IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 449 OF 2018
WILSON ELISA @ KIUNGAI ..... APPELLANT

VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the decision of High Court of Tanzania at Arusha)

(Maghimbi, J.)

dated the 6th day of September, 2018
in
Criminal Appeal No. 11 of 2018

JUDGMENT OF THE COURT

26th September, & 13th October, 2022

LILA, JA:

The appellant, Wilson Elisa @ Kiungai, was arraigned before the Resident Magistrate's Court of Arusha on an accusation that he committed the offence of rape contrary to sections 130(l)(2)(e) and 131 (1) of the Penal Code. The charge was that; on 13th day of November, 2016 at around Kitefu Secondary School area within the City, District and Region of Arusha, the appellant did have sexual intercourse with a girl aged 16 years old who, in disguising her identity, we shall refer to as the victim or PW1.

Following the appellant's denial of the allegation, a full trial ensued during which the prosecution marshalled four witnesses and a PF3 (exhibit P1) tendered while for the defence side, the appellant and one witness testified. The appellant disassociated himself from the allegation.

Having heard both sides, the trial court was satisfied that the appellant raped the victim. It consequently convicted and sentenced the appellant to serve 30 years in prison. He contested the trial court's findings, conviction and sentence before the High Court of Tanzania (Arusha Registry) but was unsuccessful as his appeal was dismissed in its entirety.

The episode the subject of this appeal is rather simple and poses no difficult to grasp. The victim and the appellant were not strangers to each other. Both were residents of Kitefu area. While the appellant stayed near Kitefu secondary school where the victim was schooling as a Form IV student staying with one Pastor Tikisael Pallangyo (PW4) near the same school since she was in primary school. When proceeding home from a saloon on 13/11/2016 at around 19:00 hrs at Kitefu area she was grabbed by a man and pulled to a hole around the school compound and undressed. That person also undressed himself and

inserted his penis into her vagina. The ordeal took half an hour and being close to each other during the sexual intercourse, the victim claimed to have been able to identify that person to be one Wilson (the appellant). In the course of the sexual intercourse, the appellant warned her not to shout as it would be a shame if his wife was to know about it and promised to give her anything so as to conceal the information. That plea did not work out as she raised alarm which attracted mama Glory and baba Glory who were passing by the hole from Kikatiti where there was a baptism ceremony. The real names of the two persons turned out to be Witness Elisante (PW3) and Elisante Emanuel (PW2). The couple turned up to where the voice came from and found two people who they could not identify because it was dark. Their attempt to rescue the victim was thwarted by the appellant who threw stones to them so as to disperse them and then ran away. Still heartedly moved to rescue the one who was blaring for help, PW2 and PW3 returned to the hole and found the victim naked and took her to PW4. Upon being asked by PW2 and PW3 as to what had befallen her, the victim told them that she was raped and named the appellant to be her ravisher. The matter was reported to the police who issued them with a PF3 (exhibit P1) and proceeded to hospital for medical examination.

In disassociating himself from the allegation, the appellant attributed the charge with grudges he had with PW4 as he had earlier on served in the capacity as pastor but later absented himself. Without disclosing reasons, he branded other witnesses as being his enemies. As for the victim, he claimed that she had also sometime before implicated her father with the offence of impregnating her which accusation culminated in being imprisoned.

The appellant's story was not believed by the learned trial magistrate who was convinced that the charge was proved beyond reasonable doubt. That led to his conviction and imposition of the sentence earlier stated. The trial magistrate believed the victim's account of the incident and exhibit P1 to make a finding that penetration was proved. The more so, she was satisfied that the victim identified the appellant and named him as her ravisher and her evidence was supported by PW2 and PW3. She dismissed the appellant's alleged grudges with PW4 for lacking in substance.

Aggrieved, he appealed to the High Court advancing five grounds of complaint. His main complaints were that he was not properly identified, he was convicted relying on contradictory and inconsistent

evidence, evidence was not properly evaluated, the burden was wrongly shifted to him and that section 312(2) of the Criminal Procedure Act (the CPA) was not complied with.

In its assessment and evaluation of the evidence on record, the High Court was satisfied that there was sufficient evidence establishing that the victim was raped. As to who was the perpetrator, the fact that the appellant and the victim knew each other before the incident as they stayed at Kitefu area, the rape incident took half an hour and her early naming of the appellant, the learned judge entertained no doubt that PW1 was able to identify the appellant as being her ravisher. The learned judge relied on the case of **Abdallah bin Wendo and Another vs Rex** (1953) EACA which was followed in the case of **Waziri Amani vs Republic** [1980] TLR 250 and **Raymond Francis vs Republic** [1994] TLR 100 and **Shamir John vs Republic**, Criminal Appeal No. 202 of 2004 (unreported) to arrive at the conclusion that the charge against the appellant was proved beyond reasonable doubt and sustained the trial court's findings, conviction and sentence.

In his further pursuit to exonerate himself from liability, the appellant lodged the instant appeal advancing four grounds of appeal

which were followed by another set of two supplementary grounds making a total of six grounds. From the substantive memorandum of appeal, the substance of his complaints are:-

1. That due to the unfavourable conditions for positive identification at the *locus in quo*, the appellant was not positively identified by PW1.
2. That, the prosecution failed to call the investigator to testify.
3. That the evidence was not exhaustively assessed as to the credibility and contradictions in the prosecution witnesses.
4. That the charge was not proved to the required standard of the law.

Two grounds of appeal advanced in the supplementary memorandum of appeal are that, **one**; the contents of the PF3 (exhibit P1) were not read out after admission as exhibit and, **two**; that, age of the victim was not proved.

Before us, the appellant appeared in person and unrepresented. Ms. Lilian Aloyce Mmassy, learned Senior State Attorney, Ms. Grace Michael Madikenya and Ms. Penina Joachim Ngotea, both learned State Attorneys, represented the respondent Republic.

The appellant adopted the grounds of appeal and briefly elaborated them. He started with ground two of appeal in the supplementary memorandum of appeal. He said that there was no evidence presented by the prosecution proving age of the victim. Relying on the case of **Andrea Francis vs Republic**, Criminal Appeal No. 73 of 2014 (unreported), he contended that proof of age of the victim in sexual offences is crucial and such failure affected the prosecution case.

In her response, Ms. Madikenya conceded that proof of age is necessary in sexual offences and in the present case no evidence was led to that effect apart from being mentioned in the charge. She, however, argued that the appellant saw the victim testifying and he did not cross-examine her on that aspect hence he was not prejudiced. Besides, she submitted, the appellant was sentenced to serve thirty years imprisonment which was enough proof that the trial court took cognizance that the victim was below eighteen years but not below ten years. She urged the Court to dismiss this ground of appeal.

We, indeed, agree with both the appellant and the learned State Attorney that apart from the mention in the charge, no other evidence

was led on the age of the victim. Since the appellant was charged with statutory rape, proof of age was crucial. This Court has consistently maintained that evidence as to proof of age may be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate (See **Isaya Renatus v. Republic**, (supra) and **Issa Reji Mafita v. Republic**, Criminal Appeal No. 337 'B' of 2020 (both unreported). That much is fine but, like any other fact, age may be deduced from other evidence and circumstances availed to the court which is permissive under section 122 of Evidence Act, [see **Issaya Renatus vs Republic,** Criminal Appeal No. 542 of 2015 (unreported)]. Applying the same principle to the instant case, the victim appeared in court to testify and presented herself in court as being 16 years old, a form IV student at Kitefu Secondary School. These circumstances, carefully considered, lend assurance that she was a girl under the age of 18 years. Besides, these crucial facts were not challenged by the appellant by way of cross-examination or during defence which signified acceptance of being true. We find no merit in this complaint and dismiss it.

Ground two of the supplementary grounds of appeal faults both courts below for acting on exhibit P1 which the appellant alleged that it

was not read out after it was cleared and admitted as exhibit. There was concession from Ms. Madikenya and to that extent and in the authority of **Robinson Mwanjisi and Others vs Republic** [2003] TLR 218, exhibit P1 is expunged from the record.

Grounds of appeal in the substantive memorandum of appeal were conjointly and generally argued by the appellant. His complaints centered on **one**; that the appellant was not properly identified because there was no mention of the source of light that would have enabled the victim (PW1) to see and identify him. We shall deal with this complaint and the alleged contradiction between PW2 and PW3 on who took out the victim from the hole as complained in ground three (3) of appeal which touches on the issue whether the charge was proved as complained in ground four (4) of appeal exhaustively at a later stage of this judgment.

Two; that, the charge was not proved beyond reasonable doubt giving two reasons for his position that no investigation was done by police because no policeman testified. We need not be detained here. Since the appellant was arraigned to face the charge, we see no logic that the police who investigated the case should have testified. It is not,

in terms of section 143 of the Evidence Act, number of witnesses that matters in proving a fact but credence of their testimony.

Different from the course taken by the appellant, Ms. Madikenya opted to respond to each ground separately. Beginning with identification, she conceded that the source of light was not stated by the victim but argued that the encounter took half an hour during which the appellant had conversation with the victim when pleading her not to let his wife know what he had done and promising to give her anything. Above all, she submitted, they were not strangers to each other. She added that carnal knowledge is practiced in close proximity and while facing each other. She beseeched the Court to find that these circumstances enabled the victim to see and recognize the appellant. The case of **Mussa Saguda vs Republic**, Criminal Appeal No. 440 of 2017 was cited to us to support her argument.

