THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 119 OF 2022

(Originating from the District Court of Ileje at Itumba, Criminal Case No. 7 of 2022)

BEN MUSSA KIBONA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 21/10/2022
Date of judgment: 26/10/2022

NGUNYALE, J.

The appellant BEN MUSSA KIBONA was charged before the trial court with the offence of Rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code Cap 16 R. E 2019 now 2022. It was alleged that on 13th day of February, 2022 around 20:00 hours at Ndola village within Ileje District in Songwe region he did rape one [name withheld] age 02 years old a

residence of Ndola village. The name of the child has been withheld to protect her modest but for the purpose of this judgment she will be identified as the victim. The trial court entertained a full trial which ended with conviction against the appellant and sentenced him accordingly per order dated 18th May 2022.

In order to appreciate the findings of the trial and subsequently this court it is prudent to state a historical background resulting to commission of this offence and the resulted appeal. According to the testimony of PW1 the father of the child and PW2 Thomas Tajilu, the victim on the evening of 13th February 2022 around 19:00 hours was playing with her fellow children near the office of PW2. One Alex Edward went there looking for the victim but he found her missing, he entered to the office of PW2 to ask for the victim. PW2 told him that the kid was playing outside with her fellows, he had seen her few minutes before. On further inquiry it was established that the victim was not there. The move to find the child started and the father of the victim was notified by phone that the child is not seen. Later, PW2 and other people were near the bush discussing about the missing child and other people who were with the father of the child were in another side looking for the child. In the course of discussing about the missing child they heard a baby crying from the side of the

bush. They directed PW3 who had a motorcycle to direct the light of the motorcycle to the bush. When he lit the lamp of the motorcycle towards the bush, they saw somebody carrying a baby.

The person who was crying a baby realized that he has been seen, he threw the baby down and started to run away. PW2 went quickly and picked the child while PW3 and other villagers successful chased the person who threw the baby and they managed to arrested him. Upon his arrest PW2 and PW3 identified the said person as Ben Kibona the resident of Lwiji village. PW2 examined the victim who was naked and she had injuries to her face particularly her light eye. She was also discharging blood from her vagina. PW1 the father of the child went to the side where the child was recovered where he was later given the child. The child was very dirty and upon examining the he, he also observed blood and white substances discharging from the victim's vagina. PW1 the father of the victim also identified the appellant as the person he knows for long time, he is living in a nearby village. The child was taken for medical examination whereby PW4 Busara Simon Kyungu a Clinical Officer checked the victim and tendered PF3 in his testimony establishing that the vagina had bruises and blood mixed with human sperm suggesting that penetration took place.

The appellant in his defence completely disassociated himself with the commission of the offence charged stating that it is not true that he raped the victim. It is not possible the chid of 2 years to be raped by a person like him.

The appellant was charged with the offence of rape as already stated basing on the facts and evidence of PW1, PW2, PW3, PW4 and PW5 and DW1. The learned trial Magistrate believed the testimony of the prosecution stating that the defence case had left the prosecution case intact. He went on to convict the appellant and sentenced him to serve life imprisonment.

Aggrieved, the appellant preferred the present appeal against conviction and sentence basing on eight grounds of appeal. I will not reproduce the grounds of appeal instead they will be considered one after another while answering the issue as to whether the offence was proved beyond all reasonable doubt the cardinal principle in criminal justice.

During hearing the appellant had nothing to submit but politely he prayed the court to consider the grounds of appeal which were before the court. The respondent as represented by Ms. Prosista Paul learned State Attorney strongly opposed the appeal.

In the first and fifth grounds of appeal the appellant complain about identification, that he was not identified at the scene of crime and PW1 and the appellant were not neighbours. It was the submission of Ms. Paul that PW1 Edward Fadhili, PW2 Thomas Tajili and PW3 Furaha Philipo in their testimony testified how the appellant was arrested on the first day. PW2 testified that while looking for the missing child they arrested the appellant to the bush while with the child. The appellant when he saw them, he ran away abandoning the child. The appellant was identified immediately after his arrest by those witnesses. PW3 in his testimony testified that light of the motorcycle assisted to see the man carrying a baby. The child was recovered from the appellant from the bush and her private parts were discharging blood. The testimony of the three witnesses that they found the appellant with the child was not cross examined by the appellant. The appellant said; '*I have no question, and I did not rape the chid*' were the only statements of the appellant. PW3 testified that the appellant was found with a raped child but the appellant did not cross examine such fact. The learned State Attorney cited the case of **Chora Samson Kiberiti v. R,** Criminal Appeal No. 516 of 2019 Court of Appeal of Tanzania at Musoma which stated while referring to the case of **Nyerere Nyague v. R** that failure to cross examine the witness on a material evidence means he accepted the truth to the matter. The

appellant failure to ask questions about rape means he accepted the fact. He prayed the court to dismiss the first and fifth grounds of appeal because the appellant was well identified at the scene of crime.

In considering the complaint about identification I agree with the learned State Attorney that PW1, PW2 and PW3 testified that they identified the appellant immediately after his arrest as the person they knew before the event, so, the argument of the appellant that PW1 was not his neighbour has no merit at all. Criminal practice and procedure tells that visual identification require the court not to act on it unless all possibilities of mistaken identity are eliminated and the courts are required to be satisfied that such evidence is absolutely watertight. This is the position in the case of **Waziri Amani vs. Republic** [1980] TLR 250. (See also **Emmanuel Mdendemi v. Republic**, Criminal Appeal No. 16 of 2007(unreported).

In **Waziri Amani's** case (supra) the Court of Appeal of Tanzania went further to propound factors to be considered in ascertaining proper identification such as the time the witness had the appellant under observation; the distance at which he observed the appellant; the time when the offence was committed, whether during day light or at night time and if at night the light used and whether it was sufficient to enable positive identification and whether the witness knew the accused before

the incident. It is also noteworthy that in identification by recognition, the factors mentioned above apply. In as far as the issue of identification by recognition is concerned, the Court of Appeal of Tanzania dealt with it at lengthy in the case of **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014 (unreported) where the Court explained the types of identification as follows:

> *"For the purpose o f analysis and the experience enriched from case law, cases of identification may be identified into three broad categories. Visual identification, identification by recognition, and voice identification. In visual identifications usually the victims would have seen the suspects for the first time. In recognition cases, the victims claim that they are familiar with or know the suspects. In the last category the victims would usually claim to be familiar with the voice of the suspect although they may or may not have seen him. It is akin to identification by recognition."*

The Court of Appeal went on to state that:

> *"Of those types of identification, it has been held that identification by recognition is more reliable than that by strangers or by voice."*

In the case at hand as alluded to earlier on, PW1, PW2 and PW3 explained on how the offence was committed at night at around 20:00 hours. The appellant was seen by PW2 and PW3 carrying a child and when he saw them, he abandoned the child and ran away. PW2 went quickly to pick the child while PW3 managed to arrest the appellant followed by other villagers. PW1 checked the victim and found her naked and injured to her

face especially the eye, and the vagina was discharging blood mixed with white substances. The appellant after arrest was identified to be Ben Kibona and all the three witnesses knew the appellant before that date of event 13/02/2022. The case of **Jumapili Msyete** (supra) is very relevant is this scenario that identification by recognition is more reliable than that by strangers.

When all this was happening, PW2 and PW3 were able to identify the appellant because of the bright motorcycle powered light illuminating the whole area. Also, it was the testimony of PW2 that smart phone torch of PW1 was used for identification of the appellant and condition of the child. The appellant was correctly identified at the scene of crime by witnesses who knew him very well before the event. In the case of **Jumapili Msyete vs R**, Criminal Appeal No. 110/2014 Court of Appeal at Mbeya it was observed that identification by a person knows the appellant before is proper. Guided by that position the argument that PW1 was not the neighbour of the appellant is irrelevant.

