

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., GALEBA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 461 OF 2018

AMBWENE LUSAJO.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from High Court of Tanzania at Mbeya)

(Dr. Levira, J

dated the 20th day of August, 2018

in

Criminal Appeal No. 108 of 2017

JUDGMENT OF THE COURT

20th & 22nd September, 2021

MUGASHA, J.A.

In the Court of the Resident Magistrate of Mbeya at Mbeya, the appellant was charged and convicted with the offence of rape contrary to sections 130 (1) and (2) (e) and 131 (1), of the Penal Code Cap 16 [R.E 2002]. The particulars of the offence alleged that, on unknown dates of May, 2016 at Iwambi area within the District and Region of Mbeya, the appellant did have carnal knowledge of one (CH) (name withheld), a school

girl aged 8 years old. He pleaded not guilty to the charge. In order to prove the offence, the prosecution paraded a total of six witnesses and four documentary exhibits namely PF3 (Exhibit P1), certified copy of birth certificate of a victim (Exhibit PE2), certified copies of clinic card and discharge form of Lilian Haule (exhibit P3) and the identification parade exhibit (exhibit P4). The appellant was the only witness for the defence. What led to the arraignment and ultimate conviction of the appellant is briefly as follows: It was alleged by the prosecution that, on unknown dates of May, 2016 while the victim was returning home from school she met a boda boda rider who offered to give her a ride. She was then taken to an unfinished house and ravished. She was repeatedly raped for about four times. The assailant warned her not to reveal about the incident or else she would be slaughtered.

According to the victim, she did not disclose what had befallen her to her own mother as she was scared of being canned. The episode was unraveled on 4/11/2016 by the victims' teacher Adella Jackson Athman (PW5) while interrogating the victim over a stealing incident, she admitted to have stolen the money and that she had an affair with one of the boda boda riders who used to take her to an unfinished house and ravished her.

Some five days later, this was revealed to Lilian Haule (PW3) the victim's mother who was also happened to be a teacher at the same school. PW3 reported the matter to the police where a PF3 was issued and the victim was taken to the hospital. Upon being examined by Dr. Atupele Subira Mlangwa (PW1), on 9/11/2016, she established that the victim's hymen was perforated not within 72 hours. Three days later, the victim narrated to have been raped when her mother was in the hospital sometimes in May, 2016 while in the care of her grandmother. However, according to PW3, the victim told her that she could not reveal about the incident because the appellant threatened to slaughter her and that she was scared of her grandmother. After the matter was reported to the police, WP 7119 DC Getruda (PW4) who was assigned the case file, after the victim was brought to her and having disclosed that the respective boda boda rider used to park at Ituha stand, PW4 took the victim there and pointed to the appellant who was arrested and taken to Iyunga police station. A few days later an identification parade was arranged and the victim identified the appellant. Then the appellant was arraigned.

The appellant denied the accusations by the prosecution. He told the trial court that, he was at his working place on 16/5 to 18/5 /2016. On

19/5/2016 he was assisting his brother to build a house and that on 20/5/2016 he was at Ikuti. Then on 22/5/2016 he was involved in an accident and taken to Mbeya Hospital for treatment, then referred to Mbeya referral hospital and was discharged on 29/5/2016.

Believing the prosecution account to be true, the appellant was convicted as charged and sentenced to life imprisonment. His appeal to the High Court was dismissed hence the present appeal. Still protesting for his innocence, the appellant has preferred the present appeal fronting ten (10) grounds of appeal. We have conveniently clustered the grounds into mainly 4 as follows:

- 1. That the charge was not proved beyond reasonable doubt which addressed grounds no. 1, 2, 3, 4, 5, and 10.*
- 2. That the reporting of the fateful incident was delayed and the suspect was not mentioned suspect at the earliest possible time which covers ground 6.*
- 3. That the conviction was based on hearsay evidence which addressed ground number 7.*

4. In respect of grounds number 8 and 9 the complaint is about the improper identification and identification parade as there was no prior description of the appellant.

