IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

CRIMINAL APPEAL NO. 04 OF 2022

(C/f Criminal Case No. 16 of 2021 before the District Court of Same at Same)

JAMAL HAMIS ABDALLAHAMAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 21st November, 2022
Judgment: 11th January, 2023

MASABO, J.:-

This appeal emanates from the District Court of Same at Same (the trial court) where the appellant was arraigned and convicted of rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E 2019]. It was alleged that on 29th January, 2019 at Mbuyuni area within Same District in Kilimanjaro Region the appellant herein carnally knew PW2 (name withheld for protection of identity), a girl aged three years old.

The incident came into light when PW1, the victim's mother, while bathing her daughter noticed that she was in pain and when inquired she revealed that her private parts were hurting as a certain *'babu'* had inserted a knife in her vagina. To ascertain what has real happened, PW1 examined PW2' vagina whereby she found out that there were sperms. She informed her neighbour and in the company of the said neighbour she reported the matter

to a police station. They also obtained a PF3 and upon medical examination being conducted on PW2 by PW3, it was established that indeed she was carnally known. Asked who was the perpetrator, PW2 stated that a person who inserted a knife into her vagina was a certain *'babu'* who carried a bag, a stick and a knife. By then, the said *babu* had not been identified. Two days, PW2 saw the *babu* (the appellant herein) as she was walking alongside PW1 whereby she pointed at him as the culprit. Police officers were notified and the appellant was arrested. Corroborating the victim's evidence was PW3, a medical doctor who examined her and PW4 who was the investigator of the case. In addition to her testimony, PW3 tendered the PF3 which was admitted as Exhibit P1 showing how he examined PW2 and concluded that she was grossly penetrated.

The appellant preferred a total denial for his defence. He claimed that and PW2 was a total stranger to him. He asserted further that PW1 must have mistaken him for someone else. But, in the end, the trial court was satisfied beyond reasonable doubt that the prosecution proved its case against the appellant. Hence, convicted and sentenced the appellant to life imprisonment. Disgruntled, the appellant filed this appeal armed with seven grounds as follows;

1. That, the learned magistrate grossly erred both in law and fact in failing to note that there is variance between the charge sheet and the evidence on record;

2. That, the trial magistrate erred in law and fact in failing to note that, the prosecution failed to extract the evidence from the victim in order to ascertain what exactly injured her;
3. That, the trial magistrate erred in law and fact in convicting and sentencing the appellant based on weak, tenuous, contradictory and unreliable prosecution evidence;
4. That, the trial magistrate erred in law and fact in failing to note that the appellant was not properly identified by the victim;
5. That, the trial magistrate erred in law and fact in failing to note that the prosecution witnesses gave a highly improbable and inconceivable evidence which was supposed to be approached with caution;
6. That, the trial magistrate erred in law and fact in being adamant that the appellant's defence did not raise any reasonable doubt on the prosecution case; and
7. That, the trial magistrate erred in law and fact in convicting the appellant despite the charge not being proved beyond reasonable doubt

Hearing of this appeal proceeded by way of written submission. The appellant appeared in person, unrepresented, while the respondent was represented by Ms. Mary Lucas, learned State Attorney. The appellant, had nothing significant to add to his grounds of appeal as his submission went astray. He did not bother to submit on the grounds of appeal raised but proceeded to submit on failure to call a material witness and chances for an

adverse inference against the respondent, a point not listed in the memorandum of appeal.

In reply, Ms. Mary Lucas supported the appeal on the ground that, the key element in proving sexual offences is penetration but the same was not proved. All what the victim told the court is that, she was playing with other kids when the appellant took her to a well undressed her pants, took a knife from his pocket and inserted it in her private parts where she uses to urinate. She further narrated that, the appellant had a big knife which he used to cut her with and after finishing he returned it in the pocket. In the learned State Attorney's view, this evidence does not suffice the requirement of section 130 (4) of the Penal Code which obligates the prosecution to prove penetration of the male organ into the victim's vagina. In support she cited the case of **Makenji Kamura v Republic**, Criminal Appeal No. 30 of 2018 CAT at Mwanza (unreported) where it was held that rape is not proved by the presence of semen or bruises on the body of the victim. It is proved by penetration of a male organ into the victim's vagina, however slightly. She proceeded that, in the appeal at hand, the victim did not clearly say how the appellant's penis penetrated her. She said she was penetrated by "a knife" drawn from the appellant's pockets and returned in the pockets afterwards. Thus, it is not clear whether the word "knife" meant the appellant's penis or a real knife. The counsel argued that, the prosecution ought to have clarified this by posing more questions to PW2 to discern what she meant by "a knife" and how it looked like but it did not.

It was the learned State Attorney's further submission that, PW3 the medical doctor who examined the victim did not clearly elaborate what was the cause of penetration whether it is a blunt or sharp object which caused bruises in the inner parts of the victim's vagina and labia Majora. He concluded that, since the best evidence of rape is of the victim as held in the case of **Selemani Makumba Vs. R** TLR [2006] 379 the conviction cannot be sustained as the victim's evidence failed to prove penetration.

The learned State Attorney also challenged the manner in which the appellant was identified. She submitted that, PW1 testified that the victim managed to identify the appellant when he was paraded with other random people at the Police Station while PW4 the investigator's testimony said nothing about the identification parade and there was no further evidence to that. Based on the above, Ms. Lucas supported the appeal in its entirety. There was no rejoinder.

