IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 12 OF 2022

(Originating from District Court of Babati In Criminal Case No. 125 Of 2022)

SHABANI JUMANNE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of last order: 14/12/2023
Date of judgment: 9/2/2013

JUDGMENT

BARTHY, J.

The appellant was arraigned before the district court of Babati (hereinafter referred to as the trial court), where he was faced with single count of rape contrary to section 130(1), (2)(e) and 131(1) of Penal Code Cap 16 R.E 2019.

Upon hearing of the case, the appellant was convicted and sentenced to serve thirty years jail term. Aggrieved with the conviction and sentence imposed by the trial court, the appellant preferred the present appeal with five grounds of appeal which can be conveniently paraphrased as follows;

1. *That the interpreter one Abdon Joshua who was interpreting to the victim was obtained and brought by the complainant (prosecution side) which is wrongly in law.*
2. *The evidence of the victim was received contrary to Section 128 (1) (2) of the Evidence Act.*
3. *That the appellant was not properly identified.*
4. *That there was no sufficient evidence to establish the appellant's conviction.*
5. *That the charge against the appellant was not proved beyond reasonable doubt.*

The brief facts culminating to the arraignment of the appellant before the trial court are such that; in the night of 28th July 2022 the victim (referred to XY or PW1) a girl of 16 years, having finished her dinner, she got out of the house to attend a call of nature in a pit latrine located outside of the main house.

Having answered to the call of nature PW1 got out of the pit latrine in order to return inside the house, but she was apprehended with one male person who ordered her not raise any alarm. The man took PW1 back in the pit

latrine, closed the door. The appellant undressed both of them and proceeded to have carnal knowledge with PW1.

The record reveals further that while PW1 was still in the pit latrine, PW3 (PW1's young brother) who was also inside the main house got out in order to attend a call of nature. PW3 saw PW1 got outside of the pit latrine but she was walking difficulty.

Then PW3 saw a man he identified to be Shabani standing inside the pit latrine. PW3 ordered his younger brother to call their mother (PW2) but the said Shabani took off to his heels.

The record reveals that, PW1 claimed to have identified the appellant to be her rapist. Hence, he was subsequently arrested and arraigned before the trial court for the offence he stood charged. Where he was accordingly convicted and sentenced, hence this appeal as shown on the grounds above.

During the hearing of this appeal, the appellant fended for himself while the respondent enjoyed the services of Ms. Grace Mgaya learned state attorney. By the consent of the parties the appeal was disposed of by way of written submissions. The parties duly complied to the schedule as ordered by the court.

In arguing the grounds of this appeal, the appellant consolidated the first and second grounds and argued them jointly. He contended that PW1 being deaf and dumb, she needed an independent interpreter to assist her in testifying before the trial court.

The appellant also contended that; the trial court erred in law to use Abdon Joshua as an interpreter for PW1, because he was brought by the relatives of the PW1 who fabricated the case against him.

On further submission, the appellant contended that the reception of evidence of PW1 was aided by the said interpreter which was contrary to the requirements of Section 128 (1) and (2) of the Evidence Act. Hence the appellant prayed to the court to expunge the evidence of PW1 from the record.

The respondent on their reply they fully supported the appeal. Ms. Grace Mgaya submitted that; the interpreter was brought by the prosecution side. The particulars of the interpreter were not well stated and the appellant was not given a right to be heard on whether or not he had any objection to the presence of the said interpreter.

She then contended that the appellant was not afforded fair hearing enshrined under Article 13 (6) (a) of our Constitution.

Having gone through the submissions of the parties my task is to determine if this appeal has the merit or not. I will address the first and second grounds together in one issue whether the evidence of PW1 was properly received.

The record reveals that, the prosecution prayed to use their interpreter to facilitate communication with PW1. Hence, one Abdon Joshua was brought in to aid the interpretation. It is unfortunate that the appellant was never given an opportunity to say anything whether he had any objection regarding the use of that interpreter brought by the prosecution.

The appellant submitted further that, the reception of the evidence of PW1 was in contravention of Section 128 (1) of the Evidence Act. The said provision reads;

> *128.-(1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, such as by writing or by signs; but such writing must be written, and the signs made, in open court.*

According to the record of the trial court and submissions of both sides it is not in dispute that the PW1 was deaf and dumb. As well pointed out in the testimony of PW2, PW3, PW4, PW5 and PW6. The record reveals that the PW1 knew how to write, but her evidence was through sign language which was then interpreted before the court.

The right to fair hearing is the fundamental principle of justice in our country. It is the requirement of the law that the accused person should understand the evidence tendered against him. On the use of interpreter, the law clearly provided under section 211(1) of the Criminal Procedure Act, Cap 20 R.E. 2022 (to be referred as CPA) as follows;

> *211.-(1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language understood by him.*

The record shows that the trial magistrate recorded that the interpreter took an oath, then PWI went ahead to testify and the appellant was afforded the right to cross examine her.

However, the records do not show how he took an oath, as the record reads;

> *Court:*

Prayer granted. Mr. Adnon Joshua is appointed to make interpretation to the victim who is not able to speak and also dumb. He takes oath first, then we proceed to make interpretation to our witness.

In assessing the competence of the interpreter and if the administration of oath was properly made, the court in the case of **Faustine Francis Tarimo v. Republic, Criminal Appeal 245 of 2010, Court of Appeal at Arusha, TZCA 176 [2012]** quoting with approval the case of **Sinu Lishinu V. R, Criminal Appeal No. 260 of 2009, CAT (unreported)** where the court observed;

First, the interpreter was required to have been sworn by the court before he assisted PW1 to take her oath...

Second, it is unclear from the record whether the interpreter was sworn by the court or the public prosecutor...

Third, it is not known what expertise in sign language the interpreter possessed or how closely familiar he was with the sign language used by PW1...

Forth, none of the signs made by PW1 were recorded by the court.

In consideration of those factors in the present case, the records of the trial court clearly show they were not addressed. As it does not indicate who administered the oath and the competency of the interpreter was not properly assessed in order to have fair trial.

The records also do not show that, the appellant was asked whether he had any objection regarding the use of an interpreter who was brought by the prosecution side. As it was also not stated what are skills of the interpreter in sign language.

As pointed out above, the evidence of PW1 was received with the aid of the interpreter, but it was coupled with a lot of irregularities. The remedy available is to discard it entirely from the proceedings and remain with the testimony of other prosecution witnesses. See the case of **Faustine Francis Tarimo v. Republic** (supra). Therefore, the first and second grounds of this appeal have the merit.

I will proceed to address the remaining grounds; third, fourth and fifth as they are related.

The appellant on his written submission he jointly argued these grounds and submitted that, PW1 testified before the trial court that the man who raped

her was not known to her and also for proper identification there was no light both inside and outside the pit latrine. Therefore, the appellant was not sufficiently identified by the PW1.

On further submission the appellant contended that even the evidence of PW3 did not establish the offence as he told the trial court that he saw the appellant standing inside the pit latrine toilet but he did not see him raping PW1.

The appellant argued that, in totality of prosecution evidence it did not prove the case against the appellant beyond reasonable doubt. The appellant referred to the cases of **Sultan Seif Nassor v Republic** [2003] TLR 231 and **Maruzuku Hamis v Republic** [1997] TLR 1 which cast the burden of proving the criminal case in the standard required.

The appellant therefore prayed his appeal be allowed the conviction and sentence meted against him be quashed and set aside.

The respondent supported the appeal. Ms. Mgaya in her contention she argued that, there was no sufficient evidence tendered to prove the appellant was identified. There was no evidence on the source of light or the distance it was.

Again, soon after the ordeal, PW2 was not told by PW1 who had raped her. Ms. Mgaya was of the view that, that there was a need to conduct identification parade so that PW1 could be in a better position to identify her rapist. However, the identification parade was not conducted. She thus supported the appeal.

Having gone through the parties' submissions from the totality of the evidence on record, it is not in dispute that the victim was raped. This is in accordance to the evidence of PW6 the medical doctor.

The essential issue is whether it is the appellant who raped her. Having considered that the alleged rape took place during the night, therefore the issue of identification becomes of importance.

To appreciate the nature of evidence mounted against the appellant the PW2 stated that PW1 could not mention her rapist, but PW3 and PW4 claimed to have seen him coming from pit latrine.

However, there was evidence that there was no light both inside and outside the pit latrine. In addressing this issue of identification, the learned trial magistrate had the following to say on page 6 of the typed judgment;

It is true that the victim told the court that man was not known to her at the time of having sex because there was no light in that pit latrine. That male person was seen clearly with PW3 and PW4.

The learned trial magistrate further observed,

At that time the security light was help them to her very well... according to him Shabani is a person who known to him very well and he was seen clearly by security light.

The prosecution evidence is contradicting, as PW3 informed the trial court that the pit latrine had no light but he used security light with high intensity power to identify the appellant.

The distance from that source of the light to the pit latrine was not established. In the case of **Magwisha Mzee and another v Republic,** Criminal Appeal No. 465 and 466 of 2007 (unreported) quoted in **Khalid Mohamed Kiwanga and another v Republic,** Criminal Appeal No. 223 of 2019 (unreported) it was observed thus;

When it comes to issues of light, clear evidence must be given by the prosecution to establish beyond reasonable

doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to identify the accused person. ***Bare assertions that "there was light" would not suffice.*** *[Emphasis added].*

Without giving a detailed explanation on the source of light the evidence of PW3 remains wanting. Even if I were to agree that PW3 was able to positively identify the appellant, PW3 only saw the appellant standing inside the pit

It was not clear as to why PW2 and others who were at the scene did not raise an alarm for help to arrest the suspect right away, but rather go quiet to report to the police station.

It is for the foregoing reasons; I hold that the appellant was not properly identified to be the one who committed the offence of rape. Therefore, the offence of rape against the appellant was not proved beyond reasonable doubt. For the foregoing reasons I find merit on the 3, 4 and 5 grounds of appeal.

The appeal is accordingly allowed, the conviction and sentence imposed on the appellant are set aside. The appellant is to be set free unless lawful held for some other cause.

It is so ordered.

DATED at **Babati** this 9th February, 2023.

G. N. BARTHY

JUDGE

9/2/2023

Delivered in the presence of the appellant in person and Ms. Blandina Msawa, the learned state attorney.