THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 42 OF 2023

(Originating from the District Court of Lindi at Lindi
in Criminal Case No. 1 of 2023)

SAID MOHAMED KILEMBA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

19th & 31st July 2023

LALTAIKA, J.

The appellant herein, **SAID MOHAMED KILEMBA**, was arraigned in court charged with Rape c/s 130(1) and (2)(a) and 131(1) of the Penal Code Cap 16 RE 2022. It was alleged by the prosecution that on 18/1/2023 at Chikonji Village in Lindi the appellant (then accused) raped a woman (adult) against her will. When the charge was read out and explained to the appellant, he pleaded not guilty. This necessitated conducting a full trial

whereupon, in order to prove the allegations, the prosecution lined up four witnesses.

Having been convinced that the prosecution had left no stone unturned in proving the case at the required standard, the trial court convicted the appellant as charged and sentenced him to seven years imprisonment and six strokes. The court also ordered the appellant to pay a compensation to the tune of TZS 500,000/= to the victim.

The appellant is dissatisfied. He has appealed to this court by way of a petition of appeal. The petition of appeal dated the **26th day of May 2023** contains ten (10) grounds as of appeal as paraphrased bellow:

1. *That the trial court erred in law by convicting the appellant while the prosecution failed to call crucial/interest witness (Doctor of Chikonji Health Center) in order to prove the charges against the appellant.*
2. *That the trial court erred in point of law by not complying with the requirement of section 210(3) of the CPA while recording the evidence of PW3 and PW4.*
3. *That the trial court erred in failing to appraise objectively credibility and reliability of the evidence of PW1 as there was no circumstantial evidence to prove that the alleged victim washed her private parts after the alleged incidence.*
4. *That the trial court failed its duty to evaluate the evidence on the record hence arriving at erroneous decision.*
5. *That the trial court erred in convicting the appellant by considering the evidence of PW1, PW2 and PW4 as PW3 and PW4 gave "hearsay" evidence.*
6. *That the trial court erred in law by convicting the appellant basing on incredible, unreliable and uncorroborated evidence [of] the prosecution witnesses.*
7. *That the trial court erred in law in convicting the appellant while relying on the weakness of his defense evidence without taking into account in accordance to (sic!) a well settled law the accused person can only be convicted of an offence on the basis of strength of the prosecution case and not the weakness of the defense case.*
8. *That the trial court erred in law in convicting the appellant in a case that it failed to effectively consider the requirement of section 235(1) of the CPA Cap 20 RE 2022.*

9. *That the trial court erred in law in convicting the appellant in a case whereby the prosecution failed to comply with section 3(2) of the Tanzania Evidence Act (TEA).*
10. *That the trial court erred in holding that the prosecution proved its case beyond reasonable doubt against the appellant.*

On the 17th day of July 2023, the appellant filed four (4) additional grounds of appeal. For reasons that will be clearer shortly, I choose not to reproduce the additional grounds.

When the appeal was called on for hearing on the 19th day of July 2023, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, enjoyed skillful services of **Mr. Melchior Hurubano**, learned State Attorney.

As expected, the appellant did not have much to add to his grounds of appeal. He requested that the learned State Attorney proceeds to tell his side of the story. The appellant, however, reserved his right to add a word or two after the learned State Attorney had spoked just in case such a need arose.

Taking up the podium, Mr. Hurubano announced that the respondent was in full support of the trial court's conviction and sentence. He proceeded to counter the grounds of appeal as summarized in the next paragraphs.

Mr. Hurubano stated that he would like to address the following points: the 1st, 3rd, 6th, 5th, 7th, 9th, 10th, and all additional grounds, as they aimed at faulting the proof of the case beyond reasonable doubt. He stated that the republic strongly believes these grounds hold no merit. According to the learned State Attorney, the prosecution was only required

to prove two elements, namely: The presence of penetration and Lack of consent

On the first point, Mr. Hurubano pointed out that penetration was proven by PW1, the victim. He referred to **pages 4-7 of the proceedings**, where the victim explained that on the eventful day at 11 AM, she was on her way to the shamba for farming. At 11:45, the appellant approached her from behind, throttled her, and forced her to the ground. He threatened her not to raise an alarm, or else she would be killed. He then took her to a nearby bush, removed ***her kitenge*** and underpants, partially lowered his trousers to his knees, and inserted his penis into the victim's vagina.

Based on PW1's statement, which was corroborated by PW2, a clinical officer at Sokoine Hospital, who explained that after examining the victim, he found nothing conclusive. He stated that the inability to find evidence was likely due to the victim taking a shower after the incident.

Mr. Hurubano argued that PW1's statement was sufficient to prove the element of penetration, citing Section **127(6) of the Evidence Act Cap 6 RE 2022,** which states that in sexual offenses, the independent evidence of the victim is crucial. He also referenced the case of **SELEMANI MAUMBA v. REPUBLIC** [2006] TLR 79, which emphasized the importance of victim testimony in such cases.

On **the second element, namely lack consent**, Mr. Hurubano asserted that this element was proven by the victim herself. He referred to page 5 of the proceedings, where she explained how the appellant forced her into the act. Despite the appellant trying to conceal his identity by making

the victim cover her face with a kitenge, he was clearly identified by the victim and witnessed by PW3 and PW4, who testified that the appellant confessed to raping the victim when brought before local *mtaa* leaders. Mr. Hurubano concluded that this indicated that the second element was also established beyond reasonable doubt.

Moving on to the second ground of appeal, Mr. Hurubano clarified that the appellant's complaint was about compliance with section **210(3) of the Criminal Procedure Act Cap 20 RE 2022** during the recording of the evidence of PW3 and PW4. He invited the court to refer to the original proceedings and expressed his opinion that indeed, such a section was not complied with.