At the hearing of the appeal the appellant appeared in person unrepresented, adopted the grounds of appeal and urged the Court to consider them and allow the appeal. On the other hand, the respondent Director of Public Prosecutions had the services of Mr. DeusDedit Rwegira, learned Senior State Attorney who did not support the appeal.

The appellant's complaint in grounds 1, 2, 3, 4, 5, and 10, is that his conviction was based on the evidence which did not prove the charge beyond reasonable doubt. In opposition, Mr. Rwegira contended that the charge against the appellant was proved to the hilt because from the victim's evidence the following is evident: **One**, it is the appellant who raped her on four different occasions. **Two**, as she was conversant with the appearance of the appellant, she led the police at the bodaboda station where she identified him and later did so at the identification parade. **Three**, although the victim revealed about the fateful incident after four months, the delay was explained because earlier on the appellant threatened to slaughter the victim if she disclosed about the incident also besides, the victim's mother

was in the hospital. It was thus, Mr. Rwegira's argument that on account of plausible explanation on the delayed silence in reporting the incident and considering that the victim was a young child, her evidence is entitled to belief. On this, the learned Senior State cited to us the case of **ABILAH**
MSHAMU MNALI VS THE REPUBLIC, Criminal Appeal No, 98 of 2010 (unreported). **Four**, it was also contended that, this being a statutory rape as the victim was under the age of 18 years, the victim's mother testified that the victim was raped when she was 8 years and penetration was proved by the victim and corroborated by the PF3 page 19.

It was Mr. Rwegira's submission that the appellant's complaint in ground 7 is without basis because his defence of alibi was considered by the trial court and properly rejected. He added that, the appellant's complaint that he was not properly identified does not hold ground because he was properly identified as the victim knew him by appearance. The learned Senior State Attorney concluded his submission by urging the Court to dismiss the appeal.

The appellant rejoined by praying the court to consider the victim's version at page 34 of the record whereby upon being asked as to who was his fiancé, she stated that he was at school. He also maintained that he was

not properly identified in the absence of his earlier description before the victim saw him.

After a careful consideration of the grounds of appeal, the submissions for and against the appeal and the record before us we are aware that, the Court rarely interferes with the concurrent findings of fact by the lower courts save where there has been a misapprehension of the nature and quality of the evidence or a violation of some principle of law and other factors occasioning a miscarriage of justice. See: **RAYMOND MWINKA VS REPUBLIC**, Criminal Appeal No. 366 of 2017, **DANIEL MATIKU VS REPUBLIC**, Criminal Appeal No. 450 of 2016 and **SAMSON SAMWEL VS REPUBLIC**, Criminal Appeal No. 253 of 2017 (all unreported).

We shall be guided accordingly in the determination of the present appeal.

In this appeal, the following is not in dispute: **One**, at the time of commission of the offence, the victim was 8 years old, therefore under section 130 (4) (a) of the Penal Code, rape is proved by penetration. Since it is settled law that the best evidence of rape comes from the victim, this was addressed by the victim's account who at page 22 of the record of appeal testified that the appellant entered his organ which he uses for a

short call into her organ which she uses for short call, which tells that there was sexual intercourse. This was cemented by the evidence of the doctor (PW1) who upon examining the victim established that her hymen was old torn as reflected in the PF3 at pages 57 and 58 of the record of appeal which proves that there was penetration. **Two**, it is also not in dispute that the victim revealed about the fateful incident four months later as she claimed to have been earlier on threatened by the assailant not to make any disclosure; and being sacred of her grandmother who was taking care of her in the absence of her mother who was hospitalized. We agree with the learned Senior State Attorney that from the circumstances surrounding the occurrence of the offence in the present case, the victim's account sufficed as plausible explanation for the delayed silence in reporting the incident. See - **ABILAH MSHAMU MNALI VS THE REPUBLIC** (supra).

