IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 6 OF 2022

(Arising from Criminal Case No. 39 of 2021 at the District Court of Tarime at Tarime)

BETWEEN

WAMBURA MAGORI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

25th May & 18th August, 2022.

A.A. MBAGWA, J.:

This is an appeal against both conviction and sentence. The appellant Wambura Magori was arraigned, charged and convicted of rape contrary to sections 130(1) (e)(b) and 131(1) of the Penal Code.

In the particulars of offence, it was alleged that Wambura Magori on 6th day of January, 2021 at Kisumwa village within Tarime District in Mara region had carnal knowledge of the victim (name withheld).

The appellant denied the allegations hence the prosecution paraded four witnesses along with one documentary exhibit (PF3) to prove the charge.

It was the prosecution evidence that on 6th day of January, 2021 at night (between 20:00hrs and 22:00hrs), the victim PW1 was walking towards her father-in-law who had requested her to take him medicine. On reaching at Kisumwa Primary School, PW1 met the appellant. They greeted one another and therefore each one took his way. However, no sooner had the duo parted way than the victim was invaded, strangled and then forcefully raped by the appellant. The victim said that in a bid to rescue herself, she bit the appellant on the hand and ear. Despite all this resistance, PW1 stated that the appellant managed to undress the victim and insert his penis. As the appellant was continuing to rape the victim, two men including PW3 Sylvester Chacha Nyagare passed by the area. According to PW3, they heard someone shouting that *'you are biting me, I would kill you'* (Unaning'ata unaning'ata nitakuuwa). The two men paused a bit and later they heard the victim saying that she was ready for anything that the appellant wanted to do to her '*usininue nifanye unavyotaka lakini uniniue*'. PW3 and his fellow lightened their torches and saw the appellant raping the victim. As PW3 bent to take a stone, the appellant ran away.

The victim felt severe pains and consequently fell unconscious. On the following day that is 7th January, 2021, the victim went to Komaswa Police Station where she was issued with a PF3. Thereafter, she was taken to Tarime District Hospital where she was attended by Dr. Masiaga Joseph Chacha PW4. Dr. Masiaga confirmed that the victim had physical injuries and her mouth was swollen. Further, PW4 stated that the victim had sexual intercourse and was feeling pains. Through the PF3, PW4 capitalised that the victim was penetrated.

In defence, the appellant testified as DW1 and called his father Magori Wambura (DW2). In essence, the appellant denied the accusations. The appellant stated that on the fateful day at the time when the offence was allegedly committed, he was at his home. He further disputed to have been bitten by the victim rather he stated that he was cut by the victim's husband (PW2) after he was arrested. His testimony was corroborated by his father DW2.

Upon assessment of the evidence, the trial magistrate was satisfied that the prosecution case was proved to the hilt. As such, she found the appellant guilty and convicted him accordingly. Consequently, she sentenced him to thirty-year imprisonment.

The appellant was aggrieved by both conviction and sentence hence he preferred the present appeal. The appellant lodged a petition of appeal containing the following grounds;

1. That, the Honourable Magistrate erred in law and fact by basing his decision on contradictory evidence.
2. That, the Honourable Magistrate erred in law and fact by convicting and sentencing the appellant on the offence not his own.
3. That the Honourable Magistrate erred in law and fact by convicting the appellant on the offence not proved beyond reasonable doubt.
4. That, the Honourable Magistrate erred in law and fact in finding the appellant guilty as charged as a result of failing to objectively evaluate the entire evidence and reaching a finding that the same did not prove the charge of rape.
5. That, the Honourable Magistrate erred in law and fact by convicting the appellant while PW1 improperly identified the appellant as required in criminal proceedings.

At the hearing of this appeal, the appellant was represented by Julius Kirigiti, learned advocated whilst the respondent/Republic had the services of Nimrod Byamungu, learned State Attorney.

Mr. Kirigiti opted to consolidate the 2nd, 3rd and 4th ground and argue them conjointly.