However, Mr. Hurubano reasoned, even if that were the case, the defect could be cured **under section 388 of the CPA**, citing the case of **RICHARD MEBOLOKINI v. REPUBLIC** [2000] TLR 90.

Regarding the fourth ground, which alleged the failure of the lower court to conduct an evaluation of the evidence, Mr. Hurubano strongly believed that this ground had no merit and should be dismissed. He referred to pages 20-23 of the trial court's proceedings, where he argued that the trial court had already evaluated the evidence sufficiently.

Nevertheless, the learned State Attorney acknowledged that if this court found otherwise, **it had the power to conduct a reevaluation** of the evidence, citing several cases, including **LEONARD MWANASHOKA v. R.** Crim App 226 of 2014.

On the eighth ground, the appellant complained that the trial court did not take into consideration section 235 of the Criminal Procedure Act (Supra). Mr. Hurubano disagreed with this complaint, asserting that the trial court had indeed complied with the section by hearing both sides of the story, evaluating them thoroughly, and considering the defense presented by the accused. Consequently, he strongly believed that the appeal had no merit and should be dismissed in its entirety.

The appellant, on his part, addressed the Court expressing his grievances with the lower court. He stated that he felt unjustly treated, referring to the testimony of PW1, who had told the trial court that he raped her early in the dark morning from behind. The appellant questioned how she could have identified him under such circumstances.

He raised an issue concerning the prosecution witnesses, particularly PW2, who supposedly examined the victim. According to the appellant, PW2 informed the court that he conducted both physical and internal examinations on the victim but found no indication of rape. Furthermore, the prosecutor confirmed that there were no signs of rape as per PW2's evidence.

The appellant expected the clinician (PW2) to be a crucial witness since there were no eyewitnesses. He confronted PW2 about the victim's alleged swollen eye, but PW2 denied having any information on it. The appellant argued that PW1 did not inform the doctor about the eye issue.

Additionally, the appellant denied confessing in the village, contrary to PW3 VEO's testimony. He asked for written proof, but PW3 claimed it was not his responsibility to interrogate accused individuals.

Regarding the shoes allegedly found with the appellant, the trial magistrate mentioned that this fact convinced her of his guilt. However, the appellant contested this, stating that the shoes were not presented in court as evidence, even though it was claimed that he was found with them. He also questioned the credibility of PW4, the *mgambo* who was ordered by the VEO to arrest him, as he was uncertain if PW4 was a genuine mgambo.

Concluding his statement, the appellant firmly believed that the case against him was not proven, and he prayed that the court would set him free if it found that the case was not proved beyond a reasonable doubt.

I have **dispassionately considered** the grounds of appeal, submission by the learned State Attorney and the court records. I must say straightaway that the trial court allowed itself to slip into some rather obvious errors. There were too many gaps in the prosecution case that should have been resolved in the interest of the appellant. These include questionable identification of the appellant at dawn, whether the victim indeed took shower while she intended to report the appellant to the authorities and more importantly the manner in which the appellant was arrested in the village.

It appears that the learned Magistrate was bombarded and completely overwhelmed with too much information that was brought to her attention by the prosecution. Issues such as shoes of the victims allegedly found with

the appellant and alleged confession before the Village Executive Officer added little if any value to the charge for rape. Unfortunately, in court, it is the quality, not quantity of evidence that matters. In the case of **MWITA KIGUMBE MWITA & ANOTHER V. REPUBLIC**, Criminal Appeal No. 63 of 2015 (unreported) the Court of Appeal of Tanzania stated:

> *"In each case, the court looks for quality, not quantity of the evidence placed before it. The best test for the quality of any evidence is its credibility..."*

In my opinion the trial court should have weighed the evidence of the victim more rigorously. As an adult, she should have been able to explain the circumstances that led her to return home, take shower and only much later report on the alleged rape to the village authorities. I tend to think that there might have been some information hidden including possibility that there was consent but only later did the victim change her narrative. Be it as it may, in the case of **NATHANIEL ALPHONCE MAPUNDA AND BENJAMIN MAPUNDA V. R. TLR** 395 2006 the Court of Appeal of Tanzania had this to say regarding uncritical acceptable of evidence of the victim of rape:

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her testimony should pass the test of truthfulness."*

The learned trial Magistrate's analysis on the essential elements of the offence of rape especially penetration is detailed enough but unfortunately attempts should have been made to go beyond ticking the boxes. The unconclusive nature of the evidence of the medical doctor should have been

a source of doubt. Likewise, the time in which the purported rape took place that is to say shortly after 11:00 AM allegedly when the victim was going to the *shamba* on her own raise doubts not only on credibility of the witness but also whether the appellant was unquestionably identified. In the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219 the Court of Appeal of Tanzania held that

> *"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."*

As alluded to above, the present case is full of gaps that were left unfilled by the prosecution. In the presence of such a cloud of doubts, it cannot be said that the prosecution case was proved beyond reasonable doubt as required by law.

In the upshot, I allow the appeal. I quash conviction and set aside the sentence of the trial court. Further, I order that **SAID MOHAMED KILEMBA** be released from prison forthwith unless he is being held for another lawful cause.

It is so ordered.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
31.07.2023

Court

Judgment delivered under my hand and the seal of this court this 31st day of July 2023 in the presence of Ms. Atuganile Nsajigwa, learned State Attorney for the respondent and the appellant who has appeared in person unrepresented.

E.I. LALTAIKA
JUDGE
31.07.2023

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
31.07.2023