THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 5 OF 2023

(Originating from the District Court of Mtwara at Mtwara in Criminal Case No. 86 of 2021)

JABIRI HAMISI BAKARI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

03/05 & 31/07/ 2023

LALTAIKA, J.

The appellant herein, **JABIRI HAMISI BAKARI** was arraigned in the District Court of Mtwara at Mtwara charged with five counts *to wit*: 1. Kidnapping from Lawful Guardianship c/s 245 and 247 of the Penal Code [Cap 16 RE 2019] 2. Rape c/s 130(1) (2) (e) and 131 (3) of the Penal Code Cap 16 RE 2019] 3. Unnatural Offence c/s 154(1) (a) and (2) of the Penal Code [Cap 16 R.E. 2019] 4. Rape c/s 130(1) (2) (e) and 131 (3) of the Penal Code Cap 16 RE 2019] 5th Unnatural Offence c/s 154(1) (a) and (2) of the Penal Code [Cap 16 R.E. 2019].

According to the prosecution, these offences were committed against a girlchild (herein after referred to as EFM to hide her identity for privacy and compliance with the law and practice for protection of the dignity of a child). The incidences allegedly took place on various dates in Mtwara and Lindi regions.

When the charges were 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. Having been convinced that the prosecution case had been proved beyond reasonable doubt, the learned Magistrate convicted the appellant as charged. He proceeded to sentence him as follows: 1st count: one year in jail. 2nd count: life imprisonment 3rd count: life imprisonment. 4th Count: life imprisonment and for the 5th count; life imprisonment. All sentences were ordered to run concurrently.

The appellant is vehemently protesting against both conviction and the sentences. He has appealed to this court by way of a petition of appeal containing ten grounds. I choose not to reproduce the grounds.

When the appeal was called on for hearing on the 31st of May 2023 the appellant appeared in person, unrepresented. The respondent Republic, on the other hand was represented by **Gideon Magesa and Melchior Hurubano**, learned State Attorneys. The appellant, not being learned in law, had nothing substantive to add to his grounds of appeal. However, he reserved his right to a rejoinder after attending to the submission by the learned State Attorney.

Mr. Magesa took the podium announcing outrightly that the respondent Republic fully supported the conviction and sentence of the lower

court. The learned State Attorney stated that the appellant filed the appeal via a Petition of Appeal on 1st March 2023, containing ten grounds of appeal. He informed the court that to streamline the grounds of appeal, he proposed paraphrasing them into six grounds, as many of them were repetitive.

He summarized the grounds of appeal as follows: 1. Jurisdiction: The trial court proceeded without jurisdiction. 2. Lack of Evidence: PW5 failed to explain that he possessed skills in collecting DNA samples. 3. Contradictory Evidence: The evidence of PW6 (medical doctor) was contradictory and inconsistent. 4. Chain of Custody: Grounds 5, 6, 7, and 8 were related to chain of custody issues with respect to physical exhibits. 5. Insufficient Proof: The prosecution failed to prove the case beyond reasonable doubt, as raised in grounds 9 and 10. 6. Complaint about the Sentence.

Mr. Magesa then proceeded to respond to each ground of appeal. **On jurisdiction**, he argued that the District Court of Mtwara had jurisdiction over the matter as the alleged offence took place within its area, as per the evidence of PW1. He cited **sections 180 and 181** of the **Criminal Procedure Act Cap 20 RE 2019** in support of his position.

On lack of evidence: The learned State Attorney countered the claim that PW5 did not possess the skills to collect DNA samples, stating that PW5, an inspector of police, mentioned his expertise in taking DNA samples on page 22 of the trial records. He referred to the **Human DNA Regulation Act No 8 of 2009** to support the qualifications of a sampling officer and stated that PW5's evidence was not challenged during cross-examination.

With regards to contradictory evidence, Mr. Magesa defended the testimony of PW6 (assistant medical officer) and stated that there was no

contradiction in his evidence regarding the examination of the victim and the lab examination. He emphasized that bruises cannot be seen in a lab examination, and PW6's expert opinion should not be expected to provide details about the object that caused the injuries.

