IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 209 OF 2021

(Originating from the decision of the District Court of Bagamoyo in Criminal Case No. 110 of 2020)

ALLY HAMIS IYUMBA ..... **APPELLANT**

VERSUS

REPUBLIC ..... **RESPONDENT**

Date of last Order: 15/11/2021
Date of Ruling: 29/11/2021

J U D G M E N T

MGONYA, J.

The Appellant herein **ALLY HAMIS IYUMBA** dissatisfied by the decision of Kinondoni District Court in **Criminal Case No. 110 of 2020** delivered on **17/02/2021** appealed to before this Honourable Court. In the Appeal the appellant presented **7 grounds** of appeal as herein below;

1. ***That, the learned trial Magistrate erred in law and fact by convicting the appellant for the offence of rape whereas there was no relevant evidence adduced to establish the said act against the appellant.***

2. *That the learned trial Magistrate erred in iaw and fact by convicting the appeliant based on doubtful and discrepant evidence of PW 1, PW 3 and PW 4 in regarding to the place where the pant was recovered hence the same wrongly failure to conduct DNA test to prove the linkages and corroboration against the appellant.*
3. *That, the learned Trial Magistrate erred in law and fact by convicting the appellant based on insufficient and unprocedural visual identification by PW 1 and PW 2 to the appellant whose evidence lacked appellant's details and unique features such as morphological appearance, colour, name etc hence no any identification parade was conducted to prove whether or not the appellant was really identified at the crime scene.*
4. *That the learned trial Magistrate erred in law and fact by convicting the appellant for the offence of rape when the age of the victim (PW1) was not sufficiently proved to establish the statutory rape, hence unreasonably failure of prosecution to call either patron, head teacher or village chairman as asserted by PW 1 and PW 2 to give their testimonies in Court.*

5. ***That, the learned trial Magistrate erred in law and fact by convicting the appellant when the prosecution failed to establish the appellant's apprehension and tender any cautioned statement in connection with the case.***
6. ***That, the learned trial Magistrate erred in law and fact by convicting the appellant relying on the evidence of PW 4 (Doctor).and Exhibit P2 (PF 3) when PW4 failed to establish his credentials, qualifications and experience and the prosecution failed to call the police officer who issued the said PF 3 so as to testify in Court as to what and when the said incident was reported at police station. This, PF 3 report is a nullity for not being read out loud in Court.***
7. ***That the trial learned Trial Magistrate erred in law and fact by convicting the appellant in a case which was not proved to the hilt by the prosecution side as required by iaw.***

WHEREFORE, the appellant humbly prays for this Honourable Court to allow his appeal by quashing the conviction, set aside the sentence and acquit him.

In the instant appeal, the appellant appeared in person before the Court and the Respondent was represented by Ms.

Rahel Mwaipyana State Attorney. The appeal was heard and hence I am hereby obliged in determining the same as hereunder.

The Appellant was charged of the offence of rape contrary to **section 130(1), (2) (e) and 131 (1) of the Penal Code Cap. 16 [R. E. 2002].** The accused after being heard was convicted of the offence charged and sentenced to imprisonment for **30 years.**

Submitting on his appeal the appellant averred before this Court that he prays his grounds of appeal be adopted for hearing and consideration of his appeal.

In reply the Respondent did not support the instant appeal and stated that, on the **first ground** of appeal the same has no weight since the evidence came from the victim herself saying she was raped by the appellant on her way to school. The testimony of the victim was corroborated by the testimony of PW 2 who states to have seen the appellant on that day heading from an opposite direction with the victim. And at the same time it is when PW 1 told PW 2 she has been raped by the Appellant. The incident was reported to the victim's teacher at school and PW 2 averred that the appellant has been stubborn on committing such acts and that he is known for that habit.

It was further stated by the Respondent that the Doctor who examined the victim testified that, after examination the test showed that the victim had been penetrated and there was existence of bruises on her outside and inside part of her vagina. Laboratory results further showed that the victims vagina had sperms as well.

In support of the argument the Respondent cited the case of ***ISAYA RENATUS V.R. Criminal Appeal No. 542/2015*** where the Court of Appeal at Tabora, observed that:

> ***"The best evidence to any occurrence at the offence of Rape is the victim."***

On the **second ground** of appeal on doubtful and discrepant evidence of the prosecution, it was the Respondent's submission that the same do not go to the root of the case. The offence the appellant is charged of is **RAPE**. From the circumstances, this ground can't stand. It was held in the case of ***GOODLUCK KYANDO VS. R [2005] TLR,*** that the court should go to the contradictions which goes to the roots of the case. It is from the above, the Respondent states not to find any merit to the Appellant's ground.

