IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 54 OF 2022

(Originating from Moshi District Court in Criminal Case No. 170 of 2022)

STANLEY SIMON URIO ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

6th Feb. & 23rd March 2023

A.P.KILIMI, J.:

The appellant one STANLEY SIMON URIO was arraigned at Moshi District Court in Criminal Case no. 170 of 2022 for the offence of rape c/s 130(1) (2) (b) and 131(1) of the Penal Code [Cap 16 RE 2019]. At the trial the particulars of this offence alleged by the Prosecution were to the effect that on 30.04.2021 at Mwika area, within Moshi District and Region of Kilimanjaro, accused did have carnal knowledge of an old woman "**WO**" (in pseudonym) without her consent and by use of force.

The appellant pleaded not guilty to the charge. It is when the prosecution paraded a total of three witnesses and the defence retaliated on disproving the charge by bringing two witnesses. In conclusion of the trial court found the appellant guilty for the offence charged, convicted and sentenced him to serve 30 years imprisonment. In addition, the appellant was ordered to pay compensation to the victim at the tune of Tshs. 1,500,000/=.

At the trial, the prosecution relied solely on the evidence of the victim and corroborated by medical evidence PF 3 which was admitted as P1.

The facts material which gave rise to this appeal as can be gleaned from the record of the trial court are; PW1 **WO** the victim on fateful date at about 19:00 hours was on the way to church at Mwika. Since, she had a torch with low battery, she went to Mrombo shop to buy the battery. There she met with the appellant speaking via a mobile phone. She missed battery at the said shop and proceeded with her journey, on the way she met with one Rogath Thomas Urio and asked him to help for a torch, Rogath informed her that appellant was just behind her therefore could light for her. Victim then heard appellant talking and seduced her for Tshs.20,000/ to do love

affairs, the victim could not understand him and thought he was drunk, and proceeded walking, suddenly she was kicked and fallen down and lost conscious. When she gained conscious she found wet at her private parts, she managed to walk slowly home, where she found her clothes wet with blood bled from her vagina. She later communicated to her relatives telling them she was raped by the appellant, relatives took her to police station and later at the Hospital for treatment.

The evidence from PW2 one Anna Frank after she was informed that the victim incident, she went to her home and found the victim in bad conditions bleeding, she saw all her clothes had blood including the mattress, she was on her bed sleeping. When she interrogated, the victim revealed that she was raped by appellant. Then they prepared her and took her to the hospital for treatment.

PW3 Fortunatus Ebreak Medical Doctor was the last witness on prosecution, said he attended the victim, and started visual examinations and then using instruments / apparatus. Through medical examination he noticed presence of bruises inner part of vagina. The bruises were caused by being penetrated by blunt object.

The appellant defence totally denied to have raped the victim PW1, and alleged that this case was planted to him after he did arrest the husband of the victim for the offence of unnatural offence. His two witnesses talked on how they were with the appellant on the fateful day and later left for their home. The trial court in evaluating the above facts found the appellant guity and convicted as stated above.

Dissatisfied by the conviction and sentence of the trial court, the appellant has turn up to this court for appeal, in his amended appeal, the appellant filed three grounds of appeal as hereunder;

1. That, the trial court erred in fact and law and convicting and sentencing the appellant without considering that there was no sufficient evidence and required guidelines to prove that the appellant was recognize in the scene of crime.

2. That, the trial court erred in fact and iaw in convicting and sentencing the appellant in hearsay, false contradictory, fabricated prosecution witnesses' evidence without considering that the prosecution failed to prove the case in a standard required by the law.

3. That, the trial court erred in fact and law in convicting and sentencing the appellant without considering that the prosecution failed to call material witnesses, the same the victim PW1 failed to name the appellant as rapist in the earliest possible moment.

When this appeal came for hearing, the appellant enjoyed the service of Mr. Mussa Mziray and Elia Kiwiya both learned advocates while the Republic was represented by Ms. Mary Lucas Senior State Attorney.

It was Mr. Elia Kiwiya who argued this appeal, he started by praying to argue all three grounds together because they interrelated. The counsel further submitted that the prosecution case at the trial did not prove the case beyond reasonable doubt, he also added the case used at the trial of **Suleiman Mkumba v. R (2006) TLR 379** is used when the victim is credible. If not credible it cannot be relied upon to ground a conviction, even when the crime is sexual offence. He also submitted that there were doubts on prosecution side, the incident happened in night, they were not stated which kind of light used to identify the appellant, despite the victim said she knew appellant and saw him at the shop of Mrombo because there were electricity light, but on the way nowhere she said she saw appellant.

