IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 148 OF 2022

(Arising from the decision of the District Court of Babati at Babati,

Criminal Case No. 6 of 2021)

ELISHA SAALI..... .... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

16/06/2023 & 13/07/2023

MWASEBA, J.

Elisha Saali, the appellant herein, was tried in the District Court of Babati at Babati with the offence of Rape Contrary to **Sections 130 (1) (2) (a) and 131 (1) of the Penal Code**, Cap 16 R.E 2019. It was alleged that, on the 17th day of December 2020, at Managa Village within Babati District in Manyara Region, the appellant did unlawfully have sexual intercourse with one H.M @ Bibi "D" (Name withheld to conceal her

identity) an old woman without her consent which is contrary to the law. In this case she will be referred to as PW1 or old woman interchangeably.

After full trial, the appellant was convicted as charged and was sentenced to serve thirty (30) years imprisonment. Aggrieved by the conviction and sentence passed by the District Court of Babati, the appellant appealed to this court based on the following grounds:

1. *That the trial court erred in law and facts by relying its conviction on the weak and contradicting evidence by the respondent.*
2. *That the trial court erred in law and facts by hearing the case in the absence of the Appellant un-procedurally contrary to the law.*
3. *That the trial court erred in law and facts for its failure to properly record and forthwith consider the evidence by the Appellant and its witnesses, ending up unjustly convicting and sentencing the appellant.*

Briefly, the prosecution case went as follows: on 17/12/2020 around 20:00hrs PW1 was sitting at the corridor of her house. The appellant went and pulled her down, covered her mouth, undressed her, then removed his trousers and inserted his penis into the vagina of the old woman. PW1 shouted for help, then her daughter (PW2) went and saw

the appellant raping the old woman (her mother). PW2 asked the appellant what he was doing then he ran away. Thereafter they notified the chairperson of Nakwa Surb, who said he would go to the crime scene the next day as it was already night. They found a militia who arrested the appellant on the next day and took him to Babati Police Station. The old woman (PW1) was taken to the police station, where she was given a PF3 and went to Mrara Hospital. Afterward, the appellant was arraigned before the District Court of Babati.

When put to his defence, the appellant denied having committed the offence. His evidence was to the effect that on 18/12/2021, on his way from his job, he met with Herman Mtuka, militia man, who arrested him without due cause. Thereafter a fabricated case of rape against him was filed. In the end, the appellant was convicted and sentenced as above, hence this appeal.

At the hearing of this appeal, the appellant appeared in person, unrepresented. On the other side, the respondent/Republic had the legal service of Ms. Eunice Makala, learned State Attorney. With the leave of the court and consensus of the parties, the hearing of the appeal was conducted by way of written submissions.

Submitting in support of the appeal on the 1st ground, the appellant averred that the evidence of the prosecution was marred with the following contradictions. **First,** it was not clear as to when the offence was committed; while PW1 and PW2 said it was committed on 17/12/2020, PW3 said, on 18/12/2021 he was assigned the file at hand to investigate. The defence evidence was adduced that the appellant was arrested on 18/12/2021 hence there are variance as to the date the incident occurred. He added that as no amendment was effected to the chargesheet then there was a violation of **Section 234 (1) Criminal Procedure Act**, Cap 20 R.E 2019. He complained that the magistrate failed to see that he was arrested a year after the commission of the offence. The act could have helped to find the appellant not guilty of the offence.

Second, he submitted that there was a weak and poor identification of the appellant by PW1 and PW2 as they never described the appellant's appearance and the type of the clothes won on the material date apart from mentioning his name. **Lastly,** he submitted that the age of the victim was not proved by the prosecution. He added that there was no official statement nor witnesses, or documentation to prove the age of the victim. He referred this court to the case of **Robert Andondile**

Komba vs The Republic, Criminal Appeal No. 465 of 2017 to support his arguments.

Responding to this ground, Ms. Makala submitted that PW1 and PW2 made it clear that the incident occurred on 17/12/2020. The allegation that he was arrested on 18/12/2021 is baseless. Regarding the issue of identification, it was her submission that PW1 and PW2 were able to identify the appellant due to the Solar light in that area. More to that, they know the appellant since his childhood. She referred this court to the case of **Waziri Amani vs Republic**, (1980) TLR No. 250 in which the court stated several conditions to be considered for a favourable visual identification in which among other things are type of light used in identifying, the intensity of the light, the distance between the culprit and the victim, and whether he knew the appellant before the incident. She was further of the stand that the identification in the case at hand was water tight. She finally responded to the issue of age of the victim that PW1 clearly stated that she was 63 years old and that was enough as there was no need to prove her age. So she was of the view that the first ground has no merit.

Submitting on the 2nd ground of appeal, the appellant complained that the case was heard in his absentia which prejudiced his right to be

heard and to cross-examine the witnesses. He elaborated further that the trial court failed to recognize his evidence that he did not jump bail but he fell sick that's why he failed to attend the hearing of the case.

