IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 43 OF 2022

(Arising from Criminal Case No. 45 of 2022 District Court of Bukoba)

MICHAEL MARTIN @ KAIJAGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

2nd and 20th June, 2023

BANZI, J.:

Before the District Court of Bukoba at Bukoba, the appellant, Michael Martin @ Kaijage was indicted with one count of grave sexual abuse, two counts of rape and three counts of unnatural offence contrary to sections 138C (1) (a) (2) (b); 130 (1) (2) (e), 131 (1) and 154 (1) (a) (2) of the Penal Code [Cap.16 R.E. 2019] ("the Penal Code"). These offences were alleged to be committed on 23rd February, 2022 at Itawa Village within Bukoba District. All three victims were girls whom I shall refer as PW7, PW8 and PW9 to protect their identity. At the time of commission of offences, PW7, PW8 and PW9 were 11, 12 and 10 years old, respectively. At the end of the trial, the appellant was convicted in all six counts and sentenced to 20 years

imprisonment for first count of grave sexual abuse, 30 years imprisonment for each count of rape i.e., second and fourth count and life imprisonment for each count of unnatural offence i.e., third, fifth and sixth count. The sentences were ordered to run concurrently. Aggrieved with convictions and sentences, the appellant filed petition of appeal containing nine grounds and later he added eight grounds. However, having examined these grounds, I realised that, they all boil down into one complaint thus, the prosecution case was not proved beyond reasonable doubt.

Before determining the merit or demerit of the appeal, it is pertinent to give the factual background leading to the conviction of the appellant. According to the victims, on the fateful day, 23rd February, 2022, around evening hours, PW7, PW8 and PW9 who are pupils of Itawa Primary School went to the forest to fetch firewood together with three boys, PW4, PW5 and PW6. After collecting firewood and while they were starting to return home, they met with the appellant who ordered the boys to lay down. Then he took the victims to the shrubs. While in the shrubs, he inserted his male organ into the mouth, vagina and then anus of PW7. After ravished PW7, he turned to PW8 and inserted his penis into her vagina and then to her anus. Lastly, he inserted his penis into the anus of PW9. According to PW7, in the course of raping her, the appellant threatened to stab them with a knife if

the raise alarm. On the other hand, PW8 said that, he slapped her when she was crying due to pain.

After he satisfied himself, he released the victims whereby each victim returned to her respective home. On arrival, PW7 was taken to police station by her father (PW14) and then to hospital. Likewise, PW8's uncle (PW13) after being informed about the incident, he reported to the police and took her to hospital. The same applied to PW9 who on arrival at home, she told her mother (PW10) about the incident who took her to the hospital. Upon being examined, PW7 and PW8 were found with evidence of penetration on the vagina an anus and PW9 was penetrated on the anus. According to PW11, PW12, PW13 and PW14, the appellant was arrested at the burial ceremony of his father after being identified by the victims. They also identified him while he was at police custody.

In his defence, the appellant denied to have committed the alleged offences. He also denied to know the victims. According to his testimony, on 24th May, 2022, he received an information about his father's death. He went to Maruku for burial ceremony together with his wife (DW2). While he was there, he was arrested by militiaman (PW11) and took him to the police station. While on the way, they met with police motor vehicle, whereby, the police officers took him to their vehicle and drove off up to police station. On

arrival, he saw policewoman with two young girls. He overheard her telling another woman that her child was unable to identify her rapist. He also heard PW11 telling the two young girls that, they should mention that, the appellant had a scar on left eye. Then police officer namely, Peter took the young girls to the cell and they told him that, it was the appellant who raped them. The appellant blamed her sister as the source of this concocted case because they were not in good terms. His evidence is supported by DW2 who stated that, there was long land dispute between her husband, the appellant and his sister.

At the hearing of this appeal, the appellant appeared in person unrepresented, whereas the respondent Republic had the service of Mr. Erick Mabagala, learned State Attorney.

The appellant began his submission by praying to adopt the grounds of appeal as part of his submission. In addition, he stated that, the prosecution failed to prove the alleged offences beyond reasonable doubt. He faulted the evidence of PW7, PW8 and PW9 which formed the basis of conviction to be full of contradictions. He added that, he was not identified at the crime scene because the evidence of parents of victims established that, the victims did not know the person who raped them. It was also his contention that, neither the victims nor independent witnesses who proved

that, he was identified at the funeral. He blamed PW11 to take control of arrest and investigation which is against the law. In that regard, he prayed for his appeal to be allowed by setting him free.

On the other hand, Mr. Mabagala firmly resisted the appeal. He further responded that, the offences were proved beyond reasonable doubt. Starting with ingredients of offences, PW10 and PW13 who are parents proved the age of victims. These witnesses were competent to prove the age of their children as it was stated in the case of **Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 CAT (unreported). Also, penetration was proved by the victims themselves which according to the case of **Selemani Makumba v. Republic** [2006] TLR 30 it is the best evidence in sexual offences. Their evidence is corroborated by the evidence of PW1 and PW2, the medical officers who examined them.

On who committed the alleged offences, he argued that, although the appellant was a stranger to but he was identified by six witnesses. According to him, PW9 and PW4 managed to describe the appellant by mentioning his special mark which is scar on the left ear and eye. Also, PW11 and PW14 stated that, it was the victims who identified the appellant at the funeral before he was arrested. He added that, the incident took long thus, the victims had ample time to identify him that is why, during cross-examination,

they were consistent in identifying the appellant. In that view, he didn't see any reason for this court to disbelieve the evidence of the victims. It was further his submission that, the complaint concerning failure to consider defence evidence is baseless because at page 10 of the typed judgment, the trial court explained about the evidence of defence witnesses. Therefore, the fact that his evidence was not believed does not mean that it was not considered. Besides, the issue of his sister being the one who concocted this case, the trial court analysed it before concluding that, his sister has nothing to do with victims.

On the remaining complaints of lack of DNA evidence and PW11 to take over the duties of investigator, he replied that, it is settled law that, DNA evidence is not a legal requirement in proving the offence of rape. On the other complaint, he argues that, militiaman is allowed by law to arrest suspects. The appellant's arrest was in accordance with the law and he was not prejudiced. He concluded his submission with a prayer for this appeal to be dismissed for want of merit.

In re-joining, the appellant was persistent that, it was the militiaman who investigated this case which is contrary to the law. He added that, the boys who testified did not state if they eye-witnessed the event. He also submitted that; he was not identified by the victims at the burial ceremony.

He insisted that, this case was planted by his sister in collaboration with PW11 who arrested many suspects near the crime scene in connection of those offences but the victims did not recognise them. He also finds it impossible for three victims to be raped at once. Apart from that, he challenged the police for not conducting identification parade considering that, he was arrested three months after the incident. It was also his complaint that, while he was at police station, two girls were brought and identified him but they were not among the victims he saw in court. He finally prayed to be released and his appeal be allowed.

Having thoroughly considered the grounds of appeal and submissions by both sides in the light of evidence on record, the main issue before this Court for determination is whether the prosecution had managed to prove their case beyond reasonable doubt.

As a matter of law, in criminal cases, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact exists. That is to say, the guilt of the accused person must be established beyond reasonable doubt and generally, and always, the burden of proof lies upon the prosecution. See sections 3 (2) (a) and 110 (2) of the Evidence Act [Cap.6 R.E. 2022]. In that regard, it was the duty of prosecution to prove beyond reasonable doubt that, the victims were raped and sodomised and

the important fact to prove was, it was the appellant who committed those offences.

Upon perusal of evidence on record, I am constrained to agree with learned State Attorney that, as far as penetration and age of the victims are concerned, there is no shadow of doubt the same were proved by the victims themselves, PW1, PW2, PW10, PW13 and PW14 as well as Exhibits P1, P2, P3, P5 and P6 collectively. According to PW1 and PW2, they found evidence of penetration on the vagina and anus of the victims. This in itself proved that PW7, PW8 and PW9 were raped and sodomised. Now the next question to be answered is who raped and sodomised those victims. Looking closely on prosecution evidence, it is undisputed that the whole evidence concerning the perpetrator of the alleged offences hinges on the evidence of identification at the scene of crime.

