IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 292 OF 2022

SAIDI ATHUMANI ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Resident Magistrate Court at Kisutu)

(Sarwat-SRM, with Ext. Jur)

dated 31st day of December, 2020

in

Extended Criminal Appeal No. 31 of 2020

.....

JUDGMENT OF THE COURT

30th April & 20th June, 2024

MGONYA. J.A.:

Said Athuman, the appellant herein, was convicted with the offence of rape by the District Court of Ilala in Dar es Salaam Region, and sentenced to 30 years' imprisonment and corporal punishment of 12 strokes. On appeal, (Sarwatt S. S. SRM) with the extended jurisdiction sitting in the Resident Magistrate's Court of Dar es Salaam at Kisutu, concurred with the trial court sustaining conviction and sentence which resulted in an order dismissing the appeal. Still aggrieved, the appellant is now before the Court on a second and final appeal.

Before the trial court, the respondent's case was predicated upon the allegation that, on 11th December 2014, at Segerea area within Ilala District in Dar es Salaam Region, the appellant did have carnal knowledge of the victim in this case whose name is concealed and will be referred herein to as PW1. The latter and her parents were sheltered in a rented unfinished three bedrooms house occupying a single room leaving other rooms to other tenants. The victim's family room was partitioned with a curtain. The victim's mother and step father occupied one side of the partitioned room, while the victim and her two siblings occupied the other. During the night, water gallons were arranged at the door so as to prevent entrance of any unwelcomed person as the door was without a topper.

At the trial court it was alleged that, on the material day, the victim's two step siblings went to visit their father so she was all alone at her side. It was PW1's assertion that, while alone at children's side at night on the material night, the appellant entered into the room and raped her. The victim is said to have felt pain but did not shout as the appellant threatened to beat her if she made an alarm. However, in the process of leaving the scene, PW3, the victim's mother while going for the call of nature allegedly, saw the appellant and shouted. The shout awakened PW2, the victim's step father who decided to chase the culprit. PW2 is said to have chased him up to the area surrounded by shops where there was light which assisted him

to recognise the person to be the appellant in this case. After recognising that it was the appellant, PW2 decided to return home. At home, PW1 informed her parents to have been raped by the appellant in this case who was well known by the victim's family.

The matter was reported to Stakishari Police Station and the appellant was arrested and later arraigned before the court. At the police, PW1 was interviewed by PW5, a police officer who also prepared a PF3 for medical examination. At Amana hospital, Doctor Chemere John who examined the victim made findings that the victim had no bruises and that her vigina was wide as two fingers penetrated in the victim's vagina during examination sailed without any impediment. From the examination, the doctor concluded that, the victim was used to sex. In his defence, the appellant categorically denied to have committed the offence.

In this appeal, the appellant appeared in person without being represented, whereas the respondent's team was led by Ms. Christine Joas, learned Senior State Attorney, assisted by Ms. Shose Maiman also learned Senior State Attorney and Mr. Erick Kamala, learned State Attorney. Seven grounds of appeal were preferred by the appellant in his memorandum of appeal, namely:

1. *That, the 1st appellate court erred in law in upholding the appellant's conviction relying on the visual identification evidence*

by PW1, PW2 and PW3 which was insufficient, incredible and problematic;

2. *That, the 1st appellate court erred in law in upholding the appellant's conviction relying on uncredible testimonies of PW1, PW2 and PW3 particularly on the intensity of the light and time used by appellant at the scene of crime;*
3. *That, the 1st appellate court erred in law in upholding the appellant's conviction relying PW4's (doctor) testimony whose evidence was unreliable for failure to tender in court PF3 without assigning any reason for the said omission;*
4. *That, the 1st appellate court erred in law in upholding the appellant's conviction without considering the appellant's defence which raised doubts to the prosecution case, hence caused miscarriage of justice;*
5. *That the PF3 report annexed in the record of appeal was neither tendered nor read out in court during the hearing of the case, hence disqualifies PW4's oral testimony;*
6. *That, the 1st appellate court erred in law in upholding the appellant's conviction relying on the prosecution case which was poorly investigated and failed to call arresting officer who also issued PF3 to establish the link between the appellant and the alleged crime; and*
7. *That, the 1st appellate court erred in law in upholding the appellant's conviction in a case which prosecution grossly failed to prove the case beyond reasonable doubt.*

At the hearing, the appellant asked the Court to consider his written statement of arguments in support of his grounds of appeal and allow his appeal.

We had time to go through the appellant's written submission in support of this appeal. it is the appellant's submission in the 1st ground that both the trial and 1st appellate courts erred in believing that the evidence of visual identification by recognition through PW1, PW2 and PW3 as sufficient without regarding to the factors for watertight recognition evidence against him at the scene of crime. The appellant further submitted that, the above-mentioned prosecution witnesses' testimonies were unreliable since at the trial, they failed to explain the intensity of light in the room and at the shop where it was alleged that he was recognised, as the incident is said to have taken place at night. Further, that the witnesses too failed to explain the time the witnesses used to observe her assailant. From the above, it is the appellant's concern that prosecution witnesses' evidence before the trial court was insufficient to ground his conviction. To support his stance, the appellant referred us to our decisions in **Felician Joseph v. Republic**, Criminal Appeal No. 152 of 2011, **Anael Sambo v. Republic,** Criminal Appeal No. 274 of 2007, **Rehani Saidi Nyamila v. Republic,** Criminal Appeal No. 222 of 2019 (all unreported); **Jaribu Abdallah v. Republic** [2003], T.L.R. 271, and **Republic v. M. B. Allui** (1942) 19 EACA 72.

