THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 92 OF 2021

(Originating from the District Court of Mbozi in Criminal Case No. 73 of 2018)

Between

MANENO MBUGI WATSON .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 21st June, 2022

Date of judgment: 27th June, 2022

NGUNYALE, J.

The appellant, Maneno Mbugi Watson was arraigned in the District Court of Mbozi with offence of rape contrary to sections 130 (1) (2) (a) and 131(1) of the Penal Code R: E 2002 now [R: E 2019]. It was alleged by the prosecution that on 6th July, 2019 at about 21:00 hrs while at Ilolo Area within the Mbozi District in Songwe Region, the appellant did have carnal knowledge of PW1 a woman aged 32 years old. The appellant denied committing the offence. To prove the case the prosecution called six (6) witnesses and tendered one (1) documentary exhibits PF3 exhibit P1. The appellant testified on oath oneself without calling any witness.

The prosecution case through PW1 was that on 6/7/2018 while working at the grocery the accused went and they confronted on the debt he owed to PW1. Afterward PW1 went to toilet and the appellant followed her. After a short call when she stood up ended in hands of the appellant who held her neck and had a knife. The appellant fell her down the floor and undressed her. He took out his penis and inserted it into PW1's vagina and had sexual intercourse with her. It was night and the place was dark. PW1 managed to identify the appellant because she had seen him before. She was threatened to be killed if she could make noise. After had quenched his sexual desire the appellant escaped. PW1 went to the grocery and informed his fellow PW2 Masia Efrahim Lwila, PW3 Frank Jimson Kwasya and PW4 Jenipha Ranathan Simkoko to have been raped by the appellant. PW2 testified that he went behind the building and identified the appellant when running using torch light. The incident was reported to police where she was issued with PF3 and taken to Vwawa hospital. At the hospital the victim was examined by PW5 and filled the result in PF3 which was admitted as exhibit P1.

In defence the appellant stated that on 3/5/2018 and 5/7/2018 was at the grocery drinking soda. Then grocery owner asked him if he caused

any trouble. On 8/7/2018 while at the same place he was arrested by militiamen and sent to police in relation to offence of rape.

Upon full trial, the trial Magistrate was satisfied that the prosecution proved the case against the appellant, the appellant was found guilty and consequently sentence to thirty years imprisonment. Aggrieved, the appellant filed petition of appeal to this court containing nine (9) grounds namely;

1. *That the trial magistrate erred in law point and fact when he convicted the appellant on a charge of rape while there were no proof on how he was alleged to commit the said offence and thus in the eyes of law could benefits the accused / appellant.*
2. *That the trial magistrate erred in law point and fact when he convicted the appellant without considering doubts in the prosecution evidence which fails totally to prove the involvement of the appellant with regards to the offence charged.*
3. *That the trial magistrate erred in law point and fact when he convicted the appellant by mere believing the evidence of pw1 (a victim) that identified clearly the appellant to be the one who did commit such offence by raping her on the fateful date of the said incident at the scene of crime. Without take into account that her evidence was never corroborated in court by her fellow witness and other customers who were together there at the said grocery with her if they saw the appellant there at the said grocery on the fateful date of the said incident.*
4. *That the trial magistrate erred in law point and fact when he convicted the appellant by believing on the evidence of pw1 (a victim) that identified the appellant because he saw him when he was in grocery so*

it was not difficult to identify him. Regard the said incident occurred at night pw1 in her evidence she could not state about the condition which favoured her to make positive identification against the appellant. Not only so but also pw.1 did not give any description against the appellant when she was reporting the said incident at police station to pw.6 and then term of that description to be most important ought always to be given Before the trial court.