I have carefully considered the submission by the learned State Attorney, the grounds of the appeal and the lower court record placed before me and I am now ready to determine the appeal. As correctly submitted by the learned State Attorney, to prove the charges against the appellant two things ought to have been established during trial. *First,* that, there was rape and *second*, the culprit is none other than the appellant. For purposes of the first element, it had to be proved that there was penetration of the appellant's male organ into the victim's vagina as provided for under section 130(4) of the Penal Code which states thus:

130.-(4) For the purposes of proving the offence of rape-

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and

(b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent.

It is trite, and I need not cite any law that the duty to prove these elements rests solely on the prosecution and the standard of proof required by law is proof beyond reasonable doubt. It is similarly trite that, a conviction cannot be based on the weakness of the defence as it is not the duty of the accussed to prove his innocence but the duty of the prosecution to prove his guilty. That said, the question to be answered in this uncontested appeal is whether the prosecution discharged its duty to the required standard. Before dwelling on this question, it is pertinent to highlight that this being a first appeal, I am duty bound to critically scrutinize the record and form an opinion on this question irrespective of whether the appeal is contested or supported as in the present case. In the event of an affirmative answer the conviction will be sustained and in the case of a negative one the appeal shall be deemed to have succeeded and shall be allowed and the appellant be discharged forthwith.

It is also of interest to note that, the law assigns special weight to the evidence of the victim of rape and other sexual offence and regards it the

best evidence. Expounding this principle in case of **Jilala Justine Vs. The Rpublic**, Criminal Appeal No. 441 of 2017, the Court of Appeal observed that;

> "... It is a trite legal principle that, in sexual offences the best evidence is from the victim while other prosecution witness may give corroborative evidence. See: **Selemani Makumba v. The Republic**, [2006] T.L.R. 379, **Galus Kitaya v. The Republic**, Criminal Appeal No. 196 of 2015 and **Godi Kasenegala v. The Republic**, Criminal Appeal No. 10 of 2008 (both unreported). However, the victim's evidence will be relied upon to convict if the same is found credible..."

Having highlighted these points, I will now move to the evidence as appearing in the proceedings starting with the identity of the culprit. Testifying as PW1 the victim told the court that;

> "I remember one day the **accused person babu** came and find us, we were praying. He did took my hand and take me to the well (Kisima) where he undressed my pants. He took of his knife in the pocket and he did insert the same to me in my down part where I used to urinate. The accused knife is big and I felt pain. He did not give me anything.
>
> **Babu had a bag and big stick** when he took me and we were two of us at the well and after he finished putting his knife to me he returned it in the pocket.

His knife is big and he did cut me where I used to urinate and I was feeling pain and when my mother was trying to wash me all my body was paining especially where I urinate and Babu is the one who cut me." [emphasis added]

Much as it is understandable that due to her minor age and cultural limitations the victim might have difficulties in graphically describing what befell her and although there is a plethora of authorities to the effect that graphic description of rape is not necessarily required to prove rape, the circumstances of the present case dictate that, better particulars of the 'knife taken from the pocket and returned in the pocket afterwards' were required so as to rule out that PW1 did mean an ordinary knife. I say so because, the ordinary knife is capable of cutting and can be kept in the pocket. As correctly argued by the learned State Attorney, the prosecution abdicated it duty when it failed to probe the victim by posing questions which would have eliminated the reasonable doubts.

Assuming that PW1's statement as to the knife was sufficient to conclude that the said knife meant a penis and that the requirement for penetration section 130 (4) (a) of the Penal Code was, therefore, established would the conviction against the appellant be sustained? In my settled view, this question attracts a negative answer. According to PW1, the victim identified the said *babu* on the second day after the incident when PW1 and PW2 bumped into him as they were walking along. PW1 pointed at the said *babu* as the culprit. Following this information, the appellant was arrested, taken

to a police station and while there an identification parade was conducted through which the victim positively identified the appellant. Surprisingly, evidence as to identification parade was without corroboration from the investigation officer (PW4) or any other witness. None of the persons who conducted the parade was summoned as a witness. Hence, a question on whether the appellant was positively identified.

Moreover, as there was no demonstration that the accussed was prior known to the victim, it is assumed that he was a total stranger to her hence the reference *babu.* Besides, no description of the said '*babu*' was given prior to the arrest, the purported identification parade or dock identification. All these casts a serious doubt on reliability of PW2's visual identification of the appellant. In the case of **Godlisten Kimaro & Another Vs. The Republic**, Criminal Appeal No. 363 of 2014 CAT at Dodoma (unreported) the Court of Appeal had this to say;

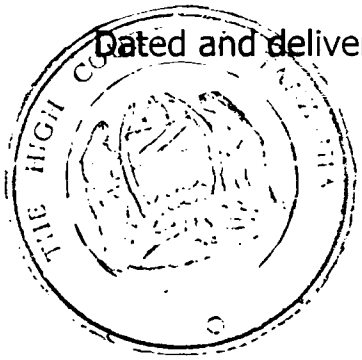
> "It is now settled that when a court of law relies on visual identification one of the important aspects to be considered is to give enough description of a culprit in terms of body build, complexion, size, attire, or any other peculiar body features to make the next person that comes across such a culprit to repeat those descriptions at his first report to the police on the crime."

In the absence of prior description of the appellant and considering the fact that the victim was only three years old and not so familiar with the appellant it is doubtful whether the identification was free of mistaken identification.

Based on the foregoing and without belaboring much on the remaining grounds of appeal, I agree with the appellant and the learned State Attorney that, the prosecution failed to prove its case. Accordingly, I allow the appeal, set aside the conviction and the sentence thereof and I proceed to order an immediate release of the appellant unless he held for another offence.

It is so ordered.

Dated and delivered at Moshi this 11th day of January, 2023.



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Signed by: J.L.MASABO

J.L. MASABO

JUDGE

11/01/ 2023