Submitting on the 1st ground, Kirigiti prayed the Court to reevaluate the evidence in order to satisfy itself whether the conviction was merited. He lamented that the trial magistrate failed to assess the evidence properly hence wrongly arrived at conviction finding. Had she done so, she would have found that the prosecution case was not proved beyond reasonable doubt, Mr. Kirigiti submitted while citing the case of **Wankuru Mwita vs the Republic**, Criminal Appeal No. 219 of 2012, CAT at Mwanza at page 15.

The appellant's counsel continued that PW1, PW2 and PW3's evidence is contradictory in that PW1 testified that incident occurred at around 20:00hrs while PW2 testified that it occurred at 22:00hrs and at the same PW3 testified that the incident occurred at 10:35 PM. The contradictions go to the root of the matter, the counsel said. To bolster his argument, Mr. Kirigiti referred to the case of **Mohamed Said Matula vs the Republic** 1995 TLR 3. He thus prayed the court to resolve the contradictions in favour of the appellant.

Coming to the consolidated grounds the appellant's counsel challenged the identification evidence stating that PW3 told the court that he was present at the scene of crime and that he was holding a torch but he did not describe the intensity of torch light nor did he state the distance at which he was from the appellant. He therefore concluded that his identification was not proper. To augment his point, he referred to the case **Felix Kichele & Another vs the Republic**, Criminal Appeal No. 159 of 2005, CAT at Mwanza. The counsel expounded that at page 9 of the judgment, the court held that description of source of light and intensity was paramount.

Furthermore, Kirigiti submitted that PW1 did not explain clearly on how she identified the appellant. Likewise, PW2 and PW3 could not tell in details how they identified the appellant such as clothes, physical appearance etc. On this, the counsel relied on the case of **Hamis Abdallah vs the Republic,** Criminal Appeal No. 184 of 2011, CAT at Dodoma where the court held that the witness ought to provide in detail the identity of the appellant. In addition, he cited the case of **Juma Marwa & 2 others vs the Republic**, Criminal Appeal No. 91 of 2009, CAT at Dar es Salaam at page 3 and 4 in which the court emphasized on the detailed identification of the appellant.

Finally, he beseeched the court to allow the appeal, quash conviction and set aside the sentence.

In reply, Mr. Nimrod Byamungu was in support of conviction and sentence. However, before delving into the grounds of appeal, he remarked that the charge was gauged on section 130(1)(e) (b) which does not exist in the Penal Code. He said that the charge ought to be preferred under section 130(1) & (2)(b) of the Penal Code. As such, Mr. Byamungu submitted that the charge was defective. Nonetheless, he hastily told the court that the defects were curable under section 388 of the Criminal Procedure Act. The learned State Attorney expounded that the appellant was not prejudiced in any how because the particulars were so elaborate. Further, Byamungu submitted that PW1 explained very well on how she was raped on the one side, and on the other side, the appellant's defence was focused thereby confirming that he was made aware of the charge. He fathomed his position by the case of **Festo Domician vs the Republic**, Criminal Appeal No. 447 of 2019, CAT at Mwanza where the court held that such anomaly is curable.

With regard to the alleged contradictions, the learned State Attorney conceded that there were contradictions particularly on the time at which the offence was allegedly committed but he was so quick to submit that the

alleged contradictions were minor. Byamungu cited section 234(2) of the Criminal Procedure Act and referred the court to the case of **Hamis Juma @ Chaupepo vs the Republic**, Criminal Appeal 95 of 2018, CAT at Dar es Salaam at page 18. He was opined that, on reading the evidence of PW3 as a whole, it becomes clear that by writing 10:35 hrs, the trial magistrate meant 22:35 hrs.