Responding to the 2nd ground of appeal, Ms. Makala argued that the case was heard under the proper procedure under **Section 226 (1) of the CPA**. She clarified that after the appellant being bailed out on 3/6/2021, he absconded bail until when he was arrested and arraigned in court on 14/02/2022. The appellant was asked as to why he absconded he gave reasons which did not hold water to court so the court proceeded with the hearing of the remaining witnesses. So, there was no violation of the above provision.

On the last ground of appeal, the appellant submitted that his evidence was not considered, which is contrary to **Section 312 (2) of the CPA**.

Responding to this ground, Ms. Makala submitted that page 3 of the trial court's judgment proves that the evidence of the appellant and his witnesses were considered by the trial court, and the evidence was properly analysed. He supported her arguments with the case of **Athuman Musa vs Republic**, Criminal Appeal No. 4 of 2020 CAT sitting at Kigoma.

In a brief rejoinder, the appellant reiterated what he already submitted in chief and added that the charge sheet did not disclose the provision which proved punishment. Hence, he was not aware of the nature of the offence facing him.

Having heard both parties and visiting the records of the trial court, this court will now determine the issue of whether the appeal has merit or not.

Starting with the 1st ground, the appellant complained that the prosecution evidence was weak and marred with contradictions. The said contradiction was based on the date of the incident and the date he was arrested. While PW1 and PW2 said the incident occurred on 17/12/2020, the appellant alleged that he was arrested on 18/12/2021 the date PW3 (H4222 PC Fadhili) stated to be assigned the file for investigation which makes a difference of one year from the date of the incident. Ms. Makala admitted the said contradiction and was of the view that it is minor and does not go to the root of the case, as the victim stated that she was raped on 17/12/2020. Having revisited the records of the trial court, I concur with the argument of Ms. Makala that this contradiction did not go to the root of the case as the charge sheet said the incident occurred on 17/12/2020 and it was the same date

mentioned by the victim (PW1) and PW2. Further to that, the record shows that on 7/1/2021 the appellant was before the trial court for plea taking. So, the statement made by PW3 that he was assigned to investigate the file on 18/12/2021 could have been just a slip of tongue and not otherwise. It should be noted that contradictions by witnesses cannot be avoided save that they should not go to the root of the case. The same was held in the case of **Twalaha Ally Hassan vs The Republic**, Criminal Appeal No. 127 of 2019 (CAT-reported at Tanzlii) that:

> "*It is germane to observe at this point that contradictions by any particular witness or among witnesses cannot be avoided in any particular case.*"

See also the case of **Dickson Elia Nsamba Shapwata vs Republic**, Criminal Appeal No. 92 of 2007 (unreported) and **Evarist Kachembeho & Others vs Republic** [1978] LRT.

As for the issue of identification the appellant complaints that he was not properly identified as PW1 and PW2 did not give description of how they identified him. Ms. Makala argued that the appellant was properly identified due to the solar light and PW1 and PW2 knew the victim since his childhood. In the present case the case against the appellant is rested entirely on the visual identification evidence of PW1 and PW2.

The law on this type of evidence is well settled that it is of the weakest character and the courts should only act on it when fully satisfied that it is absolutely watertight. See the case of **Waziri Amani vs Republic** (supra). In this case the PW1 and PW2 stated that they know the appellant since his childhood and that at the crime scene there was solar light. The court has held several times that even if a victim knew the accused person, a mistake of identity might occur. As it was held in the case of **Shamir s/o John vs Republic**, Criminal Appeal No. 166 of 2004 (Unreported) cited with approval in the case of **Philimon Jumanne Agala @ 34 vs Republic**, Criminal Appeal No. 187 of 2015 that:

> "*The Court has already prescribed in sufficient detail the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the observation and the subsequent identification to the police?* ***Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance?***

> *... Finally, recognition may be more reliable than identification of a stranger,* ***but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made.***"(Emphasis added)

Being guided by the above authority, there is no dispute that in this case the offence was committed at night. PW1 and PW2 stated that there was solar light at the crime scene and that they know the appellant since his childhood. PW1 went further to state that the incident took almost 15 minutes. However, both of them did not give descriptions as to the appearance of the appellant which enabled the militia (PW4) to arrested him. In his evidence, PW4 stated that he was asked by mama Selima who told him that the PW1 was raped by the accused so he was supposed to arrest him. The record is silence as to who is mama Selima and how did she become aware that the appellant raped PW1. There is no any description given to the arresting officer by the victim to enable him to arrest the right culprit. Thus, I am inclined to agree with the appellant that PW1 and PW2 failed to describe the appellant's appearance hence the salient factors to avoid the occurrence of mistake identification as settled in the case of **Shamir s/o John vs Republic**

(Supra) was not met. Therefore, the first ground has merit as far as the identification of the appellant is concerned.

So long as the first ground disposes of this appeal, I find no need to fumble on the remaining grounds of appeal as they will not add anything to verdict of this appeal.

For the fore stated reasons, this court finds the appeal merit-based on the 1st ground of appeal. Thus, the same is hereby allowed. The conviction and sentence imposed to the appellant are quashed and set aside. The appellant has to be set at liberty unless otherwise lawfully held.

Ordered accordingly.

DATED at **ARUSHA** this 13th day of July, 2023.

N.R. MWASEBA

JUDGE