It is settled law that, evidence of visual identification is of the weakest kind and most unreliable. Thus, no court should act on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight. This position has never changed since it was settled in the case of **Waziri Amani v. Republic** [1980] TLR 250. In the matter at hand, although PW4 claimed to know the appellant but he did not state how he came to know him. Besides, when he

was cross-examined, he admitted to see the appellant for the first time at the scene of crime. His admission connotes that, the appellant was not known to him prior to the incident. In that regard, there is no doubt that the appellant was not known to the victims and the three boys before the date of the incident. In other words, the appellant was a stranger to the victims and the boys. The position on identification of a stranger was also settled by Court of Appeal for Eastern Africa way back in 1942 through the case of **Mohamed Alhui v. Rex** [1942] 9 EACA 72 where it was stated that:

> *"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."*

This position was fortified by the Court of Appeal of Tanzania in the case of **Raymond Francis v. Republic** [1994] TLR 100

> *"Since all the witnesses admitted seeing the appellant for the first time during the incident that day it was necessary in their evidence of identity to describe in detail the identity*

of the appellant when they saw him at the time of the incident."

What I gathered from the extracts above is that, whenever the witness sees the accused in crime scene for the first time, that witness is supposed to give a detailed description of the accused to the persons to whom he/she first reported about the incident before he/she had a chance of seeing the accused thereafter. The description would be on appearance, colour, height and on any peculiar mark of identity. In the instant case, although learned State Attorney admitted that the appellant was a stranger to the victims and the boys but, they managed to identify him by giving his description that, he has scar of his left ear and eye. I had opportunity of examining the testimonies of PW4, PW5, PW6, PW7, PW8 and PW9. PW4 gave the description of scar on left ear and eye during cross-examination. PW5 and PW6 did not give any description at all. As for victims, PW7 did not give any description of the appellant, while, PW8 during cross-examination, she just mentioned that, the appellant was wearing yellow T-shirt. On the other hand, PW9 gave the description of scar on ear and the cloth of the appellant i.e., yellow T-shirt. Nonetheless, according to the testimony of PW4, PW8 and PW9 there is nowhere they mentioned to give such description to PW10, PW13 and PW14 who they first reported the matter as required by law.

Apart from that, according to PW11, after being informed by PW12 about the incident, he went to police station and met with PW12 who asked him to assist the police on investigation. Following that, he returned to the village and visited the victims and eye witnesses who informed him the particulars and personality of the rapist. Soon thereafter, he embarked on investigation by visiting the crime scene where he made random arrests on the people, he found there but the victims did not manage to identify them. He kept on investigation until he met with one person namely Kyaruzi who informed him that the appellant is accused of raping another girl. He further claimed that, the appellant was their village mate until he shifted and went to live in town. He further testified that, when the appellant's father passed away, he made the trap and the victims identified him and that is when he arrested him. If you put the evidence of PW11 into scrutiny, you will realise that, he was given description of the appellant by the victims. Surprisingly, none among the victims explained before the trial court about describing the appellant to PW11. Had the victims truly described the appellant to PW11 or their parents, it couldn't have missed the eye of the prosecutor to lead them to state it in their testimonies. If at all, PW11 was given such description and realised that it was the appellant who raped the victims, then he couldn't have proceeded to make random arrest on whoever he found at the crime

scene and conducted his informal identification parade which did not bear any fruit. The act of making random arrest is a clear proof that, the alleged description did not exist in the first instance.

Furthermore, PW11, PW12, PW13 and PW14 claimed that, the appellant was identified by the victims at the funeral before he was arrested. This implies that, the victims were present at the funeral of the appellant's father. However, in their testimony, neither PW7, PW8 nor PW9 testified to be present at the said funeral leave alone, to identify the appellant before or after his arrest. Under these circumstances, can it be said that, the identification of the appellant was watertight to the extent of eliminating all possibilities of mistaken identity? My answer to this question is definitely NO! simply because, the evidence on record failed to meet the requirements of the law on identification of a stranger as stated in the cited cases above. Thus, while the evidence on record supports the allegation of rape and unnatural offence but it is with deep sentiments that, the prosecution has failed to discharge its burden under the law in proving beyond reasonable doubt that it was the appellant who committed those offences.

From the foregoing analysis and reasons, it is the finding of this court that, the prosecution had failed to prove their case beyond reasonable doubt. As a result, I find the appeal with merit and I allow it by quashing the

convictions and setting aside the sentences meted against him. I order his immediate release from prison unless otherwise lawfully held.

It is so ordered.

I. K. BANZI
JUDGE
20/06/2023

Delivered this 20th June, 2023 in the presence of Mr. Erick Mabagala, learned State Attorney for the respondent, Republic and the appellant in person. Right of appeal fully explained.

I. K. BANZI
JUDGE
20/06/2023