vs R***, Criminal Appeal No. 525 of 2021 (Court of Appeal of Tanzania (**CAT**) at Kigoma) and section 234 of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the **CPA**) to cement his argument.

Regarding the second ground of appeal, the appellant's counsel contended that the case was not proved beyond reasonable doubt at the Trial Court. He maintained that the victim stated that Robin and Abdul took her to their home, but she never stated where Robin and Abdul were staying. As per the testimony of PW1, Robin was their fellow tenant at the same house. However, Robin was never interrogated by the police. He said there was a contradiction in the identification of the appellant in the charge sheet and evidence presented in court. The charge sheet showed that the victim was raped by the appellant, while the evidence shows that there was a gang rape; even the date and time the offence was committed was not mentioned. He referred to the case of ***Abel Masikiti vs R***, Criminal Appeal No. 24 of 2015 (CAT at Mbeya) and section 234 of the CPA to support his argument.

On the third ground, Mr. Kapinga submitted that the Trial Court summarized and assessed the evidence of the Republic only and did not analyze the defense evidence. He referred to the case of *Abel Masikiti vs R* (Supra), which CAT quoted from the case of ***Amiri Mohamed v R*** (1994) TLR 138 to cement his argument.

In reply, Ms. Paul supported the appeal. She agreed that the evidence of PW1 and PW3 contradicted each other. It was expected that PW1's

evidence would collaborate with PW3's. PW3 said he did not see any blood or bruises.

She submitted that it is a settled principle that the victim's evidence is sufficient in a rape case. However, in this case, the evidence from PW1 and PW3 was contradictory. She argued that the evidence of PW1 and PW3 was critical.

She further submitted that there is a contradiction in names. In the charge sheet, the appellant was Ibrahim Ashimu Salum @ Abuu. However, the evidence on records PW1 and PW2 mentions the appellant as Abdul. The variation in names was supposed to be resolved before finalizing the case under section 234 of the CPA. Ms. Paul argued that she had expected the investigation to resolve the issue that Ibrahim Ashimu @ Abuu was also known as Abdul, but that issue was not resolved. She found that the prosecution did not prove the offence beyond reasonable doubt and prayed the court to quash the decision of the Trial Court and set the appellant free.

In rejoinder, the appellant counsel supported quashing the Trial Court's decision and setting the appellant free.

I have gone through the court records, grounds of appeal and submissions made by the parties. The issue is *whether the case at the Trial Court was proved beyond reasonable doubt.*

This court, being the first appellate court, I wish to re-evaluate the evidence on record. It is a settled principle of law that in criminal cases, the burden of proof lies on the prosecution, and the standard of proof in criminal cases is proof beyond reasonable doubt. The CAT in the case of ***Mohamed Haruna @ Mtupeni & Another v Republic***, Criminal Appeal No. 25 of 2007 (unreported) held that;

"Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proven beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence".

The appellant complained that the evidence adduced by PW1 and PW3 contradicted each other, a fact conceded by respondent counsel.

Starting with the issue of the contradiction of evidence between PW1 and PW3, I have gone through the court proceedings and found a contradiction in the evidence of PW1 and PW3. PW1 testified that she examined the victim and noticed that she was bleeding, while PW1 testified that he inspected the victim and noted the remains of semen,

and there were no bruises or blood. It is a settled principle of law that where there are discrepancies in evidence, the court has to decide if the contradiction is minor or goes to the gist of evidence. In ***Dickson Elia Nsamba vs Republic***, Criminal Appeal No. 92 of 2007 (CAT at Mbeya), it was held that:

"In evaluating discrepancies, contradictions or omission, it is undesirable for a court to pick alit sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies or contradictions are only minor or whether it goes to the root of the matter."

In this case at hand, I expected both PW1 and PW3 to adduce similar evidence concerning the issue of blood and bruises because they both examined the victim, but unfortunately, each witness narrated his own story in court.

In my opinion, these contradictions are material that goes to the case's root. This court is aware that every witness is entitled to credence. In the case of ***Goodluck kyando vs Republic***, [2006] TLR 363, the court held that:

*"Every witness is entitled to credence and must be believed, and his testimony accepted **unless there are good and cogent reasons not to believing a witness.**"*

Being guided by the above principle, I find the contradictions in the evidence of PW1 and PW3 affect their credibility, and this court is not in a position to understand who is telling the truth between the two. For that reason, I disregard the evidence of PW1 and PW3 because they are not reliable witnesses.

It is the settled position of law in rape cases that the best evidence comes from the victim. This was provided in the case of ***Seleman Makumba vs Republic***, [2006] TLR 379, which held that:

"True evidence of rape has to come from the victim, if an adult, that there is penetration and no consent, and in case of any other women, where consent is irrelevant, there is penetration."

Having carefully gone through the court records, I find that there was a variation of names between the charge and the evidence presented by the prosecution. For easy reference, I wish to reproduce the charge sheet.

STATEMENT OF OFFENCE: Rape C/S 130 (1) (2) (e) and 131 (1) (3) of the Penal Code [Cap. 16 R.E 2022]

PARTICULARS OF OFFENCE: That **IBRAHIM S/O ASHIMU SALUMU @ ABUU** charged on 21st Day of January 2023 about 14:00 Hrs at Maporomoko street-Tunduma within Momba District in Songwe Region unlawfully did have carnal knowledge to one DAINES D/O NELSON SANGA a child aged SEVEN (07) years.

Upon perusal of the charge sheet and evidence presented by the prosecution to prove their case, which is also expected to be the best evidence. I find that in the charge sheet, the name of the appellant appeared as Ibrahim S/O Ashim Salumu @ Abuu, while as per evidence presented by the victim, she stated that she was raped by a person called Abdul.

Section 234 (1) of the CPA allows amendment of a charge when the charge is defective. The prosecution was required to seek leave to amend the charge when they became aware that the appellant's name varied in the charge sheet and in the evidence presented. However, in the instant case, this was not done at all.

It is a well-settled principle that in such a situation, failure to amend the charge sheet is fatal and prejudicial to the appellant. Such an anomaly leads to serious consequences for the prosecution case. This position has been reiterated in various decisions, including ***Mohamed Juma @ Mpamaka vs Republic***, Criminal Appeal No. 385 of 2017, ***Noah Paulo Gonde and Another vs Republic***, Criminal Appeal No. 456 of 2017 and ***Issa Mwanjiku @ White vs Republic***, Criminal Appeal No. 175 of 2018 (unreported). Also, in the case of ***Abel Masikiti vs Republic***, Criminal Appeal no. 24 of 2015, the court observed as follows:

"If there is any variance or uncertainty in the dates then the charge must be amended in terms of 234 of CPA. If this is not done, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal."

Therefore, I find that even though, in this case at hand, the variation was not on dates but on the name of the appellant, it is my opinion that the consequences should be the same that the charge against the appellant was not proved beyond reasonable doubt and the accused shall be entitled to an acquittal.

For the reason I have stated above, the appeal is allowed, the conviction is hereby quashed, and the sentence is set aside. I consequently order the appellant's release from prison unless he is detained for other lawful cause.

It is so ordered.

The Right of Appeal was explained.

DATED at **MBEYA** on this 9 day of April **2024**.



A. Zin

**A.A. SINDA
JUDGE**

The Judgment is delivered on this 9 day of April 2024 in the presence of the appellant who appeared in person and represented by Mr. Felix Kapinga, advocate and Mr. Augustino Masesa counsel for the respondent.

A. A. Sinda



**A. A. SINDA
JUDGE**