IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO: 114 OF 2018

(Arising from the decision of the Court of the Resident Magistrate for Coast Region at Kibaha in Criminal Case No. 114 of 2018)

REBAGO TOTOO.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

MASABO, J.,

The Appellant Rebago Totoo was convicted and sentenced to thirty years imprisonment on the 27th November, 2018 contrary to section 130 (2) (e) and section 131 (1) of the Penal Code [Cap 16 RE 2002] for having raped a girl of 12 years. He is now appealing against the conviction and sentence armed with 18 grounds of appeal namely;

1. That, the learned trial magistrate erred in law and fact by shifting the burden of proof from the prosecution to the appellant hence convicting him on the weakness of his defence instead of the strength of the prosecution evidence contrary to procedural law;
2. That, the learned trial magistrate erred in law and fact for failing to note that the appellant was detained at police custody above the period of time prescribed by law and there were no reasons advanced by the prosecution evidence for that illegal action;
3. That, the learned trial magistrate erred in law and fact by convicting the appellant relying on the dock identification without being preceded with a fair conducted identification parade as PW.2 (the

victim) testified before the court that the alleged culprit was a stranger to her while she had an opportunity to see the appellant at the police station contrary to the procedure of law;

4. That, the learned trial magistrate erred in law and fact for failure to analyse that the appellant was apprehended simply because he is a Masai as PW. 3 testified before the court a stance which shows that his apprehension does not link him directly with the offence charged with;
5. That the trial magistrate erred in law and fact to convict the appellant relying on PW5 testimony as he (PW 5) alleged to give the room for the appellant to stay and the appellant stole two bags from him (PW.5) without those alleged stolen bags being tendered before the court;
6. That the learned trial magistrate erred in law and fact by convicting the appellant on the evidence of a child witness (PW.2) who is a victim and contrary to procedure of law;
7. That the learned trial magistrate erred in law and fact by convicting the Appellant relying on PW2's incredible and unreliable testimony as she alleged to be cut on her finger during the incident without any supporting evidence such as PF.3 or a medical sheet or from PW7 who is a clinical officer alleged to examine the victim (PW.2) to corroborate;
8. That the learned trial magistrate erred in law and fact by convicting the appellant in a trial which was un-procedural conducted as the appellant was not furnished with the complainant statement contrary to procedure of law;

9. That the learned trial magistrate erred in law and fact by convicting the appellant relying on the retracted cautioned statement (Exh.3) un-procedural recorded by PW6 after the expiry of the legal period available for interviewing a person without any application for a further extension of that period which is contrary to procedure of law;

10. That the learned trial magistrate erred in law and fact for failing to note that the victim (PW2) was interrogated by PW6 after the appellant's arrest and his cautioned statement recorded a stance which prove that the case against the appellant was concocted one.

11. That the learned trial magistrate erred in law and fact by convicting the appellant without drawing an adverse inference against prosecution evidence for failure to summon as the Ward Councillor who allegedly took the victim (PW2) to hospital before the court of law;

12. That the learned trial magistrate erred in law and fact for convicting the appellant on a case whereby prosecution side failed to adduce evidence such as birth certificate to prove age of the victim (PW2);

13. That the trial learned magistrate erred in law and fact by convicting the appellant on PW7 evidence who is a clinical officer alleged to examine the victim on the 7th July 2018 which is one day after the incidence while tendered PF3 (Exh.4) being filed on 12th July 2018;

14. That the learned trial magistrate erred in law and fact by convicting the appellant while failing to address him properly in the

ruling of *prima facie* case without being reminded the charge against and asked to plead thereto before defence case

15. That the learned trial magistrate erred in law and fact by convicting the appellant relying on the prosecution evidence whereby they failed to prove the case against him without any reasonable doubt as charged

In addition, the appellant fronted three 3 additional grounds namely;

1. That the learned trial magistrate erred in law and fact in disregarding the fact that the appellant affirmed that he was not at the alleged scene of crime on the 6th July 2018 resulting the prosecution evidence to be suspicious and /or framed up story;
2. That the learned trial magistrate erred in law and fact when convicted the appellant relying on retracted caution statement (P3) which was irregularly recorded and admitted while the same was in violation of sections 53 (c) (ii) , 54 (i) , 57 (2) , (4) of CPA Cap 20 RE 2002 and Section 27(2) of TEA [Cap 6 RE 2002] hence P4 PF3 was irregularly admitted without being read aloud to court;
3. That the learned trial magistrate erred in law and fact to convict the appellant relying on deficient visual identification of the appellant and the exhbits P2 without determining that PW1 and PW2 were called at Police Station to identify the appellant before their substance of evidence were taken see evidence of Pw1, Pw2 and PW6;

When the appeal was called for hearing the Appellant appeared in person via video conference and Ms Christine Joas learned State Attorney appeared for the respondent Republic.

Submitting in support of his appeal he consolidated the 3rd and the 10th ground of appeal and the 3rd ground in the additional grounds list and submitted that, since the victim testified that the culprit was a stranger it was imperative that an identification parade be constructed in accordance with Police General Order No. 232. He proceeded further that the victim's statement was not taken on the fateful day as she was in bad condition as per PW3 and PW6 testimony. It was taken on 11th July, 2018, 4 days after the fateful event.

He then consolidated the 1st ground in the memorandum appeal and the 1st ground of the additional grounds of appeal and submitted that the prosecution did not prove their case beyond reasonable doubt as the Appellant had an alibi. That section 3(i) (a) of the Evidence Act was not complied with. The appellant invited the court to consider the case of **Shatis Abdallah Man Mboja V Republic** Criminal Appeal No 104 of 2017, CAT (unreported).

In regard to the 2nd ground, he submitted that he was detained at Police Station for two months without being aligned to court contrary to Section 132 (1) of the Criminal Procedure Act cap 20.

Regarding the 9th and 13 ground of appeal in the memorandum of appeal and the 2nd ground in the additional grounds, he submitted that his

statement was taken out if time contrary to section 50 (a) CPA which requires that the accused's statement be taken within four hours after the arrest, a time which can be extended in accordance to section 51(1) (a) of CPA (supra). Also, the provision of Section 57 (2) and 4 of the CPA was not assigned time for his interview was not disclosed.

In regard to the 2nd ground of the additional grounds it was submitted that Exhibit 4 was not read over to the accused contrary to the requirement of the law. The Appellant cited the case of **Rashid Amir Jabar & Another v Republic** Criminal case No. 204 of 2008, CAT (unreported) in support. On the 4th ground of appeal, the Appellant argued that the testimony of PW3 does not connect him with the offence as PW3 merely stated that the Appellant was arrested because he is a Maasai. Regarding the 6th ground of appeal, it was submitted that PW2 evidence was admitted contrary to Section 127 (2) of Evidence Act [Cap 6 RE 2019].

On the 7th ground the appellant argued that PW2 stated that the Appellant injured her but there was no evidence adduced to prove the same. Therefore, her evidence should be disregarded as she is not a credible witness. In regard to 8th ground the Appellant submitted that the statement of the victim and of the witnesses were not availed to him contrary to Section 9 (3) of the Criminal Procedure Code Cap, 20 RE 2019. On the 11th ground the Appellant contented that the Ward Counsellor who took the victim to the police station and to hospital was a material witness. The failure to call this material witness draws an adverse inference on the prosecution case. On the 12th ground he submitted that the age of the

victim ought to be proved but it was not as her birth certificate was not produced before the court. Regarding the 14th ground was argued that the trial magistrate violated the law by inviting the defence case defence without making a ruling on whether *prima facie* case was established. Lastly on the 15th ground, he argued that Exh. P1 was not read over after being admitted contrary to the law.

On the respondent side, Ms. Christine Joas supported the conviction and sentence and proceeded to submit that, the 1st ground of appeal and 1st ground in the additional list are all baseless as the Appellant's evidence was admitted. She submitted that the alibi raised by the appellant could not be entertained as it was raised in total contravention of section 194 (6) of the Criminal Procedure Act. On the 9th, and 13th ground of appeal and 2nd ground in the additional grounds, she briefly submitted that they are baseless as the caution statement was properly admitted and read over to appellant who did not object its admission.

In regard to 3rd and 10th ground of appeal and the 3rd ground in additional list of grounds of appeal, she submitted that they are baseless as the victim knew the Appellant as she saw him before the incidence occurred during the day therefore the victim ably identified the appellant on the material date.

Miss Joas contented that the 2nd ground of appeal cannot be raised at appeal stage as it was not an issue during the trial. Regarding the 5th ground Ms. Joas asserted that the issue of proof that the Appellant was caught with the bags and the 7th ground that the victim was injured by

the appellant are not relevant in proof of the case at hand. Regarding voire dire, Ms Joas submitted that voire dire test was properly done as it is reflected at page 7 of the proceedings. On the 8th ground she argued that it is not fatal as the appellant was aware of the charges against him. Therefore, the fact that he was not given the complainant statement did not prejudice him.

Regarding the 11th ground of appeal Ms. Joas asserted that it is the prosecution duty to choose their witness. The Ward Councillor was not brought before the court as there were other credible witnesses. On the issue of proof of the age of victim she placed reliance in **Elia Elibariki V R**, Crim Appeal No.321 of 2016, where it was pointed out that the age of the victim can be proved by parents, birth certificate, doctor, guardian or the victim. In the instant case the doctor proved the age of the victim. On the 14th round Miss Joas submitted that the trial court complied with the requirement of the law. At page 30 of the trial court proceedings, the appellant told the court that he was ready to render his defence under oath. Lastly, Ms. Joas submitted that the case was proved beyond reasonable doubt. The victim proved that she was raped, the Appellant confessed and his confession was admitted in court as it was uncontested.

I have given due regard to the grounds advanced in the memorandum of appeal and the additional grounds thereto, the prayer by the appellant and submission by both parties. I will start with the grounds revolving around reliability of the evidence of PW2. My choice to start with this part of the appeal is placed on the fact that in sexual offences, the evidence of the prosecutrix is the best evidence (see **Mohamed Haji Alli v. DPP,**

Criminal Appeal No. 225 of 2018 CAT (Unreported); and **Juma Mohamed v. Republic**, Criminal Appeal No. 4 of 2011 CAT (Unreported). Therefore, in the present case, if the evidence of PW2 is found credible, is it will suffice to sustain conviction as it is the best evidence.

The appellant has challenged PW2's evidence from different slants the major ones being, noncompliance with section 127 (2) of the Evidence Act, Cap 6 RE 2019, and unreliability of virtual identification. The appellant has also argued that PW's age was not established.

Starting with the issue of age, as stated above, the appellant was charged and convicted of the offence of rape a girl of 12 years. As the offence of against which the appellant was charged (statutory rape) is predicated on the age of the victim, it was imperative that the prosecutrix's age be established.

The modality for establishing the age of the victim is stipulated under section 114(2) of The Law of the Child Act [Cap 29 of 2009] that;

> "..... 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."

The provision is well illustrated in ***Francis V Republic***, Criminal Appeal No. 173 of 2014 (CAT) where it was pointed out that the victim's age can be proved by the victim, both of her parents or at least one of them, a guardian, a birth certificate etc. In the instant case, the age was confirmed

by the prosecutrix and PW2 who both testified that she was 12 years old. To that extent, this complaint fails for lack of no merit.

As to the complaint on noncompliance with Section 127 (2) of the Evidence Act [Cap 6 RE 2019]; it is a mandatory legal requirement that when a witness is of tender age (of the age not more than 14 years (Section 127(5)), his/her evidence should only be taken after she/he has promised to tell the truth to the court and not to tell lies. Failure to comply with this provision renderes the respective testimony invalid. (see **Godfrey Wilson v R** Criminal Appeal No. 168 of 2018, CAT (unreported).

In the instant case, the trial court record reveal that this requirement was meticulously complied with. Before accepting the evidence of PW2, the trial court commendably took her through the necessary legal steps and, ultimately, in compliance with the respective provision, she promised to tell the truth not lies and henceforth, her testimony was taken. Therefore, the assertion that the requirement of section 127(2) of the Law of Evidence Act (Supra), is self-defeating and totally misplaced.

Coming to the reliability of virtual identification, the law as to propriety and credibility of virtual identification was articulated in **Waziri Amani v. Republic** [1980] TLR 250. In this case which has become a trite law in our jurisdiction, the Court of Appeal held that evidence of visual identification, is the weakest and most unreliable evidence. Hence, a court should not convict based solely on this evidence unless it is satisfied that the evidence is absolutely watertight. Echoing its position in **Waziri Amani v R** (supra) the Court of Appeal in **Mussa Hassan Barie &**

Albert Peter @ John v R, Criminal Appeal No 292 of 2011 CAT at Arusha (unreported) had this to say:

> The law on visual identification is, we think, now fairly settled. It is of the weakest kind, especially if the conditions of identification are unfavourable. So, no court should base a conviction on such evidence unless, the evidence is absolutely watertight. (See **Waziri Amani vs R** (*supra*).
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> Although, no hard and fast rules can be laid down as to what constitute favourable conditions (as those would vary according to the circumstance of each case) factors such as whether or not it was day time or at night if at night, the type and intensity of light; the closeness of the encounter at the scene of crime; whether there were any obstructions to clear vision, whether or not the suspect(s) were known to the identifier previously; the time taken in the whole incident; and many others, have always featured in considering whether or not identification of suspects is favourable (See **WAZIRI AMANI vs R** (*supra*).

In the instant case, the following facts are not in dispute: **First**, the offence was committed in broad day light at around 14hours while the victim was grazing cattle in the bush. **Second**, the victim and her assailant were not familiar to each other. Their first meeting was on the fateful day. On that day they had three encounters in short time intervals. In her testimony, PW2 stated that in the first two encounters the appellant asked her if his cattle were in the herd of cattle she was grazing and having given him a negative answer he vanished. Later on, he returned and committed the atrocious sexual attack.

Thereafter, they met at police station. As submitted by the appellant, no identification parade was conducted. The prosecutrix was taken straight to the appellant who was then held under police custody and identified him. I note that she had, prior to this identification, given to the police the appellant's description in terms of attire and physique. According to PW3, E.1062 D/CPL Shadrack, the prosecutrix reported that her assailant was a new comer to the village, black, not too tall, he wore a Masaai sheet, black open shoes and was armed worth a sword and a club.

The trial court was not convinced that this identification was free of mistaken identity. Its reasoning which I fully subscribe to was that, testimony as to colour and height are, most often, subjective. Also, the garments allegedly wore by the appellant and the things he was found under his possessions are traditional apparels for Maasai men. Thus, any Maasai man could have the apparels at any given time. Let me add that, placing reliance on such apparels for identification not only entertains mistaken identity but also carries a risk of condemning the appellant on ethnic considerations. Needless to say, it was imperative for the prosecution to lead independent evidence in proof that the person in the said apparel who committed the atrocious offence was none other than the appellant.

To this extent, I am of the considered view that although the crime was committed in broad day light which suggests that the environment was favourable for identification, this alone would not suffice to warrant a conviction. It was mandatory that all the possibilities of mistaken identity be eliminated. Needless to say, since the appellant was a total stranger

to the prosecutrix, dock identification was not enough. It was imperative that an identification parade be conducted. As held in **Mussa Elias and Three Others v. Republic**, Criminal Appeal No. 172 of 1993 (unreported):

> "... dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade of which the witness successfully identified the 16 accused before the witness was called to give evidence at the trial."

Now, since there was no identification parade and having applied the principles above, I have come to the conclusion that the evidence on record was not watertight to sustain the appellant's conviction. The question is whether there is any other evidence connecting the appellant to the offence. The answer is in affirmative, there is in place a caution statement which was admitted as exhibit P3. However, this too was not free of blemishes. It is on record that although the appellant did not formally object it, in the course of his defence, he complained that he was beaten and threatened. He also complained that caution statement was recorded after the expiry of time limit.

Also as held by the trial court, the fact that the appellant admitted to have raped the prosecutrix is speculative because, all he admitted is that he raped a Mang'ati. There is a possibility that the Mang'ati woman being referred, is the other victim of rape referred to in testimony of PW3 and PW 1. With these impairments, I accord no weight to the caution statement.

I note that, the trail magistrate correctly found that there was no was no direct evidence connecting the appellant to the crime. However, while placing reliance on Ally Bakari and Another v R [1992] TLR 10 and **Protas John Kitogole and Another v R** [1992] 52, he proceeded to convict the appellant on circumstantial evidence. Whereas I am alive to the fact that it is now a settled law that where the evidence in criminal case is based entirely on circumstantial evidence, the court can enter conviction if it is satisfied that the evidence irresistibly points to the guilt of the accused, the appellant in this case, to the exclusion of any other person, In my view, the facts relied upon, to wit, the appellant was arrested in a nearby village, he spent a night in the village, he was a stranger to the area, he did not explain why he went to the village, do not irresistibly lead to the guilty of the accused.

In the foregoing, since there was no direct evidence connecting the appellant to the claim and since the circumstantial evidence incriminating him did not irresistibly point to his guilty, I see no need to proceed with determination of the rest points of appeal, as that would not have any impact on the final verdict. In the final event, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. The Appellant is to be discharged with immediate efect unless he is otherwise held for a lawful cause.

DATED at DAR ES SALAAM this 18th daof December 2020.

J.L. MASABO

JUDGE