However, the follow up question is whether the appellant did rape the victim? It is glaring on the record that the victim was not familiar with the appellant whom she alleged to have raped her four months earlier before his arrest. This being the case, the question for consideration is whether the appellant was properly identified which is the gist of his complaint in grounds 8 and 9. It is on record that, a clue that the victim was being ravished was

unfolded by her teacher (PW5) who in the course of interrogating the victim gathered that she was sexually abused by a boda boda rider and the victim's parent had to be informed. Later, as the matter was reported to the police, according to PW4, the victim disclosed that she knew the appellant by appearance and that he used to park at Ituha stand. Then, the appellant was arrested after he was identified by the victim at the said Ituha stand and subsequently at the identification parade. The trial magistrate disregarded the evidence of identification parade and instead, relied on the victim's evidence on the identification of the appellant at Ituha stand which was upheld by the first appellate court at page 97 of the record of appeal. The lingering question is whether the appellant was properly identified?

In the record before us, it is glaring that the victim was not familiar to the appellant. In this regard, it is trite law in order to act on the evidence of identification of a stranger, the witness must have first given the description of that person. This principle was underscored in the case of **REPUBLIC VS MOHAMED B. ALLUI [1942] EACA 72** in the following words:

"That in every case in which there is a question as to the identity of the accused, the fact of there having been given description and the terms of that

description are matters of highest importance of which evidence ought to be given first, of course by the person who gave the description, or purports to identify the accused and then by the person to whom the description was given.

The said principle was followed in a number of our decisions including the cases of **YOHANA CHIBWINGU VS REPUBLIC**, Criminal Appeal No. 117 of 2015 and **COSMAS CHAULA VS REPUBLIC**, Criminal Appeal No. 6 of 2010 (both unreported). In the latter case the Court categorically stated:

"...it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such suspect to a person whom he first reports the matter to him/her before such a person is arrested. The description should be on attire worn by a suspect, his appearance, height, colour and/ or any special mark on the body of such a suspect."

Looking at the evidence on the record *vis a vis* the stated principles regulating identification, can it be safely vouched that the appellant was positively identified. The answer is absolutely in the negative and we shall give our explanation. **One**, although the victim claimed to have been raped four times by the appellant who was a stranger, she neither described him

nor gave terms of description to her teacher (PW5) who upon being told by the victim, she initially discovered that the victim was sexually abused. The victim never did so to her own mother (PW3).

Two, the handling of the matter went astray while in the police hands in the course of investigation because although PW4 testified that the victim identified the appellant by appearance, this is not borne by the record because the evidence of both PW4 and the victim is silent on the prior description of the appellant before he was arrested at Ituha stand. This sounds rather unfortunate because since it was already known that the person who raped the victim was a stranger, it was incumbent on the police to interrogate the victim about the description and terms of the description of the assailant before proceeding to arrest the appellant. This was not done. Thus, although we sympathise with the victim who was sexually abused, the evidence on the record before us does not connect the appellant with the offence charged because he was not properly identified by the identifying witness.

In view of the aforesaid it is clear to us, there was a misapprehension of the substance, nature and quality of evidence, that occasioned a miscarriage of justice by the trial court which necessitated the intervention

of the High Court decision at the hearing of the first appeal. Thus, in this second appeal having re-evaluated the trial evidence, the appeal is merited. We allow the appeal, quash and set aside the conviction and sentence and order the immediate release of the appellant from the prison unless otherwise held for another lawful cause.

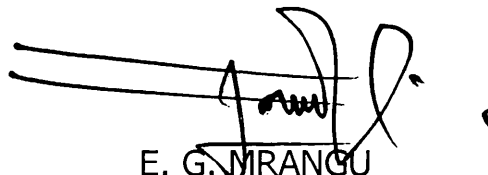
DATED at **MBEYA** this 21st day of September, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This judgment delivered this 22nd day of September, 2021 in the presence of the Appellant in person unrepresented and Mr. Hebel Kihaka, learned Senior State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.


E. G. MIRANGU
DEPUTY REGISTRAR
COURT OF APPEAL