IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL NO. 5 OF 2022

(Arising from Resident Magistrate Court of Bukoba at Kagera in Criminal Case No. 116 of 2019)

DEUSDEDIT EMMANUEL .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of Judgment: 19.05.2023
A.Y. Mwenda, J

Before the resident Magistrates' Court of Bukoba at Bukoba the appellant was arraigned for rape C/S 130 (1) (2) (e) and 131 (1) of Penal Code [Cap 16 RE 2019]. The particulars of which are that on the 7th day of May 2019, during night hours, at Butairuka Village within Bukoba District in Kagera Region, the appellant had carnal Knowledge of the victim (PW1), a child girl aged 11 years. When the Charge was read in Court, the appellant pleaded not guilty. As such the trial commenced. At the hearing, the republic paraded 4 witnesses and tendered one exhibit. On the other hand, the appellant fended for himself and tendered no exhibit. At the end of the judicial day, the trial Court was of the view that the prosecution proved its case beyond reasonable doubt. The appellant was then convicted as charged.

The appellant was not satisfied with the trial Court's findings. He then preferred the present appeal with 6 grounds. The said grounds read as follows;

1) *That, the trial magistrate erred in law and fact to disregard the defense evidence of the appellant*
2) *That, the age of the victim was not proved to the required standard by adducing the evidential documents to proving so. (sic)*
3) *That, the major essential element of rape being penetration was not confirmed by the doctor neither did not the doctor a tend or appear in court to produce a PF3 and no clarification given for his failure to appear. (sic)*
4) *That, the trial court erred in law and fact to convict the appellant without efficient evidence of the D.N.A forensic profiling test as recommended by section 395A of the CPA [Cap 20 R.E 2019]*
5) *That, the charge sheet was fully defective for being failure to indicate the time of incidence that as recommended by section 135 (f) of the CPA Cap 20 R.E 2019 (sic)*
6) *That, the prosecution side failed to prove the case to the required law standard that to say beyond the reasonable doubt C/S 106 and 108 of the Penal Code Cap 16. R.E 2019 (sic)*

When this appeal was called on for hearing, the appellant appeared without legal representation. On the other hand, Mr. Noah Mwakisisile and Elias Subi, Learned State Attorneys appeared for the respondent, the republic.

After the parties have shown readiness to proceed, the hearing commenced by the Court inviting the appellant to submit in support to his grounds of appeal. Briefly, while retaining his right to rejoinder, the Appellant prayed the Court to adopt his grounds of appeal to form part of his oral submission. On top of that he said that at the time of the commission of the alleged offence he was in another village. He then prayed the present appeal to be allowed.

Upon inviting the respondent's side to submit, Mr. Mwakisisile, Learned State Attorney notified the court that he was going to argue the present appeal while combining the 2nd, 3rd, 4th and 6th grounds of appeal together and the 1st and 5th grounds separately.

Regarding the 2nd, 3rd, 4th and 6th ground of appeal, Mr. Mwakisisile submitted that the case against the appellant was sufficiently proved to the standard required which is beyond reasonable doubt. According to him, the ingredients for the offence which is penetration and lack of consent as stated in the case of NDENDYA V. REPUBLIC, CRIMINAL APPEAL NO. 340 OF 2017 page 10 – 11 were proved. He said that in the present case, since the victim was a minor then her age was to be proved by evidence from either medical practitioner, parents, guardian, producing a clinic card or by tendering birth certificate. Based on authority in the case of

HARUNA MTASIWA V. REPUBLIC, CRIMINAL APPEAL NO. 206 OF 2018 page 18, the learned counsel said that the victim's age was proved through PW2's evidence (the victim's mother). According to him, PW2 said the victim was born on 08/02/2008 thus by simple mathematics, she was 11 years by the time of the commission of offence. Further to that the learned state attorney averred that even if the victim's age was not proved, the evidence is clear that the accused used force at the commission of the crime.

Regarding the proof of penetration, Learned State Attorney was of the view that, as it was stated in the case of ALEX NDENDYA (supra), the best evidence in sexual offences is that of the victim. According to him the victim testified on how the offence was committed. He said that the victim narrated how she was undressed and the appellant's male organ inserted into her female organ thereby causing pain, injuries and bleeding to her.

Responding to appellant's complaint that penetration was not proved by PF-3, the Learned State Attorney submitted that the same was tendered and added that in even if the victim's PF-3 was not tendered, the law is clear that medical evidence does not prove rape. He cited the case of FRANK DEULE @ DAMES V. REPUBLIC, CRIMINAL APPEAL NO. 396 OF 2018 at page 2 to support this point.

