IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 90 OF 2021

(Appeal from the Decision of the District Court of Mkuranga in Criminal Case No. 189 of 2020)

HAMIS SELEMANI @MGARUSI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27th September & 11th October, 2022

BWEGOGE, J.

In the District Court of Mkuranga, one Hamis Selemani @Mgarusi, the appellant herein, was alleged of committing sexual intercourse with one "BM" (pseudonym), a child aged seven (7) years, on 14th August, 2020. Based on this allegation and the evidence procured by the prosecution, the appellant was convicted of the offence of rape c/s 130 (1) (2) (e) and

131 (1) of the Penal Code [Cap. 16 RE 2019] and sentenced to suffer thirty (30) years in prison. The appellant was aggrieved with the conviction and sentence entered by the trial court and appealed to this court. The appellant has initially advanced a single ground of appeal as hereunder reproduced:

1. *That the learned trial magistrate erred in law and fact in arriving into a finding that the prosecution case was proved against the appellant beyond reasonable doubt.*

Later on, the appellant filed a supplementary ground of appeal which avers:

1. *That the trial magistrate erred in law and fact for convicting the appellant based on evidence of visual identification without assessing the credibility of the evidence of PW1 and PW2 on the identification of the appellant to eliminate all possibilities of mistaken identity.*

Before canvassing the above preferred grounds of appeal, this court highlights the background of this case as follows: One Hidaya Athumani Mkonji (PW1) is the mother of BM, the victim in this case. The same had noticed that the victim who was a pupil at Kiguza Primary school was returning home at 19:00 whereas she used to be at home around 16:00hrs. PW1 had demanded an explanation from the child, to the extent

of punishing her. The child disclosed the blood-chilling truth that she used to meet a man who took her into the forest and inserted his penis in her private parts. The victim could not identify the alleged rapist by name. PW1 had reported the matter to the police station whereas her complaint was registered and given the PF3 for medical examination. The victim was examined by Doctor Ahmad Said Msumi (PW3). The same had made finding that the victim's hymen was not intact. Since the victim could not mention the name of the suspect, PW1 was instructed to search for the suspect and report any development to the police. Later on, the victim identified the suspect and PW1 informed the policemen who had arrested the suspect. The said suspect is the appellant herein.

Based on the identification evidence by the victim (PW2), corroborated by the testimonies of her mother (PW1), and the medical practitioner (PW3) who had tendered the medical examination report (Exhibit P1); the trial court had found that the charge of rape was proved beyond sane doubts, convicted the appellant and imposed prescribed custodial sentence aforementioned. Hence, this appeal.

The appellant was represented by Mr. Mashaka Ngole, learned advocate whereas the respondent Republic was represented by Mr. Emmanuel

Maleko, the Senior State Attorney. During the hearing of this appeal, Mr. Ngole, in substantiating the 1st ground of appeal filed hereto, submitted that based on the evidence brought to the trial Court, the appellant herein should not have been convicted. That the trial Court had based its decision on the testimony of PW1 who deponed that she observed the victim herein returning home late. She had investigated the victim. Later on, she found that she had been sexually abused by the appellant when she was returning home from school.

However, contrary to what was deponed by PW1. the victim (PW2) deponed that she was sexually assaulted by the appellant and felt pain in her private parts; hence, opted to report to her mother (PW1). The Counsel opined that this is a serious contradiction which leads to the conclusion that one of these witnesses lied to the Court.

Likewise, the counsel contended that PW1 had deponed in court that the victim disclosed the fact that the appellant had anal sexual intercourse with her. However, this allegation is not found in the testimony of the victim and contradicts the findings made by PW3. Further, the counsel contended that the date of the alleged rape, i.e., 14th August, 2020, is not indicated in the evidence adduced before the trial court. The counsel concluded his submission on the 1st ground of appeal by stating that the

findings in the medical examination report (exhibit P1) didn't support the charge laid to the door of the accused person by the prosecution. To bring his point home, the counsel referred the mind of this Court to the decision of the Court of appeal in ***Nelson Onyango vs Republic.*** Criminal Appeal No. 49/2017 (unreported) whereas the Court held that the evidence of the victim should not be taken as the gospel truth.

In substantiating the 2nd ground of appeal, the counsel submitted that the appellant was not correctly identified as the victim didn't provide description of her perpetrator before the appellant was arrested. That it was incumbent for the victim to have identified the appellant before he was arrested as the test for her credibility. The counsel cited the cases; ***Andrea Augustino @ Msigara & other vs Republic,*** Criminal Appeal No. 365 of 2018 CA (unreported) at pg. 17 and ***Republic vs Mohamed bin Allui*** (1942)19 EACA 72 to buttress his point.

In the same vein, the counsel contended that the evidence of identification of the offender, the appellant herein, was insufficient to warrant his arrest and prosecution taking into consideration the delay in arresting the appellant. That, if at all the victim was familiar with the appellant, the same would have been arrested earlier. The counsel cited the case of ***Patrick Sanga vs The Republic,*** Criminal Appeal No. 213

of 2008. CA (unreported) to make his point. The counsel prayed this court to find the appeal herein meritorious and allow it.

On the other hand, Mr. Emmanuel Maleko, the Senior State Attorney, from the outset, informed this court that he supports the conviction and sentence entered by the trial Court. And, in responding to the submission made on 1st ground of appeal he opined that the charge was proved beyond sane doubt. That the record entails that PW1, the mother of the victim received a complaint in respect of the allegation of sexual assault from the victim whereas she examined the victim's private parts and found her hymen not intact. She had reported the matter to the Ward Executive Officer and later lodged her complaint at the police station. That this record proves the fact that the victim had mentioned her perpetrator at the earliest opportunity in line with the decision of the Court of Appeal in the case of **Kudumu Gurube vs Republic**, Criminal Appeal No. 183/2015 CA [2017] TZCA 217 contrary to the submission made by counsel for the appellant in that the victim had failed to disclose her perpetrator.

Further Mr.Maleko countered that the evidence of PW1 is merely corroborative evidence as the prime witness in the case at the trial Court

is PW2 (victim), a child of tender age who promised the Court, in line with the requirement of the law, to tell nothing but the truth. That in proof of sexual offences, the victim's evidence is the best evidence as per the principle enunciated in the case of **Selemani Makumba vs Republic** [2006] TLR 379. The counsel had opined that the victim was the witness of truth who is entitled to credence.

In respect of the findings in the medical report, Mr. Maleko submitted that the slight penetration is sufficient to prove rape under s.130(4) of the Penal Code. That the medical doctor found that the victim's hymen was not intact which proves the alleged penetration of the victim's genitalia. And, in respect of the evidence of identification, Mr. Maleko argued that the victim had identified the appellant as she had deponed in court how she identified the appellant and informed her mother (PW1). Mr. Maleko concluded his submission by stating that the prosecution witnesses were witnesses of truth who are entitled to credence. This court referred to the case of **Goodluck Kyando vs. Republic** [2006] TLR 363 to make a point. Based on the above presentation, the counsel prayed this court to dismiss the appeal herein. In rejoinder, the counsel for the appellant had reiterated what was submitted earlier and this court finds it needless to replicate the same herein.

At this juncture, this court reverts to the grounds of appeal advanced by the appellant herein which were mentioned earlier. This court shall commence with the supplementary ground of appeal with regard to the allegation that the appellant was convicted on basis of the unreliable identification evidence of PW1 and PW2.

From the outset, this court finds it pertinent to put it clear that the trial court had relied on the identification evidence of the victim (PW2) and corroborative evidence of her mother (PW1) in convicting the appellant herein. The question is whether the evidence adduced by these key witnesses was sufficient to ground conviction on the charge levelled against the appellant herein.

This court subscribes to the submission of Mr. Maleko, counsel for respondent Republic in the following aspects: **First,** it is now well settled that in proof of sexual offenses, the best evidence comes from the victim in line with the principle in the case of **Selemani Makumba vs. Republic**(supra). **Secondly**, it is likewise a rule of law that unless there are good and cogent reasons for not believing a witness, every witness is entitled to credence and must be believed and his testimony accepted [**Goodluck Kyando vs. Republic** (supra)]. **Third,** in the same vein, this

court subscribes to the Counsel for the appellant in that the ability of a witness to mention a suspect at the earliest opportunity is an all important assurance of his reliability [**Marwa Wangiti Mwita and Another vs. Republic** (2002) TLR 39].

The counsel for respondent Republic opined that the trial court was justified to hinge its conviction on the evidence of PW2 based on the best evidence rule mentioned above. He fortified his position in that both PW1 and PW2 were entitled to credence as there are no cogent grounds to impeach their credibility. And that PW1 had mentioned the appellant at the earliest opportunity which is an assurance of her reliability. As aforementioned, the counsel for the Appellant had a different opinion. His opinion is that PW2 failed to mention her perpetrator at the earliest opportunity which renders her testimony less credible. The counsel for the appellant justified his position by pointing to the fact that it had taken so long for the appellant to be arrested and prosecuted, let alone wanting particulars of the appellant's descriptions prior to his arrest.

This court, being the 1st appellate court, shall revert to the record of the trial court pertaining to evidence adduced by the key witnesses herein, i.e., PW1 and PW2, and re-evaluate their evidence objectively and make

factual findings therefrom, if necessary. It is in the testimony of PW1 that she had noticed PW2 returning home late, at 19:00hrs for the months of July and August, 2020. Then she inclined to investigate her daughter. It seems the investigation exercise had taken a toll on her, as she had resorted to beating the victim to solicit information. Indeed, her scheme worked, as the victim disclosed the fact that there was a man who used to meet her along the way, led her into the forest, and sexually assaulted her. It is a glaring fact that PW2 had not identified the suspect by name, or given any description. And, PW1 had deponed in court that even after reporting at the police station the suspect could not be arrested as PW2 could not mention the suspect, his description or the place to be found. PW1 was instructed to continue searching for the suspect with the assistance of the victim and report immediately, if they succeeded to locate him. Further, PW1 testified that the victim managed to recognize the person who raped her and PW1 immediately informed the police officers who had arrested him. However, PW1 never gave particulars on how the victim recognized the appellant let alone the exact place the appellant was arrested.

This court has likewise gone through the testimony of the investigator who testified as PW4. The same deponed in court that the victim managed

to identify the appellant on 28/08/2020. There is no clue to suggest that the victim had prior given particulars of the suspect when her statement was taken. Likewise, PW4 failed to inform the trial court on what basis the victim had identified the appellant.

This court has also attempted to go through the testimony of PW2 (victim) to find out on what basis she had identified the appellant as the actual rapist. The following is a leaf of what was deponed by PW2:

> *"I saw the accused standing on the sand. I managed to recognize him and informed my mother that he is the one who used to rape me..... the person who raped me is here in this court (pointing to the accused person)."*

The above quotation is all about the identification evidence given by the victim. The law pertaining to identification evidence is settled in the case of **Waziri Amani vs. Republic** [1980] TLR 250 that the court should not act on evidence of visual identification unless all possibilities of mistaken identity are eliminated. This principle is reiterated in the case of **Maganga Udugali vs. Republic,** Criminal Appeal No. 144 of 2017 CA [2021] TZCA 639 as follows:

"It is also settled that although relevant and admissible, the eyewitness visual identification evidence is still of the weakest kind and most unreliable which should be acted upon with great caution. Before the court can act on such evidence, it must satisfy itself that the conditions were favourable for proper identification. The evidence must be watertight and all possibilities of mistaken identity must be eliminated. It has to be insisted that the principle applies even in cases of visual identification by recognition as it is in the instant case."

And in the case of **Philimon Jumanne Agala @J4 vs. Republic**, Criminal Appeal No. 187 of 2015 CA [2016] TZCA 278, the superior court citing the case of **Shamirs/o John v The Republic**, Criminal Appeal No. 166 of 2004 (unreported) held as thus: -

"Admittedly, identification in cases of this nature, where it is categorically disputed, is a very tricky issue. There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgment, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness. This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one. Even a number of such witnesses can all be mistaken. It is now trite law that the courts should closely examine the circumstances in which

the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance? ... Finally...recognition may be more reliable than the 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 close relatives and friends are sometimes made."

It suffices to point out that the superior court in the above-cited decisions emphasizes the fact that evidence of visual identification should only be invoked when the court is satisfied that the evidence is watertight and the possibilities of mistaken identity are overruled. The evidence of recognition is not spared by this rule.

The evidence of visual identification and, or recognition given by PW2 should have been treated with caution. This crucial witness was not led to explain how she had identified the appellant as the actual rapist. And

this court is not in the position to know the point in time and condition into which the victim had identified the appellant save the fact that she had managed to recognize her perpetrator. The wanting particulars lead this court to arrive at the conclusion that possibilities of mistaken identity cannot be ruled out.

This court, while subscribing to the counsel for the respondent Republic that in proof of sexual offences, the best evidence comes from the victim, it worth pointing out that the cherished principle has an exception. In the case of **Mohamed Said vs. The Republic,** Criminal Appeal No. No. 145 of 2017 [2019] TZCA 252, the Court held:

> *"We are aware that in our jurisdiction it is settled law that the best evidence of sexual offence comes from the victim [Magai Manyama v. Republic (supra)]. We are also aware that under section 127(7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded solely on the uncorroborated evidence of the victim.* ***However, we wish to emphasize the need to subject the evidence of such victims to security in order for courts to be satisfied that what they state contains nothing but the truth."*** (Emphasis mine).

Based on the observations made by this court above, coupled with the mode upon which PW1 had solicited information from PW2, this court

cannot arrive at a conclusion that PW1 had stated nothing but the truth. This court subscribes to the counsel for the appellant in that the evidence of PW1 and PW2 alone could not have found conviction. It needed corroborative evidence which is wanting in this case. This court finds substance in the supplementary ground of appeal. Having found the supplementary ground of appeal with merit, this court finds it needless to canvass the remaining ground of appeal.

Finally, this court finds the appeal herein meritorious. The appeal is allowed in its entirety. The conviction and sentence imposed on the appellant are quashed and set aside. The appellant to be released forthwith from prison unless the same is otherwise lawfully held.

Order accordingly.

DATED at **DAR ES SALAAM** this 11th of October, 2022.

O. F. BWEGOGE

JUDGE