Responding to the appellant's submission, Ms. Joas at the outset expressed her stance to support the appeal, mainly on the ground that the appellant was not properly identified at the scene of crime. That being the case, the learned Senior State Attorney decided to exhaust the entire appeal through the first ground only. She was in agreement that the 1st appellate court erred in upholding the appellant's conviction relying on the visual identification evidence by PW1, PW2 and PW3 which was insufficient, incredible and problematic.

The learned Senior State Attorney argued that, prosecution witnesses, PW1, PW2 and PW3 when testifying before the trial court claimed to have identified the appellant at the scene and when was chased by PW2. It was her further submission that, the said prosecution's witnesses also failed to state the intensity of light that assisted them to identify the appellant, neither give the appellant's description and mention the exact time of the event to that effect. Outlining the scenarios of which the appellant was not properly identified, the learned Senior State Attorney pointed out, **first**, the victim's step father (PW2) who went to chase the assailant upon his return said to have noted that the one who was at their house was the appellant. However, it was the learned Senior State Attorney's argument that, since PW2 did not see the face of the person he was chasing, he could not have concluded that the person he was chasing from their house was the

appellant. **Secondly,** it was the learned Senior State Attorney's submission that, PW3 although testified to have identified the appellant at the scene, she did not state what kind of light assisted her to identify the appellant. From this kind of testimony, Ms. Joas reiterated her persuasion that the appellant was not properly identified at the scene to warrant his conviction. In support of her argument, she referred us to the decisions of this Court in **Hassan Hussein v. Republic**, Criminal Appeal No. 41 of 2022, **Waryoba Elias v. Republic**, Criminal Appeal No. 112 of 2020 and **Godfrey William @ Matiko & Another v. Republic** Criminal Appeal No. 409 of 2017 (all unreported).

Concluding her submission, the learned Senior State Attorney submitted that, as far as the appellant categorically denied to have committed the offence, then the above legal shortfall on insufficient identification of the appellant, be resolved in favour of the appellant and allow the appeal.

The appellant had nothing in rejoinder as he agreed on what has been submitted by the learned Senior State Attorney.

As seen above, the learned Senior State Attorney supported the appeal upon the 1st ground based on insufficient evidence of identification of the appellant.

Having heard both parties and going through the record of appeal, we have observed that PW1, PW2 and PW3 were the ones who alleged to have identified the appellant at the scene of crime. It is also undisputed fact that the three prosecution witnesses and the appellant knew each other before the alleged incident as they were staying together in the same house before they shifted to the house they stayed on the date of the incident. That being the case, identification claimed to be done on the night of incident, was by recognition. From the parties' submissions, the issue is whether the evidence on which 1st appellate court sustained appellant's conviction was sufficient to warrant dismissal of his appeal.

It is settled that identification by recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made. See: **Jumapili Msyete v. The Republic** Criminal Appeal No. 110 of 2014 and **Hekima Madawa Mbunda & Another v. The Republic,** Criminal Appeal No. 566 of 2019 (all unreported). In the latter decision we stated that:

> *"Much as it was not disputed that the appellants were not strangers yet that is no guarantee that there could be no chance of a mistaken identification. Cognizant with that possibility, the*

Court has consistently held that even in identification by recognition chances of a mistaken identity still obtains."

Likewise, it is elementary law that in a case where the prosecution entirely depends on the evidence of visual identification, the court can only act on it upon satisfying itself that the conditions for a proper and unmistaken identification are favourable such that they eliminate the chances of a mistaken identity. See our often-cited case of **Waziri Amani v. Republic** [1980] T.L.R. 250 where we stated:

"... evidence of visual identification... is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight".

Referring to the record of this appeal, PW1 informed the trial court to have recognised the appellant to be the one who entered unlawfully into their room that night as she is well known by the appellant as that it was not the first time they had sexual interaction. In her own words at page 12 and 13 of the records when testifying she said:

"When I was asleep, Said entered in the room, he awakened me. I wore only a khanga and skin tight.

He also unzipped his trouser, took his penis and inserted into my vagina. He laid me backward. I felt pain but I did not shout as he threatened to beat me if I make an alarm. .....

That was not the first time to know me carnally, he started knowing me carnally i.e. having sexual intercourse with me ever since we were living together in the former house."

In corroboration of PW1's testimony, it was PW2's testimony that, when they were asleep on the day of the event, he was awakened by his wife who told him that there was someone inside their room. Out of the sleep, he found a man in short trousers running from their children's side of the room and decided to chase him. It is in his testimony that he chased the assailant up to the point where there was a shop with electricity light, therefore he recognized that it was the appellant. He thus concluded that, it was the appellant who entered their room and raped the victim.

