IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: SEHEL, J.A., KENTE, J.A. And MDEMU, J.A.)

CRIMINAL APPEAL NO. 489 OF 2022

ZILAM HAMIS ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam

(Luvanda, J.)

dated 15th day of June, 2022
in
Criminal Appeal No. 100 of 2021
.....

JUDGMENT OF THE COURT

31st May & 6th June, 2024

SEHEL, J.A.:

On 5th October, 2018, after school hours, two primary school girls aged 11 and 12 years were standing at Mzambarauni bus stop, waiting for the bus going to the direction of their home at Gombo la Mboto. It is instructive to point out here that the names of the girls are withheld in order to preserve their dignity, but, for the purpose of this judgment, we shall be referring to them as AM or RA, respectively or the girls or victims.

Apparently, at that bus stop, there was also a man standing behind them. He was talking on his mobile phone, and then, asked the girls where they were schooling at. Genuinely, they replied to him that they were standard six students at Mzambarauni Primary School. They then heard the man telling the person over the phone that he had found the two girls. He hung up and told them that he was directed by their head teacher to take them to the library at Chanika Mbande and Mbagala to collect books for school. He then continued talking on the phone pretending that he was conversing with their head teacher. They heard him, telling the head teacher to request a permission from the girls' parents. He turned to them and asked their names which they told him. He pretended to relay the names to the head teacher. After hanging up the phone, he assured the girls not to worry as their parents have already granted him permission to go with them to the library. They believed him.

The trio boarded the bus going to Chanika Mwisho. Upon reaching there, the man told them to follow him. They obliged. They walked a long distance on foot up to a forest. At the forest, the man lied to the girls that the forest was guarded by soldiers, thus, they should let him tie their hands with a rope so that if the soldiers appeared, he would have pretended to

have arrested them. They believed and let him tie. He also wanted to tie their legs but they resisted. That is when, he threatened to kill them if they would not let him tie their legs. He tied their legs, undressed them and started to rape and sodomise them, one after the other. After fulfilling his desires, he took the girls back to Chanika and left them there helplessly.

At home, their parents got worried. They started searching for the girls with no vail. In the midnight, the girls found their way home. They were in a terrible condition as they were smeared with faeces on their clothes. They narrated the whole ordeal to their parents, PW3 and PW4. The parents took the matter to Gombo la Mboto Police Station where they were issued with two Police Forms No. 3 (the PF3s) which were admitted in evidence as exhibits M1 and M2. The victims were taken to Amana Hospital for medical examination.

According to Dr. Magreth Ibobo (PW8), the anal sphincters for both victims were loose; the victims had no virginity and their hymens were perforated.

The police officers at Stakishari Police Station set a trap to capture the culprit. According to the evidence of Detective Corporal one Zainabu, a

police officer with police force number 5034 (WP 5034) working at the police gender desk at Stakishari Police Station, on 10th October, 2018, the appellant was arrested by Detective Corporal Emmanuel at the same bus stop with another pupil who the appellant was about to take in the forest.

After the appellant was arrested, Ex-Inspector Bernard Salanga Mnikola (PW6) conducted an Identification Parade where PW1 and PW2 identified him as their assailant. The Identification Parade registers were admitted in evidence as exhibits M3 and M4.

The appellant was also interrogated by WP 2240, Detective Sergent Bahati (PW7) and his confessional statement was admitted in evidence as exhibit M5.

Subsequently, the appellant was arraigned before the District Court of Ilala at Samora Avenue (the trial court), with four counts; two counts of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code (the Penal Code) and two counts of unnatural offence contrary to section 154 (1) (a) of the Penal Code.

In the trial court, the appellant fended for himself. He did not call any witness nor tender any exhibit. His defence evidence was that he was

arrested on 7th August, 2018 as habitual offender and charged with several offences including rape and unnatural offence. He completely disassociated himself with the charged offences claiming that none of the witnesses were able to properly identify him.

At the end of the full trial, the trial court was satisfied that there was no mistaken identity of the appellant as the incident took place during day time; the victims conversed with the appellant for a period of time; they walked a long distance on foot together, and that, the victims managed to identify the appellant at the identification parade which was conducted in accordance with the law. It further held that the cautioned statement of the appellant and PF3s corroborated the prosecution case. However, it was not convinced with the appellant's defence that he was arrested for offences other than the charged ones. In the end, it held that the prosecution proved the case beyond reasonable doubt. It thus, found the appellant guilty as charged, convicted and sentenced him to 30 years imprisonment in respect of each count of rape and life imprisonment for each count of unnatural offence. Further, he was condemned to pay TZS. 200,000.00 as fine for each count of rape and TZS. 300,000.00 as compensation to each victim and to receive three strokes of a cane for each count of rape.

