THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 113 OF 2022

(Originating from the District Court of Chunya at Chunya Criminal Case No. 285 of 202)

KELVING MNYEMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 25/10/2022
Date of judgment: 25/11/2022

NGUNYALE, J.

The appellant is before the court challenging the verdict of the trial Court in Criminal Case No. 285 of 2020 where he was charged with offences in two counts namely; Rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R. E 2019. It was alleged by the prosecution that on or about 27th day of December 2020 at Godiama Village within Chunya District and Mbeya Region the appellant did have carnal knowledge to one [name withheld] a pupil of 11 years old.

The second count he was charged with Unnatural Offence c/s 154 (1) (a) of the Penal Code Cap 16 R. E 2019, it was alleged that on the same day place and time mentioned in the first count he did have carnal knowledge with one [name withheld] a pupil of 11 years old against the order of nature.

The name of the victim has been withheld for the purpose of hiding her identity but for the purpose of this judgment she will be identified as GIFT. Upon a full trial which was conducted between December 2020 and December 2021 the appellant was found guilty of the two counts charged and he was sentenced to serve thirty years (30) imprisonment for each count per order dated 21st December 2021.

The appellant was not happy with sentence passed; he timely lodged Notice of Intention to Appeal and on 14th day of July 2022 he appeared before the registry of this court armed with the petition of appeal containing six grounds of appeal challenging the above verdict. The appeal was admitted and registered as Criminal Appeal No. 113 of 2022.

The factual background which moved the trial court to hold full trial and the present appeal may be narrated for easy of understanding as follows; Dotto d/o David the mother of GIFT was owning grocery business closer to her rented room where she was living with her daughter GIFT at Godima Village Chunya District. At the night of 26th December 2020, a special day which is popularly known as boxing day Ms. Dotto was serving customers at her grocery leaving her daughter at home. Her daughter was sleeping and the solar powered bulb was switched on illuminating light the whole room. At mid night at about 01:00 hours on 27th December 2020 Dotto went to her room to see her daughter after noting that light was off in the room something which raised suspicious. She decided to enter inside to look if there was anything wrong. Upon entering the room, she was pushed by the appellant who came from the room and she did fall down. While puzzled on earth, she heard her daughter crying! Thereafter she entered inside where she found the child naked and blood was around the bed.

Thereafter, the neighbours were informed and the incident was reported to police. At the scene the appellant was identified, basing on that identification the villagers arrested the appellant on the same day and he was referred to police and PF3 was issued. On the same day the girl GIFT was examined by a doctor and PF3 was filled. The appellant was arraigned in Court where he faced the trial and the verdict was pronounced.

Upon reading between lines the grounds of appeal against the verdict I extracted the following issues which will determine the appeal sufficiently;-

(i) Whether the evidence of PW1, PW2 and PW3 was properly evaluated and if PW1 and PW2 being members of the same family occasioned any failure of justice.

(ii) Whether the offence against the appellant was proved beyond all reasonable doubt and his defence was properly considered.

The appeal was called for hearing on 25th October 2022 whereby the appellant appeared in person without legal representation and the respondent republic was represented by Rosemary Mgenyi learned State Attorney. The appellant submitted that the event did not occur because PW1 and PW2 testified very contradictory evidence about the date of event. Their testimony raised doubt which suggests that the case is a flamed one. The two witnesses are members of the same family and their evidence ought to be corroborated. He challenged the testimony of PW1 the mother of GIFT who said that she identified the appellant. How he successful identified him while he said that the room was dark. The police officer who issued the PF3 was not called to prove that he issued the same to be satisfied that the PF3 tendered was not forged. Somebody called

Jack has been mentioned by PW2 but he was not called to testify. If the offence occurred why this Jack was not called to testify.

After having heard the submission by the appellant the learned State Attorney started by declaring his stance that she does not support the appeal filed by the appellant. She submitted that there is no big variation about the evidence of PW1 and PW2. The event occurred on Christmas day. The contradiction if exists does not go to the root of the case. About the complaint that the evidence is of the members of the family she submitted that there is no law which prevent evidence of family members instead the important thing is credibility of the very evidence. She referred the court to the case of **Edward Nzabuge v. R**, Criminal Appeal No. 136 of 2008 the Court of Appeal sitting at Mbeya observed that there is no law which prevent close relatives to testify in the event which they witnessed. The additional witnesses were irrelevant because the testimony of PW2 which was corroborated by the doctor PW3 was enough to ground conviction. The said Jack was not material witness because was not the eye witness of the event, on this point she recalled the case of Edward Nzabuge supra which cited section 143 of the Evidence Act that there is no number of witnesses for proving a certain fact.

On the complaint that the evidence of a doctor was not reliable the State Attorney submitted that the best and true evidence in sexual offences comes from the victim as stated in the case of **SULEMAN MAKUMBA VS. R** (2006) TLR 384. The victim testified clearly that when he moved out for a short call, he met the appellant outside where there was light. When she returned to her room, she found the appellant inside the room where he addressed her pants and committed the offence of rape and sodomy. Still the evidence of doctor was proper and not flamed.

The learned State Attorney went on to state that identification was correct. The appellant was identified by PW1 at the scene of crime. PW1 knew very well the appellant, the fact that they knew each other was admitted even by the appellant in his defence case that he is known to PW1 and PW2 GIFT. In order to support his argument, the learned State Attorney referred the court to the case of **Jumapili Msyete vs. Republic**, Criminal Appeal No. 110 of 2014 Court of Appeal sitting at Mbeya where the court stated that identification by a person who is known is proper.

In order to answer the first issue, it is imported to read and understand thorough the testimony of PW1, PW2 and PW3 and weighed with that of DW1. Having read the proceedings I wish to state that the appellant complaint that there is variation about the dates has no merit. PW1 in her evidence stated that the offence occurred at mid-night on 27th day of December 2020, on the very date and time is when he witnessed the appellant coming out of her room where the offence was committed. PW2 testified that the event occurred at the end of December 2020. Certainly, I agree with the learned State Attorney that there is no variation between the two witnesses about date of the event, the fact that PW2 did not mention the exactly date does not go to the root of the case. The two witnesses still point to the dates at the end of the year 2020. There is another complaint that the testimony of PW1 and PW2 as relatives their evidence was not corroborated. The testimony of PW1 is very clear that she met the appellant coming out of his room where the child GIFT was sleeping and when she entered inside, she found the child crying. The testimony of PW2 GIFT is to the effect that she saw the appellant and the

appellant is the one who committed a sin to her. I wish to quote part of the testimony of PW2 GIFT;

> *"Then I went on to sleep. I woke up to go to the toilet. I opened the door and I found Kevin. When I returned I find the door opened while I closed it before. I went in for sleeping. I saw accused inside my room. He then suddenly turned the light off in my room. When I tried to go out, the accused blocked my mouth and my neck. He asked me to undress my cloth or I will be killed. He undressed my skirt, my tight and my underpants (chupi) but I tried to hold it. He removed it and make me bend. He removed his cloths and took his 'dudu' a penis then inserted in my vagina. He put it inside me in my rectum.... I could not shout as he holds my neck and had a knife so I was afraid. He asked my name but I kept quite I told him to let me free..."*

The evidence of GIFT/the victim is coherent to the testimony of her mother about the fact that the appellant was at the scene of crime. The coherence and consistency of the testimony of PW1 and PW2 proves that the two were credible witnesses. I therefore agree with the learned State Attorney that that there is no law which prevent evidence of family members instead the important thing is credibility of the very evidence. The trial court was right to find that the two were reliable and credible witnesses. The trial court observed in part in its judgment at page 6;

> *" PW2 evidence during examination in chief and after being subjected into a cross examination this court find that PW2's testimony appeared to be very pure and authentic, accordingly the child was telling nothing but the truth regarding what transpired at that time."*

The court is settled that PW1 and PW2 were credible witnesses, PW3 Medical Doctor corroborated the testimony of PW2 that she was penetrated to her vagina and anus. I am aware that the expert opinion is not binding the court but in this case the findings of the doctor suggested

that penetration took place. In the PF3 exhibit No. P1 establishes that the vagina and anus had bruises caused by blunt object, from those findings the doctor testified that bruises were caused by blunt object which might be a penis. The expert opinion was very relevant corroborating the testimony of PW2 about penetration but the testimony of PW2 alone was enough to ground conviction, so, the complaint of the appellant issuance of PF3 have no merit.

The testimony of GIFT as quoted above is very clear that she was penetrated by the appellant to her vagina and anus. It has been established already that the victim was a credible witness. Since she was a credible witness, I tend to agree with the submission of the State Attorney that under the rule laid in **Suleman Makumba case** (supra) here evidence was enough to ground conviction.

The appellant complained that he was not identified at the scene of crime by PW1 the mother of GIFT so he submitted that the case was flamed. I will attempt to answer the issue as to whether the appellant was identified at the scene of crime. There is no doubt that the appellant, PW1 and PW3 are the people living at the same village and knew each other. The fact that they knew each other is very clear in the proceedings before the trial court. During preliminary hearing among the admitted fact is the fact that the appellant and PW1 are known to each other and during defence hearing the appellant admitted that he is well known to PW1 and the child. This is a clear case about visual identification, in visual identification all possibilities of mistaken identity must be eliminated as stated in a number of case law.

Criminal practice and procedure tell 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 the witness PW2 observed the appellant closely when she opened the door going outside for a short call, and when she was returning back, she again observed the appellant for some time until the appellant switched light off. It is in evidence as testified by PW1 and PW2 that the event occurred at night. The two witnesses managed to identify the appellant using light of solar powered bulbs which were illuminating outside the room and inside the room respectively. PW1 witnessed the appellant using such light when she moved out and upon returning to the room. When she returned to the room, she observed the appellant until the appellant switched off the solar powered bulb. There is no doubt that the time and the light which PW2 used to witness the appellant was enough for correct identification. PW1 witnessed the appellant for a short time when he was escaping from the scene of crime. It has already been pointed out that there is no doubt that the appellant was familiar to both witnesses, the fact that he was well known means the appellant was correctly identified by recognition which is more reliable.

From what has been said and done, the court is of the settled view that the evidence was properly analysed, the defence case did not raise any doubt to the prosecution case on two key issues namely one, penetration occurred against the girl GIFT, two, such penetration was done by nobody else but the appellant. The appellants defence case was correctly analysed ending with the above findings. The trial Magistrate in considering the defence evidence stated in part at page 6 and 7 of the typed judgment;

"This court doesn't subscribe at all DW1's defence premising his attack that he wasn't around at the scene of crime. Such a defence was only fronted during

defence stage. The evidence by PW1 at examination in chief session was very certain in the sense that she saw him and he even pushed him by force and run away. DW1 never challenged that PW1 & PW2 were strange to him. In that sense DW1 is much known to the victim and the victim's mother. All this set of events negatively negates DW1 defence of not been at the crime scene on 27/12/2020."

The quotation above gives a clear position that the trial court was keen to consider evidence of both sides during analysis and evaluation of evidence, I need not to detain long on that.

As a whole then, and from what has been deliberated, the trial court correctly analysed evidence of both sides ending with the immutable decision that the offence was proved beyond all reasonable doubt. Therefore, the appeal is hereby dismissed for lack of merit.

Dated at Mbeya this 25th November 2022.

THE HIGH COURT OF TANZANIA

D. P. Ngunyale
Judge