IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 19 OF 2023

(Original Criminal Case No. 28 of 2022 at Kibaha District Court)

HAMIS ALLY @ ALFAN..... APPELLANT

VERSUS

REPUBLIC..... .....RESPONDENT

JUDGMENT

18th July, & 28th August, 2023

BWEGOGE, J.

One Hamis Ally @ Alfani, the appellant herein, is a convict behind the bars serving a custodial sentence of 30 years. The same was arraigned in the District Court of Kibaha (henceforth "the trial Court") on a charge of rape contrary to section 130 (1), (2) (e) and section 131 (1) of the Penal Code [Cap 16 R.E 2019] and convicted forthwith.

A short resume of the prosecution case in the trial court is thus: The victim (PW1) in this case is a girl who was, by then, 16 years old. On the fateful evening of 10th April, 2022 at 19:00hrs she was heading home having visited her grandmother. She had seen the accused whom she knew very well coming from behind. When he was crossing an open space/playground, the accused caught up with her. He grabbed the victim, closed her mouth and then dragged the same into the bush. Then, the appellant fell the victim down, undressed her and forcibly penetrated his penis into her vagina. Having satisfied his lust, the accused released the victim. The victim hurried home, her vagina bleeding and reported the incident to her mother namely, Hellena Yakobo (PW2). It was around 19:45 hrs when the victim enlightened her mother about the crime. PW1 and her husband reported the crime to their relatives who eventually informed the Village Executive Officer (VEO), one Samwel George Msangi (PW3), who had instructed the militiaman namely, Said Seif Tekenya (PW4) to arrest the accused person (appellant herein). PW2 escorted the victim to the nearby health centre where they were referred to Tumbi Hospital. The victim was attended by one Alphonce Moyo (PW5), the medical practitioner.

All the above-mentioned persons testified in court in support of the allegation made by the victim against the accused/appellant herein. It is in the testimonies of witnesses, namely, the village Executive officer (PW3) and militiaman namely, Said Seif Tekenya (PW4) that when the accused was apprehended and informed of the allegation levelled against him by the victim, he responded that the victim had consented to sexual intercourse. The victim's mother (PW2) deponed in court in respect of the allegation made by the victim against the accused that fateful evening and how she observed the victim bleeding before she reported the crime and escorted her to Tumbi Hospital. And, the medical practitioner (PW5) from Tumbi Hospital enlightened the trial court on how he observed the victim bleeding from the lacerated vagina and perforated hymen. The same tendered the PF3 which was admitted in evidence as exhibit P1. The appellant herein, in defence, hit the sky denying the allegation made against him.

The trial court, having evaluated the evidence, opined that the prosecution witnesses were entitled to credence and their testimonies were believed. Having warned himself of the danger of relying on the

evidence of visual identification, the trial resident magistrate opined that the victim (PW1) had undoubtedly recognized her perpetrator that fateful evening as he knew him well and all possibilities of mistaken identity were eliminated. The defence case was discarded for the reason of being an afterthought. Consequently, the trial court found that the charge was proved beyond reasonable doubt, and proceeded to convict and sentence the appellant as charged.

The appellant, being aggrieved with the conviction and sentence, preferred the appeal herein on six (6) grounds. Upon scrutiny, it has been found that all grounds of appeal raised by the appellant herein, in substance, boils down to two main grounds, as follows:

i. That the appellant was not properly identified at the crime scene.
ii. That the charge was not proved to the standard required in criminal cases.

During the hearing of the appeal, the appellant appeared in person and fended for himself. The respondent Republic was represented by Mr.

Emmanuel Maleko, learned Senior State Attorney. Before the appeal herein was heard, the appellant prayed to argue his case by way of written submission. His prayer was granted. On the other hand, Mr. Maleko made an oral submission contesting this appeal.

I find it pertinent, at this juncture, to recount the submission made by the appellant in support of the appeal herein. In establishing that he was not properly identified at the crime scene, the appellant charged that, the trial court failed to observe that the purported evidence of visual recognition of her assailant was insufficient and unreliable to establish his conviction. That the victim deponed that the assailant came from behind, the fact which suggests that she did not see her assailant properly.

Further, the appellant charged that the victim did not state whether there was enough light which enabled her to identify him. That the identification through moonlight was the weakest evidence to be relied upon. In this respect, the appellant cited the cases of **Ramadhani Mangobele vs. Republic**, Criminal Appeal No. 76 of 2010, CA (Unreported) and **Godfrey Lucian Shirima vs. Republic** (Criminal Appeal 40 of 2021) [2022] TZCA

584 to buttress his argument. In the same vein, the appellant concluded that the victim did not give any graphical description of her assailant in terms of morphological appearance, height, clothing, and voice to render her identification evidence credible.

In establishing that the charge levelled against him was not proved to the standard required in criminal cases, the appellant argued that the prosecution case was tainted with inconsistencies. That the testimonies of PW1, PW2 PW3 and PW4 were marred with inconsistencies which rendered their evidence improbable and incredible altogether. The appellant clarified that the inconsistencies he referred to are in respect of the timing of the crime and unexplained delay on part of PW2 to pass information to PW3 and PW4 who belatedly effected his arrest. That PW1 testified that the alleged rape was perpetrated at 19:00 hrs and she informed PW2 about the alleged crime at 19:45hrs; however, PW3 deponed to have received information at 21:00 hrs whereas he contradicted himself by stating that the crime was committed at 21:40. The appellant concluded his argument by citing the case of **Aloyce**

Maridadi vs. Republic (Criminal Appeal 208 of 2016) [2017] TZCA 244, among others, whereas the Apex Court opined that:

> *"Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses."*

On the above account, the appellant prayed this appeal be allowed and the conviction and sentence imposed by the trial court be quashed and set aside.