Finally, the victim's mother's (PW3) testimony was to the effect that, on the day of the event at 04:00 a.m. when she was going out to attend the call of nature, she found appellant coming out of the victim's side of the room and she shouted. As the result, her husband (PW2) decided to chase him. She said nothing close to identifying the culprit.

From the above testimonies, the trial court convicted and sentenced the appellant. Further, the first appellate court concurred with the trial court's findings that PW1 was raped by the appellant relying on her own as well as her parents' testimonies as seen above. It is obvious that the first appellate court's decision relied on the well-established principle that, the best evidence in sexual offences must come from the victim; as it was established in the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379 reinforcing the spirit under section 127 (6) of the Evidence Act.

Nevertheless, this Court has always insisted on great caution before acting on visual identification evidence to avoid the possibility of mistaken identification. It is clear from the record of appeal that, the trial and the first appellate courts merely restated the caution over identification evidence without relating that caution to the evidence on record.

We have noted that, apart from the findings of the trial court to which the first appellate courts concurred, the identification evidence of the appellant by PW1, PW2, and PW3, such evidence was not impeccable because there was no any evidence regarding the intensity of light which aided the victim and her parents in identifying the appellant. It was not enough for PW1 to merely tell the trial court that she knew the person who entered their room to be the appellant simply because he identified himself

to be the appellant. Further, it was not enough for PW1 to say that she knew it was the appellant as they had sexual interaction before.

It has to be noted that the house in which the victim and her parents were staying had no electric, solar lights or any other source of light or from another external source at that particular time of the night to enable them to clearly see the invader. Even for PW1 who claimed that the person who entered the room was the appellant, that kind of evidence has to be taken with caution.

In this case, the appellant is said to have entered the room and informed the victim that he was the one and that she should not shout. Under the circumstances, it is expected that the invader's conversation with the victim to be in the very low voice so that he cannot be heard by any other person in that room. Further, knowing that he invaded the room unlawfully with the intension to commit an offence, the lowered voice could not sound exactly to be same as someone's normal voice, hence could occasion into a mistaken identification. Equally in those circumstances, it is possible for the invader to imitate someone's else voice to win his intension.

The law is settled that voice identification is not reliable and absolute. In the case of **Mkwavi s/o Njeti v. Republic,** Criminal Appeal No. 301 of

2015 this Court referred what was stated in **Stuart Erasto Yakobo v. Republic,** Criminal Appeal No. 202 of 2004 that:

> *"The issue is whether voice identification is reliable in law. In our considered opinion, voice identification is one of the weakest kind of evidence and great care and caution must be taken before acting on it..... There is always the possibility that a person may imitate another person's voice. For voice identification to be relied upon, it must be established that, the witness is well familiar with the voice in question as being the same voice of a person at the scene of crime....."*

PW2 identification of the appellant is said to be by way of recognition. However, this witness as well did not describe the intensity of the light at the shops where he claimed to have seen and recognised the appellant. Also in his testimony, PW2 did not describe the appellant's body description to resemble that of the appellant. We have also noted that, his testimony is silent on whether, when he was chasing the appellant, the same turned back to face him for his easy and clear recognition to eliminate the possibility of mistaken identity. Likewise, PW3 who claimed to recognise the appellant in the room without stating the kind and intensity of light which enabled her to recognise the assailant, her recognition was also prone to mistaken identity towards the assailant who claimed to be the appellant. Moreover,

it is on record that, after seeing the appellant, she was shocked and became unconscious. Under the circumstances as the assailant did not turn to expose his face, amidst darkness at that hour in the night there could be a chance of mistaken identity of the appellant's identification by recognition.

As we said in **Hamis Hussein and Two Others v. The Republic,** Criminal Appeal No. 86 of 2009 (unreported):

> *"We wish to stress that even in recognition cases, where such evidence may be more reliable than identification of a stranger, clear evidence on the source of light and its intensity is of paramount importance. This, is because, as occasionally held, even when the witness is purporting to recognize someone he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."*

In the case at hand, having carefully scrutinized the evidence on the record in comparison with the legal principles laid down in the above decisions, we are of the view that the identification of the appellant was not watertight. In the event therefore, we fully agree with the learned Senior State Attorney that the appellant was not properly identified to ground conviction and sentence meted to him.

Consequently, we hold that the prosecution failed to prove their case beyond reasonable doubt. Since the first ground is sufficient to dispose of the appeal, we do not see any need delving to other grounds. In the event, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released from prison forthwith unless he is lawfully held therein.

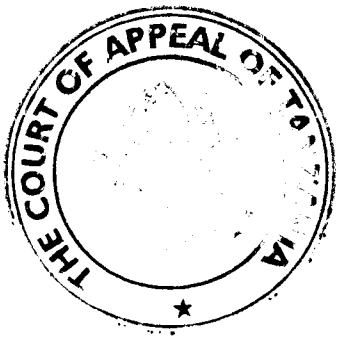
DATED at **DAR ES SALAAM** this 23rd day of May, 2024.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of June, 2024 in the presence of the appellant appeared in person via Video link from Ukonga Central Prison and Mr. Leonard Reuben Chalo, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL