

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 113 OF 2020

(Originated from the criminal case no. 90 of 2019 in the Resident Magistrate's Court of Mbeya at Mbeya)

IDD S/O SAID -----APPELLANT

VERSUS

THE REPUBLIC -----RESPONDENT

JUDGEMENT

Date of last order: 06.09.2021

Date of Decision: 27.09.2021

Ebrahim, J.:

The Appellant herein has filed the instant appeal raising eight grounds of appeal as follows:

1. That- the trial magistrate erred in point of law and fact by convicting the appellant relying on the evidence which is not corroborative.
2. That- the trial magistrate erred in point of law and fact by convicting the appellant on the hearsay evidence that the victim (PW1) was a pupil of Lyoto Primary School

3. That the trial court erred in law and fact by convicting the appellant without citing the governed section of the law.
4. That the trial court magistrate erred in law and fact when he convicted the appellant basing on the exhibit P1 which was improperly admitted as per criminal law requirement.
5. That the trial court magistrate erred in law and fact when he convicted the appellant relying on the prosecution case only and totally ignored the defence case.
6. That the trial court magistrate imposed un witnessed evidence by saying on the proceedings of the court at page 4 that the appellant confessed to have raped the girl.
7. That the lower court erred in law and fact by convicting the appellant relying on the evidence of PW6 with its exhibit P2(PF3) while the medical test for DNA and sexual transmitted disease (STD) was not taken to corroborate the victim medical test.
8. That the trial magistrate faulted to convict the appellant while the prosecution side failed to prove the case beyond reasonable doubt.

The brief facts of the case can mainly be gathered from the testimony of the victim that on the night of 29th March 2019 before her mother had returned from the Pombe shop while inside the house sleeping with her siblings, she heard the appellant calling him but she did not respond. She pulled her head inside the blanket to

hide but the appellant went inside their room, pulled the blanket and started raping her. Her siblings raised an alarm and the appellant threatened to slash them and ordered them to be quiet. One of the victim's younger sister went to call a neighbour, mama Mary but the appellant ran away. The victim said she recognised the appellant by his voice as he was a friend of their brother Dude and lives nearby. The prosecution called additional five witnesses.

On his side, the appellant denied to have raped PW1 and said that on the fateful night he was sleeping at home. The police went to arrest him at his place.

The trial magistrate after hearing the evidence from both parties was convinced that the appellant was identified through his voice as he was a neighbour. He convicted and sentenced him to 30 years imprisonment. Thus, the instant appeal.

When this case was called for hearing the appellant appeared in person through virtual hearing while at Ruanda prison. The Respondent was represented by Mr. Baraka Mgya, learned State Attorney.

The appellant prayed for the respondent to begin while reserving his right to re-join.

Mr. Mgaya told the court that after going through the proceedings and judgement, they concede on the eight ground of appeal where PW1 said she identified the appellant by his voice. He made reference to the Court of Appeal case of **Nuhu Selemani V R**, [1984] TLR 94, where it was held that voice identification by itself is not very reliable. He made further reference to the case of **Stuart Erasto Yakobo V R**, Criminal Appeal No. 202 of 2004 (unreported) – CAT at page 6 where it was held that voice identification is one of the weakest kinds of evidence and great care and caution must be taken before action is taken on it as there is possibility people may imitate other people's voice. He explained further that in the instant case the victim only said that she identified the appellant's voice because he is their neighbour but did not say how close they were and for how long to confirm that there was no mistaken identity. He concluded that since in sexual offences the best evidence comes from the victim, then it was wrong to convict the appellant on the identification of the voice only.

In rejoinder, the appellant simply prayed to be set free. Understandably so.

It is certainly that voice recognition is most unreliable as stated clearly stated in the cited case of **Nuhu Selemani Vs Republic** [1984] TLR 93 where it was observed that “...it is notorious that voice identification by itself is not very reliable”. This position has also been illustrated in the cases of **Jumapili Msyete Vs Republic**, Criminal Appeal No. 110 of 2014; **Frank Maganga Vs Republic**, Criminal Appeal No. 93 of 2018; and the cited case of **Stuart Erasto Yakobo Vs The Republic(supra)** – all are unreported. In the **Stuart Erasto’ case** the Court of Appeal illustrated further that:

*“The issue is whether voice identification is reliable in law. **In our considered opinion, voice identification is one weakest kinds of evidence and great care and caution must be taken before acting on it.** We say so because there is always a 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 very familiar with the voice in question as being the same voice of the person at the scene of crime**”. [emphasis is mine].*

It follows therefore that since voice identification is the weakest kind of evidence, obviously it needs to be corroborated for it to be relied upon. Even so as the jurisprudential precedents would reveal, in order to rely on the same, other factors must be considered including the level of relationship and or familiarity as well as the time that the witness stayed with the assailant to positively recognise/identify him/her. Mostly, in all the cited cases that the Court of Appeal confirmed the reliance on the voice identification, the victim had closed relationship and very familiar with the assailant and or either spent enough time to positively recognise or identify that person.

Looking at the victim's evidence in this case, she said that she heard the voice of the appellant calling her. After the appellant had gone into the house, PW1's young brother yelled "Iddi what are you doing in our house". However, that young brother was not called to corroborate the voice identification testified by PW1. More so, the PW1 did not state the close relationship they have for her to have positively recognised the voice of the appellant. She only said, she is a friend of our brother but did not explain clearly the extent of

friendship and how close they were that she could not in any way mistaken his voice. In the circumstances, I agree with the counsel for the respondent that it was an error to convict the appellant on the identification by voice only.

Therefore, it is also my finding that prosecution case was not proved to the required standard i.e. beyond reasonable doubt. Consequently, I allow the appeal and order immediate release of the Appellant from prison unless otherwise lawfully held.

Ordered accordingly.




R.A. Ebrahim

Judge

Mbeya

27.09.2021