5. *That, the trial magistrate erred in law point and fact when he convicted the appellant by believing the evidence of pw.2 that identified well the appellant at the scene of crime through the light of torch he had, this kind of light was very weak to pw.2 to make correct identification when you regard the culprit (rapist) escaped soon at the scene of crime after pw.1 (a victim) being raped by the culprit. Hon. Judge see the case of:- NUHU SELEMAN VR (1984) TLR 93 it held that " Torch identification is not reliable".*

6. *That, the trial magistrate erred in law point and fact when he convicted the appellant by believing the evidence of pw.1 that Identified clearly the appellant at the scene of crime, regard always the Identification of at night as in this case has the great possibility to make mistakenly Identity even if the appellant known before as appeared in this case. Hon Judge please see the case of'.-ATHUMANI SHABANI V.R (1976) LRT NO 15 it held that when the Identification of culprits is in issue, it is not only credibility that matters but also the possibility of a witness making a honest mistake in identification such that the witness think he/she is right yet he/she is wrong?".*

7. *That the trial magistrate erred in law point and fact when convicted the appellant relying on the evidence of pw.5 (a clinical officer) and PF3 (Exh. P.1) that pw.5 in her medically examination by examining pw.1 she found her with sperms in her vagina, but there was neither bruises nor blood stains were seen in her vagina also regard there was no evidence of DNA test be conducted between the said sperms found in pw1 's vagina with blood sample from the appellant in order to prove*

whether the said sperms found in pw1's vagina by pw.5 (c o) during her medically examination if were human sperms of the appellant.

8. *That, the trial magistrate erred in law point and fact when he convicted the appellant by disregarding his defence as he defended himself that pw.1 was his lover but she decided to plant this case against the appellant due to appellant failure to give her money Tshs l0, 000/= which she once asked from to him (the appellant) although on the fateful date of the said incident he did never met her there at the grocery.*
9. *That the charge against the appellant was not proved by the prosecution side beyond all reasonable doubt.*

When this appeal came up for hearing, the appellant was unrepresented appeared in person whereas, the respondent Republic was represented by Mr. Davice Msanga, learned State Attorney. When the appellant was called to elaborate his grounds of appeal, he prayed the court to consider them as filed because he was an able to read and write.

In reply State Attorney did not support the appeal, the 1 and 2 grounds were submitted jointly that the victim narrated how the appellant committed the offence and that she was threatened by a knife. He added that evidence of the victim was enough to prove rape.

Third, fourth and sixth grounds were also combined, Mr. Msanga submitted that the appellant was known to PW1 as they met before the incident. He further added that evidence of PW1 was corroborated by PW3 that the appellant was at the grocery, hence there was no mistaken

identity of the appellant. The case of **Abdul Ally Chande v Republic,** Criminal Appeal No. 529 of 2019 was cited to support the position.

In seventh ground on conducting DNA test Mr. Msangi submitted that it is not the requirement of the law in proving rape because evidence of the victim is enough to prove rape and in this case lack of consent was proved. He cited the case of **Edward Nzabuga v Republic,** Criminal Appeal No. 136 of 2008 to bolster the argument.

Regarding eighth ground of appeal that the defence case was not considered, it was submitted that defence was considered as reflected at page 5, 6 and 7 of the judgment.

In respect of the 9th ground of appeal as to whether the case was proved beyond all reasonable doubt Mr. Msanga submitted that the offence of rape was proved through the testimony of PW1, PW2, PW3, PW4 and PF3.

I have considered the petition of appeal of the appellant and submission by the learned State Attorney for the respondent. This appeal can only be fairly determined based on three grounds;

One, that the conviction of the appellant was wrongly based on evidence of PW5 and exhibit P1. Ground 7

Two, that the appellant was not properly identified at the scene of crime as contained in 3, 4, 5 and 6.

Three, that the prosecution did not prove the case against the appellant beyond reasonable doubts. Gist of ground 1, 2 and 9

On the first complaint on proof of rape by bruises, blood and sperm. In this appeal the appellant was charged with rape to an adult woman Ingredients of rape in whatever category under section 130 (2) of the Penal Code [Cap 16 R: E 2019] are penetration however slight is sufficient to constitute rape and lack of consent from the victim above the age of eighteen. PW1 testimony was that she was held her neck and the perpetrator had a knife and she was threatened not to make noise. This evidence implies that there was no consent on part of the victim on the alleged sexual intercourse. So long as the victim was adult it was necessary to prove lack of consent which she did in this appeal that there was threat in procuring consent. Similar complaint was raised in the case of **Manyinyi Gabriel @ Gerisa v The Republic,** Criminal Appeal No. 594 of 2017, CAT at Mwanza (Unreported) and the Court held that;

> *'We entirely share the same view for if bruises are to be the natural and probable consequences of sexual intercourse women would better opt to completely abstain from it. Crucial in cases of this nature is penetration however slight it may be and the person better placed to tell is the one on*

whom it is practiced which is in line with the Swahili saying "maumivu ya kukanyagwa anayajua aliyekanyagwa".

