IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

CRIMINAL APPEAL CASE NO 44 OF 2022

(Originating from Lindi District Court at Lindi in Criminal Case No 67 of 2020)

SALUMU IBRAHIMU MIHEVA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

27/7/2022 & 31/10/2022

LALTAIKA, J.;

The appellant herein **SALUMU IBRAHIMU MIHEVA** was arraigned in the District Court of Lindi at Lindi charged with the offence of Rape Contrary to Section 130(1) (2) (e) and 131(1) of the Penal Code Cap 16 RE 2019 (now RE 2022). It was alleged that on the 17th day of November 2018 at Mnolela Mashambani Village within the District and Region of Lindi, the appellant had carnal knowledge of ZYZ a girl of 13 years.

It is imperative at this earliest stage, to acquaint ourselves with the facts of the case as can be gleaned from the lower court records. In a nutshell, the story is that, in the morning hours of the 17th day of November 2018 at Mnolela Mashambani Village, the victim, a thirteen-year-old girl went

to pick up cashewnuts in her parent's farm. This is how cashewnuts an important cash crop in the Southern regions of Mtwara and Lindi is harvested. Suddenly, the appellant appears holding a panga. He threatens ZYZ with a panga, two of ZYZ's fingers and a part of her neck were brutally injured. Having given her an opportunity to choose between rape or being killed, ZYZ goes for the lesser evil-carnal knowledge. The appellant forcefully undresses the victim and commits rape against her.

No sooner had the rape started than a good Samaritan, an Oldman known to both the accused and the appellant passed by. On hearing the young girl crying bitterly, the good Samaritan tried to find out what was wrong. The appellant replied that he was "making love" with the girl because they had agreed to do so. When the good Samaritan probed further how comes the girl was crying if she had indeed consented to being carnally known, he was fatally attacked by a panga. He passed away a few days later after the appellant was arrested and charged with attempted murder, allegedly having mentioned the appellant as the person who attacked him. For reasons not disclosed, the prosecution later decided to drop the charge for attempted murder and pursued the offence of rape.

When the charge was read over and explained to the appellant, he pleaded not guilty. Consequently, the court had to conduct a full trial to enable the prosecution to prove the allegations leveled against the appellant (then accused) at the required standard while also affording the appellant the opportunity to wage his defense.

The prosecution marshalled in a total of 6 witnesses and produced 3 exhibits. The defense side had only one witness, the appellant (DW1). The

trial was concluded on 18/3/2020 when the impugned judgement was delivered. Upon being convinced that the prosecution had left no stone unturned in proving its case, the learned Resident Magistrate M.B. Magara convicted the appellant as charged and sentenced him to thirty years imprisonment and to pay TZS 1,000,000 as compensation to the victim.

Dissatisfied and aggrieved with both conviction and the sentence, the appellant has appealed to this court on ten grounds. The grounds are hereby reproduced while deliberately retaining originality (grammatical errors, typos and expressions that suggest direct translation from Kiswahili, the language used by the appellant and presumably, his legal drafter). As will be apparent later, it is necessary to reproduce the grounds of appeal because the appellant has time and again insisted that this court carefully considers his grounds of appeal.

1. *That the trial Magistrate erred in law and facts when convicting and sentenced the appellant whenever no first description was given at the police station on 17/11/2018 according to the appearance of the said rapist if was true the appellant*
2. *That the trial court erred in law and facts in convicting the appellant as prosecution side (police) failed to tender the statement of PW1 of 17/11/2018 if was true this one was reported there to support her claims of rape at the fateful day and if her statement was mentioned the name of the Appellant*
3. *That the trail magistrate erred in law and fact in convicting the appellant since this allegation was done at the midst of the village why PW1 or the unknown old man was failed to rise an alarm to the nearby neighbor to arrest the appellant in the area of crime but instead he watched only without taking any step to serve PW1? Is there any sketch plan map tendered at the Trial Court to show that the said area was not surrounded with the house of villagers or any distance from one to another up to the crime place?*

4. *That, the trial Magistrate erred in law and fact in convicting the appellant as according to the evidence of PW2 the son of old man his father was told him that he was attacked by "SALUM ULEMWA" who is his neighbor but was not the name of the appellant and the appellant was not the neighbor of this old man*
5. *That, trial magistrate erred in law and fact in convicting the appellant without considering that that the trial court nowhere in the evidence of PW4 was testified that PW1 told him the name of the rapist to be the Appellant*
6. *That the trial Magistrate erred in law and fact in convicting the Appellant as the identification parade failed to be complied by law due to the fact that it was conducted without first description of the appellant given at 1st day of crime occurring by PW1 and the all procedure of conducting the identification parade was not complied of.*
7. *That the trial Magistrate erred in law and fact by convicting the appellant without considering that PW9 failed to prove in his evidence if was true the appellant name was SALUM ULEMWA since he was not tendered any facts exhibits such as Appellant's birth certificate. Vote Identification and NIDA*
8. *That trial Magistrate erred in of law and fact by convicting the appellant without considering that the trial court was convicted the appellant by citing the case of SELAMANI MAKUMBA v. REPUBLIC 2006 TLR 379 whenever he know that nowadays the investigation was growing very high by using other investigation such as DNA tests, finger prints, all this may be used to prove if the appellant was the one who commit his allegation and was the supported facts.*
9. *That trial magistrate erred in law and fact by convicting the appellant without considering the prosecution side failed to prove the case against the appellant as per required standard of proving it beyond reasonable doubt*
10. *That the trial court erred in law and fact in convicting the appellant without considering that the appellant's defense was not considered by the trial court.*

When this appeal was called on for hearing on the 27/7/2022, the appellant appeared in person unrepresented. The respondent Republic, on

the other hand, enjoyed the services of Mr. Enosh Gabriel Kigoryo, State Attorney.

The appellant, not being learned in law, had nothing substantial to add to his petition of appeal except a prayer that the same are adopted as part of his in-depth submission. He prayed further that the learned State Attorney be allowed to submit first, and he would add a word or two after the lawyer has spoken as part of his rejoinder. Mr. Kigoryo, agreed to the proposal to submit first but stated on the outset that he objected the appeal.

Responding to the first ground where the appellant asserts that there was no description by the police before he was arrested, Mr. Kigoryo averred that as recorded on page 6 to 7 of the trial court, PW1 had stated that when she arrived at the Lindi Police Station she was asked if she could identify the accused person and she did. The learned State Attorney averred further that PW1 had explained how she identified the appellant by pointing out that he had a special protruding mark *"nundu"* on his face and she went on to mention those peculiar features. To that end, Mr. Kigoryo reasoned, the grounds of appeal related to description of the appellant at the police station on the reporting date have no merit.

Moving on to the second ground, Mr. Kigoryo clarified that the applicant's complaint is that the statement of PW1 was not tendered in court to show that the incident took place 17/11/2018. It is Mr. Kigoryo's submission that tendering statement of the complainant as an exhibit is not a legal requirement. What the law requires as per **section 9(3) of the Criminal Procedure Act**, averred Mr. Kigoryo, is that the accused should

be supplied with the complainant's statement. Winding up his submission on this ground, the learned State Attorney insisted that the ground is equally misconceived and should be dismissed.

On the third ground that the victim PW1 did not raise an alarm when she was raped, Mr. Kigoryo emphatically stated that the evidence of PW1 as appears in the trial court's records is to the effect that the appellant was armed with a panga and had even injured the victim by cutting off her finger and a part of her neck. The learned State Attorney narrated further that according to the victim, she was in danger and could not raise an alarm as she was given two choices either to accept to be raped or get killed. It is Mr. Kigoryo's submission that when the victim was offered the choice between death and rape her fingers had already been cut.

Mr. Kigoryo averred further that according to the evidence adduced in the trial court, an old man passing nearby had heard the fracas. When he tried to inquire what was happening, Mr. Kigoryo asserted, he too was attacked by a panga and has since passed away. He concluded on this ground by a prayer that this court makes a finding that the [prosecution] evidence has not been shaken.

Moving on to the fourth ground of appeal where the appellant is complaining that at page 10 PW 2 referred him as Salumu Ulemwa while that is not his name, Mr. Kigoryo opined that PW2 was asked about the name, and he mentioned the name he knew. The learned State Attorney is of a firm view that variation of names should not affect the evidence tendered

because, it is not only the name that constitute the evidence but also identification.

After PW1 had described the appellant at the police station, Mr. Kigoryo averred, PW6 conducted an identification parade where the appellant was clearly identified by PW1 as the person who had committed the offence. Irrespective of the variation of name, reasoned Mr. Kigoryo, the identification of the appellant through his features was enough. The learned State Attorney prayed that the ground of appeal be dismissed.

Responding to the fifth ground of appeal, counsel for the respondent Republic averred that PW4 (the victim's mother) had testified as indicated on page 15 of the proceedings that the victim was taken to the health center immediately for further actions thereafter, she (PW4) went to report the incidence to the police. This means, reasoned Mr. Kigoryo, the first person to inform the police was PW4 and that she was not to blame. Mr. Kigoryo prayed that this ground too is dismissed.

On the sixth ground of appeal, where the appellant asserts that there was no description issued before the identification parade, it is Mr. Kigoryo's submission that the procedure for conducting an identification parade is governed by **Section 60 of the Criminal Procedure Act Cap 20 RE 2019** and the **Police Force (Auxiliary Service Act) Cap 322 RE 2002** as well as the **Police General Order No 232** (PGO). The learned State Attorney expounded further that the PGO reflects the rule in the Ugandan case of **Republic v. Mwango Manaa (1936) 18 EACA p. 29** and the case of **R. v. XC 7535 Venance Mbuta [2002] TLR 48**

He averred that on page 18 to 20, PW 6 had explained how the parade was conducted and it was in line with the law and the hence, as intended, identification of the appellant as the culprit of the offences that took place on 17/11/2018 was achieved. It is Mr. Kigoryo's submission further that the law requires description before identification parade as stated in the case of **Omari Hussein @ Ludanga and Another v. R. Crim App. 547 of 2017 CAT, Arusha at 9** and the same had been achieved. To this end, Mr. Kigoryo argued that the 6th ground is equally misplaced and should be dismissed.

The learned State Attorney appeared rather ephemeral on the seventh ground. He averred that, like the fourth ground the seventh ground also raises a complaint on the name of the appellant. Mr. Kigoryo emphasized that the evidence adduced at the trial court was not only on the name but also physical identification. He argued that the seventh ground of appeal be dismissed.

Responding to the eighth ground, the learned State Attorney clarified that the appellant's complaint is that the court wrongly convicted him by citing the case of **Selemani Makumba v. R. [2006] T.L.R. 379.** He explained further that the appellant wished that the investigation had gone a step further to conduct a DNA test. It is Mr. Kigoryo's submission that in Tanzania, it is not a requirement of the law that every rape case be proved by a DNA test results. Be it as it may, the learned State Attorney reasoned, scientific evidence is merely persuasive in court. To support his argument, Mr. Kigoryo referred this court to the case of **Amani Ally @Joka v. R.** Crim

App. 353 2019 Court of Appeal of Tanzania at Iringa (unreported) in which, the Apex Court stated on page 18:

> *"We also find untenable the claim that no DNA or sexually transmitted decease STD evidence on the appellant was introduced to corroborate the victim's medical test results. We endorse the learned State Counsel's submission that there is no legal requirement for use of such evidence."*

To that end, the learned State Attorney prayed that this court dismisses the eighth ground as well.

On the ninth ground, Mr. Kigoryo explained that the appellant was complaining in general terms that the offence was not proven beyond reasonable doubt. The learned State Attorney strongly disagrees. He averred that the evidence of PW1 alone was sufficient to prove the offence of rape against the appellant let alone that of PW3 a medical doctor who had corroborated the same by tendering PF3 as recorded on page 13. On proof of age, Mr. Kigoryo asserted that the complainant (victim) had stated her age clearly adding that even the charge sheet indicated that the victim was 13 years old by then. The learned State Attorney asserted further that the victim had attained the age of 15 by the time she was called to testify and that even the evidence of PW4 (father of the victim) as recorded on page 14 had explained that the victim was 13 years old and a standard 6 pupil at MKOWELA Primary School.

It is Mr. Kigoryo's submission that the age of the victim had to be proved as an essential element of statutory rape. Mr. Kigoryo emphasized that the victim had insisted in her evidence that it was the appellant who had raped her, and the claim was supported by the evidence of PW6 and

PW11. Mr. Kigoryo concluded on this ground by an assertion that he was fortified that the offence was proven beyond reasonable doubt and therefore the ground should be dismissed.

Responding to the tenth (and last) ground, Mr. Kigoryo started by explaining that the appellant's complaint is that the court did not consider the defense evidence. The learned State Attorney disagrees. Mr. Kigoryo is of a considered opinion that going through the impugned judgement, the trial court had considered the defense evidence. Mr. Kigoryo averred that the appellant did not cross examine the prosecution witnesses. Consequently, reasoned Mr. Kigoryo, the trial court considered that the defense evidence adduced was not enough to prove the appellant's innocence. The learned State Attorney prayed that the appeal be dismissed in its entirety.

In rejoinder, the appellants insisted that this court takes cognizance of the detailed explanation he had provided in writing on each of his ten grounds of appeal.

Having carefully and dispassionately considered the grounds of appeal, trial court records and arguments by both parties, I am inclined to decide on the merits of this appeal. It is the position of the law that the first appellate court can reevaluate evidence of the lower court and come up with its own findings, if need be (see **Peters v. Sunday Post [1958] E.A. 424** and **Alex Kapinga v. Republic Criminal Appeal No 252 of 2005 (unreported)**.

I find it prudent, first and foremost, to provide a preambular account to then concept of rape and child sexual abuse in general. Although the word

rape is often used by experts and lay people alike in its general meaning, rape happens in many ways. These include stranger rape, acquaintance rape, marital rape, gang rape, alcohol and drug induced rape and vengeful rape. Stranger rape happens where the rapist and the victim do not know each other at all. Acquaintance rape happens between colleagues or people who have known each other for a while even if not that closely. See White, J. W., and J. A. Humphrey 1991 "Young People's Attitudes toward Acquaintance Rape." In A. Parrot, ed., ***Acquaintance Rape: The Hidden Crime.*** New York: Wiley.

Marital rape, on the other hand which is increasingly being recognized in many jurisdictions happens between a married couple where the husband has carnal knowledge of his wife without her consent. Gang rape is where more than one rapist forcefully rapes one victim. Alcohol and drug induced rape is committed mostly in bars and nigh clubs where spirits with high alcoholic content or a special drug is put in the drink of the victim to induce dizziness, disorientation, and loss of memory. Incest is also a form of rape where the victim and the rapist are related such as a father and a daughter. Statutory rape may be any of these if it involves a minor.

Scholars have debated for a long time on biological, cultural, sociological, psychological, and even anthropological aspects of rape. See mainly Sanday, P. R. 1981 "The Socio-cultural Context of Rape: A Cross-cultural Study." Journal of Social Issues 37:5–27. Earlier researchers viewed rape as a tool of domination used by men to exercise their social control over women. There is almost universal consensus that rape is more of a sociological than psychological or biological phenomenon. The explanation

as to why rape happens usually goes back to the values a particular society places on women and children. In a society where laws are hardly enforced rape incidents increase. Likewise, when men are considered heroes for sexually subjugating women, or where rape related acts are somehow tolerated, rape incidents are also high.

The crime of rape and other forms of child sexual abuse take place in secrecy. See Rush, F. 1980 ***The Best Kept Secret: Sexual Abuse of Children***. New York: McGraw-Hill. Perpetrators usually use death threats to force their victims not to raise an alarm. Children who are victims of child sexual abuse perpetrated by family members are forced to live in fear. Rapists go as far as threatening to kill not only the victim but also her parents. As a result, testifying in court as a victim of rape is considered one of the most heroic acts any one can do. It is like breaking the jail of death threats only to surrender one's self to yet another jail of social stigma.