Regarding identification of the victim's assailant, the Learned State Attorney submitted that the said offence was committed at night and based on the famous case of WAZIRI AMANI V. REPUBLIC, the Appellant was correctly identified.

According to him, PW1 testified how she identified the appellant DEUSDEDIT by the help of torch light beamed by her brother one Kalumuna. She said that the light was sufficient, and she described the appellant's attire which is a white sweater. She also stated that the distance between them was only one meter and added that when the appellant pulled her outside, there was moonlight where she again, identified the appellant.

The learned Counsel was of the view that since the victim recognized the assailant as their neighbor whom she knew before, and described his career as a charcoal vendor/seller, then his identification was watertight. He also of the view that since the appellant failed to cross examine the victim when she finished her testimony then that entail what was testified against him is a truth.

Regarding the appellant's complaint over failure by the prosecution to tender DNA profiling test's report, the Learned State Attorney submitted that DNA profiling report is not a requirement in proving rape cases. In support to this point, he cited the of KELVIN JOHN V. REPUBLIC, CRIMINAL APPEAL NO. 05 OF 2022 at page 15, 2nd paragraph. As for the appellant's complaint on non-compliance to Section 106 and 108 of Penal Code [CAP 16 R.E 2019] the learned State Attorney was of the view that, this argument is misplaced.

As for the appellant's complaint that the trial court failed to consider his defense, the Learned State Attorney submitted that at page 18 of the typed proceedings, the appellant defended his case on 16/4/2020 in that he was not present at the

scene of crime. However, despite his noncompliance with Section 194 (4) and Section 194 (5) of Criminal Procedure Act [CAP 20 R.E 2019] which require the accused to issue notice, the trial court, while aligning to the guidance in the case of PAUL THOMAS KOMBA AND ANOTHER V. REPUBLIC, CRIMINAL APPEAL NO. 177 OF 2018 (page 16 and 17), considered his defense of alibi at page 9 and 10 of the typed judgment.

Regarding the appellant's complaint in 5th ground of appeal that time of commission of offence was not indicated in the charge sheet, the Learned State Attorney submitted that although no specific time was indicated, the charge sheet states that the offence was committed during night hour and the witnesses testified to that effect. In conclusion, the Learned State Attorney submitted that this appeal is without merits and should be dismissed.

In rejoinder, the appellant said that the case against him was framed up. According to him the victim's PF-3 was objected to its tendering but was admitted by force. The appellant submitted further that he wanted the doctor to be summoned to testify but he was not brought. He then prayed this appeal to allowed.

Having summarized the rival submissions from both sides, the court is now bound to deliberate this appeal. To do so, the issues as to whether there are merits in the present appeal is framed. At the outset, it is crucial to point out that the onus of proof in criminal cases lies on the prosecutions side and standard of which is

beyond reasonable doubt. See Section 3(2) (a) of the Evidence Act [Cap 6 R.E 2019] and the case of MOHAMED MATULA V. REPUBLIC [1995], TLR 3.

In a bid to provide answers to the above issue the court have decided to firstly consider the issue of identification at the scene of crime. In this matter the record reveal that, the incident took place at night. It was the victim's (PW1) evidence that on the night in question while she was at home having private studies with her brother one Kalumuna, the door to their house was stormed open by the appellant. Having entered therein the victim and her brother managed to escape and hide. The victim said that she hid herself at the chicken shade, but the assailant searched and found her. She said that after being found, the assailant ordered her to call her brother which she complied and when her brother came, he beamed torch light unto the assailant and it is at that point she identified him as Deusdedit. According to her, the assailant was infuriated by Kalumuna's act and chased him out of the chicken shade. After that he took the victim out of the chicken shade where there was moonlight and raped her.

It is trite law that identification at night is of the weakest kind and no court may rely on it unless the conditions for unmistaken identity are cleared. This position was stated in the case of YUSUPH SAYI & TWO OTHERS V. REPUBLIC, CRIMINAL APPEAL NO. 589 OF 2017, where the Court of Appeal while citing the case of WAZIRI AMANI V. REPUBLIC [1980] TLR 250 held inter alia that,

"...evidence of visual identification, as courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated, and the court is fully satisfied that the evidence before it is absolutely watertight." **[emphasis added]**

In the same case the court went further and stated as follows.

