IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 19 OF 2022

(Original Criminal Case No. 96/2020 of the District Court of Iringa before Hon. S. A. Mkasiwa, PRM.)

MEDA JOHN ..... **APPELLANT**

VERSUS

REPUBLIC ..... **RESPONDENT**

JUDGMENT

3rd March & 3rd May 2023

I.C MUGETA, J:

The appellant was arraigned before the District Court of Iringa for the offence of rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code, [Cap. 16 R.E 2002]. It was alleged by the prosecution that on the 31st day of May 2020 at Wenda Village within the district and region of Iringa, the appellant did have carnal knowledge of the victim (name withheld), a girl aged 12 years.

After a full trial, the appellant was found guilty. He was sentenced to serve life imprisonment and ordered to pay Tshs. 10,000,000 as compensation to the victim. The appellant was aggrieved by this decision. He filed a petition of appeal with five grounds which I quote in verbatim:

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1. *That the trial Magistrate erred in law and fact to convict and sentence the appellant based on the PW.2 evidence (victim) while whole evidence was untruthful due states that she has been raped and sodomized while the PW.1 and PW.4 (a doctor) proved that she didn't sodomized at all, thus the case proved that it was planted.*
2. *That the learned trial Magistrate erred in law and fact to convict and sentencing the appellant based on contradictory evidence adduced by PW.2 when said she was raped and sodomized which contradicted with the evidence of PW.1 and PW.4 (a doctor) who proved that she didn't sodomized but the magistrate still relying on that untruthful and not conclusive.*
3. *That the trial magistrate erred in law and fact to convict and sentence the appellant relying on prosecution side evidences which were shown the more ambiguities and uncertain events when PW.3 states that PW.1 came at evening to report the issue of rape which makes more doubts when the PW.2 states that she has been raped from 16:00 to 22:00 at night while PW.3 said at evening PW.1 came with PW.2 for claims, thus makes more ambiguities.*
4. *That the learned trial Magistrate erred in law and fact to convict and sentenced the appellant based on contradicted identification of an accused person when PW.1 states that the man raped PW.2 he was white and*

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short while PW.2 stated that the man was short and black which was two thing per one but also the real is the man is tall and white, thus proved that the case was planted against appellant.

5. *That through those ambiguities and uncertain above its will be just to expunged the evidence of PW.2 as untruthful one and contradictory, PW.1 and PW.3 which were contradicted on time of the act of rape ended.*
6. *That the prosecution side failed totally to prove this case beyond reasonable doubts.*

The appeal was argued orally. The appellant appeared in person whereas Mr. Alex Mwita, learned Senior State Attorney (SSA) represented the Republic.

In supporting his appeal, the appellant had nothing to add to his grounds of appeal. He just urged the court to consider them and allow his appeal.

The learned SSA on the other hand, argued the 1st, 2nd and 3rd grounds jointly as they are similar. He contended that the victim in her evidence clearly testified that she was carnally known and sodomized by a stranger whom she was unfamiliar with but could identify the offender by appearance and his dresses. That the victim's evidence is supported by PW.4, the medical doctor, who examined her. However, PW.4 did not testify that the victim was sodomized as the charge was only limited to

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rape. He argued that in rape cases the best evidence is that of the victim as it was held in **Seleman Makumba v. Republic** [2006] TLR 379. Thus, the victim is a credible witness as her testimony matched the testimony of PW.1. In his view, the fact that the doctor did not testify on sodomy does not bring any contradictions in the evidence thus the offence of rape was proved. To support his argument on the credibility of the victim's evidence, he cited the case of **Nyakuboga Boniface v. Republic**, Criminal Appeal No. 434 of 2016, Court of Appeal – Mwanza (unreported). In this case, it was held that credibility of a witness can be determined by assessing the coherence of the testimony and two considering the testimony of the witness in relation to the evidence of other witnesses.