In this appeal PW1 managed to prove that she has sexual intercourse without her consent. Her evidence was corroborated by PW5 and exhibit P1. Therefore, this ground lack merits.

The second ground is identification of the accused at the scene of crime, State Attorney submitted that the appellant was properly identified as they saw him before the incident. On my part I will start with the law on identification. It is a settled law that in order to convict on the evidence of visual identification, the same must absolutely be watertight as expounded in the famous case of **Waziri Amani v Republic** [1980] TLR 250. In this appeal as per evidence, identification of the appellant was by recognition. It is settled law that evidence of recognition is more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of relatives and friends are sometimes made. See the case of **Philimon Jumanne Agala @ J4 v Republic,** Criminal Appeal No. 187 of 2015 (Unreported).

Scanning the prosecution evidence, I find it not watertight about identification as per the settled law. PW1 testified that when she was going to toilet, the appellant followed her. The toilet is about 20 steps

from the grocery and it was dark. This witness did not explain how she managed to identify the appellant on the darkness condition. Evidence of PW2 was that she followed PW1 and he did lit a torch and identified the appellant who was running. By then he said that PW1 was crying on the lower voice. This piece of evidence is doubtful as the witness did not explain more. In akin situation is the case of **Richard Athanas v. Republic**, Criminal Appeal No. 115 of 2002 the Court expressed its dissatisfaction with the failure by the prosecutor to lead a witness on crucial issues relating to identification at night in these words;

> *'...He could have asked the witness to explain what the source of the light was, how strong it was and whether the light was shone on the intruder in order to give the court an assurance that the witness actually saw and identified the intruder. Instead, the prosecutor did not ask the witness any question in re-examination. With respect it can not be enough in evidence of identification during night time for a witness to simply say- "identified you. There was light.'*

Going by evidence of PW1 and PW2 did not specifically point how they were able to identify the appellant. PW1 is recorded to have said that the area is 20 steps from the grocery and it was dark but there are no explanations as to how that was possible. Likewise, PW2 who said he saw the appellant running and was aided by torch light still no evidence was led to show intensity of the light, the distance was not weighed with speed to identify the culprit. Basing on that

evidence it cannot be said with certainty that the rapist was correctly identified.

The last ground is whether prosecution proved the case as required by the law. There is no dispute that PW1 was raped but it has not been proved that the appellant is the person who raped her and nobody else because possibility of mistaken identity was not eliminated. Chances of mistaken identity was high.

After evaluating prosecution evidence, it cannot be said that the case against the appellant was proved beyond reasonable doubt. First, evidence of PW1 that the place was dark cannot be lightly without eliminating any possibility of mistaken identity. Although PW2 stated that he identified the appellant with torch light while running casts doubts as to how he identified the appellant from behind, how intensity of the torch light was, how far did he observe the appellant running.

Second, there are material contradictions on the prosecution evidence. The witness PW2 said that PW1 was crying at low voice but PW3 said that he heard a voice of a woman seeking help for being raped. PW3 evidence do not tally with PW1 who had earlier testified

that she was threatened not to make noise. These contradictions raise tangible doubt to the prosecution case.

Thirdly, how PW1 was acquitted with the name of Maneno. While PW3 and PW4 were testifying they said PW1 named the culprit being Maneno. At the same time PW1 kept on referring the appellant as accused and never called by his name. This impacts credibility of PW3 and PW4 that PW1 mentioned Maneno as being the rapist.

Taking all these shortcomings cumulatively leads to the conclusion that the prosecution did not prove the case against the appellant beyond reasonable doubts.

In that end, the Court is satisfied that the offence was not proved beyond reasonable doubt. The trail court erred to convict and punish the appellant for the offence of rape contrary to sections 130 (1) (2) (a) and 131(1) of the Penal Code Cap 16 R: E 2019. The appellant Maneno Mbugi Watson is hereby released from prison forthwith unless lawful held with another good cause.

DATED at MBEYA this 27th day of June, 2022

THE HIGH COURT OF TANZANIA

D.P NGUNYALE
JUDGE
27/06/2022