IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 265 OF 2018

(Originating from the District Court of Nyamagana Criminal Case No. 111 of 2015)

SESE PAULO VENANCE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

17.2 & 26.2.2020

U. E. Madeha. J

Before the District Court of Nyamagana, the appellant Sese Paulo Venance was charged and convicted with rape offence C/S 130 (1) (2) (e) and 131 of the Penal Code Cap 16 of the Law (R. E. 2002). He was sentenced to serve thirty years in prison. The sentence and conviction did not amuse him, he lodged this first appeal. In view of the grounds of appeal raised the issues here are:

1. Whether the appellant was identified at the time of the incident.
2. Whether the victim age was determined by the trial court.
3. Whether there was sufficient evidence led by the prosecution to prove that the victim was a school girl of 16 years old.

The facts as set out shows that; the victim was sent by her mother on 20:00 hours on 2.5.2015 to send money to one mother called Njile at Bugarika street from Igogo street. When she was returning back home at night hours she met with a black tax. The appellant with the other two accused who were not arrested kidnaped the victim and drove her to the car. After taking her to the car they took her up to Buzuruga Street where they rented a guest room, they raped her and left while leaving the door locked, the victim was unlocked by the guest attendant in the morning. The victim's mother admitted that she had sent the victim to send money overnight. On defence side the appellant denied the allegations. The only evidence linking the appellant with this incident is the victim's evidence, the caution statement of appellant Exhibit P1, the victims PF3 which was received in evidence as exhibit P2. In the caution statement the appellant denied to commit the alleged offence. The only remaining evidence against the appellant is the victims' testimonies and the evidence of a doctor who tendered the PF3 of the victim.

I will determine this appeal by discussing all the issues arising from the grounds of appeal. Starting with the first issue whether the appellant was identified at the time of the incident. Mr. Juma Sarige Senior State

Attorney submitted that; the appellant was properly identified by using a flash of lightning, but I go through the victim's testimony who stated that, she comes to recognize the appellant when he turned on lights, but was not told what kind of lamp. I'm with the view that the incident took place at night, and the victim says that she recognized the appellant by using a light. Something I do not dispute that there was a light. But the victim failed to explain to the Court what light, where the bulb, tube light, candle light or a lamp. The victim failed to explain properly what the diagnosis was. She had a duty to explain exactly what light made her to identify the appellant, in order to help the Court to do justice than to say that there was light on the scene. It cannot be gain said that visual identification is of the weakest kind and courts are enjoined to ensure that before entering a conviction on the basis of visual identification such identification is watertight. In the celebrated case of **Waziri Amani Versus Republic.** (1980) TLR 250, It was held that, I quote:

(i) *"Evidence of visual identification is of the weakest kind and most unreliable;*

(ii) *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 watertight. "

A number of factors were enumerated in the above case which are to be taken into account by a Court in order to satisfy itself on whether or not such evidence is watertight. These factors include: the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance, whether it was day or night- time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before.

There is no dearth of authorities restating the principles laid down in Waziri Amani on visual identification. These include **Raymond Francis Versus. Republic (1994) TLR 100 Jaribu Abdalla Vesus Republic. Criminal Appeal No. 220** of 1994, **Issa Mgare @ Shuka Versus. Republic. Criminal Appeal No. 37 of 2005. Said Chally Scania Versus. Republic, Criminal Appeal No. 69 of 2005 Kulwa Mwakajape Versus Republic Criminal Appeal No. 35 of 2005** (all unreported), In Jaribu Abdalla the Court stated:

"…. In matters of identification it is not enough merely to look at the 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…."

In the present case credibility of the witnesses was highly suspect. There were several contradictions in the testimonies of the witnesses. As explained here above, the victim failed to speak the source of light in the room.

Coming to the second issue which raise an issue whether there was sufficient evidence was led by the prosecution to prove that the victim was a school girl aged 16 years old. In my considered view it was supposed to be proved by the prosecution beyond reasonable doubt that PW1 was a student. However, the prosecution side had a duty to prove all the ingredients of the offence beyond reasonable doubt, including all elements of an offence and thus the age of the victim. The law is settled as to how the issue of age of a victim has to be determined in court. When considering whether the age of the victim was sufficiently proved, section 114 (2) of the Law of Child Cap 29 of 2009 is relevant. It states that:

"Without prejudice to the preceding provisions of this section, where the Court has failed to establish the correct age of the person brought before it, then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person".

In the case of **Francis Versus Republic** Criminal Appeal, No. 173 of 2014, the Court of Appeal stated that;

"Where the victim's age is the determining factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim under normal circumstance. Evidence relating to victim's age would be expected to come from the following; the victim, both her parents and at least one of them, a guardian, a birth certificate etc. So, the citation by the magistrate regarding the age of a witness before giving evidence is not the evidence of a person's age".

Furthermore, as regards to the age, the Court of Appeal in **Emmanuel Kibona and another Versus Republic** (Court of Appeal of Tanzania) (1995) TLR 241 stated that:

"Evidence of a parent is better than that of a medical Doctor on the child's age. Where the age cannot accurately be assessed, the benefit of the doubt must be given to the accused".

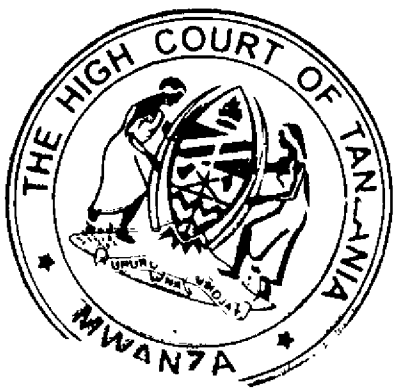
Likewise, going by the case of **Robert James V R Criminal Appeal,** No 247 of 2010 Court of Appeal Dodoma, it is clear that the issue of age of the victim where the offence involved is statutory rape must be ascertained by the trial court. I found that the issue of the age of the victim was not addressed in the trial Court as required by law that, the child age must be verified to support the statutory rape.

Lastly, whether the case of rape was proved to the required standards. In this case the evidence by the prosecution side is inaccurate. First the evidence of the caution statement in which the appellant has not confessed to committing the alleged offence. PF3 shows that the incident happened on 2/5/2015 and the victim went to the hospital on 5/3/2015 three days passed from the day of the incident. I found that the victim failed to report the matter at the earliest opportunity. The prosecution side could not prove its case. There is no connection with the one who helped the appellant to rent the room to the lodge. I wonder how they did not call someone from the lodge to come and testify, to prove the case if the appellant and the other two suspects were not arrested who rented the room. Also, the issue of identification was not proved. I disagree with the senior State Attorney who found that there was enough evidence to

ground conviction. I found this case was distinguishable there is no enough evidence to convict the appellant.

In the result, I find the appeal of **Sese Paulo Venance** to have been filed with good cause. I accordingly allow it. Conviction entered against the appellant is quashed and sentences imposed on them are set aside. The appellant is to be set at liberty forthwith unless otherwise held in connection to lawful cause. Order accordingly.

DATED and **DELIVERED** at **MWANZA** this 26th day of February, 2020



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U.E. Madeha
Judge
26/2/2020