In trying to clear his criminal record, the appellant unsuccessfully appealed to the High Court of Tanzania at Dar es Salaam (the first appellate court). Still in search of his innocence, he has come to this Court with the following eight (8) grounds of appeal:

> *"1. That, both lower courts erred in law and fact in upholding the appellant's conviction in the offence of unnatural offence when the appellant was neither cautioned nor interrogated in respect of the same offences during the interview at the police station contrary to the provisions of the Criminal Procedure Act.*
>
> *2. That, both lower courts erred in law and fact in upholding the appellant's conviction in absence of cogent and coherent evidence from prosecution in establishing the appellant's apprehension in connection to this case he is facing.*
>
> *3. That, both lower courts erred in law and fact in upholding the appellant's conviction basing on the evidence of PW1 and PW2 (victims) when the same were incredible, untruthful and unreliable by failing to give graphic description of their assailant before he was arrested.*

4. *That, both lower courts erred in law and fact in upholding the appellant's conviction when neither PW3 and PW4 nor the prosecution proved beyond reasonable doubt that there was any money transaction between PW3 and the appellant as they failed to show in court the alleged mobile phone numbers they contacted with.*

5. *That, both lower courts erred in law and fact in upholding the appellant's conviction when the appellant's defence evidence was never sufficiently evaluated, analyzed, discussed, weighed and considered before arriving at the conclusion that the appellant was guilty.*

6. *That, both lower courts erred in law and fact in upholding the appellant's conviction based on Exh. M5 (cautioned statement) which was unprocedurally admitted in court by failure of the trial court to conduct an inquiry after the objection raised by the appellant so as to determine whether or not the said Exh. M5 was voluntarily and legally taken.*

7. *That, both lower courts erred in law and fact in upholding the appellant's conviction when the purported Exh. M3 and M4 (identification parade registers) were unproceduraily conducted without*

complying with the instructions of Police General Orders (PGO) No. 232, hence, a nullity.

8. *That, both lower courts erred in law and fact in upholding the appellant's conviction when the prosecution did not prove its case against the appellant beyond reasonable doubt as required by law."*

On 21st November, 2023, the appellant filed a supplementary memorandum of appeal adding one more ground that; the learned first appellate court erred in upholding the appellant's conviction based on PW1's and PW2's evidence which was received contrary to the dictates of section 127 (2) of the Tanzania Evidence Act (the Evidence Act).

At the hearing of the appeal, the appellant appeared in person without legal representation, whereas, the respondent/ Republic had the joint services of Mr. Michael Lucas Ng'hoboko, learned Senior State Attorney and Ms. Jenina Rugalama, learned State Attorney.

When the appellant was invited to address the Court, he opted to adopt his grounds contained in the memorandum and supplementary memorandum of appeal; the gwritten arguments which he filed to this

Court on 21st November, 2023 and the list of authorities lodged on 21st November, 2023. He had nothing more to add.

At the outset, Mr. Ng'hoboko informed the Court that the Republic supports the conviction and sentence meted out to the appellant by the trial court and sustained by the first appellate court. He pointed out that the appellant abandoned the sixth ground of appeal in his written arguments, hence, he will not submit on that ground of appeal. For the remaining grounds of appeal, he clustered them in the following five issues; **one**, the evidence of PW1 and PW2 was received against the dictates of section 127 (2) of the Evidence Act; **two,** the cautioned statement was unprocedurally admitted in evidence; **three**, the visual identification made by PW1 and PW2 was not watertight; **four,** the identification parade registers which were admitted in evidence as exhibits M3 and M4 were unlawful and irregular for offending the Police General Orders (PGO) No. 232; and **five,** the defence evidence was not considered by both the trial and first courts.

Submitting on non-compliance with section 127 (2) of the Evidence Act, the appellant argued that, the trial court received the evidence of PW1

and PW2 who were of tender age, after they promised to tell the truth without assessing their competence on whether they knew the meaning and nature of an oath. In trying to support his argument that the trial court ought to have assessed the competence of the girls before promising to tell the truth, he referred us to the cases of **Godfrey Wilson v. The Republic** (Criminal Appeal 168 of 2018) [2019] TZCA 109 (6 May 2019; TANZLII); **Faraji Said v. The Republic** (Criminal Appeal No. 172 of 2018) [2020] TZCA 1755 (31 August 2020; TANZLII) and **John Mkorongo James v. The Republic** (Criminal Appeal No. 498 of 2020) [2022] TZCA 111 (11 March 2022; TANZLII).

Responding to the arguments, the learned Senior State Attorney adverted us to the wording of section 127 (2) of the Evidence Act that a child of tender age has to promise to tell the truth and not lies. It was his submission that the law is silent on the procedure to adopt when receiving the promise from such witness of a tender age. He contended that the fact that PW1 and PW2 promised to tell the truth before the trial court, the reception of their evidence was in compliance with the law. He, therefore, urged us to dismiss this complaint.

On our part, we have duly considered the written arguments of the appellant, the oral submissions of the learned Senior State Attorney, revisited the record of appeal and the law and observed that section 127 (2) of the Evidence Act no longer requires the trial judge or magistrate to test whether a child of tender age understands the nature of an oath, or is of sufficient intelligence to justify the reception of the evidence. The law as it stands, as rightly argued by Mr. Ng'hoboko, permits a trial court to receive the evidence of a child of tender age after he/she has promised to tell the truth to the court and not lies. For ease of reference, we reproduce the said section which reads:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not tell any lies."*

The Court lucidly considered the import of the above provision in the case of **Godfrey Wilson v. The Republic** (supra) and held that:

> *"To our understanding, the above cited provision as amended, provides for two conditions.* ***One****, it allows the child of a tender age to give evidence without affirmation.* ***Two****, before giving evidence, such child*

is mandatorily required ***to promise to tell the truth to the court and not to tell lies.***"

In this appeal, as correctly noted and submitted by the learned Senior State Attorney, the trial court complied with the prevailing position of the law by requiring the witness to promise to tell the truth and not lies. The record of appeal shows, at page 15 that, PW1 promised to tell the truth. Similarly, it is evident at page 19 of the record of appeal that PW2 promised to tell the truth. In that regard, we are satisfied that the evidence of PW1 and PW2 was received according to the dictates of the provisions of section 127 (2) of Evidence Act. Accordingly, we find this ground of appeal is without merit. We proceed to dismiss it.

The other complaint by the appellant was on the admission in evidence of the cautioned statement which the appellant argued that it was unprocedurally admitted. The learned Senior State Attorney, rightly observed that, the first appellate court considered this same complaint when dealing with his appeal and found the cautioned statement was recorded outside the period prescribed by section 50 (1) (a) of the Criminal Procedure Act (the CPA). Accordingly, it found merit to the compliant and

rightly proceeded to expunge it from the record of appeal. We, therefore, find that the appellant's complaint was superfluous.

After resolving the grounds raising procedural issues, we now turn to the grounds touching evidential matters. For a start, we wish to state that, this being a second appeal to the Court, we rarely interfere with concurrent findings of fact made by the courts below. We can only do so where there are mis-directions or non-directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice -see: **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149 and **Musa Mwaikunda v. The Republic** [2006] T.L.R. 387.

Arguing on the visual identification, the appellant submitted that neither PW1 nor PW2 gave a graphic description of their assailant which could have assisted the trial court to rule out the possibility of mistaken identity. Further, he argued that even PW5 who recorded the victims' statements did not state whether she was given any graphic description of the assailant. He therefore argued that there was no proper identification.

Mr. Ng'hoboko replied that, given the surrounding circumstances, both PW1 and PW2 positively identified the appellant. He reasoned that the

conditions for proper identification was favourable as it was during day time and the identifying witnesses described the features of their assailant. He pointed out that PW1 said on that incident day the appellant wore a Real Madrid jersey, jeans, a cap and had a bag and PW2 said that the appellant wore a T-shirt written Tanzania. He added that the identifying witnesses had ample time to observe their assailant as they were together for a while; they conversed, boarded a bus together and walked a long distance together. He added that the appellant was arrested by PW5 when he was about to take another child to the forest. He, therefore, beseeched us to find the complaint meritless.

The cardinal principle laid down by the erstwhile East African Court of Appeal in **Abdallah bin Wenda & Another v. Rex** (1953) 20 E.A.C.A. 116 and followed by this Court in the celebrated case of **Waziri Amani v. The Republic** (1980) T.L.R. 250 on the evidence of visual identification that: no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence on conditions favouring correct identification is absolutely watertight.

In **Jaribu Abdalla v. Republic** [2003] T.L.R. 271 we said:

"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The ability of the witness to name the offender at the earliest possible moment is a reassuring, though not a decisive factor."

The ability of an eye witness to name or give a description of his or her strange attacker(s) to the police or to any other person soon after the occurrence of the incident is crucial in establishing the credibility of the witness. It is in that respect, in the case of **Taiko Lengei v. The Republic** (Criminal Appeal 131 of 2014) [2015] TZCA 288 (25 February 2015; TANZLII) citing the erstwhile East African Court of Appeal in **Mohamed Alhui v. Rex** (1942) 9 E.A.C.A. 72, the Court said:

"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given: first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."

In the present appeal, both the trial court and first appellate court held that the appellant was positively identified. The trial court found that the identifying witnesses had sufficient time to observe the appellant as they were together from 15:00 hrs till midnight. It said:

> *"... the time the accused person was observed by the victims herein during conversation and walking given the day light, rules out the possibility of mistaken identity. Both victims told this court they described the accused person at the police station when they went to report. From the version of both victims, the* ***accused person was described to be slim, tall and average white "mweupe'*** *wearing a jeans and T-shirt features which facilitated the arrest of the accused person herein."*

We shall revert back to the bolded part. The first appellate court concurred with the trial court that there was no possibility of mistaken identity of the appellant as the victims had ample time to observe their assailant.

While we agree with the two lower courts that the identifying witnesses had ample time to observe their assailant as they were at a close range and were together for a long time from 15:00hrs till midnight, we are

not convinced that the identification of the appellant was impeccable. We are aware that, according to the evidence on record, both PW1 and PW2 saw their assailant for the first time, on that incident day. In other words, the appellant was a stranger to them. Therefore, it was not possible for the identifying witnesses to mention the name of their assailant but we expected from them, at least, to provide a description of their assailant to the person they first met and narrated the whole ordeal.

The only description given by PW1 and PW2 is the assailant's attire. This is gathered at page 17 of the record of appeal where PW1 described her assailant as follows:

> *"On the date this man [the appellant] was taking us he was wearing a Real Madrid jersey and jeans, he also had a cap and a bag."*

Further, at page 21 of the record of appeal, PW2 said:

> *"... he was wearing T- shirt written Tanzania."*

The above description given by PW1 and PW2 before the trial court was too general to fit to anyone. In the entire record of appeal, there is no evidence tending to show that PW1 and PW2 gave descriptive particulars of

their assailant either to the police or their parents that the appellant was slim, tall with average complexion as held by the trial court (the bolded part of the trial court's finding). What we gathered from the record of appeal, PW1 and PW2 narrated the ordeal to PW3 and PW4 but did not give any peculiar description of their assailant. Further, they did not describe their assailant to PW5 who recorded their witness statements.

In the case of **Omari Iddi Mbezi & 3 Others v. The Republic** Criminal Appeal No. 227 of 2009 (unreported), we reiterated that:

> *"The witness should describe the culprit or culprits in terms of body build, complexion, size, attire, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence....ideally, upon receiving the description of the suspect(s) the police should mount an identification parade to test the witness's memory, and then at the trial the witness should be led to identify him again."*

The evidence in the present appeal tends to show that, during investigation, PW6 conducted an investigation parade. The appellant

complained that the said identification parade was conducted in contravention of PG0 232. He contended that the identification parade was wanting in cogency as the identifying witnesses failed to give any prior description of their assailant before the same was conducted. To cement his argument, he cited the case of **Adriano Agondo v. The Republic**, Criminal Appeal No. 29 of 2012 (unreported).

On the other hand, the learned Senior State Attorney had a contrary view. He argued that the identification parade was conducted in compliance with the requirements of the law. To cement his argument, he referred us to page 41 of the record of appeal where PW6 said the following:

> *"On 10/10/2018 I was assigned a duty by OC CID to conduct an identification parade against the suspect called Zilam Hamls who was in police custody. The identifying witness were [AM] and [RA]. I went to the lock up. I found the suspect. I introduced myself to him and informed him that I wanted to conduct an identification parade against him. I told him he was entitled to call a relative or friend to participate in the parade. The suspect said he had no one to call. I took the suspect to the room where I prepared an identification parade. The room had*

doors and windows so there was sufficient light. The witnesses were outside the police station, and by then, I did not know them except their names. I arranged a total of 09 persons including the suspect, the rest who were on parade resembled the suspect by color, height, size and age."

When probed by the Court as to whether there was any prior description of the appellant's features before the conduct of the parade, Mr. Ng'hoboko admitted that there was none. However, he maintained that, since the appellant was arrested while in the process of committing a similar offence and since PW1 and PW2 managed to identify the appellant in the parade, the identification parade was properly conducted.

Principally, an identification parade conducted during investigation by police officers is not substantive evidence. It is meant to test a witness's alleged visual identification of a suspect during the commission of a crime. This is clearly provided for in section 60 (1) of the CPA that an investigative officer may hold an identification parade for the purpose of ascertaining whether a witness can identify a person suspected of the commission of an offence. For the identification parade to have a probative value, it must comply with the laid down procedures set out in PGO 232 issued by the

Inspector General of Police pursuant to the authority granted to him under section 7 (2) of the Police Force and Auxiliary Services Act, and further, elaborated in the celebrated case of the **Rex v. Mwango Manaa** (1936) 3 E.A.C.A. One of the requirements is to line up persons as far as possible *"of similar age, height, general appearance and class of life"* as the suspect.

In the case of **Adriano Agondo v. The Republic** (supra), the Court reiterated that:

> *"It is settled law that for any identification parade to be of any value, the identifying witnesses must have earlier given a detailed description of the suspects."*

In this appeal, we have shown that the requisite of giving prior description of the assailants before mounting an identification parade was not complied with. Therefore, we wonder how PW6 was able to comply with the requirement of lining up persons *"of similar age, height, general appearance and class of life"* as of the appellant. Such omission is fatal and renders the whole exercise of the identification parade worthless with no evidential value. We are therefore satisfied that the trial court misapplied the evidence by acting and relying on identification parade in founding the appellants' convictions and sentences.

Another complaint by the appellant was that his defence evidence was not considered by the trial court. On this we shall be brief. We entirely agree with the learned Senior State Attorney that the complaint is baseless because the record of appeal bears out at page 78 that the trial court considered the appellant's defence but it was not convinced with his defence.

Lastly, relying on the authority of the case of **Selemani Makumba v. The Republic** [2006] T.L.R. 379, learned Senior State Attorney impressed us to sustain the convictions and sentences because the evidence of PW1 and PW2 who were the victims of the rape offences was the best evidence and required no further proof.

Having heard the submission of the learned Senior State Attorney, we carefully reviewed the entire evidence on record and observed that the prosecution evidence is dented with inconsistencies and material contradictions which go to the root of the matter. We noticed that, while PW1 said that the appellant wore a Real Madrid jersey, PW2 said that the appellant wore a T-Shirt written Tanzania. Further, PW1 claimed that the appellant gave PW3 a sum of TZS. 500.00 as fare, PW2 said that it was

PW1 who was given the said fare. Again, the claim by PW1 that she gave the appellant the mobile number of her mother and he demanded money from her mother is not corroborated by the evidence of PW3 who said nothing about his wife being called by the appellant. PW3 simply told the trial court that his wife called him at around 08:00pm and informed him that their daughter had not yet returned home. Upon receipt of the information, he started searching for her, with no more.

Besides, given the material contradictions coupled with the fact that PW1 and PW2 failed to give a detailed description of their assailants to the police, we failed to find any connection between the appellant's arrest made on 10th October, 2018 and the incident that occurred on 5th October, 2018. Much as PW5 was believed by the two lower courts that the appellant was arrested while he was about to commit similar offence but the police officer, Detective Corporal Emmanuel who arrested the appellant was not called as a witness. Since the arresting officer was not called to testify for undisclosed reasons, we are compelled to draw an adverse inference against the prosecution and conclude that had he been called he would have shed light on the actual reason of the appellant's arrest.

In the end, we find merit in the appeal. Accordingly, we proceed to quash the convictions, set aside the sentences, orders for payments of fines and compensation and three strokes of cane if not yet implemented. Further, we make an order of immediate release of the appellant, **Zilam Hamis**, unless otherwise he is lawfully held for any other lawful purpose.

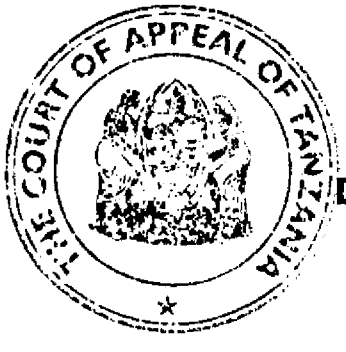
DATED at **DAR ES SALAAM** this 5th day of June, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P.M. KENTE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 6th day of June, 2024 in the presence of the appellant appeared in person and Ms. Lilian Rwetabura, learned Senior State Attorney for the respondent/Republic both being connected via video conference; is hereby certified as a true copy of the original.



W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL