

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.17 OF 2023

(Originating from the District Court of Lindi at Lindi in Criminal Case No.47 of 2021)

YAHAYA RAJABU MABOGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

9/8 & 29/9 2023

LALTAIKA, J.

The appellant herein, **YAHAYA RAJABU MABOGA** was arraigned in the District Court of Lindi at Lindi (hereinafter referred as the trial court) and charged with the offence of rape contrary to section 130(1), (2)(e) and 131(1) of the Penal Code [Cap.16 R.E. 2019] now the **REVISED EDITION 2022**.

It was allegedly by the prosecution that on 30th day of June 2021 at Nachunyū Village within the District and Region of Lindi, the appellant had carnal knowledge of one "**BBB**" or the victim a girl of 8 years old.

When the charge was read over and explained to the accused (now appellant) he pleaded not guilty. This necessitated the conducting of a full trial. The prosecution paraded three witnesses to prove the case. The appellant also brought two witnesses. The trial court was convinced that the prosecution case had been proved beyond reasonable doubt. The appellant was convicted as charged and sentenced to 30 years imprisonment and to pay a fine of 1 million shillings.

Dissatisfied, the appellant has appealed to this court on four (4) grounds. He later added three more grounds. I choose not to reproduce them. When the appeal was called on for hearing, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, appeared through Ms. Atuganile Nsajigwa, learned State Attorney.

Ms. Nsajigwa addressed the first ground of the appellant's complaint, which focused on the defectiveness of the charge. She acknowledged that the penal conviction cited was incorrect, **stating 131(1) instead of 131(3)**. However, she argued that this omission is curable under section 388 of the Criminal Procedure Act. Ms. Nsajigwa referenced the case of **FARAJI SAIDI v. REPUBLIC** Crim Appeal No 172 of 2018, which held that such omissions are not fatal but curable under section 388 of the CPA. She also cited the case of **BURTON MWIPABILEGE v. REPUBLIC** Crim Appeal No 200 of 2019, supporting the notion that errors in citing the right provision of the law are curable. Ms. Nsajigwa concluded that the first ground has no merit and should be dismissed.

Regarding the second ground, which pertains to the proof of the case beyond a reasonable doubt, Ms. Nsajigwa referred to **section 3(2) of the Law of Evidence Act** in criminal cases. She asserted that the prosecution had fulfilled its duty to prove the case beyond reasonable doubt. She addressed what she called three matters in rape cases: credibility, penetration and age as follows:

On credibility, Ms. Nsajigwa cited the case of **MARWA WANGITI MWITA AND ANOTHER V. REPUBLIC** [2002] TLR 39 at p. 43, emphasizing that the victim had identified the appellant early in the proceedings, indicating that the evidence was not shaken.

On penetration, she pointed out that penetration was proven by PW3, a medical doctor, **Yohana Zablon**, who examined the victim. The doctor's testimony indicated the absence of virginity, supporting the conclusion of penetration.

Finally on age, Ms. Nsajigwa argued that the victim's age was adequately **proven by PW1 Rutia Hamisi, the victim's mother**, and the charge itself, stating that the victim was an eight-year-old girl. She referenced the case of **ISAYA RENATUS v. REPUBLIC** Crim App No 542 of 2015, stating that the evidence of the victim's age was sufficient. Ms. Nsajigwa concluded that grounds 2, 3, and 3 in the additional grounds lacked merit and should be dismissed.

Moving on to the fourth ground, which concerns the appellant's complaint that his defense was not considered, **Ms. Nsajigwa disagreed**. She mentioned that the learned trial magistrate had analyzed the evidence

of the appellant as required by section 235(1) of the CPA. She argued that this ground lacked merit and should be dismissed.

Addressing the second ground in the additional grounds of appeal, Ms. Nsajigwa responded to the alleged inability of the trial court to observe section 127(2) of TEA. She mentioned the case of **GODFREY WILLSON v. REPUBLIC** Crim Appeal No 168 of 2018 and argued that the section was complied with. She emphasized that the cited case provided guidelines rather than mandatory requirements. Ms. Nsajigwa referred to the proceedings, indicating that the victim was asked questions, and the court was satisfied with the answers before proceeding to adduce evidence. She cited the case of **RAPHAEL IDEJE @MWANAHAPA v. REPUBLIC** Crim App No of 2022 TZCA 71 (TANZLII) to support her argument, concluding that this ground lacked merit and should be dismissed.

Concerning the first ground of the additional grounds, Ms. Nsajigwa addressed the appellant's complaint about the improper application of section 194 of the CPA. She argued that, upon reading the section, it did not support the appellant's argument. She referred to the proceedings, mentioning the four witnesses named, and stated that the appearance of **RUTIA HAMISI** was a typing error. Ms. Nsajigwa prayed for the dismissal of this ground.

In his rejoinder, the appellant expressed dissatisfaction, stating that he had not been fairly treated, saying, "*nimeonewa*." He recounted the events, explaining that in the village where he was a newcomer, he went

to greet his grandfather. However, while preparing to return to Mtwara, he was confronted by the village militia who accused him of raping a child.

According to him, they took him to the office, and the next day, he was taken to Mingoyo Police Station without any examination being conducted. He was informed that he was a suspect, and when he inquired about the specific time of the alleged offense, they claimed it occurred on the same occasion. He denied the accusation and insisted on a medical examination.

In 2021, the medical examination was finally conducted, and the response received at the police station indicated that the victim was fine, and nothing had happened to her. Despite this, he expressed surprise that he was still facing difficulties. He concluded by praying that the court would set him free.

I have dispassionately considered the grounds of appeal and the submissions presented. The appellant faces a charge of rape under Penal Code [Cap.16 R.E. 2022], section 130(1), (2), and (3). Rape involves a male person sexually assaulting a girl or woman under specific circumstances outlined in section 130(2) and (3). The offense requires particular circumstances from subsections 2(a-e) or 3(a-e) to be complete.

It's noted that the charge incorrectly cites section 131(1) instead of 131(3) of the Penal Code. However, this procedural flaw doesn't impact the appellant's defense, as the charge sheet adequately informed him of the offense's nature. This defect is considered curable under section 388 of the Criminal Procedure Act, as it did not cause a miscarriage of justice. This

aligns with the position of the law set in **FARAJI SAID VS REPUBLIC** (Criminal Appeal 172 of 2018) [2020] TZCA 1755 (31 August 2020).

Concerning the victim's age, proof may come from various sources, including the victim, relatives, parents, medical practitioners, or a birth certificate. In this case, the victim's mother testified to the victim being 8 years old. Discrepancies in the victim's age testimony (9 years according to PW3) do not undermine the case, as per the principles outlined in *Said Ally Ismail v. Republic*, Criminal Appeal No. 249 of 2008 (unreported).

To prove rape, penetration is crucial, and section 130(4) specifies that even slight penetration constitutes the offense. Consent is irrelevant in statutory rape cases. The victim's testimony and medical evidence should corroborate penetration. However, doubts arise about the evidence of penetration in this case. This aligns with the Court of Appeal of Tanzania's stance in **MATHAYO NGALYA @ SHABANI VS REPUBLIC**, Criminal Appeal No. 170 of 2006 (unreported).

Moreover, a discrepancy in the victim's name between the charge sheet and trial proceedings is noted. Such a variance affects the case's validity, following the precedent set in **MOHAMED HAMISI @ BILALI VS THE REPUBLIC**, CRIMINAL APPEAL NO. 300 OF 2021. To this end, the prosecution failed to prove the case beyond a reasonable doubt. Doubts regarding penetration, age, and the variance in the victim's name benefit the appellant, adhering to the fair trial principle of deciding any reasonable doubt in favor of the accused, as established in **WOODMINGTON V. DPP** [1935] AC 462.

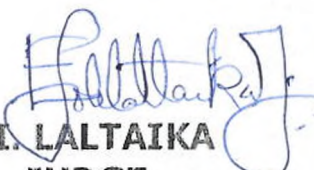
In the upshot, appeal is allowed. I hereby quash the conviction and set aside a sentence of thirty (30) years in jail term and the compensation order of TZS. 1,000,000/=. Furthermore, I do hereby order that **YAHAYA RAJABU MABOGA** be released from prison forthwith unless he is being held for any other lawful course.




E.I. LALTAIKA
JUDGE
29/9/2023


Judgement delivered this 29th day of September 2023 in the presence of Mr. Melchior Hurubano and Ms. Atuganile Nsajigwa, both learned State Attorneys while the appellant has appeared in person and unrepresented.




E.I. LALTAIKA
JUDGE
29/9/2023

Right to appeal to the Court of Appeal of Tanzania fully explained.




E.I. LALTAIKA
JUDGE
29/9/2023