Mr. Kiwiya further added the evidence of Rogath Urio is doubtful, because seems He was coming opposite side, how he knew that the appellant is coming the same way. Second doubt it is not known where Rogath Urio aimed , third, the said Rogath Urio was not called as witness and he think was a material witness, failure to call as important witness

court shall draw adverse interest to the prosecution. To fortify his view he has referred the case of **Hemed Said v. Mohamed Mbilu High Court** (1984) TLR 113.

Mr. Kiwiya further submitted that, the fact the victim heard the appellant is talking to her, but did not explain how she identified the sound of the appellant different from other sound of others without mistake. She was required to state how familiarity she is with the voice of appellant and the time used in conversation, since it was not stated in court, the evidence cannot be with merit as it was the observation in the case of **Hekima Madawa Mbunda and Onesmo Kumburu v. Republic** Criminal Appeal No. 566 of 2019 CAT at Iringa. (Unreported)

Mr. Kiwiya also submitted that victim said after being kicked down she lost conscious, later after she gained conscious, she found herself wet with blood this means she was unconscious at the time of raping, but when she was re-examined said the incident of rape took one hour, this brings doubt if she was unconscious and knew the time used.

In respect to medical evidence, Mr. Kiwiya submitted that PW3 a Medical Practitioner said that he found bruises in the inner part of victim's

vagina, but PW3 was not the first Doctor to attend PW1 since on the statement of PW1 said she slept until next morning where she was taken to Himo Health Centre then after the said day, she was taken to Mawenzi Hospital and stayed for one week. He expected that the Doctor was required from Himo Health Center, but the one came to court is from Mawenzi Hospital, and no reasons stated that why they did not bring a Doctor from Himo who attended PW1 being fresh.

Mr. Kiwiya further concluded that, PW1 did not explain to anybody the incident at earliest possible moment but also PW1 was required to explain the circumstances which caused to be raped since she was adult, could have said about the wear of under pants, or after gaining conscious she did not state about clothes she wore, and did not say which kind of clothes were given to her granddaughter to be washed, to bolster this observation, the counsel cited the case of **Soma Breki v.R** Criminal Appeal No. 92 of 2020 CAT at Mbeya at page 16.

Submitting in response to this appeal on part of the Republic, Mary Lucas, learned Senior State Attorney, basically supported this appeal, and she stated the main reason for doing so is that, the victim failed to prove how penetration was done, thus she said the best evidence of rape was not

water tight. She further added that since the appellant was convicted by rape, penetration however slight was required to be shown by the victim as in the case of **Filbert Gudson @ Paschol v. R** Criminal Appeal No. 267 of 2019 CAT at Dar es Salaam, also in the case of **Amour Mbaruku @ Aljeb v. R** Criminal Appeal No. 226 of 2019 CAT Dar es Salaam, which it was observed penetration of a male organ is necessary to prove the offence of rape. The learned Senior State Attorney submitted that when you consider PW1 evidence did not say how penetration happen and how did penis or male organ was inserted in her vagina, therefore failed to describe how the penetration took place.

She also added that, if one considers the issue of identification, the appellant was not properly identified. Therefore, she also concedes with counsel for appellant submission to such effect. In rejoinder, Mr. Kiwiya said that the learned Senior State Attorney has said the truth and he also concede the same.

In dealing with this appeal, I have considered the entire evidence on record and submissions of both parties, as argued by counsels above, according to the nature of the grounds raised, I am also convinced to determine those grounds together and the issue for determination before

me is whether the offence of rape was proved by the prosecution to the required standard in law.

It is trite law that for the offence of rape to be proved there must be unshakeable evidence of penetration. In the case of **Selemani Makumba v. R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal considered whether or not the complainant had been raped by the appellant and observed: -

> " *True evidence of rape has to come from the victim, of an adult that there was penetration and no consent and* ***in the case of any other woman where consent is irrelevant that there was penetration...***"
>
> [Emphasis added].

According to the typed proceeding of the trial court at page 7 the victim had this to testify;

> *"When I was in narrow way I met one Rogath Thomas Urio..... I asked her to give me her torch as to Mrombo I didn't get battery. Rogath told me that Stanley (appellant) was behind me with torch and he could light to me. When we proceeded with journey Stanley (appellant) started talking to me. He told me that I was beautiful so he could give me Tshs.*

20,000/= so as I could make love with him. I could not understand him and I considered him as drunken. When we proceeded with the journey the accused kicked me and I failed down. ***I lost conscious there. When I recovered, I found something like water dropping from my vagina****. I managed to walk slowly home. When I took into my clothes were wet with blood as I was bleeding from my vagina. I asked my granddaughter to wash my clothes. I remain sleeping and suffering from pain. My granddaughter communicated with other relatives who next day took me to police then to hospital for treatment at Himo Health Center. The following day I was referred to Mawenzi for further treatment"*

(Emphasis is mine.)

Moreover, at page 12 of the same typed proceeding, PW3 Fortunatus Ebreak. A Medical Doctor at Mawenzi hospital appeared before the trial court and had this to say;

"On 01/05/2021 I was medical doctor on duty in the ward of mothers and children. Among others came one mother named (WO) with the case of being raped. I received her and conduct medica l examination. I started visual examinations and then using instruments/ apparatus. Through medical examination we ***noticed presence of bruises inner part of vagina. The bruises were caused by being penetrated by brunt***

object..... *Thereafter I completed a PF3. The PF3 was stamped and handed to police for further legal steps."*

(Emphasis is mine.)

As it can be discerned above from the medical expert evidence, there is no dispute the victim was penetrated in her vagina. Now, since penetration of a penis into the vagina is an essential ingredient in a rape case. The next point to be determined is whether the said penetration was affected by the penis of the appellant and not any other person or anything else.

I am mindful that the best evidence of rape come from the victim herself, but I have carefully considered the circumstances surrounding this case and I am settled view that penetration was not proved to be of the penis of the respondent, I reserve my reasons which now I give other evidence on record to support the offence of rape.

The evidence above, shows after being kicked down she lost conscious and when she gained conscious she found herself wet. Therefore, this means the victim did not see any acts before she was raped until when she gained conscious and found by then she was alone.

In **Mathayo Ngalya @ Shabani v. Republic,** Criminal Appeal No. 170 of 2006 (unreported) the Court Appela stated that;

> *"The essence of the offence of rape is penetration of the male organ into the vagina. Subsection (a) of section 130(4) of the Penal Code... provides: - For the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence.* ***For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence."***
>
> (Emphasis is mine.)

In my view of the above principles of law and the evidence adduced at the trial, as said that the law recognizes penetration of a penis only into the vagina for the purposes of the offence of rape. But according to the evidence on record, the victim PW1 lost conscious and therefore could not testify to the effect that is the appellant who inserted his penis into her vagina. Therefore, the general conclusion the fact that he knew that the appellant was following her then he is the one raped her cannot be acceptable in law

under these circumstances, however, in my view the blunt object said by PW3 cannot necessarily mean a penis. I think this is a case apparently it was unfortunately on part of the victim to lost conscious before the act. Not only have that to my view the credibility of the victim was shaken when she said at paged 7 of typed trial proceeding that;

> *"Even where I met with Rogath I saw Stanley the accused here. He was the one with me on one way and we were talking to each other. I managed to recognise him as the person who raped me as I know him. He is our son at our home village. I saw him and I identified him. The blood was caused by rape. The rapist was the accused here named Stanley."*

Despite the fact this version of her testimony contradicts the earlier version that she lost conscious, in this version she did not proceed to elaborate what actually took place, which in my view is still a general statement which no one can draw inferences and conclude that she was raped by the appellant. One would expect the victim for instance would have explained whether she had pants or not and that the appellant encountered no obstacles in penetrating her, how the appellant positioned before penetrate her if at all she saw him doing that sinful act. (See the cases of **Soma Breki v.R** (supra)

and **Mathayo Ngalya @ Shabani v. Republic** (supra). In view thereof, the fact this second version is contradicting the earlier when she said she lost conscious, I am settled view affects her credence.

Nonetheless, since in this contradicting version of the victim said she identified the victim, I am persuaded to go further, to see whether the appellant was identified at the scene of the crime.

In a very celebrated case of **Waziri Amani v. Republic** (1980) TLR 250, the Court outlined factors that have to be considered when courts deliberate on identification evidence. These factors are such as; **One,** the time the witness had the accused under observation. **Two,** the distance at which the witness had the accused under observation. **Three,** if there was any light, then the source and intensity of such light; and **Four,** whether the witness knew the accused prior to the incident.

Consistent observations were made in the decisions of **Raymond Francis v. Republic** [1994] TLR 100, **August Mahiyo v. Republic** [1993] TLR 117, **Mohamed Musero v. Republic** [1993] 290, **Nyigoso Masolwa v. Republic** [1994] TLR 186 and **Marwa Wang'iti Mwita and Another v. Republic,** Criminal Appeal No. 6 of 1995 (unreported), to mention few.

According to the record there is no dispute that at fateful time it was dark, this can be inferred from the testimony of the victim quoted above that she sought a help of a torch from Rogath when they met on the way, who then told her the appellant is coming behind, he will light for her, the victim further said she heard the appellant talking while they proceeded on the same way. I have considered this evidence, I am forced to concede with the counsel for appellant, the facts that the victim did not state whether she turned back to see whether the one talking to her was real the appellant or was any other person imitating the voice of the appellant so as to disguise his identity and did not state the intensity of light from the person talking to her, in my opinion the same cannot remain unshaken on issue of identification. (See the case of **Mussa Maongezi @ Pilato v. Republic,** Criminal Appeal No. 263 of 2005 and **Stuart Erasto Yakobo v. Republic,** Criminal Appeal No. 202 of 2004 (both unreported).

Undoubtedly, the law is well settled that evidence of visual identification is the weakest kind and unreliable and the court should not rely on such evidence without warning itself of its fallibility. In **Felician Joseph v. Republic,** Criminal Appeal No. 152 of 2011 (unreported) it was emphasized that:-

> "***Visual and aural identification evidence****, be that of a stranger or a previously known person, particularly one done under unfavorable conditions, such as at night is of the weakest kind and unreliable. Such evidence should be approached with utmost circumspection. No court should act on such evidence* ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight."***
>
> (Emphasis is mine.)

Moreover, the facts as quoted above, if it is true as stated by one Rogath that appellant is the one who could light for her, despite of evidence of the intensity of the said torch was not adduced, I wonder how the victim who was shone by the light could identify the person holding the torch. It is common sense that in the circumstances it was the person holding the torch who was better placed to see the victim. This was emphasized in the case of **Michael Godwin and Another v. Republic,** Criminal Appeal No. 66 of 2002, where it was held that;

> *"It is common knowledge that it is easier for the one holding or flushing the torch to identify the person against whom the torch is flushed. In this case, it seems to us that with the torch Light flushed at them, (PW1 and PW2), they were more likely*

dazzled by the light They could therefore not identify the bandits properly."

In the premises, also in this case at hand, the victim could not easily identify the appellant as alleged for the torch light dazzled her and that apart, the person behind the torch light cannot be easily identified. Another doubt is aural identification, as said above voice of a person can easily be imitated, taking the circumstances stated which was unfavorable to identify the culprit, I think a person named a Rogath was material witness in this case, this is because is the one told the victim the appellant is behind, he will light for her. This witness could have said how he saw the appellant that is on the same way and if it is true, he also met appellant as the first person following the victim on the same way. The fact he was not called as witness these issues cannot be answered, hence creating uncertainty on part of prosecution on proving that really the appellant was identified that is the one was behind the victim on the said narrow way on the fateful date of incident.

It is a trite law to convict an accused person should only be where all likelihood of mistaken identity is eliminated and when the court is satisfied that the evidence before it, is absolutely watertight. (See the case of **Shamir John v. Republic,** Criminal Appeal No. 166 of 2004 (unreported).

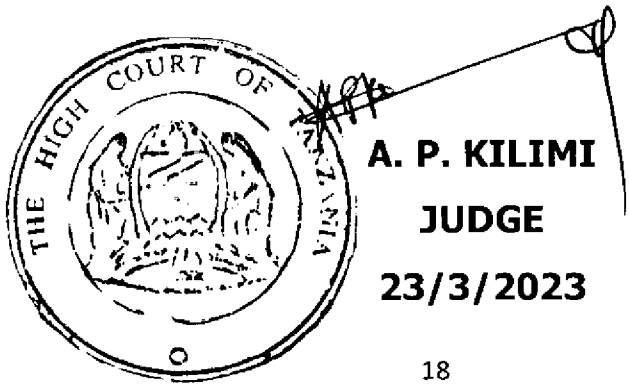
Therefore, as observed above, reliance on such evidence, I am of settled view, the evidence creates unfavorable surrounding and the likelihood of mistaken identity was not eliminated, thus, I am bold to say the appellant was not properly identified by the victim.

With the foregoing endeavors and the findings which I have made. It is my considered opinion, the prosecution in proving these lefts doubts as stated above, these doubts ought to have been resolved in favour of the appellant at the trial court. Therefore, it is my conclusion that the charge against the appellant was not proved beyond reasonable doubt.

Under the above circumstances, I allow the appeal. quash the conviction and set aside the sentence and order imposed against the appellant. Consequently, I order the immediate release of the appellant from prison forthwith unless he is so held for any other lawful cause.

Order accordingly.

DATED at MOSHI this 23rd day of March 2023.



A. P. KILIMI

JUDGE

23/3/2023