"Then the Court stated at p.252, that;

Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on record a careful and considered analysis of all the surrounding circumstances of the crime being tried. ***We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance***

whether it was day or night time, whether there was good or poor lighting at the scene and further whether the witness knew or had seen the accused before or not. *These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity".*

[Emphasis added]

In further discussion on the issue at hand, the Court of Appeal did not stop there. While citing the case of SAID CHALY SCANIA V. REPUBLIC, Criminal Appeal No. 69 of 2005 the Court stated further as follows, that.

"We think that where a witness is testifying about identifying another person in unfavorable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aid to unmistaken identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within the view and also whether the person is familiar or a stranger".

In the present case, the victim alleged she identified her assailant through the aid of moon light and a beam from torch light. She also said that the assailant is

familiar to her since he was residing in the same village and she also described the assailant's attire in that he was wearing a white sweater and that she was at a proximity to the appellant, i.e. One meter only.

That being the way the victim purported she identified her assailant, this court found it prudent to put her identification to a test. Beginning with the source of light, which is torch light and the moon light she failed to describe the intensity of the said sources. Again, these sources are not left uncovered by the legal authorities. Regarding identification by torch light, it is trite law that they are not effective. In the case of MOHAMED MUSERO VS. REPUBLIC,1993 TLR 290, CAT, it was held inter alia that;

> *"Torch lights are not effective in identifying thieves, the High court judge's remarks on torch beams were pure conjecture which has no room in Criminal trials."*

In the same footing, since the victim did not describe the intensity of torch light then her identification is doubtful.

Again, the victim testified that when her assailant took her out from the chicken shade, she managed to identify him through the aid of moonlight. While dealing with the case with similar circumstances to the present matter, the Court of Appeal in RASUL AMIR KARAN@JUMA & 3 OTHERS, V. REPUBLIC, Criminal Appeal NO. 368 OF 2017, (Unreported) had this to say that,

"...PW2 stated that when she was moved outside, she only relied on the moonlight. There is also the fact that the commotion that ensued during the robbery, without doubt put PW1, PW2 and PW4 in the state of shock and fear, a fact acknowledged by Pw1 in his testimony. All these factors we find contributed to the unfavorable condition for proper identification regardless of the proximity of the identifying witnesses and the duration the robbers were under observation."

In the present case, the victim testified that the assailant stormed in the house by breaking the door with a stone. They ran and hid, and the assailant started searching for them, later called Kalumuna who was beaten and run away. Under these circumstances, the atmosphere at the scene of crime was horrific which automatically led to unfavorable condition for proper identification despite the victim's allegation that the assailant was at a proximity of about one meter only. Again, the victim did not describe the time spent to put the assailant under observation.

Lastly, during the trial of the case before the trial court, the witness made no dock identification. In her testimony she mentioned her assailant by a single name. At one point she referred to him as "DEUS" "ACCUSSED" and "DEUSDEDIT". She however made no dock identification. Such failure led to inference that her

identification is incorrect. This is so because had her identification been unmistaken and correct, she would have made a dock identification. This shakes their credibility and this court in MAKOYE MWINAMILA @KAFILOFILO V. THE REPUBLIC, CRIMINAL APPEAL NO. 131 OF 2019, while citing the case of RAYMOND FARANCIS V. REPREPUBLIC [4] TLR 100, JARIBU ABDALLAH VS. REPUBLIC, CRIMINAL APPEAL NO. 220 OF 1994, ISSA MGARE@SHUKA V. REPUBLIC CRIMINAL APPEAL NO. 37 OF 2005, SAID CHALLY SCANIA V. REPUBLIC CRIMINAL APPEAL NO. 69 of 2005, held that.

> *"...In matters of identification it is not enough merely to look at the factors favoring accurate identification. Equally is the credibility of witnesses. Conditions of identification might appear ideal but that is not a guarantee against untruthful evidence..."*

Based on the authorities above, this court is of the view that the victim's identification is not watertight and victim's identification of her assailant was not free from mistakes.

Since this issue can putt this matter to an end, this court found no reasons to discuss other grounds of appeal.

This appeal therefore succeeds. The appellant's conviction is quashed, and the sentence is set aside.

It is also ordered that the appellant be immediately released from prison unless he is lawfully held.

Right of appeal explained.

It is so ordered.

A.Y. Mwenda

Judge

19.05.2023

Judgment delivered in chamber under the seal of this court in the presence of the Mr. Deusdedit Emmanuel the Appellant and in the presence of Mr. Noah Mwakisisile and Mr. Elias Subi Learned State Attorneys for the respondent (Republic).

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