IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 43 OF 2021

(C/f Criminal Case No. 301 of 2014 in the Resident Magistrates Court of Manyara at Babati)

MARIKI HAMISI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

14/06/2022 & 27/07/2022

KAMUZORA, J.

The Appellant herein is challenging the conviction and sentence of 30 years imprisonment imposed to him by the Resident Magistrates Court of Manyara at Babati (the trial Court). The Appellant stood charged with the offence of Rape Contrary to section 130 (1) (2) (a) and 131 (1) of the Penal Code Cap 16 R.E 2002. It was alleged that, the incident took place on 30th Day of October 2014 at Mapea Village within Babati District in Manyara Region. The Appellant was arrested following an allegation that he raped his grandmother one Mwajuma Majengo.

The trial court found the Appellant guilty of the offence and convicted him. Being aggrieved, the Appellant brought the present appeal on the following grounds: -

1)*That, the learned trial magistrate grossly erred both in law and fact for holding and making findings to believe that the Appellant was positively identified at the scene of crime, while the circumstance and conditions were not conducive for proper and positive identification.*

2) *That, the learned trial magistrate grossly erred both in law and fact in failing to note that the question of familiarity will only hold if were conductive for correct/proper identification, if the condition is not conductive for correct identification the question of familiarity does not arise at all.*

3) *That, the learned trial magistrate erred both in law and fact in basing a conviction on a cautioned statement allegedly made by the Appellant which was procedurally recorded, tendered and received as an exhibit before the court. Further more the trial court failed to adhere and with the required procedure of conducting inquiry after the Appellant objected its tendering.*

4) *That, the learned trial magistrate erred both in law and fact in relying on a weak, incredible uncorroborated and concoct prosecution evidence as a basic of convicting the Appellant.*

5) *That, the learned trial honorary magistrate erred both in law and fact in failing to consider at all the Appellant's defence evidence and make a reference of it in the judgment, which is contrary to natural justice unsettles the trial court judgment.*

During hearing of this appeal which proceeded orally, the Appellant appeared in person with no any legal representation while Ms. Amina Kiango, learned State Attorney appeared for the Respondent, the Republic.

Arguing for the 1st ground of appeal the Appellant submitted that, the offence was alleged to be committed which is not proper time for the culprit to be identified. As for ground 2 of appeal, the Appellant argued that, the trial court erred in not considering that the issue whether the victim and the Appellant were relatives could be considered only if there was proper identification of the accused. That, in the absence of conducive environment for proper and correct identification, the issue of relative cannot stand.

On the 3rd ground, the Appellant submitted that, the trial court erred in convicting him based on the statement at the police which did not comply to the legal requirement as the same was objected by the Appellant. Arguing for the 4th ground the Appellant submitted that, the conviction was entered based on weak evidence of the prosecution side which is against the law. On the last ground 5 the Appellant submitted that conviction was entered without regarding the Appellants defence

which is contrary to the law. The Appellant therefore prays for the appeal to be allowed and be released from prison.

Responding to the appeal, Ms Amina Kiango submitted for ground 1 and 2 that, the prosecution evidence at page 17 to 18 of the types proceedings shows a clear identification of the Appellant. That the victim clearly identified the Appellant at the scene as the Appellant was well known to the victim. That, the victim was able to identify the Appellant with the aid of the moon and the victim described the way the Appellant dressed. Ms. Amina Kiango prays for this court to consider that there was proper identification of the Appellant and invited this court to be guided by the decision in the case of **Waziri Amani Vs. The Republic**, TLR [1980] Pg 210, **Hamis Ally Kazwika Chadog Vs. The Republic,** Criminal Appeal No 66 of 2003 CAT at Mwanza where the court held that sexual offence is committed in close proximity thus easy for the victim to identify the accused as the victim can see the accused very closely.

Responding to the third ground, Ms. Kiango agree with the Appellant's argument that the caution statement did not meet the legal requirement when tendered in court as after the Appellant objected it, an inquiry ought to have been conducted but the same was not done by the trial court. To cement on this, she cited the case of **Nyerere**

Nyague Vs. The Republic, Criminal Appeal No 67 of 2012 CAT (Unreported). She added that, even after the admission of the caution statement the same was not read in court as required by the law. Reference was also made to the case of **Robson Mwanjis and 3 others Vs. The Republic**, TLR [2003] Pg 218. Basing on the said defects the Respondent conceded to the 3rd ground of appeal and prayed for the cautioned statement to be expunged from record.

Ms. Kiango however submitted that, even in the absence of the cautioned statement the evidence of PW2 who is the victim is still enough to prove the case as she clearly explained the whole incident. She supported her submission with the case of **Jacob Mayan Vs. The Republic**, Criminal Appeal No 558 of 2016 CAT at Shinyanga and section 127 (7) of the TEA. She maintained that the evidence of PW1 clearly proves the offence against the Appellant.

For the ground 4, Ms. Kiango reiterated her submission on grounds 1 and 2 and insisted that, the prosecution evidence is water tight to prove the case against the Appellant. She added that, the evidence of the victim was collaborated by the evidence of PW3, the doctor who examined the victim. That, the Doctor's evidence shows that the victim's vagina contained bruised suggesting that she was penetrated.

On the 5th ground of appeal, Ms. Kiango conceded to the fact that in the trial court's judgment, the defence evidence was not considered. She prayed for this court to step in to the shoes of the trial magistrate and see if the defence evidence was able to shake the prosecution evidence and make a decision thereon. In concluding, Ms. Kiango prays for the conviction and sentence to be upheld.

In a brief rejoinder the Appellant added that, in one month there are 30 to 31 days. That, every first or second day of the month is when the moonlight comes out thus to him on 29th of the month the moonlight is too weak to allow a clear identification at the midnight of 03:00hrs. the Appellant insisted that there was no proper identification hence, prayed for this court to allow the appeal.

I have clearly considered the grounds of appeal and the submission by the parties. The grounds raised by the Appellant entail the second scrutiny of the evidence to see if the decision of the trial court was made in considering the evidence in record. I understand that the trial court considered the cautioned statement as supporting evidence in entering the conviction. I agree with the submission by the parties that the admission of the same did not meet legal requirement thus, in taking

into account the proposal by the learned state attorney I hereby expunge the same from record.

Having disregarded the cautioned statement, the remained evidence is that of the victim and the Doctor who examined the victim as the evidence of two other witnesses who are police officers (PW1 and PW4) was based on investigation procedures and the recording of cautioned statement which is no longer part of evidence.

PW3 Doctor Rose, a medical officer who attended the victim testified in court that she found no bruises on the victim's private parts. When she examined the victim by inserting fingers in her vagina, the victim had no pain and upon conducting laboratory tests she discovered epithelia cells. She explained that epithelia cells develop from dead tissue due to friction including friction by sexual intercourse. She also conducted other tests on the victim and the accused and discovered that the victim was free from HIV while the Appellant was HIV positive.

On further explanation, the Doctor testified that the victim had bacteria infection and the concluded that sometimes friction can be as a result of mechanical friction from thing like penis, bacteria or chemical friction. Based on the analysis of Doctor's evidence, the same does not suggest penetration at all. As the doctor suggested that there was no

bruises or pain experience by the victim suggesting penetration, the only thing that could supported penetration is the laboratory test. However, the test suggested probable friction which the doctor explanation suggested that the same does not necessarily come from penetration by penis. The tests also revealed that the victim had bacterial infection due to unclean environment.

The trial court conclusion which I also support is that, the Doctor's evidence did not support the claim for rape. The trial court however, after warning itself departed from the doctor's evidence and convicted the Appellant on the basis of the victim's evidence and the Appellant's cautioned statement. As the cautioned statement is no longer part of evidence, I will direct myself to the evidence of the victim and see if the same prove the offence of rape against the Appellant. In doing so I will also consider the evidence by the Appellant.

In his defence, the Appellant claimed that on the date of incident at about 09:00 at night he went to her home where he was living with his other two relatives Juma and Shaban. In the morning he was informed that her grandmother was attacked thus he went to her house but he was arrested by police. The Appellant however did not bring any witness to collaborate his defence. In my view, there is no tangible defence

except for the general denial of the offence. In that regard I turn to the assessment of the remained evidence of PW2 to see if it proves the offence against the Appellant.