Ms. Madikenya, in the alternative, submitted that even if the other evidence is rejected, still the victim's evidence was sufficient to sustain the appellant's conviction. She submitted that she gave a detailed account of the ordeal and applying the best evidence rule in sexual offences propounded in the case of **Selemani Makumba vs Republic** [2006] TLR 379 and **Athumani Rashid vs Republic**, Criminal Appeal

No. 264 of 2016 (unreported), her evidence proved penetration and properly identified the appellant as her assailant since she was able to name him to PW2 and PW3 who responded to her cry for help when being raped. She discounted the alleged contradictions on the time of the incident between PW2 who said it was at 19.15hrs and PW3 who said it was at 1800hrs as being immaterial as witnesses are not expected to pay attention to their watches.

We shall begin our deliberation with the alleged contradiction on the time the offence was committed. We think this ground is arid of merit. Section 234 (3) of the CPA is very clear on this. It provides that variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were commenced within time if there is any time limit set for institution of such proceedings. No time limit is prescribed for lodging these proceedings. It is logical that witnesses are not expected to draw their attention to the time of a particular happening instead, they draw their attention to the occurrence itself. It is no wonder that witnesses of the same incident may not be exact and are prone to telling different times of the incident. However, what is

important is that the difference should be reasonable. Accordingly, expressions of time that it was morning, afternoon, evening or night time or even periods of time would suffice. That said, in the instant case the difference, if any, is not huge to attract any doubt. Besides, our examination of the evidence by those two witnesses show that the time under reference referred to the time they left Kikatiti and not the time when the incident occurred. So, this ground also fails.

We turn to the complaint that the appellant was not adequately identified. This Court has consistently maintained that evidence of visual identification is of the weakest kind and before basing conviction on such evidence the court must be absolutely sure that it is watertight. In **Waziri Amani vs. Republic** [1980] TLR 250 the Court stated that:

> *"...in a case involving evidence of visual identification no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight"*

In another case of **Raymond Francis vs Republic** (1994) TLR 100 the Court held:

"It is elementary that in a criminal case whose determination depends essentially on identification evidence on conditions favouring a correct identification is of the utmost importance."

Equally important, the Court warned against untruthful witnesses when acting on evidence of identification that it should not be taken wholesale in **Jaribu Abdalla v. Republic,** Criminal Appeal No 220 of 1994, (unreported) thus:-

"... in matters of identification, it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."

Conditions for identification, in the instant matter, can be deduced from the testimonies by the victim, PW2 and PW3. According to PW2 and PW3, they were able to see people in the hole but they could not identify them. It is therefore evident that the offence was committed when it was somehow dark. There was no mention of any kind of light illuminating the area. However, the victim told the trial court that the person who grabbed her from behind was the appellant, a person he knew prior to the incident and took about thirty minutes of being raped

while the appellant was talking to her. Much as it can be said that the conditions were not very favourable for a proper and unmistaken identification, the time the victim had the appellant in observation in such proximity during rape incident and being familiar with the appellant, we are convinced that she was able to see and identify the appellant. As an assurance of her credibility, she named the appellant to PW2 and PW3 at the earliest opportunity. (see **Fred Mathias Marwa vs Republic,** Criminal Appeal No 136 of 2020). This ground lacks merit.

Having satisfied ourselves that the appellant was properly and unmistakenly identified by the victim at the scene and therefore placed him at the scene of crime, the immediate issue for our resolution is therefore whether or not the appellant raped her. As alluded to above, both courts below were convinced that the evidence by PW1, the victim, in sufficient details explained the whole ordeal of being raped. She was dragged in a hole, undressed and penetrated by the appellant who also had undressed himself. Her demeanour was not doubted by trial court and our appraisal of her testimony has not come up with anything that may have shaken her credence. She gave consistent and coherent evidence informative of the incident. We hasten, like both courts below,

to hold that the appellant's involvement in committing rape was impeccably proved.

In fine, this appeal lacks merit and we dismiss it in its entirety.

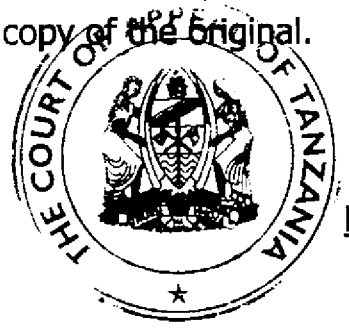
DATED at **ARUSHA** this 7th day of October, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 13th day of October, 2022 in the presence of Appellant in person and Ms. Lilian Kowero, State Attorney for the Respondent both appeared through Video Link is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL