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

(APPELLATE JURISDICTION)

CRIMINAL APPEAL No. 52 OF 2022

(Arising from the decision of the District Court of Bagamoyo at Bagamoyo by Hon. Mwaria, RM) dated 6th day of January, 2022, in Criminal Case No. 296 of 2021)

GODFREY JOSEPH ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

6th & 16th June, 2022

ISMAIL, J;

The appellant herein was arraigned in court facing a charge of rape. The contention by the prosecution is that the said offence was committed at 10.00 pm, on 6th September, 2021, at Epifin Area, within Bagamoyo Township, Coast Region. The victim of the alleged incident was YKZ (in pseudonym), a girl aged fourteen (14) years, who featured in the proceedings as PW2.

The brief factual account of the incident is that, on the fateful day, the victim was outside their house but within the compound, together with a

woman known as Mama Ali. The latter informed her that somebody was out of the house calling her. The victim went out and met the appellant who held her hand and led her to a ruined building behind their house. The appellant took off the victim's clothes as well as his. He then inserted his penis into the victim's vagina and anus. As he did that, the appellant allegedly filled a cloth into the victim's mouth to suppress her voice. In the middle of the action, the victim was called by her mother, PW1. On arrival, PW1 became suspicious of her movement. She probed her on where she was but the victim's answers raised more suspicion. She inspected her private parts and found some traces of blood in her vagina, while an excreta was discharging from her anus. The victim (PW2) named the appellant as the perpetrator.

On apprehension, the appellant was taken to police where he was put in interrogation. In the meanwhile, PW2 was taken for medical examination. The findings of the medical examination were that the victim's vagina was swollen and had bruises in it.

On arraignment in court, the appellant denied any wrong doing. He wondered why Mama Ali, who appears to be the link between the two was not called to testify. Not even the police officer who investigated the case. The appellant wondered why the victim did not raise an alarm during the incident. He held the view that these were trumped up charges.

At the end of the trial proceedings that saw the prosecution marshal attendance of three witnesses against one for the defence, the trial court made a finding of guilt and convicted the appellant. Accordingly, it sentenced the appellant to imprisonment for a term of thirty years.

The conviction and sentence did not sit well with the appellant, hence his decision to institute the instant appeal. The petition of appeal has 11 grounds of appeal. But, as it will apparent soon, the contest in the appeal was settled through ground one of the appeal. This ground is reproduced in verbatim as follows:

1. *That the learned trial magistrate rightly conceded that the alleged victim (PW2) is a minor but grossly erred in law and fact by convicting the appellant relying on the evidence of PW2 (the victim) which was taken in contradiction of section 172 (2) of the Evidence Act, (Cap. 6 R.E. 2019) since the record didn't show that voire dire test was conducted. Hence PW2 (the victim) lied throughout her illegally obtained evidence in court, as it is evident.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent enjoyed the services of Ms. Laura Kimario, learned State Attorney. Not unexpectedly, the appellant merely prayed that his grounds of appeal should be considered and have the appeal allowed.

Mr. Kimario express her support of the appeal. She chose to address the Court to only ground one of the petition of appeal.

With regards to ground one, the learned attorney conceded that it is true that the victim gave evidence while on oath. However, she argued that was done before the trial court satisfied itself if the victim, a 14-year old girl, knew the nature of the oath or affirmation. This means that section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019 (CPA) was flouted. She submitted, however, that in ***Wambua Kaginga v. Republic***, CAT-Criminal Appeal No. 301 of 2018 (unreported), it was held that, where the victim has satisfied that the victim is telling the truth, such testimony may be admitted and form the basis for conviction under section 127 (6) of the Evidence Act. She added that the wisdom ushered in the case is that substantive justice must be dispensed to the children of tender age where section 127 (2) of the Evidence Act has not been conformed to but the court is satisfied that the witness is telling the truth. She was of the view that the testimony of PW2 may be used against the appellant, despite the stated anomaly.

Ms. Kimario submitted, however, that when PW2 testified, she did not tell how she identified the appellant and circumstances under which she identified the appellant, knowing that it was at 10.00 pm. Learned counsel argued that courts have pronounced themselves on the visual identification

of a suspect, and that the case of ***Waziri Amani v. Republic*** [1980] TLR 250 stands out as the benchmark on visual identification. She submitted that, in terms of the cited decision, visual identification testimony must be free of any possible mistaken identity. She argued that, in the instant case, none of the conditions, such as the source of the light, its intensity, and the fact whether the victim knew the appellant, were observed.

She argued that identification of the appellant was not watertight enough to satisfy the Court that all possibilities of mistaken identity were eliminated. Moreover, Ms. Kimario submitted, no identification parade was held to satisfy if "God" she named is the appellant who was later arraigned in court. She took the view that the identification was not proper and urged the Court to allow the appeal, quash and set aside the sentence, and set the appellant free.

For his part, the appellant had nothing to add.

The appellant's contention in ground one is that the provisions of section 127 (2) of the Evidence Act were not conformed to. In his view, a *voire dire* test was not conducted before the testimony of PW2 was recorded. For avoidance of doubt, it should be clearly understood that *voire dire* is no longer a requirement under a new dispensation, following the amendment of section 127 (2) of the Evidence Act which dispensed with the requirement

and placed, in its stead, a requirement that a child of tender age must only promise to tell the truth and not to tell lies. In the instant case, Ms. Kimario admits that there was an anomaly, but she cited the decision of ***Wambua Kaginga v. Republic*** (supra) as a cure to the said malady. In view of its not so decisive nature, I will not delve into the argument raised by the learned attorney.

With respect to visual identification, I agree with Ms. Kimario that a serious cloud has engulfed the prosecution's case. The cloud stems from the fact that the incident was allegedly perpetrated at around 10.00 pm. This means that any identification of the perpetrator who is not said to be very well known to the victim was to be conducted with the aid of light that would be luminant enough as to allow an unmistakable identification of the perpetrator of the offence. The testimony adduced by the PW2 or any other witness did not shed any ray of light on whether conditions that existed at the time favoured any positive identification.

As stated by Mr. Kimario, this requirement was set out in the landmark decision of ***Waziri Amani v. Republic*** (supra). Subsequent decisions have built on this scintillating position. In ***Demeritus John @ Kajuli & Others v. Republic***, CAT-Criminal Appeal No. 155 of 2013 (unreported), the Court of Appeal of Tanzania observed as hereunder:

"In a string of decisions, the Court has stated that evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a Court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight (See, ***Waziri Amani v. R.*** *(1980) TLR 250;* ***Raymond Francis v. R.*** *(1994) T.L.R. 100;* ***R.V. Eria Sebatwo*** *(1960) EA 174;* ***Igola Iguna and Noni @ Dindai Mabina v. R.,*** *Criminal Appeal No. 34 of 2001, (CAT, unreported). Eye witness identification, even when wholly honest, may lead to the conviction of the innocent (****R. v. Forbes****, (2001) 1 ALL ER 686).* ***It is most essential for the court to examine closely whether or not the conditions of identification are favourable and to exclude all possibilities of mistaken identification."*** [Emphasis is added]

Instructively, the foregoing position is an amplification of the Court of Appeal of Tanzania's earlier decision in ***Ally Mohamed Mkupa v. Republic***, CAT-Criminal Appeal No. 2 of 2008 (unreported). In that case, the upper Bench held:

"Where one claims to have identified a person at night there must be evidence not only that there was light, ***but also the source and intensity of that light. This is so even if the witness purports to recognize the suspect"*** [Emphasis added].

In this case, as argued by Ms. Kimario, not even an identification parade was conducted in order to validate PW2's assertion that it is the appellant, and none else, who was her tormentor. It remains that the court had to rely on what PW2 considered to be her right judgment in the circumstances which militate against the basic principle on identification.

In my considered view, to the extent that identification of the appellant is matter that attracts serious questions, the legitimate conclusion is that the prosecution failed to discharge its burden of proof, and it cannot be said that guilt of the appellant was established. It follows that the conviction of the appellant and eventual sentence were predicated on very weak evidence and, therefore, unsupportable.

Consequently, on this ground alone, I allow the appeal. Accordingly, I quash and set aside the conviction and sentence, and I order that the appellant be immediately released, unless he is held on some other lawful grounds.

Order accordingly.

Rights of the parties have been explained.

M.K. ISMAIL,

JUDGE

16/06/2022

DATED at **DAR ES SALAAM** this 16th day of June, 2022

M.K. ISMAIL,

JUDGE

16/06/2022