THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

Criminal APPEAL NO 67 OF 2022

(Originating Tandahimba District Court at Tandahimba in Criminal Case No. 32 of 2022)

JABIRI MBOKO NAMWETA .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

5th and 30th June 2023

LALTAIKA, J.

The appellant herein **JABIRI MBOKO NAMWETA** was arraigned in the District Court of Tandahimba at Tandahimba charged with Rape c/s 130 (1), (2) (a) and 131(1) of the Penal Code Cap 16 RE 2019. It the prosecution's story that on the 2nd of March 2022 in the night hours at Pachani Village, Tandahimba District the appellant raped ADL against her will. The victim was **an old blind woman.**

When the charge was read over and explained to the appellant (then accused) he denied wrongdoing. The trial court entered a plea of not guilty and proceeded to conduct a full trial. To prove the allegations, the prosecution fronted a total of 4 witnesses. The appellant was found with a case to answer and placed to enter his defence. The defence side had only one witness, the appellant. Having been convinced that the offence was proved beyond reasonable doubt, the trial court convicted the appellant as charged and sentenced him to 30 years imprisonment.

Dissatisfied, the appellant has appealed to this court on five grounds as follows:

1. *The learned trial Magistrate Court erred in law and fact to convict and sentence the appellant while the prosecution side failed to conduct D.N.A, test in order to prove their offence against appellant.*
2. *That, the trial Magistrate Court erred in law and fact by convicting and sentencing the Appellant without considering how PW1 (victim) saw appellant and knew while she is blind.*
3. *There was unfair trial to convicting and sentence the appellant while the incident occurred at night, how PW3 knew appellant while event took place at night.*
4. *That the learned trial Magistrate Court erred both in law and fact by convicting and sentence the appellant while the prosecution case failed to prove their charge beyond reasonable doubts as required by law.*
5. *That the learned trial Magistrate Court erred grossly in law and fact by convicting and sentencing the appellant without considering the defense witness of the appellant.*

When the appeal was called on for hearing the appellant appeared in person unrepresented. The respondent Republic, on the other hand, enjoyed skillful services of **Ms. Atuganile Nsajigwa, learned State Attorney**. The appellant, not being learned in law, had not any substantive addition to make to his expounded grounds of appeal. This paved the way for Ms.

Nsajigwa. The appellant, however, reserved his right to a rejoinder upon being informed of his right to do so.

Taking the podium, Ms. Nsajigwa declared that the respondent was totally against the appeal and wished the trial court's conviction and sentence would be upheld.

Ms. Nsajigwa stated that the present appeal was based on five grounds. She mentioned that she would address the first, second, third, and fourth grounds collectively, and the fifth ground separately. The first group of grounds focused on the **complaint that the case had not been proven beyond** reasonable doubt.

Ms. Nsajigwa explained that the victim in this case was an elderly blind woman. On the night in question, the appellant had entered the victim's house and raped her. The victim raised an alarm, and PW2 and PW3 apprehended the appellant as he was leaving the house, as stated on page 6 of the lower court's proceedings. Although the victim couldn't see the appellant's face due to her blindness, PW2 and PW3 witnessed him running away from the victim's house. They were fellow villagers and night guards on shift that day (locally known as "*sungungu*"). As lack would have it, they were sitting outside the victim's house after their patrol, as described on pages 7 to 9 of the proceedings.

Ms. Nsajigwa mentioned that PW2 and PW3 were able to see the victim because they heard her alarm. As they approached the victim's house, they saw the appellant fleeing. They chased after him and caught him. Initially, the appellant denied committing any offense, but later he admitted to raping

the victim and pleaded to be set free, as indicated on page 7 of the proceedings. The prosecution presented a medical doctor (PW4) who examined the victim and found bruises and semen in her private parts. The doctor submitted PF3 as exhibit P1. Referring to the case of **GODI KASENEGALA V. REPUBLIC CRIM APPEAL NO 271 OF 2006** CAT, Iringa, Ms. Nsajigwa emphasized the requirement of proving penetration in cases of rape.

The learned State Attorney argued that the evidence presented by PW4, the medical doctor, clearly established that the victim had been sexually penetrated, thus proving the case beyond a reasonable doubt.

Regarding the appellant's claim that the prosecution failed to conduct DNA profiling to prove the offense, Ms. Nsajigwa stated that it was not a legal requirement. Citing the case of **AMANI ALLY @JOKA V. REPUBLIC CRIM APP. 353 OF 2019 CAT IRINGA**, she highlighted that there was no legal obligation to introduce DNA or sexually transmitted disease evidence to corroborate the victim's medical results.

After thoroughly examining the first four grounds, Ms. Nsajigwa asserted that the prosecution had proven the case beyond reasonable doubt and urged the dismissal of those grounds.

Moving on to the fifth ground, she pointed out that the District Court had considered the defense evidence, as stated on **page 10 of the impugned judgment.**

Lastly, Ms. Nsajigwa emphasized the cardinal principle of criminal law, which places the burden of proof on the prosecution to establish the case

beyond reasonable doubt. She stated that there was no duty on the accused to prove innocence. She concluded by praying for the dismissal of the appeal and for the court to uphold the conviction and sentence of the Tandahimba District Court, in order to serve as a lesson to other youths.

In rejoinder, the appellant requested the court to disregard the lawyer's submission, stating that the matter was fabricated. The appellant claimed to have been in a contentious relationship with the victim due to land conflicts and asserted that they had shared their side of the story with the trial court, but it was not heard.

I have dispassionately considered the rival submissions and carefully examined the lower court's records. The prosecution case in the matter at hand is very simple, the appellant had raped an old blind woman, member of his own village, totally against morality of the village, our country and indeed in violation of the law as cited by the learned State Attorney. I have examined the evidence adduced in the lower court. It is rather sad that the appellant took advantage of an otherwise helpless old lady.

The first four grounds of appeal as correctly grouped by the learned State Attorney, faulted proof of the prosecution case at the required standard namely beyond reasonable doubt. I am alive to the legal position as stated in **MAGENDO PAUL AND ANOTHER V. REPUBLIC [1993] TLR 219** thus:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."*

The victim in this case is a blind old woman who happened to be living alone in a house in Pachani Village. This makes the whole matter rather unique. It is obvious that the blind lady who had been sexually abused would not have been able to tell who the perpetrator was. I do not want to sound condemnatory but there are chances that some other evil people in the village (the appellant inclusive) had taken advantage of the helpless blind lady before to further their lustful evil. As they say in Kiswahili "Za Mwizi ni Arobani" the days were numbered.

A critical examination of the evidence adduced in the lower court leaves no doubt that there were no eyewitnesses. Circumstantial evidence is at play here. The old lady raised an alarm. The *sungsungu* happened to be nearby. As they approached to respond to the alarm, the appellant was seen trying to take to his heels "kuchanja mbuga". He was seen, apprehended and the rest is history.

In my opinion these circumstances link him up neatly with the offence. This is one of those scenarios where circumstantial evidence results into Mathematical precision. Nevertheless, I will still consider the rest of the evidence including those that are specific to the offence of rape. In **SAID BAKARI V. REPUBLIC, CRIMINAL APPEAL NO. 422 OF 2013** (unreported), the Court stated that:

> *"In determining a case centered on circumstantial evidence, the proper approach by a trial court is to critically consider and weigh all circumstances established by the evidence in their totality, and not to dissect and consider it piecemeal or in cubicles of evidence or circumstances."*

Having linked the appellant to the offence albeit circumstantially, the prosecution proceeded to prove that there was penetration. In the case of **GODI KASENEGALA V. REPUBLIC (supra)** cited by Ms. Nsajigwa, the Court of Appeal of Tanzania stated that in a rape case the element of penetration must be proved beyond reasonable doubt, however slightest that penetration was. I have examined the evidence PW4, and I agree with Ms. Nsajigwa that the interpretation is that there was penetration.

Without going into unnecessary legal jargon rape is defined under section 130(1), (2) and (3) of the Penal Code [Cap.16 R.E. 2022]. It is originally a common law offence defined as "Unlawful carnal knowledge of a woman without her consent by force, fear or fraud." The prosecution must prove unlawful carnal knowledge in the form of penile penetration of the vagina. As alluded to above, penetration, however slight, is sufficient.

In case the victim is an adult lack of consent is also required. In the case at hand the appellant's attempt to run away made it totally unreasonable to consider consent. Legally, anyone under the influenced of drink, drugs, sleep, age, or mental handicap is considered incapable of giving consent. The offence of rape as per the cited provisions of the law has, therefore, in my considered opinion, been proved beyond reasonable doubt.

I am inclined to emphasize the argument by Ms. Nsajigwa on DNA. I agree. It is not a legal requirement in our law. In the case **OF MUHIBU SEFU MOHAMED VS HAWA HEMED MALIVATA** (PC. Civil Appeal No. 1 of 2022) [2022] TZHC 15291 (19 December 2022) This court stated as follows on DNA evidence:

> *"In Tanzania we are yet to reach a stage where DNA is considered the panacea of all our problems. As a form of expert evidence, DNA results are merely of persuasive value in a court of law. More importantly, our courts should not project a picture that DNA technology has taken over all other forms of evidence in criminal and civil matters. That would be stretching forensics too far and criminalistics in general, too far."*

I should add that the appellant's attempt to invoke land conflicts between him and the victim are, unfortunately, baseless. These are two different matters in this court and proof of one does not in any way preclude another. As I windup I must say that I see no reason for the village *sungusungu* to choose to make the appellant carry such a heavy cross of raping the victim, an old blind lady. Even in his defence, the appellant never invoked such a possibility but rather chose to try his lack by bringing land up land matters. I see no connection.

In the upshot, the appeal **is hereby dismissed in its entirety** for lack of merit.

It is so ordered.

E.I. LALTAIKA
JUDGE
30/6/2023

This Judgement is delivered under my hand and the seal of this court this 30th day of June 2023 in the presence of Ms. Atuganile Nsajigwa, learned State Attorney and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
30.06.2023

Court:

The right to appeal to the court of appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
30.06.2023