

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI**

CRIMINAL APPEAL NO. 121 OF 2023

(Originating from District Court of Hanang' at Katesh in Criminal Case No. 181 of 2022)

STEPHANO JOSEPHAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

REASONS FOR THE JUDGMENT

20th March and 3^d May, 2024

MIRINDO, J.:

The appellant, Stephano Joseph, was convicted of the offence of grave sexual assault contrary to section 138C (1) (a) of the Penal Code [Cap 16 RE 2022], sentenced to a prison term of fifteen years and ordered to compensate the victim 500,000/=TZS.

The star witness for the prosecution was the victim herself, aged fifty years. She testified that on the material day she hired a motorcycle, famously known as "bodaboda", driven by the appellant to take her home. Along the way the appellant changed the direction and took her to unknown place in a bush. He covered her mouth, pushed her to the ground, and undressed her. He undressed his trousers and attempted to insert his sexual organ into her sexual

organ. As his sexual organ could not erect, he put his fingers into her sexual organ. She shouted for help. Her son was the first person to respond to the alarm and he found her on the ground while the appellant was putting on his trousers and then ran away. Many people responded including one Mama Pendo.

The second witness was the victim's son who testified that at the material day she phoned her mother and her mother told him that the appellant was taking her to unknown place. The second witness went home and took a torch and left with a neighbour to fetch for his mother to the direction where he was told the motor cycle headed. Suddenly, he heard her mother screaming for help and rushed to the scene. He found her lying down on the ground. The appellant who was standing nearby, switched on his motorcycle and left. The third witness was an investigator whose evidence had nothing to do with proof of the offence.

The appellant denied the charge and raised the alibi defence. He testified that he neither owned a motorcycle nor met the victim on the day of the incident.

As mentioned earlier, the trial court held that the charge was proved beyond reasonable doubt, convicted and sentenced the appellant. On appeal to this Court, the appellant has raised eight grounds of appeal. The appellant was represented by the learned advocate, Mr Joseph Masanja while Ms Rhoida Kisinga, learned State Attorney appeared for the respondent Republic. The learned counsel, Mr Masanja contended that the prosecution case was not

proved beyond reasonable doubt because: (1) there was no proof of lack of consent from the victim; (2) Although several people came to the scene, only the victim's son testified; (3) trial court's reliance on uncorroborated evidence of the victim without warning itself on the dangers of doing so. The learned counsel concluded that the case is an example of victimising innocent people.

In support of the appellant's conviction, the learned State Attorney, Ms Kisinga, argued that the victim's evidence indicates that there was no consent and the victim clearly identified the appellant as the person who committed the offence. It was not necessary for Mama Pendo to testify because the law does not prevent a relative to testify on behalf of their relatives. The learned State Attorney emphasized that the second prosecution witness was reliable. She concluded that the prosecution case was based on direct evidence and there was the best evidence of the victim. The learned State Attorney, concluded that the prosecution case was proved beyond reasonable doubt.

The appeal was heard on 20/3/2024. At the close of the hearing, I allowed the appeal, quashed the conviction and sentence imposed by Hanang' District Court and ordered the immediate release of the appellant unless he was held for some other lawful cause. I reserved reasons for judgment which I now give.

In their totality the eight grounds of appeal boil down to one question: was the charge proved beyond reasonable doubt? In my considered view the prosecution case raises reasonable doubts.

There was no evidence that the appellant was a boda boda driver. This finding alone is sufficient to negate the charge on the ground of mistaken identity. It was upon the prosecution to investigate and produce a witness to testify on this crucial issue. I agree that it was reasonable for the victim not to remember the registration of the motorcycle she hired on that day but it was important to provide description of the motorcycle she hired on that day. Evidence from persons who witnessed the victim hiring the motorcycle would have clarified these doubts

While the prosecution has no obligation to call every witness, there are serious doubts in the prosecution case which constitutes failure of justice. The aspect of failure of justice was stated in **Peter Mwafrika v R**, Criminal Appeal 413 of 2013, where a judgment delivered by Bwana JA:

They would have, in our opinion, given independent evidence on what actually transpired at the scene of crime. Failure to call them without good cause being shown did, in our view, prejudice the course of justice in this case. ... The prosecution, therefore, needed to produce more evidence implicating the appellant, given the serious nature of the offence with which he was charged. The loopholes left unanswered ...should be , in the interest of justice, interpreted in favour of the appellant.

The omission of material witnesses may also be consistent with an adverse inference that those witnesses would have offered evidence favourable to the appellant. In **Kasema Sindano alais Mashuyi v R**, Criminal Appeal 214 of

2006 in a rape charge, the prosecution did not call the village leaders to whom the incident was first reported, the Court of Appeal held that the omission called for an adverse inference that the prosecution intended to negate the accused innocence:

Although both PW1 and PW2 claimed that they reported the rape to the 10cell leader and the Village Chairman, these two key witnesses did not testify. The prosecution, which had the duty to prove the charge beyond reasonable doubt, for undisclosed reasons, decided not to call them. An affirmative answer to the question that if they had been called, they would have belied PW1 and PW2 should not be ruled out in the circumstances.

The victim's testimony and that of her son, witness is that the appellant drove the victim to unknown location. This version of the prosecution evidence is doubtful. If the appellant drove the victim to unknown location why did the victim's son easily located the place? The inference is that the location was well known to the victim. It is surprising that the location remains unknown even though the victim's son and several people responded to the alarm from the victim. Why should the location remain a mystery in a serious criminal charge like this one? This doubt could also have been clarified by the evidence of either Mama Pendo and neighbours who came to the scene and failure to call them necessitate an adverse inference in light of the Court of Appeal's holding in **Gallus Faustine Stanslaus Wasiwasi and another v R**, Criminal Appeal No 231 of 2007

The non-calling, as witnesses of **neighbours** who came to the scene of crime gives rise to doubts as to whether or not the appellants were the culprits. No explanation was given by the prosecution why even a single **neighbour** was not called as a witness. [Emphasis original]

A famous principle stated by the Court of Appeal in **Selemani Makumba v. R** [2006] TLR 379 is that the victim of rape (a fortiori of sexual offences) is the best evidence in sexual offence is counterbalanced by the principle restated in **Mohamed Said v R** (Criminal Appeal No 145 of 2017) [2019] TZCA 252:

it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness.

Given that the victim lied about the location she was taken, the conclusion is that the victim was not a truthful witness. This conclusion is unsurprising because it is not in all cases a victim of sexual offence is the best witness.

In the present appeal, the prosecution evidence is deficient on several material particulars and given that the failure to call material witness has prejudiced the cause of justice. Therefore, I accept the appellant's alibi that on the material he did not meet the victim and hold that the charge against the appellant was not proved beyond reasonable doubt.

It was for these reasons, that I allowed the appeal and made the orders stated above.

DATED at BABATI this 28th April 2024


F.M. MIRINDO

JUDGE

Court: Delivered this 3rd day of May, 2024 in the absence of the appellant and Ms Leah Vyosena, State Attorney for the respondent. B/C: William Makori present.

Court: Right of appeal explained.




F.M. MIRINDO

JUDGE

3/5/2024