IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL NO. 88 OF 2021

(Arising from Biharamulo District Court at Biharamulo Criminal Case No. 390 of 2017)

DEUS PASCHAL .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Judgment: 07.10. 2022

A.Y. Mwenda, J.

Before the District Court of Biharamulo at Biharamulo, the appellant was charged for rape C/S. 130(1) (2) (e) and 131(1) of the Penal Code, [Cap 16 RE 2002]. The facts deduced by the prosecution's side are that on the 7th day of October 2017, at around 20:00 hours, the appellant, while at Kebelezo Village within Biharamulo District, in Kagera Region had sexual intercourse with the victim who by then was 10 years old.

These facts were refuted by the appellant, as a result, the prosecution's side lined up four witnesses and tendered one documentary exhibit, PF-3 to prove its case. On his part, the appellant called three witnesses to prove his innocence.

Having analyzed the evidence, the trial court was satisfied that the prosecution's side discharged its duty of proving its case. The Hon. Trial magistrate relying on the victim's evidence, concluded that she was raped and the perpetrator is none other than the appellant. He thus convicted him and sentenced to serve a term of thirty years jail imprisonment.

Aggrieved by the conviction meted against him, the appellant exercised his rights of appeal by filing the present appeal with five grounds. Summarily, the appellant is challenging the prosecution's case in that it was not proved to the required standards.

At the hearing of the present appeal, the appellant appeared in person without any legal representation. On the respondent's side, Ms. Magile, learned State Attorney was in attendance.

Invited to submit in support of the grounds of appeal, the appellant begun with a prayer beseeching the court to adopt his grounds of appeal. On top of that, the appellant challenged the prosecution's allegations that the victim was a child of 10 years old. He said it was wrong for the trial court to believe that argument while no parent was called to support that fact. In attacking the PF-3, exhibit P.1, the appellant submitted that the same was tendered in court without reading its contents to him.

Further to that, the appellant challenged the victim's credibility in that while she alleged that in the course of being raped, one woman came to give her a helping hand, the said woman was never called to testify in that regard.

Again the appellant submitted to that effect that the evidence of PW1 and PW2 are contradicting each other in the sense that while PW2 testified that the victim used to visit at his (appellant's) residence regularly where she was being offered alcohol, PW1 did not mention anything in regard to the victim being offered alcohol.

The appellant also challenged the identification made by the victim at his residence which was supervised by the victim's teacher but failed to involve the street authorities. Lastly the appellant challenged the argument by the prosecutions that the victim was not attending school regularly without producing any proof from school such as attendance register. He thus concluded by beseeching the court to allow his appeal.

Responding to the submissions by the appellant, the Ms. Magiye informed the court that the republic opposes the present appeal. With regard to complainant by the appellant regarding lack of proof to the victim's age, she said it is true that there is no parent who was called to testify in that regard but, the victim's age can be proved by a teacher, a doctor or a guardian and according to her the victim's age was proved by the victim's teacher and the doctor. The learned State Attorney

submitted further to the effect that although the victim might not be exactly of 10 years old, still the records reveal she was a minor. She said this may be inferred from section 122 of TEA and in support to this point she cited the case of ISAYA RENATUS VS. THE REPUBLIC, CRIMINAL APPEAL NO. 542 OF 2015 (unreported).

In respect to complaint by the appellant that the PF-3 was not read in court, the learned State Attorney admitted that the said complaint has substance but was of the view that even if the PF-3 is expunged from records still the evidence from the victim and the Doctor reveal that the victim was raped.

With regard to the appellant's submission that there was contradiction between PW1's and PW2's evidence, the learned State Attorney, submitted that the same does not go to the root of the matter as the main issue is whether the appellant raped victim or not.

In respect to the identification of the victim's assailant, the learned State Attorney submitted that PW2, a teacher testified in court that the victim led them towards the appellant's home where the appellant appeared to welcome the victim but stopped when he saw that she was not alone.

The learned State Attorney concluded her submissions with a prayer seeking the present appeal to be dismissed.

In rejoinder, the appellant submitted that, when the victim led PW2 and others towards his home, the village authority ought to be involved, which was not the case.

Further to that, he insisted on the importance of calling the woman whom the victim alleged she witnessed the incident to testify in that regard.

Lastly, the appellant said, the doctor testified that the victim was examined and found to have had experienced regular sex and he (the appellant) wondered how someone whom she alleged had regular sex with, could not be known by his name. He added in that in the circumstances of this case, there was a need to conduct an identification parade so as to satisfy on his involvement in the alleged offence. The appellant then concluded his rejoinder repeating to his previous payer beseeching the present appeal to be allowed.

I have considered the submissions by both parties. From the records, and as it was rightly submitted by Ms. Magiye, learned State Attorney, there is no dispute that the victim, a minor, was raped. This is in accordance to the victim's evidence PW1 and that of the Doctor who testified as PW3. Although PF-3, which was tendered as exhibit P.1 was expunged by the trial magistrate, still by relying on the evidence of PW1 and PW3 it was concluded that the victim was raped. I too, join hands with Hon. Trial magistrate's findings because PW3, a Medical Doctor examined the victim and observed that the victim had signs of having regular sex

and also that the best evidence in rape case is that of the victim who is capable of describing what befell unto her. In the case of ALLY NGOZI V. THE REPUBLIC, CRIMINAL APPEAL NO. 216 OF 2018 (unreported), the court while citing the case of SELEMAN MAKUMBA VS. REPUBLIC [2006] TLR 379 and EDSON SIMON MWOMBEKI V. REPUBLIC, CRIMINAL APPEAL NO. 94 OF 2016 (unreported), the court of appeal held inter alia that;

> *"Lastly, since it is settled law that medical evidence does not prove rape, the best evidence is the credible evidence of the victim who is better placed to explain how she was raped and the person responsible."*

In the present appeal, much as the victim seem to be credible in her explanations regarding being raped, the issue is whether or not the appellant is a person responsible for the alleged crime.

From the records, while convicting the appellant, the Hon. trial Magistrate relied on the evidence of the victim in that she testified nothing but the truth. The Hon. Magistrate believed her evidence when she said that on the night of 7/10/2017, the appellant, a person whom she used to see previously while she was fetching water, took her to his room where he had sexual intercourse with her and in the course, the bulb light was on. The Hon. Trial Magistrate reasoned further in that

in the way the victim was testifying in court, there is no way in which she would be lying against the appellant.

On his part, as I have previously pointed out, the appellant challenged the victims testimony in the following ways. **One,** that while she alleged that when she screamed for help during the incident, one woman responded and informed her to go home, that woman was never called by the republic to support the victim's allegation. **Two,** that while the incident is alleged to happen on 7/10/2017, it took nine more days to have him arrested i.e on 16/10/2017. **Three,** that it was not proper to exclude the village authority when PW2, a teacher, accompanied the victim to his residence and. **Lastly,** that if the Doctor who examined the victim was of the view that the victim has signs of regular sexual intercourse, then how would she (the victim) fail to mention the names of her assailant in the said circumstances.

At the outset, it is important to note that the incident in question happened at night and although the victim purports the appellant is familiar to her, in the circumstances of this case it is revealed that he was a stranger to her. Since the incident occurred at night, then the Hon. Trial Magistrate ought to have analyzed as to whether the victim properly identified her assailant. Since he did not do so, this court being the first appellate court is going to step in the trial magistrate's shoes to examine and deliberate on the same. In so doing it paramount to look

for guidelines on visual identification. In the case YUSUPH SAYI AND TEO OTHERS V. REPUBLIC, CRIMINAL APPEAL NO. 589 OF 2017 the court of appeal while citing the case of WAZIRI AMANI V. THE REPUBLIC [1980] TLR 250, held inter alia that;

> *"...evidence of visual identification as courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that 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 before it is absolutely water tight."*

The court went further to make reference at page 252 of the cited case in that;

> *"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.* ***We would, for example, expect to find on record questions as the following posed and resolved by him, the time the witness had the***

accused under observation, the distance at which he observed him, the conditions in which such observation occurred, for instance, whether it was day or night time, whether there was good or poor lighting at the scene; and further whether the witness know or had seen the accused before or not. *These matters are but a few of matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity." [Emphasis added].*

Further to that, the court in the same case, while citing the case of SAID CHALY SCANIA V. REPUBLIC, APPEAL NO. 69 OF 2005 (unreported) thus:

"We think that where a witness is testifying about identifying another person in un favorable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to un mistaken identification like proximity to the person being identified, the source of light and its intensity, the

length of time the person being identified was within view and also whether the person is familiar or stranger."

Again in the case of BAYA LUSAMA V. REPUBLIC, CRIMINAL APPEAL NO. 593 OF 2017 (unreported), the court while citing the case of ISSA S/O MGARA @ SHUKA V. REPUBLIC, CRIMINAL APPEAL NO. 37 OF 2005 (unreported) held inter alia thus;

"We wish to stress that even in recognition cases, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when a witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."

In the present matter the victim testified that on the fateful date, at around 20:00hours one person told her to go at his home. She, in the course of giving out her testimony in court, made a dock identification. She said, at his home, the assailant stripped her nacked and raped her. In her testimony however, the victim did not state where exactly did she meet with the assailant and how far is it from the area he took her to his homestead. With this gap it is not easy to describe if, with the said distance, she had opportunity of putting her assailant under

observation bearing in mind that she did not describe the source of light at the area where they met.

Another gap with the victim's evidence is that she did not describe the intensity of the bulb light and the time she spent in observing him during the occurrence of the incident. In the case of HAMIS ALLY AND THREE OTHERS VS. REPUBLIC, CRIMINAL APPEAL NO. 596 OF 2015 (supra) the court held inter alia that;

> *"In our settled minds, we believe that it is not sufficient to make bare assertions that there was lights at the scene of crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lantern etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with the light from a pressure lamp or fluorescent tube. Hence the overriding need to give in evidence sufficient details the intensity and size of the area illuminated..."*

With these gaps, it is therefore unsafe to conclude that the victim's testimony regarding identification of her assailant is free from mistakes.

Apart from that, the appellant challenged the victim's identification and for a failure to conduct identification parade. I have considered this point, and I am in

agreement with the appellant that the prosecution's side ought to have conducted identification parade since the appellant was not known to the victim. This is so because the victim alleged that she knew the appellant as the very one who raped her due to the fact that she used to see him along the river when she used to go and fetch water. In the circumstances such as in the present matter, it cannot be concluded that the appellant was familiar to her, no wonder she failed to even mention his name before PW3 (her teacher) and even before the court. Bad indeed, she failed to even describe his physique and attire to the persons who she reported. In emphasizing the importance of conducting an identification parade, the court in the case of HAMIS ALLY AND THREE OTHERS (supra) held inter alia that;

> *"...it is trite law that the test in an identification parade is to enable a witness to identify a person whom she or he had not known or seen before the incident. An identification parade held soon after the incident in which a witness positively identifies an accused lends assurance to the court of that witness's dock identification of that person."*

On her part, the learned State Attorney, believed on the victim's identification on the fact that she led PW2 to the appellant's residents. I have considered the

learned State Attorney's argument and with respect, I tend to differ with her views on the following reasons. **One,** the exercise of the victim leading way to the appellant's home was not witnessed by the village authority and two, the said exercise was not preceded by any description of the assailant's residence i.e (the location or the neighborhood). In the said circumstances, there is a likelihood that the whole exercise was conducted in violation to the appellant's rights to have the neutral witnesses bearing in mind that the supervisor of the whole exercise (PW2) had no investigative powers.

Again, as it was pointed out by the appellant, the prosecutions side alleged that the incident took place on 7/10/2017 but the appellant was arrested on 16/10/2017. One wonders, if at all the victim knew who exactly raped her, why would it take nine (9) days to have him reported?. This create a lot of doubts because it is trite law that the ability of a witness to mention a suspect at the earliest opportunity is of utmost importance. While discussing this principles the court of appeal in the case of YUSUPH SAYI AND TWO OTHERS V. THE REPUBLIC (supra), held inter alia that;

> *"In a matter of identification, it is not enough merely to look at facts favoring accurate identification, equally important is the credibility of the witness. The ability of* ***the witness to name the offender at the earliest***

possible moment is a reassuring, *though not a decisive factor."*

Lastly, while testifying in court, the victim said, while the appellant was raping her, she screamed for help and one woman whom she knew by face responded, and told her to go home. The appellant while making submissions in support of his appeal said failure to call the said woman is fatal as the said woman would assist to show if at all he was involved in the crime. On her part the learned State Attorney was of the view that the said woman was merely known by face and for that matter it was not possible to procure her. I have considered this point and I am not in agreement with the learned State Attorney. This is so because, just like the appellant who was known by face by the victim, the said woman was also known by face. For that matter efforts ought to be exerted to procure her attendance. Failure to call the said woman leads to an inference that the victim was not credible on who exactly raped her. In the case of NKANGA DAUD NKANGA V. THE REPUBLIC, CRIMINAL APPEAL NO. 316 OF 2013, CAT (unreported) the court held inter alia that;

"...under section 113 of the Evidence Act [Cap 6 RE 2002] no amount of witnesses is required to prove a fact see, ***Yohanis Msigwa v. Republic [1990] TLR 148.*** *But it is also the law (see section 122 of the Evidence Act) that*

the court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons see Aziz Abdallah v. Republic [1991] TLR.71."

From the foregoing analysis this court is of the view that the victim, PW1 did not give a credible account on who raped her. I therefore, find the prosecution's side failed to discharge its duty of proving its case beyond reasonable doubt. This therefore succeed. The appellant's conviction is quashed and the sentence entered against him is set aside.

I thus order an immediate release of the appellant unless otherwise lawful held.

Right of appeal fully explained.

A.Y. Mwenda

Judge

07.10.2022

Judgment delivered in chamber under the seal of this court in the presence of the Appellant and in the presence of Mr. Yusuf Mapesa, the learned State Attorney for the Respondent and assisted by Mr. Alex Francis State Attorney trainee.

A.Y. Mwenda

Judge

07.10.2022