Moving on to the complaint about chain of custody, Mr. Magesa asserted that the chain of custody for the exhibits was maintained, as evidenced by PW1's seizure of the items and the paper trail documented in Exhibit P5. He acknowledged that PW8 did not mention receiving the exhibit but argued that the paper trail sufficiently showed the transfer of the evidence.

Mr. Magesa referred to the case of **ISSA HASSAN UKI CRIM. APPEAL NO** 129 of 2017 CAT, Mtwara, and **GITABEKA GIYAYA V. R** Crim App No 44 of 2020 (pp 17 and 18), CAT, Arusha, to support his argument that the traditional strict compliance with the chain of custody has been relaxed in some cases.

On proof of the prosecution case beyond reasonable doubt, Mr. Magesa stated that he believed the evidence presented before the trial court was strong and sufficient to prove the case beyond reasonable doubt. He referenced the case of **SELEMANI MAKUMBA V. R. [2006] TLR 379 CAT**, where it was established that even the evidence of a single witness could be enough for a conviction in sexual offence cases. He also referred to the case of **WOODMINGTON V DPP (1935)** AC 462, in which the House of Lords emphasized that the burden of proof always rests on the prosecution and never shifts to the accused.

Although there is no specific legal definition of "beyond reasonable doubt," Mr. Magesa reasoned, in the case of **MAGENDO PAUL AND ANOTHER V. R.** [1994] TLR 219, the Court of Appeal of Tanzania had explained that for a case to be considered proved beyond reasonable doubt, the evidence must be strong enough to leave only a remote possibility in the accused person's favor, which can be easily dismissed.

Mr. Magesa opined that the prosecution's evidence was sufficient, including the testimony of PW1, who described the kidnapping, rape, and sodomy of the victim, and PW2, the victim's father, who confirmed her age and the circumstances of her disappearance. He also highlighted the evidence of PW4, the former OC-CID of Mtwara, who presented the accused's cautioned statement (Exhibit P1) without any objection from the appellant. Additionally, he mentioned PW9, who identified the accused at the scene of the crime. These pieces of evidence corroborated PW1's account.

The evidence of PW10 (the chemist who conducted the DNA analysis) and PW5 (Insp Oscar who collected the DNA sample) pointed directly to the accused as being at the scene of the crime. Mr. Magesa argued that the questions raised by the appellant did not create reasonable doubt, and the credibility of the prosecution witnesses was intact. Regarding any contradictions in the evidence, Mr. Magesa considered them to be minor and attributed them to the fallibility of human memory. He invited the court to refer to the case of **GITABEKA GIYAYA** (supra) at p. 9.

Addressing the appellant's complaint about the exhibit keeper not being called to court, Mr. Magesa cited Section 143 of the Evidence Act, emphasizing that the number of witnesses is immaterial. He stated that **the**

truth is not determined by a majority of votes, and the testimony of a single, credible witness can establish a case beyond reasonable doubt. He referred to the case of William **NTUMBI V. DPP CRIM APPEAL** No 320 of 2019 as an authority that supports this principle.

Finally, regarding the penetration claim made by PW1, Mr. Magesa acknowledged that it was not expressly stated. He referenced the case of **HASSAN BAKARI @MAMAJICHO V. R. CRIMINAL APPEAL** No 103 of 2012, where the Court of Appeal of Tanzania explained that sometimes children do not specifically refer to private parts by their names.

Mr. Magesa stated that the last **complaint was on sentence**. He mentioned that for the 1st, 3rd, and 5th counts, the court was justified in imposing the sentence of life imprisonment and seven years for kidnapping. He referred to the Memorandum of Agreed Facts (p7) where the appellant agreed that he was **18 years old. According to section 131(2) of the Penal Code,** he was supposed to be caned and not imprisoned for rape. However, he expressed the opinion that the sentence was correct. He further explained that in other cases before the same magistrate, the appellant denied his age. The court made an inquiry by calling the appellant's grandmother, **Stella Anton, to testify on 21/10/2021**. She stated that the appellant was born in 1996. The court considered this testimony and concluded that the sentence was appropriate. In conclusion, he stated that the respondent Republic was fortified in their belief that the appeal has no merit, and it should be dismissed.