The evidence of the victim PW2 reveals that, the Appellant is the grandchild of the victim who stay alone at her house. The victim alleged that, on the date of incident at night hours, the victim was at home sleeping and she had locked her door with a simple iron bar. While sleeping the Appellant entered her house and she saw him in her bed touching her legs. When she tried to scream, the Appellant covered her mouth and pushed her outside the house and raped her. The victim claimed to identify the Appellant by the aid of the moonlight as the rape incident took place outside the house. She stated also that, the Appellant was wearing a trouser and black shirt and after the rape incident, the Appellant disappeared leaving the victim on the ground. On the same night, the victim went to her daughter and informed her of the incident and in the morning, they went to report to the police station. It is unfortunate that the victim's daughter was not called in court to collaborate such a story.

From the above evidence, there is no dispute that the Appellant was known to the victim as they are relatives. The issue is whether

there was proper identification of the Appellant by the victim on the date of incident. In the case of **Wazir Aman Vs Republic** [1980] TLR 250 page 251 and 252 it was held that,

> *"(i) Evidence of visual identification is the weakest kind and most unreliable;*
> *(ii) No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight"*

The Court of Appeal had in number of occasions dealt with visual identification evidence that was alleged to have been facilitated by moonlight. In **Hamimu Hamisi Totoro Zungu Pablo & Two Others Vs. the Republic,** Criminal Appeal No. 170 of 2004 the court concluded on the legal premise that source of light from the moonlight is a weak source for purposes of positive identification. The Court emphasized on the need for the identifying witness to also disclose such surrounding factors as the proximity, familiarity to the assailant (in terms of appearance, living in the same locality, being a family member, in names, walks). The Court insisted that, it is after taking into account the source of light and other related factors can it be said that the moonlight facilitated the positive visual identification.

In the present matter, I have doubt on the identification by the PW2. The evidence reveal that the Appellant sneaked into the house of PW2 while she was asleep and covered her mouth and took her outside. When she tried to scream, he again covered her mouth and raped her. In my view and in considering that PW2 was coming from the sleep, her mind at that time could not be stable to concentrate taking into account the ordeal of being pushed around in that chaos. We are not informed how long the incident lapsed and if the Appellant was talking with the victim to make the victim be sure that it was no one else except the Appellant.

The witness PW2 alleged to have identified the Appellant with the aid of moonlight. In the case of **Pontian Joseph Vs. the Republic**, Criminal Appeal No. 200 of 2015 (unreported), the Court of Appeal held that,

> *"Though under certain circumstances, identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity o f the moonlight, Whereas PW2 merely said there was moonlight, the complainant said there was enough moonlight: It is our considered view that it does not suffice to say there was moonlight or enough moonlight Its brightness had to be explained."*

The evidence reveal that the incident took place at night hours but PW2 did not mention the exact time thus raising a probable question as

to whether the moonlight was shining at all time of night to allow a clear identification. In other words, there was no explanation of the intensity of the light at the time of the incident that could assist in identification or how in fact the moonlight facilitated her in identifying the Appellant. The fact that the Appellant was known to the victim is not enough to conclude that the Appellant was identified. In the case of **Issa Mgara @ Shuka Vs. Republic**, Criminal Appeal No. 37 of 2005 (unreported) which was cited with approval by the Court of Appeal in Criminal Appeal No. 348 of 2016, **Masolwa Sio Samwel Vs. the Republic** the Court of Appeal held that: -

> *"... even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence of light and its intensity is of paramount importance. This is because, as occasionally held, even when witness is purporting to recognize someone whom he knows... mistakes in recognition of close relatives and friends are often made."*

In that regard, there must be other related evidence connecting the identification such as proximity and time spent with the culprit and conducive environment for identification. Apart from the claim by PW2 that she knew the Appellant and that he was wearing a black shirt and a trouser which was not mentioned its colour, nothing else was stated which could be relied upon to conclude that there was no mistake in

such identification. That being the case, I find that there is doubt if at all there was proper identification at the scene.

I therefore conclude that the prosecution case was not proved beyond reasonable doubt as required by the law. The judgment, conviction and sentence of the trial court is hereby quashed and set aside. This court orders the immediate release of the Appellant from prison unless lawfully held under a valid cause.

Appeal allowed.

DATED at **ARUSHA**, this 27th day of July, 2022.

D.C. KAMUZORA

JUDGE