IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

RM. CRIMINAL APPEAL NO. 75 OF 2021

MWARABU S/O SUGWEJA @ KIHENA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrates' Court of Katavi at Mpanda)
(J. S. Musaroche, SRM)
Dated 29th day of July 2021
In
Criminal Case No. 61 of 2020

JUDGMENT

11/05 & 13/06/2022

NKWABI, J.:

The appellant in this Court is striving to overturn the decision of the trial court. He was convicted for unnatural offence contrary to section 154(1) (a) of the Penal Code, Cap, 16 R.E. 2019. He was sentenced to life imprisonment for the offence he committed against a girl aged five years.

The appellant, having been annoyed by the decision of the trial court, tabled this appeal to this Court protesting his virtuousness. His petition of appeal has three grounds of appeal. They are as follows:

1. That, the trial court erred at law by convicting the appellant who was not properly identified.
2. That, the trial court erred at law by convicting the appellant depending on mere suspicion.
3. That, the trial court erred at law by convicting and sentencing the appellant for the offence which was not proved beyond reasonable doubt.

The backdrop of the case is that the offence was claimed to have happened on the 14th October 2020 at Ikaka village within Tanganyika District in Katavi region where the appellant did have carnal knowledge against the order of nature of R.W.L. a girl aged 5 years. The incidence happened at 07:30 pm when the victim of the offence was going to the village center to see her mother. The appellant pulled her by hand into the bush and proceeded to have sex with her against the order of nature. PW2 Wille ran and informed PW1's mother namely Flora who made follow-up which led to the arrest of the appellant at the house of PW4 Merisiana where the appellant was a tenant. The victim and PW2 identified the appellant as he was a village mate.

After being arrested the appellant had his caution statement recorded by PW9. The appellant defended that he did not commit the offence. He said the case was fabricated against him and the evidence of PW1 and PW2 was very weak. He was not caught in flagrante delicto. The trial court did not purchase his defence. Found the prosecution witnesses credible, convicted him and sentenced him as indicated above. He was aggrieved and filed this appeal.

Once the appeal came up for hearing, the appellant appeared in person, unrepresented while the respondent was represented by Ms. Marietha Maguta, learned State Attorney.

In submission in chief, the Appellant had a brief assertion that his grounds of appeal be adopted as his submissions. He then prayed the court to allow his appeal and release him.

Ms. Maguta slams the contention of the appellant and the appeal as such she objects the appeal and, in the circumstances, supports the conviction and sentence.

Ms. Maguta slashed the first ground of appeal contending that the appellant was correctly identified and he was mentioned at the earliest opportunity. She added that the victim identified the culprit who was in a group of persons. Even at page 14 the relative of victim reported the matter, Ms. Maguta observed.

While battling the claim that the appellant was sentenced based on suspicion, Ms. Maguta asserted that is not true as there are witnesses, PW1 and PW2. The evidence is not on suspicion. Best evidence in unnatural offence cases is that of the victim as per **Selemani Makumba v Republic [2006] TLR 384,** she pointed out. She stressed, conviction was not based on suspicion, the ground be dismissed.

Combating the last ground, Ms. Maguta stated that there was sufficient evidence to ground conviction. She was of the firm opinion that the appellant was clearly identified. She added, PW1's evidence was corroborated by the evidence of PW2. PW8 found the victim with discharge on the anus and bruises. She prayed the appeal be dismissed.

In recapping his submissions, the Appellant invocated the court to consider his grounds of appeal and release him.

The appeal of the appellant could be summarized to the effect that the case against him was not prove beyond reasonable doubt because the identification was not watertight as such he was convicted on mere suspicion.

To determine whether the identification of the appellant was water tight or not, I propose to look at his defence in the first place. His defence was that he did not commit the offence and that the evidence of the prosecution was weak. That defence entails that he was mistakenly identified by the victim (PW1) and PW2. It is trite law that when one mentions the culprit at the earliest opportunity signifies truthness as per **Ezra Mkota & Another v. Republic,** Criminal Appeal No. 115 of 2015 (CAT) at Dodoma (unreported):

> *"Her credibility is vouchsafed by her report and naming of the suspect to PW3 which enabled the arrest of the appellant."*

Verily, the incidence happened during the night. The decision of the Court of Appeal in **Waziri Amani vs. Republic** [1980] TLR 250 has to come into play where it was held:

> *If at the end of his examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbor, a close friend, a wake mate and the like, we think, he would in those circumstances, safely convict on the evidence of identification. On the other hand, where the quality of identification evidence is poor, for example, where it depended on a fleeting glance or on a longer observation made in difficult conditions such as a visual made in poorly lighted street, we are of the considered view that in such cases the judge would be perfectly entitled to acquit."*

See also **Raymond Francis vs. Republic** [1994] TLR 100 (CA.

I am aware however, there are circumstances like in this case, where even though the incidence happened during the night, the identification could be

water tight. That is the position in **Rajabu Khalifa Katumbo & 3 Others v Republic** [1994] TLR 129 (CA) where it was held:

> *"Where the accused were known to the witnesses well before the day of the incident; the witnesses, therefore, were extremely unlikely to mistake them."*

The above holding, reminds me of the words stated by the Court of Appeal in **Philip Rukaiza v. Republic,** Criminal Appeal No. 215 of 1994 (Unreported) (CAT) (Mwanza) that:

> *"We wish to say that it is not always impossible to identify assailants even at night and even where victims are terrorized and terrified. It is because of this truth that even bandits who scatter terror and indulge in barbaric acts sometimes take the precaution of disguising themselves by various artifices. The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonably possibility of error has been dispelled. There could be a mistake in the*

identification notwithstanding the honest belief of an otherwise truthful identifying witness."

The victim and PW2 stated that the knew the appellant prior to his commission of the offence. The appellant did not cross examined PW4 on that fact which amounts to admission of a fact as per **Athuman Rashidi Vs. Republic,** Criminal Appeal No. 264/2016 Court of Appeal of Tanzania at Tanga.

In fact, the evidence of PW1 was corroborated by the evidence of PW8 and the PF3 which was admitted as exhibit P2. The assertion that the evidence of PW1 proved the offence made by Ms. Maguta is, in my view, supported by the authority of **Seleman Makumba** (supra) where the Court of Appeal of Tanzania had these to say:

"It is, of course, for the prosecution to prove the guilty of an accused person beyond a reasonable doubt and an accused person does not assume any burden to prove his innocence.

A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there

was rape, that is unconsented sex, even if bruises are observed in the female sexual organ. True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. In this case under our consideration the victim, Ayes, said the appellant inserted his male organ into her female organ. That was penetration and since she had not consented to the act, that was rape notwithstanding that no doctor gave evidence and no PF3 was put in evidence. The appeal against conviction, therefore fails."

as well as **Goodluck Kyando v Republic, [2006] TLR 363,** (CA) the Court held:

"The appellant also complained that the police officer who conducted the investigation was not summoned to give evidence. ... This being a criminal case, the burden lies on the prosecution to establish the guilty of the appellant beyond all reasonable doubt. ... This in own view, is not dependent upon the number of witnesses called upon to testify ... It is trite law that every witness is entitled to credence and must be believed and his

testimony accepted unless there are good and cogent reasons for not believing the witness. Their testimony was not challenged."

Therefore, the lamentation by the appellant that he was not properly identified is unmerited. It crumbles to the ground.

In actuality, suspicion however grave cannot ground conviction, see **G. Ntinda v. Republic Criminal Appeal No. 17 of 1991** (Unreported) (CAT) (MBEYA):

"There was, we agree, a lot of suspicion against the appellant as the person who killed the deceased, but, as the trial judge will no doubt agree with us on reflection, suspicion no matter how grave cannot be the basis of a conviction in a criminal charge."

But this case was not decided on suspicion rather, it was decided on the strong evidence against the appellant that is available in the case file. The appellant's claim that he was convicted on suspicion lacks merit and it is dismissed.

The above discussion, disposes the allegation of the appellant that he was convicted and sentenced on an offence that was not proved beyond reasonable doubt to the effect that that claim has no justification. The prosecution case is based on sufficient evidence that proved that the appellant committed the offence termed unnatural offence against PW1.

In the premises, I conclude by dismissing the appeal for being devoid of any merit. The conviction entered and sentence meted out to the appellant by the trial court are upheld.

It is so ordered.

DATED at **SUMBAWANGA** this 13th day of June 2022.

J. F. NKWABI

JUDGE