The appellant, on his part, stated that firstly, he prayed that his grounds be considered, and he believed that the lower court had erred. He

expressed that he was suffering a lot in jail, and he needed to be set free. He mentioned that the cases had come to him in a surprising way. According to him, **it was in August 2021** while he was at Mkwajuni Pachayambae, playing pool table with his fellow youths, when a woman and her daughter came and ordered his fellow youths to arrest him. However, they refused. He said that she called her husband, and they took him to their home place where they found two other people.

The appellant further asserted that the prosecution witnesses, including PWs from the 1st, 8th (the chemist), and all the rest, were not truthful in his opinion. He believed that their evidence was not sufficient.

I have dispassionately considered the grounds of appeal, response by the learned State Attorney and additional information by the appellant by way of a rejoinder. I have also keenly examined the lower court record presented before me. My first and natural reaction is that the sentence of life imprisonment must have been a shock to the appellant, a child. I say he was a child because the only evidence used to contradict his earlier statement that he was 18 years old is purported "inquiry" by the learned trial Magistrate. In that highly questionable inquiry, the learned Magistrate concluded that since the appellant's "grandmother" said he was born in 1996 he was not a minor and therefore deserved to be sentenced to life imprisonment.

This kind of reasoning defeats the fabric of criminal justice. It has been repeatedly stated that should there be any doubt in proving a criminal case, that doubt should be resolved in favour of the accused person and not otherwise.

In addition to the above major contradiction, I must say that our criminal justice system also rests in the assumption that it is better to acquit 99 guilty people than to convict one innocent person. I say so because it the whole, the evidence of the 10 prosecution witnesses sailed through complete absence of counterarguments from the accused a minor, unschooled, and terrified accused person. The learned trial Magistrate needed to adjudge the matter with uttermost care and deep sense of justice.

The cloud on inability to properly find out the age of the appellant (then accused) coupled with the overwhelming difficulties he went through trying to prove his innocence leave me with no iota of doubt that his right to a fair trial was significantly curtailed. Proving a criminal case beyond reasonable doubt is one thing, ensuring that the tenets of fair trial are observed is quite another. A court of justice must not only tick the boxes on proof of the various elements of a given offence must also satisfy itself with observance of fundamental rights including the right to a fair trial.

It should be emphasized that in addition to the above argument on fair trial, sentencing is equally an important part of criminal justice. Courts of law do not simply sentence an accused to life imprisonment (or any other sentence in that regard) without considering the purpose of such a sentence. Learned Author Hyman Gross ***A Theory of Criminal Justice*** 1979 (New York: Oxford University Press) pp. 385-400 provides for some of the considerations for sentencing. They include

1. *Removal of socially dangerous persons from society*
2. *Rehabilitation of socially dangerous persons*
3. *Paying one's debt to society*
4. *Intimidation or deterrence of would-be offenders*

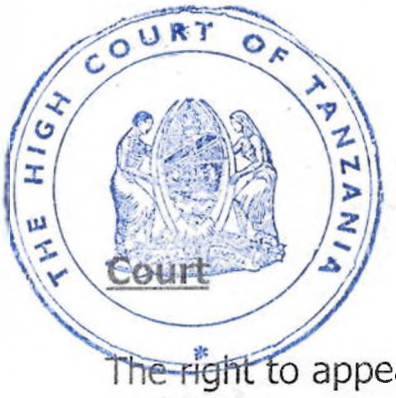
Had the learned trial Magistrate considered the age of the appellant more seriously in the light of the theory of punishment, he would have taken a completely different path.

Premised on the above, I allow the appeal. I quash conviction and sentence of the lower court. Further, I order that **JABIRI HAMISI BAKARI** be released from prison forthwith unless he is being held for any other lawful cause(s).

It is so ordered.

E.I. LALTAIKA
JUDGE
31.07.2023

Judgement delivered under my hand and the seal of this Court this 31st day of July 2023 in the presence of Mr. Mr. Justus Zegge, learned State Attorney for the Respondent and the appellants.



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