

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MANYARA  
AT BABATI**

**CRIMINAL APPEAL CASE NO. 4 OF 2023**

*(Originating from Criminal Case No. 17 of 2022 in the District Court of Babati at Babati)*

**SALIMU SAIDI @HAJIMU MUSA LABAI.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

*3<sup>rd</sup> & 13<sup>th</sup> March, 2023*

***Kahyoza, J.:***

One woman, whom I shall refer to as the victim, alleged that she woke on the fateful day going to her business. When she arrived at Tamboo canyon at around 06:30a.m one man waylaid her, tore her underpants, and had sexual intercourse with her. After the nasty act, the man entreated the victim not to report the incident. The victim promised not to report him. The rapist left the crime scene and the victim pursued him from behind. The rapist entered a bar at Gallopo. The victim sought assistance to have her assailant arrested. A person arrested and later charged with the offence of rape was **Salimu Saidi @Hajimu Musa Labai** (the appellant).

The trial court convicted **Salimu Saidi @Hajimu Musa Labai** (the appellant) with the offence of rape and sentenced him to serve 30 years' imprisonment. Aggrieved, the appellant appealed to this court.

**Salimu Saidi @Hajimu Musa Labai** (Salimu) raised five grounds of appeal, which boil down to five issues-

- 1) Whether the victim's [(Pw1)'s] evidence was recorded without administering her on oath;
- 2) Whether the victim did properly identify the appellant;
- 3) Whether the identification parade was necessary in the circumstance of the case;
- 4) Whether a person who testified as a doctor was a doctor and whether the person conducted any laboratory test to establish the allegation; and
- 5) Whether the appellant admitted to commit the offence as alleged by (Pw4).

At the hearing, **Salimu Saidi @Hajimu Musa Labai** (Salimu) defended for himself and Ms. Grace Mgaya appeared for the respondent, the Republic. The appeal was argued orally and the appellant added two new grounds of appeal, which did not raise new issues. This Court being

the first appellate court has a duty to consider the grounds of appeal and review the whole evidence on record to find out if the prosecution proved its case beyond reasonable doubt.

### **Did the victim (Pw1) take oath or affirmation?**

The appellant complained that the victim (Pw1) testified without taking oath. He added that the trial court convicted him and sentenced him without considering principle governing criminal law.

Ms. Grace resisted the appeal and submitted in relation to the first ground of appeal that the victim was a moslem so she was affirmed. She prayed the first ground of appeal to be dismissed.

I examined the record and found that the victim (**Pw1**) told the court that she professed Islamic so she was affirmed. The record reads-

*"Pw1: Salimu Abraham peasant, Nyiramba by tribe, 52 years Islamic, she affirm (sic) and states as follows;- "*

Section 3 of the Oaths and Statutory Declarations Act, [Cap.34 R.E. 2019] allows courts to administer an oath or affirmation. A witness may therefore be affirmed or sworn. Section 3 states that-

**"3. Every court shall have the authority, itself or by an officer duly authorized by it in that behalf, to administer an oath or affirmation**

*to any person whom it may lawfully examine upon oath or affirmation."*

A witness who professes Christian faith makes oath and a witness who professes any other religious belief shall make his solemn affirmation. Since the victim (**Pw1**) professes Islamic religious belief, it was lawful for her to make affirmation before she testified. Section 4 of the Oaths and Statutory Declarations Act, states that-

*4. Subject to any provision to the contrary contained in any written law, an oath shall be made by-*

- (a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court;*
- (b) any person acting as interpreter of questions put to and evidence given by a person being examined by or giving evidence before a court:*

*Provided that, **where any person who is required to make an oath professes any faith other than the Christian faith or objects to being sworn, stating, as the ground of such objection, either that he has no religious belief or that the making of an oath is contrary to his religious belief, such person shall be permitted to make his solemn affirmation** instead of making an oath and such affirmation shall be of the same effect as if he had made an oath.*  
*(Emphasis added)*

Given the above position of the law, I find the first ground of appeal without any merit, I dismiss it.

**Did the victim properly identify the appellant?**

The appellant complained that the trial court erred in law and fact to believe the victim (**Pw1**) that the appellant had a mark on the face which was not true.

The respondent's state attorney opposed the second ground of appeal contending that the trial court record did not show that the victim identified the appellant by marks on the face. She prayed the second ground of appeal to be dismissed.

I perused the record thoroughly to see how the victim identified the appellant. Nowhere does the record depict that the victim deposed that she identified the appellant by marks on the face. The victim deposed that the offence was committed at around 06:30am in the morning. She narrated that she did not know the appellant before the nasty incident. After the appellant waylaid her, she resisted in vain. The appellant overpowered her, pulled her in the bush and had sexual intercourse with her. She described that the appellant spent ten minutes on top of her. She added that after the appellant was satisfied, he requested her not to report the incident.

The victim deposed that she pursued the appellant without the appellant noticing up to Gallopo centre where the appellant entered a bar. The victim then asked Felechisini Paul (**Pw2**) to arrest the appellant. Felechisini Paul (**Pw2**) deposed that he entered the bar and called the appellant outside and while interrogating him he escaped. He chased and arrested him. He tied his hands and hired motorcyclist, Lubuva Joseph (**Pw3**) who rode the appellant to police station.

The appellant's case was simply that on 11. 01.2022 he was at Gallopo collecting sand using a cart. The civilians accompanied by one police officer and the victim arrest him. He denied to rape the victim.

The evidence shows that the victim did not lose sight of the appellant from the time she set eyes on him before he raped her until the time she caused his arrest. The act was committed when the sun had set in and the victim pursued the appellant until he was arrested, for that reason, there was no need for describing the appellant's mark for identification purpose. It is settled as the Court of Appeal stipulated in **Khalid Mohamed Kiwanga and Ramadhani Magongo @Andazi v. R.**, Criminal Appeal No. 223 of 2019 (CAT-unreported) that-

*"Where a suspect is arrested at the scene of crime or pursued from there and arrested immediately thereafter, the question of identification does not arise."*

In the present case, there was no need for evidence of identification as the victim pursued the appellant from the crime scene until that time she caused his arrested. Thus, the appellant's complaint that the victim failed to describe marks on his face or made wrong description is baseless. I dismiss the second ground of appeal.

**Was the identification parade necessary?**

The appellant complained in the third ground of appeal that the trial court erred in law and facts to convict him while the prosecution did not conduct an identification parade.

The respondent state attorney submitted that there was no need to conduct an identification parade as the victim pursued the appellant and caused his arrest thereafter. To support her position, she cited the case of **Khalid Mohamed Kiwanga and Ramadhani Magongo @Andazi v. R.**, (supra).

I wish to repeat my findings while addressing the second issue, that the appellant indeed was arrested after the victim pursued him from the

crime scene until he was arrested. She did not lose sight of him. She deposed that she pursued the appellant from far to avoid alerting him. On reaching at Gallop, the appellant entered in the bar. After the appellant entered in the bar, the victim rushed to Felechisini Paul (**Pw2**) and requested him to arrest the appellant. Thus, is a fallacious to contend that the victim did identify the appellant in the dock. For the reason, there was no requirement to conduct an identification parade.

The purpose of conducting the identification parade is to enable the victim to identify her assailant who she had not seen or known before the incident. The Court of Appeal in the decision not cited observed that-

***"The purpose of an identification parade is inter alia, to enable a witness identify his/her assailant whom he/she has not seen or known before the incident (See Abdul Farijalah and Another vs Republic, Criminal Appeal No. 99 of 2008; John Paulo @ Shida and Another vs. Republic, Criminal Appeal No. 335 of 2009 (both unreported). Such identification conducted by the Police is not substantive evidence (See Eailian Aidan Fungo and Another vs Republic, Criminal Appeal No. 278 of 2008; Imamu Selemani Msovu and Another vs. Republic, Criminal Appeal No. 306 of 2010 (Both unreported). As provided for under section 60 (1) of the Criminal Procedure Act (the CPA), an identification parade may be conducted during the***

***investigation stage for the purpose of ascertaining whether a witness can identify the suspect of the crime.”*** (Emphasis added)

In so far as the present case is concerned, there was no need for an identification parade as the victim pursued the appellant from the crime scene and caused his arrest. In other words, there was no need to ascertain whether the victim identified the appellant as after the appellant committed the offence, the victim pursued him and caused his arrest. I dismiss the third ground of appeal.

**Was Neema (Pw5) a qualified doctor?**

The appellant complained that Neema (**Pw5**) neither proved that she was a doctor nor established how laboratory examination was conducted to establish that sperms found in the victim’s vagina was human’s sperms.

The respondent’s state attorney replied that the doctor described her credentials before she testified. She added that the witness deposed that she was a registered doctor and mentioned her registration number.

I examined the record and found that doctor Neema (**Pw5**) described her credentials. She said that she studied at Bugando Medical Centre and holder of a Diploma in Medicine. She deposed that she was registered and her registration number was MCTER 0963. I am of the view that evidence

was enough to establish was that she was qualified personnel to examine the victim. In addition, the law section 240(2) of the CPA, allows the Court to presume that person signing the medical report held the office or had the qualifications which he or she possessed to hold or to have when he signed it. Section 240(2) states that-

**"240.-(1) .....**

**(2) The court may presume that the signature to any such document is genuine and that the person signing the same held the office or had the qualifications which he possessed to hold or to have when he signed it."**

Since the appellant did not cross-examine doctor Neema (**Pw5**) regarding her qualifications as a doctor he admitted facts that she was qualified and this Court is entitled to presume that she had the qualifications which she possessed to hold. This position is clearly provided by section 240(2) of the CPA. I therefore, find no merit in the fourth ground of appeal.

As to the contention that Neema (**Pw5**) did not establish that sperms found in victim's part were man's sperms or otherwise, I see no merit in that contention. To prove the offence of rape of an adult woman, the prosecution need to prove two elements; **one**, penetration; and **two**, lack of consent. The victim proved both lack of consent and penetration. The doctor's

evidence collaborated the victim's evidence that she was not only penetrated but also a person who penetrated her ejaculated. That evidence was enough to collaborated the evidence of the victim.

I dismiss the fourth ground of appeal in its entirety.

**Did the appellant admit to commit the offence as alleged by (Pw4)?**

The appellant complained the trial court erred in law and fact for its failure to note that (Pw4) told the court that the appellant admitted to commit the offence without tendering the caution statement.

The respondent submitted that the fifth ground of appeal was baseless as the trial court did not convict the appellant because he admitted to commit the offence.

I examined the record and found that G.1578 D/CPL Erasmus (**Pw4**) deposed that he interrogated the applicant who admitted to commit the offence. He recorded the appellant's statement. However, G.1578 D/CPL Erasmus (**Pw4**) did not tender the appellant's alleged caution statement as evidence. I had cursory review of the judgment and found that the trial court did not refer to the evidence of G.1578 D/CPL Erasmus (**Pw4**) to convict the appellant. For that reason, the appellant's complaint that the trial court failed

to note that the prosecution did not tender the caution statement is baseless. The trial court gave no value to the evidence of G.1578 D/CPL Erasmus (Pw4).

Lastly, the appellant complained that the case was fabricated against him as the victim did not report the incident to the ten-cell leader or the hamlet chairperson.

The respondent's state attorney submitted that there was no need to call ten-cell leader or the hamlet chairperson. She added that a case is not proved a certain number of witnesses.

I am of the firm view that the prosecution summoned key witnesses. The ten-cell leader or hamlet chairman had no evidence to give. As to the complaint why was the matter was not reported to the ten cell leader or the hamlet chairperson, there was no need of making such a report. The victim narrated that he pursued the appellant and caused his arrest. If she had opted first to report the incident to ten-cell leader or hamlet chairman, she would have not pursued successfully the appellant. (Pw2) deposed that after he called the appellant outside the bar and interrogated him why he committed the nasty act, the appellant escaped. He chased and arrested him. I would not think it was ideal instead of taking the accused to police to

report the incident to the ten-cell leader or the hamlet chairperson. After all, I know no law that make it mandatory to first report a criminal act to the hamlet chairperson before reporting to police. I do not find merit in that complaint and dismiss it entirely.

Having discussed the grounds of appeal, I find it my duty as a first appellate court to comment on the evidence as whole. The appellant was charged and convicted with the offence of rape. The prosecution summoned the victim(**Pw1**) who deposed that the appellant raped her in the canyon surrounded by bushes. She pursued the appellant without raising alert until she saw him entering a bar at Gallop centre. She requested Felechisini Paul (**Pw2**) to arrest the appellant. Felechisini Paul (**Pw2**) arrested him and hired motorcyclist, Lubuva Joseph (**Pw3**) to ride the appellant to police station.

The appellant does not dispute to have been arrested by civilians but he disputes to rape the victim. The victim deposed and her evidence was not challenged that the appellant raped at her around 06:30 am. She identified the appellant as there was favourable environment. It was already bright and they took time before the appellant raped the victim as she struggled to escape the ordeal. She saw the appellant during the commission of the offence as he was on top of her. She also had time to identify the appellant

after the nasty act as the appellant asked her not to disclose the incident. In addition, the victim pursued the appellant leading to his arrest immediately thereafter.

The victim and Doctor Neema (**Pw5**) proved that there was penetration. The doctor deposed that she found laceration on the vagina wall and male's sperms in the vagina.

The trial court found the victim credible. I have no reason to hold differently. She explained how she met the appellant while going to her business and how he appellant ambushed her and tore her underpants and raped her. She deposed how she pursued the appellant and caused his arrest.

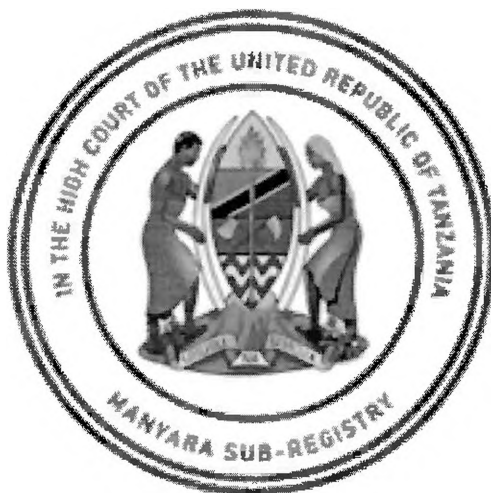
It is settled that the best evidence in **sexual offence comes from the victim**. The Court of Appeal of Tanzania in the case of **Akwino Malata Vs. R.**, Cr. Appeal No, 438/2019. (CAT-Unreported), warned that the court before relying on the evidence of the victim to convict it must be satisfied that the victim is telling nothing but truth. It stated-

*"This is a principle of law to the effect that the evidence of sexual offence has to come from the victim **and if the court is satisfied that the victim is telling the truth it can convict without requiring any corroborative evidence.**"*

In the end, I find that the victim (**Pw1**) was a credible witness and the trial court properly relied on her evidence to convict and sentence the appellant. Consequently, I dismiss the appeal in its entirety and uphold the conviction and sentence of thirty (30) years' imprisonment for the offence of rape.

I so order.

**Dated** at Babati, this 13<sup>th</sup> day of March, 2023.



**J.R. Kahyoza**

**JUDGE**

**Court:** Judgment delivered in the presence the presence of the appellant and Mr. Otafu, State Attorney for the Respondent. B/C Dora present. Right of appeal explained.

**J.R. Kahyoza**

**JUDGE**

**13 /03/2023**