There is evidence that after arrest and preliminary interrogations the appellant managed to escape. The fact that the appellant was correctly identified at the scene of crime means when he later escaped and re arrested means the second arrest was guided by the previous

identification that is to say they were looking for the person they already know. PW2 testified in part; -

> *"your honour while we were on the process of sending the suspect. to the village office we forgotten ourself a little we lost attention, it is where the suspect used the opportunity to escape and run away. However, on 14/02/2022 the accused person was re-arrested at Mbozi and transported to Mbalizi police station. It is not the first time to see the suspect; the suspect is a resident of Lwiji village. I have no hatred with him"*

As I have stated before the appellant after he was correctly identified he escape but he was re-arrested, re-arrest was done based on the fact that they were looking for the person who was already known. I therefore agree with the learned State Attorney that the appellant was correctly identified at the scene of crime by PW2, PW3 and later PW1 so the 1st and 5th grounds of appeal have no merit, they are worth of being dismissed.

The 2nd ground of appeal the appellant complained that **the trial court erred in law and fact when convicted and sentenced him without regarding whole situation of such crime up to try to arrest the said culprit without any success**. The appellant submitted nothing in respect of this ground of appeal. The learned State Attorney submitted that the very ground of appeal is vague and has no merit. The appellant has not set it well and it is not well understood. But the three witnesses proved how he was properly arrested.

The way the ground of appeal has been set I find no reason to detain long on it. It seems the appellant is complaining about the crime and his arrest, the crime is rape and his arrest has been well proved by PW2 and PW3 as rightly stated by the learned State Attorney, there is nothing essential to detain the court on this ground of appeal.

The 3rd ground of appeal the appellant complains that PF3 was issued at Ileje district where there is government hospital but the child was taken for treatment to Ilembo hospital in another district therefore the PF3 might have been planted. The appellant could not elaborate this ground of appeal but the learned State Attorney submitted that PW1 explained how he witnessed the condition of the child who was serious injured to her private parts therefore the problem needed more expertise where he was admitted for seven days attending treatment. The doctor attended the child and tendered PF3 which he filled on 13/02/2022. He tendered the very PF3 which was not objected during tendering in court. At the time of tendering the appellant did not ask any question, he prayed the ground of appeal to be dismissed.

In this ground the appellant attempt to raise other issues which are not within the legal ambit, the essential facts are that; **one**, the victim received medical examination and treatment **two**, the whole exercise was

done by a competent personnel Dr. Busara Simon Kyungu a clinical officer from Ilembo Healthy Centre and **three**, he filled his findings in a legally recognized document PF3 exhibit No. P2. After all, the findings noted at the PF3 resemble to what was seen by eye witnesses PW1 and PW2. Both witnesses witnessed injuries to her vagina which was bleeding. Therefore, I agree with the respondent that this ground has no merit the appellant could not even cross examine about the PF3 during trial.

The 4th ground of appeal the appellant complain that the event was not reported to police and the PF3 was not issued there and the planted PF3 was taken to another district. On this ground the State Attorney stated in short that this ground of appeal should be dismissed because it has no merit since the event was reported to Ileje police station where PF3 was issued for the victim to receive treatment. The issue of PF3 is not exclusive proof to penetration, oral evidence can even prove penetration. essentially in rape cases penetration need not necessarily be proved by the victim herself although the best evidence is always expected from the victim. Penetration in rape cases can be equally proved and or established by a third party such as the doctor through medical examination, a parent or any other person through physical examination. In the case of **Salu Sosana v. Republic**, Criminal Appeal No. 31 of 2003 for instance which

was quoted in the case of **Mussa Ally Onyango**, Criminal Appeal No. 75 of 2016 the Court of Appeal of Tanzania held that rape can be established even if there is no medical evidence provided that there is other evidence pointing to the fact that it was committed. In this case the findings of the doctor were not far from what was observed by PW1 and PW2. The two witnesses observed oozing of blood and white substances from the vagina the fact which suggest penetration. This ground should not exhaust my mind much.

In the 6th ground of appeal, the appellant laments that the evidence of PW1 was not evaluated well because in his evidence he did not testify if he went to police station to get PF3. On this ground the appellant submitted nothing specific instead during rejoinder he stated that he did not accept PF3. On her part Ms. Paul for the respondent submitted that the PF3 was filled by the doctor after he examined the child, the ground should be dismissed for want of merit.

This complaint about PF3 has already been resolved that, the victim was examined by competent personnel (the Clinical Officer) who certified his findings that the victims' vagina had bruises, blood and human sperms. Those findings suggested that the victim was penetrated. The testimony of PW1 was properly evaluated establishing the condition of the child at

the time she was recovered from the appellant. The testimony of PW1 corroborated the evidence of PW2 who was the first to see the victims' condition at the scene of crime. I think this ground also has no merit.

In the last ground of appeal, the appellant complains that the offence was not proved beyond all reasonable doubt and his defence was not considered by the trial court. The appellant did not submit anything specific about this ground in short, he just stated during rejoinder that the child of 2 years cannot be raped. Ms. Paul submitted that this ground has no merit because all witnesses proved the offence of rape. Their testimony that the appellant is the one who raped the victim was not cross examined by the appellant. In his defence the appellant testified that he did not rape the victim. His defence did not raise doubt to the prosecution case which proved that he raped the victim, therefore the offence was proved beyond all reasonable doubt. The appellant was found with the child who had all signs suggesting that she was raped. The appellant did not cross examine important issues which means he admitted the truth to it. He prayed the appeal to be dismissed and the decision of the trial court to stand.

In order to answer whether the offence was proved beyond all reasonable doubt or not I wish to be guided with the following issues; -

1. *Whether the established penetration into victim's vagina was done by the appellant.*
2. *Whether such penetration was by the penis of the appellant and not anything else.*

In determining the first issue above, there is no doubt that all what was befallen to the victim, the appellant was behind it. That is very clear on the evidence on record. The testimony of PW1, PW2, PW3 and PW4 is to the effect that penetration took place against the victim and the appellant was the only person with an opportunity to effect such penetration. The best evidence in sexual offences as already stated is that of the victim as propounded in a number of cases including the celebrated case of **Suleman Makumba v. R** (2006) TLR 379, the present case is an exceptional to that rule because presence of such rule does not mean that without evidence of the victim rape cannot be proved. In the present case penetration has been proved by circumstantial evidence which is watertight. The child victim was not able to testify because she was not of sufficient intelligence as established by the trial Magistrate who physically observed the child. The prosecution evidence has proved beyond reasonable doubt that only the appellant had an opportunity to commit the offence charged. The appellant in his defence stated that the child of 02 years old cannot be raped, this might be true as a result the child was serious injured to her vagina. I agree with the learned State

Attorney that the defence of the appellant did not fault the prosecution case. In the present circumstance there is no escape from the conclusion that with all human possibility the crime was committed by the appellant and nobody else as stated in the case of **Justine Julius & Others vs. Republic**, Criminal Appeal No. 155 of 2005 (unreported). The evidence irresistibly points the guilty to the appellant to the exclusion of any other person. The child was noted to be missing and in a short while she was found with the appellant in a situation that she was raped. As rightly submitted by the learned State Attorney the appellant's defence could not shake the prosecution case which remained intact all the time.

About the second issue that penetration was of the penis of the appellant and nothing else I think this is simply answered by the evidence on record that that appellant is the one who was found with the child and the child was bleeding to her vagina. PW1 and PW2 saw also white substances oozing from the vagina. Those substances were later proved by the doctor to be the human sperms, the fact that they were sperms means that penetration was done by the penis of the appellant and not anything else. The proof that there was penetration which was done by the appellant means that the offence of rape was proved beyond all reasonable doubt before the trial court.

In the end result, the court has been satisfied that the offence of rape was proved beyond all reasonable doubt the standard required in criminal cases. It was proved during evidence through exhibit No. P1 that the victim was 2 years old at the time the offence was committed. Section 131 (3) of the Penal Code provides; -

> *"Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."*

The trial court correctly complied to the above provision of the law in imposing sentence of life imprisonment to the appellant. The court has no jurisdiction to alter the punishment imposed. Therefore, the sentence remains undisturbed.

Having said and done, the appeal is bound to fail, it is hereby dismissed entirely for lack of merit. Order accordingly.

Dated and delivered at Mbeya this 26th day of October 2022.

D. P. Ngunyale
Judge