Responding on the attack against identification evidence, Mr. Byamungu contended that the appellant was properly identified. He said that PW3 was five paces from the appellant. Further, Byamungu said that PW3 testified that the appellant was wearing a track suit and a black shirt and was holding a knife. The State Attorney said that PW3's evidence was corroborated by PW1. He referred the court to the case of **Makende Simon vs the Republic**, Criminal Appeal No. 412 of 2017, CAT Mwanza, to emphasise his point that identification should be considered according to the circumstances. He concluded that PW1, PW2 and PW3 were all reliable witnesses and sought reliance on the case of **Phora Samson vs the Republic**, Criminal Appeal No. 519 of 2019, CAT at Kigoma at page 14. Besides, Byamungu told the court that non-conducting of identification

parade was irrelevant, in the circumstances, for the witnesses knew the appellant before. He thus prayed the court to dismiss the appeal.

In his short rejoinder, Kirigiti added that that PW3 testified that the appellant was holding a knife and was dressed in a shirt with flowers and that he had seen him in afternoon on the material day as such, the identification was not sufficient.

Upon appraisal of the evidence on record and the submissions by the counsel, the crucial issue for determination is whether the conviction and sentence were merited.

It is a clear position of law that the first appeal is in the form of rehearing and the first appellate court is entitled to reevaluate evidence. See the case **Maramo s/o Slaa Hofu and 3 other vs the Republic**, Criminal Appeal No. 246 of 2011 CAT at Arusha and **Deemay Daati and 2 others vs the Republic**, Criminal Appeal No. 80 of 1994, CAT at Arusha. Thus, this being the first appellate court, I took trouble to reevaluate the evidence adduced during trial. According to the prosecution evidence, the incident took place at night at around 22:00hrs. Further there are only two eye witnesses namely, the victim, PW1 and PW3. PW1 said that she resisted but the appellant forcefully raped her. The victim stated that in a bid to protest the

act, she bit the appellant on the hand and ear. Unfortunately, the record is silent on whether the trial court had an occasion to examined the appellant and see the alleged cut or bit wound. Whereas PW1 testified that she was resisting to the extent of biting the appellant, PW3 testified to have heard the victim screaming by uttering the following words '*usiniue nifanye unavyotaka lakini usiniuwe'.* Practically, these are two contradicting versions. In my views, a person who is resisting to be raped by biting the appellant cannot, at the same time, utter such words. Also, there is nowhere PW1 stated to have shouted during rape. Indeed, the evidence of PW1 and PW2 raises strong doubts which should be resolved in favour of the appellant. In addition, there is nowhere on record, PW1 described the appellant such as attire he wore on the fateful day. To crown it all, PW3 testified that he identified the appellant at the scene. In the meantime, PW2 testified that the appellant is his relative and neighbour. Yet, none of the prosecution witnesses went to the appellant's home on the fateful night to check whether the appellant was present. Had PW2 and PW3 truly identified the appellant at the scene, they would have gone to the appellant's home to trace and arrest him on the very night the offence was committed.

DW1 and DW2 testified on the way the appellant was arrested. Further, DW1 said that after he was arrested, he was taken to the victim for identification. DW1 testified that PW1 said that the person who raped her had similar clothes to that of the appellant. DW1 was not contradicted on his testimony with regard to the way he was arrested and the fact that he was taken to the victim for identification. This implies that the victim did not properly identify the appellant at the scene as the prosecution wants the court to believe.

With regard to wrong citation of the provision under which the appellant was charged, I entirely agree with the State Attorney that the error did not prejudice the appellant as such it is curable under section 388 of the Criminal Procedure Act.

Having strenuously reassessed the evidence, I agree with the appellant's counsel that the identification evidence was too scanty to be relied on. In the circumstances, I am of unfeigned views that the case for prosecution was not sufficiently proved as such, the appellant was wrongly convicted.

In the results, I allow the appeal, quash conviction and set aside the sentence of thirty-year imprisonment. I consequently order his immediate release from prison unless he is otherwise lawfully held.

It is so ordered.

Right of appeal is explained.

A. A. Mbagwa

JUDGE

18/08/2022