On the **third ground** of appeal that is on identification, Ms. Mwaipyana for the Respondent replied that there was no identification parade to prove the Appellant was identified at

the parade since the appellant was well identified by the victim and PW 2 on that particular day and that he was wearing a yellow trouser and on his hand he had a bottle of beer. The Counsel for the Respondent cited the case of ***RIZIKI JUMANNE V. R ;Criminal Appeal No.370/2019*** where in this case it stated on how the witness who was able to mention/identify the accused at the earlier stage and thus making an identification parade not necessary and hence **this ground is meritless.**

On the **fourth ground** of appeal it has been alleged that the victims age was not proved. It was the Respondent's Counsel Argument that the matter of age was identified when the victim was testifying where she mentioned her age to be **15 years.** However, at the trial court, the Appellant did not cross examine the victim on age, the same came later. The issue of age was ruled on the case of ***ALOYCE LUSOKO VS. REPUBLIC Criminal Appeal No. 152/2021 at page 4.*** Hence the appellant argument on the age of the victim **holds no water.**

Submitting on the **fifth ground** the Respondent argued that the same is meritless because the Appellant himself did not pray for that cautioned statement. Further, the caution statement was not in the Court and the prosecution had no

intentions of using the same for there is enough evidence that the Appellant raped the victim.

Replying on the **sixth ground** of appeal, on failure for the Doctor not to state his credential and the PF3 not being read aloud at trial court. The Respondent countered the said ground to the effect that it is true that the PF3 was not read, therefore they pray to expunge the same. However, the counsel was of the view that, the credentials of the Doctor were revealed, but yet still the same does not carry weight to nullify the conviction and sentence of the appellant. The case of ***ISSA HASSANI UKI V. REPUBLIC Criminal Appeal No. 129/2017 CAT at Mtwara*** was cited in support of the above argument.

Finally on the **seventh ground** of appeal upon failure for the prosecution to prove the case beyond reasonable doubt, It was the Respondent's averments that this ground is meritless as the victim had testified on what happened to her and the same was done by the Appellant and also the Doctor's testimony corroborated the victim's testimony.

Concluding her submission, it was the Respondent's Counsel prayer that this ground be denied and the entire Appeal be dismissed.

After the above reply by the Respondent's Counsel upon the grounds of appeal set forth to this Court by the appellant, I am now at a position to determine the said grounds.

Beginning with the **first ground** of appeal where the appellant claims for lack of evidence on proving the commission of the offence he is charged with. The Respondent on the other hand states that there was enough evidence since the evidence of the victim was in records and that it is the appellant that raped her. Referring to the records before the trial Court the appellant stands charged with the offence of rape. It was the Victim herself who testified before the Court whereas her testimony was in corroboration with that of PW 2 together with PW 4.

It is the position of the law that the best evidence in rape cases, is the evidence of the victim herself. It is so since it the victim that undergoes the wrath, agony and embarrassments of the act and the same is mostly committed when it is the victim and the offender in place. Best testimony in sexual offenses was stated in the case of ***GODI KASENEGALA VS REPUBLIC, CRIMINAL APPEAL NO. 10 OF 2018 (UNREPORTED)*** it was held that:

> ***"It is now settled law that the proof of rape comes from the prosecutrix herself."***

This position was also held in the case of ***SELEMANI MAKUBA VS REPUBLIC, 2006 TLR 379.*** In the circumstance of this case the proceedings at the trial show that PW 1 testified to have been on her way to school when she met the appellant who ordered her to stop of which she did not. He chased her and uttered words that indicated the act of rape grabbed her to the bushes and raped her. This is the testimony of the victim herself. Having this testimony in the records and from the principle of the case laws above, I find that there was sufficient evidence to convict the accused. **It is from here I find the first ground of appeal meritless.**

Referring to the **second ground** of appeal, the appellant states that the Court erred in considering doubtful and discrepant evidence with regard to where the pant was found together with failure to conduct a DNA test to link and corroborate him with the offence committed. The Respondent was of the opinion that the offence before the Court that the appellant is facing is rape, and that the discrepancies spoken of do not extend to the root of the matter to cause him any injustice.

PW 3, the investigating officer stated to have located the pant at the crime scene where the incidence occurred. Took it and stored it. PW 4 the Doctor also testified that when the

victim was taken to hospital, the victim undressed herself and her under pant was kept safe as an exhibit. It from these two witnesses the contradiction is found the question is as to where exactly was the pant found.

This ground will not take much of this Courts' time. I do join hands with the Respondent that the said contradiction does not go to the root of the matter since the offence is not limited to where the exhibit was found but rather the offence of rape. I find the discrepancy to be minor and not extend to the root of the matter. See the case of ***MOHAMED SAID MATULA VS REPUBLIC*, [1995] TLR** where the Court held that:

> ***"Where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root o f the matter."***

From the above explanation, **I find this ground lacking merits.**

In determining the **third ground** of appeal the appellant is concerned on the absence of an identification parade and

hence suggests the Court to have erred in not considering that an identification parade was not conducted. In reply the Respondent's Counsel opined that the absence of the identification parade not to have been required from the surrounding of commission of the offence. It is from the record that I have not come across any records that states of an identification parade. Under **section 60 (1) of the Criminal Procedure Act Cap. 20 R.E. 2019**, The law states that:

> ***"Any police officer in charge of a police station or any police officer investigating an offence may hold an identification parade for the purpose of ascertaining whether a witness can identify a person suspected of the commission of an offence."***

Therefore, from the wording of the act as stated above, it appears that an identification parade is not mandatory requirement and hence the same not being conducted does not nullify any proceedings of the Court. It is here that I find **this ground is meritless.**

With regards to the **fourth ground** of appeal the appellant, is appealing on the grounds that the age of the victim was not sufficiently proved. The Counsel for the Respondent countered the averments by stating that the victim

herself stated her age to be **15 years** and the appellant did not dispute the victim's age at trial. Matters of age have been determined in a string of cases stating at what circumstances age of a child is proved. Age can be proved by birth certificate, a parent or the child herself. In the circumstance of this case age of the child has been stated by the child herself and was not disputed by the appellant at time of trial. To me this appears to be an afterthought by the accused in efforts to seeking reverse of the outcome of the conviction and sentence on him. **This ground holds no water and is** therefore **meritless.**

Referring to the **fifth ground** of appeal, the appellant states the Court erred in convicting him without showing how he was apprehended or the caution statement that was taken of him. It was argued that the caution statement was not before the Court and his apprehension is not an ingredient to the offence hence was not a fact to be entertained. From the records before the Court, I took ample time to thoroughly go through it and it did not reveal apprehension of the appellant to have been a fact in issue at the trial Court.

The caution statement of the accused from the records shows to have been taken as testified by the appellant himself. But the same was not introduced by the prosecution to be used

as part of their evidence neither didn't the appellant request for it at trial. It has to be made known to the appellant that if the prosecution did not use the caution statement as part of their evidence. Using of the same is not a mandatory requirement and the prosecution cannot be compelled to do so if they have a reason not to rely on the caution statement in proving their case. It is from this stance, **I find this ground of appeal has no merits.**

In determining the **sixth ground** of appeal the appellant challenges the testimony of PW 4 the Doctor and Exhibit P 2 the PF 3. Whereas PW 4 is said not to have stated his credentials and that exhibit P 2 was not read aloud. The Respondent on the other hand conceded to this ground and prayed that exhibit P 2 be expunged from the records.

It is from the records of the Court that exhibit P2 was not read out loud before the Court and I join hands with the Respondent's prayer to expunge the same from the records. However, having expunged exhibit P 2 in records we still have PW 4's evidence which states the results after examining the victim and the same proves penetration and existence of bruises. From the above, I still find remaining evidence to be strong enough to hold the appellant's conviction. **Hence this ground has no merits.**

Finally on the **seventh ground** of appeal the appellant is dissatisfied for the Court convicting him while the case was not proved to the requirement of the law. The Respondent states that the appellants ground is meritless for the victim testified on the ill acts of rape by the appellant and there was more evidence in corroboration to the victim's testimony. It is a settled principle of law that criminal cases have to be proved beyond reasonable doubt. From the records and in the circumstance of this case the matter was prosecuted and the Court found the matter to have been proved beyond reasonable doubt. **From the records, I find no reason to overturn the decision of the trial Court hence this ground holds no water and is therefore meritless.**

From the above reasons and analysis, I therefore find the appeal before this Court meritless and hence dismiss the same.

It is so ordered.

Right of Appeal Explained.

L. E. MGONYA

JUDGE

29/11/2021

Court: Judgement delivered in chamber in the presence of Appellant himself Ally Hamis Iyumba, Ms. Imelda Mushi State Attorney and Ms. Veronica RMA.

L. E. MGONYA

JUDGE

29/11/2021