On the 4th ground, the learned SSA submitted that the appellant was properly identified by the victim at the identification parade. The appellant was identified by physical appearance. Moreover, PW.5, a police officer who conducted the identification parade testified on the procedures followed and that the appellant was arrested in connection with another offence. Thus, in his view all criteria of identification as described in **Waziri Amani v. Republic** [1980] TLR 250 were met.

On the propriety of sentence, the learned SSA argued that the sentence is excessive as the victim was above 10 years. Therefore, if the court sustains this appeal, the sentence should be reduced to 30 years.

It is my view that all the six grounds of appeal can be considered under one complaint that the prosecution failed to prove the charge against the appellant beyond reasonable doubts.

In the 1st, 2nd and 3rd grounds, the appellant complains about the evidence of the victim on whether she was raped or sodomized. His main argument is that while the victim testified that she was carnally known and sodomized, the doctor did not give evidence that the victim was sodomized. To him the evidence of the victim and the doctor is contradicting. The learned SSA submitted that as the appellant was charged with rape, the doctor's evidence was confined to proving the offence of rape.

I agree with the learned SSA. The prosecution confined its evidence to the offence charged. This does not make the victim a lier for testifying on sodomy if, indeed, she was sodomized. The fact that the victim was carnally known is supported by the medical evidence in exhibit P1. The medical doctor opined that the victim's vagina was penetrated and was

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bruised. In my view, the fact that the victim testified on being sodomized to but the doctor did not does not make their evidence contradictory.

The question for determination is whether it is the appellant who raped the victim.

The trial court answered this question in the positive on account that the appellant was properly identified in the identification parade. At the trial court, the victim testified that the event occurred at about 16:00 hours and that she was unfamiliar with the rapist before their encounter. However, in evidence she described the rapist as a short, black person who wore red trouser and black jacket. The appellant was not arrested in connection with commition of the charged offence. Thereafter, an identification parade was held and the victim identified him. The prosecution has not tendered any evidence which raised suspicion against the appellant after his arrest for another offence as the rapist in this case. This was important because the victim testified that she did not know the accused before the incident. The description she gave of the accused was too general for anyone other than the victim to associate the appellant with the offence charged. PW4 who is a Police Officer said after the appellant was arrested for another offence, informers told her that he was the rape suspect in this case. There is no

evidence on how the informer linked the appellant with the offence. Further, there is no evidence that the victim did explain the description of the appellant to anyone she first came by after the incident. The duration of time from when the offence was committed to when the victim identified the appellant at the parade is almost three months. The prosecution did not show that the clothes the appellant wore at the parade were the same he wore on the date of the incident. Therefore, the only feature upon which the appellant could be identified was being short and back. Black and short men are innumerable.

The foregoing notwithstanding, the question remains: was the identification parade conducted properly? In **R v. XC-7535 PC Venance Mbuta [2002] TLR 48** the court held as follows:

> *"the evidence of Identification derived from an identification parade may have probative value if the following factors, as were abridged in **R v Mwango Manaa [1936] 18 E.A.C.A 29,** are present, that is to say;*
>
> *a) The accused person is always informed that he may have a solicitor or friend present when the parade takes place;*
>
> *b) At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply;*

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c) In introducing the witness, tell him that he will see a group of people who may or may not contain the suspected person. Don't say "pick out somebody" or influence him in any way whatever;

d) Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.

In the instant case there is no evidence that any of these requirements was complied with. Inspector Elizabeth Swai (PW4) who conducted the parade did not testify on the processes followed. The parade identification evidence, therefore, lacks probative value.

With a doubtful identification of the accused person, the prosecution could not be said to have proved the charge against the appellant beyond reasonable doubt.

I, thus, allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. He should be released from custody immediately unless otherwise held for another lawful cause.

I.C MUGETA

JUDGE

03/05/2023

Court: Judgment delivered in chambers in the presence of the appellant and Nashoni Saimon, Barton Mayage and Magid Matitu, State learned State Attorneys for the respondent.

Sgd. I.C. MUGETA

JUDGE

03/05/2023