It is not easy to tell a rapist by their outward look. Strangers, acquaintances, parents, close family members, friends, teachers, state, and even religious leaders all over the world have been arraigned in court charged with rape and other forms of child sexual abuse. It would be a grave mistake to think that a rapist must belong to a certain social group. The adage "do not judge the book by its cover" applies also to rape offences. Nevertheless, those who are more likely to face the arm of the law tend to commit the offence more sparingly than those who consider themselves living in the vicinity where offences are not reported to the police and other law enforcement agencies.

Coming back to the instant matter, the trauma experienced by adults who testify as victims is even more acute in children. It is true that children may sometimes appear timid or even inconsistent in their testimony. I have gone through the evidence of PW1 the victim in this case and I am impressed by the level of consistency and coherence. The appellant who did not cross examine the victim during trial has raised a complaint (see ground of appeal number three) that the victim did not raise an alarm. How could she? As testified, she was already in pain. Nevertheless her groaning led to the appearance of the good Samaritan who ended up being fatally attacked.

PW1's eloquence corroborated by the evidence of PW3 a medical doctor who had corroborated the same by tendering a PF3 in my opinion is sufficient proof of penetration. On proof of age, the victim had clearly stated that she was 13 years old by then. The appellant did not bother to cross examine. Since this is statutory rape offence, I do not need to consider consent.

The offence of rape was defined at common law as the unlawful carnal knowledge of a woman against her will. Statutory definitions have retained this original concept of rape particularly the essential elements namely penetration of the male sexual organ into the female sexual organ however slight (see **Salu Sosoma v. Republic Crim Appeal No 31 of 2006 CAT Mwanza**). Consent is not relevant if the victim is a minor. It is also an established position of the law in Tanzania that in rape cases, the evidence of the victim is the best. It is immaterial and illogical to think about it in the instant case. I see no ground to fault the commendable efforts of the prosecution to prove the offence beyond reasonable doubt.

Before I pen off, I must say that the appellant, unlike his pears, has prosecuted this appeal rather halfheartedly. As alluded to above, his only emphasis has been that this court takes cognizance of his detailed grounds of appeal. No one knows for sure if the appellant was happy that the charge for attempted murder was dropped or he was simply too timid to speak out, but one thing is clear: I sustain this conviction not for the weakness of the defense case but for the strength of the prosecution case. In an often-cited United Kingdom case of **DPP v. Woolmington [1935] AC 462** it was held that the expression burden of proof entails two different concepts: 'legal burden of proof" and "evidential burden". I entertain no doubt whatsoever in my mind that the prosecution has discharged its legal and evidentiary duties as required by law to prove the case beyond reasonable doubts.

In the upshot, I hereby dismiss this appeal in its entirety. I sustain conviction and uphold the sentenced of thirty years imprisonment and order to pay TZS 1,000,000 as compensation to the victim meted by the trial court.

It is so ordered.

THE HIGH COURT OF TANZANIA

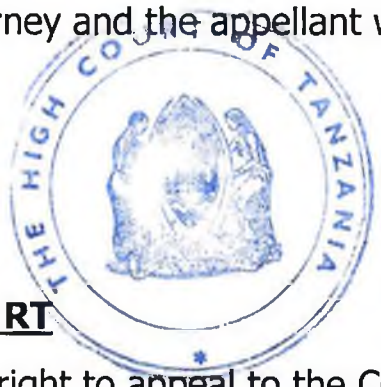
E.I. LALTAIKA

JUDGE

31/7 /2022

Court

This judgement is delivered under my hand and the seal of this court this 31st day of October 2022 in the presence of Mr. Enosh Gabriel Kigoryo, State Attorney and the appellant who has appeared in person, unrepresented.



E.I. LALTAIKA

JUDGE

31/10/2022

COURT

The right to appeal to the Court of Appeal of Tanzania is duly explained.

E.I. LALTAIKA

JUDGE

31/10/2022