Responding to the submission made by the appellant in support of the appeal herein, Mr. Maleko, the learned state attorney, contended that in this case, the appellant is well known to the victim. Therefore, she recognized the appellant through blazing moonlight. The attorney asserted that there is no contradiction in the victim's testimony as the same identified the appellant at the earliest opportunity which guarantees her reliability. To support his position, the attorney cited the case of

Leonard Sakata vs. Republic (Criminal Appeal 235 of 2019) [2022] TZCA 30.

I have anxiously attended rival arguments by both parties herein. It is my turn now to canvass the grounds of appeal and find whether they are merited to warrant variation of the trial court findings as craved by the appellant herein.

I commence with the 1st ground of appeal pertaining to contested evidence of recognition given by the victim (PW1) and acted upon by the trial court in convicting the appellant. It is gleaned from the testimony of PW1 on record of the trial court that the alleged rape occurred at 19:00hrs. Unarguably, the time in which the crime was committed is an hour of darkness. It is settled law of this land that evidence of visual identification is of the weakest kind/unreliable and the court should not act on such evidence unless all possibilities of mistaken identity are eliminated. See the cases: **Republic vs. Allui** [1942] 9 EA 72, **Waziri Amani vs. Republic** [1980] TLR 250, **Shamir s/o John V. Republic,** Criminal Appeal No. 166 of 2004, CA (unreported) and **Philemon**

Jumanne Agala @J4 vs. Republic (Criminal Appeal No. 187 of 2015) [2016] TZCA 278, among the plethora of decided cases in this respect.

In the case of **Philemon Jumanne Agala @J4 V. Republic** (supra) the Apex Court restated its observations in the case of **Shamir s/o John V. Republic** (supra) in respect of the factors be considered by the court ascertaining the credibility of the evidence of visual identification as thus:

> *"It is now trite law that the courts should closely examine the circumstances in which the identification by each witness was made. 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, as 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."*

See also the cases; **Jaribu Abdalla vs. Republic,** Criminal Appeal No. 220 of 1994 (unreported) and **Yohana Kulwa Mwigulu & Others vs. Republic** (Criminal Appeal 192 of 2015) [2015] TZCA 30. In view of the afore-visited decided cases, it goes without saying that identification/ recognition evidence should be cautiously acted upon as it is prone to either fabrication or being based on honest mistakes. It follows that, in matters of identification, apart from observing the factors favouring accurate identification, equally important is the credibility of witnesses.

In this case, I am constrained to agree with the submission made by the attorney for the respondent Republic in that the victim undoubtedly identified the appellant herein as the perpetrator of the alleged rape. My inclination is based on the following observations: **First,** when the victim passed a populated area and commenced to walk across the open ground, she noted that the accused was walking in her direction from behind. She identified him right away. The victim deponed in court that she knew well the appellant. She identified him as a barber in the village. It seems she didn't suspect that the accused was up to something detrimental. Soon

thereafter, the accused caught up with the victim, covered her mouth and dragged the same into the bush where he raped her. The victim enlightened the court that the incident lasted for about 30 minutes. Likewise, the victim deponed that the crime scene was illuminated by blazing moonlight and she managed to recognize the appellant by face and voice. Considering the fact that the accused was well known to the victim (who deponed to have identified him), the time taken (30 minutes) by the appellant to quench his lust, and the distance between the two, I am constrained to agree with the attorney for the respondent Republic that the victim properly identified the appellant. **Secondly**, the victim had mentioned the appellant as the perpetrator of the alleged rape at the earliest opportunity to her mother (PW2) when she reached home. The identification of the offender enabled the VEO (PW3) and militiamen (PW4) to immediately apprehend the appellant. It is the law that the ability of a witness to name the assailant at the earliest opportunity is an assurance of his reliability. See the case of **Marwa Wangiti Mwita & Another vs. Republic** (Criminal Appeal No. 06 of 1995) [2000] TZCA 4 in this respect. **Thirdly**, PW3 and PW4 had deponed in court that when they informed the appellant of the allegation levelled by the victim against

him, he responded that the sexual intercourse was consented by the victim. The record entails that the appellant never cross-examined these key witnesses in this respect and in his defence he never attempted to controvert the evidence in that he justified his wrongful act on the pretext of consent. Therefore, the evidence deponed by PW3 and PW4 remains uncontroverted. In the case of **Shomari Mohamed Mkwama vs. Republic** (Criminal Appeal 606 of 2021) [2022] TZCA 644 the Apex Court opined:

> *"It is the settled position of the law that failure to cross-examine the adverse party's witness on a particular aspect, the party who ought to cross-examine the witness, is deemed to have taken as true, the substance of the evidence that was not cross-examined.*

See also the cases; **Issa Hassan Uki vs. Republic,** Criminal Appeal No.129 of 2017 (unreported) and **Martin Misara v. Republic**, Criminal Appeal No. 428 of 2016(unreported). It suffices to point out that the evidence adduced by PW3 and PW4 clears the doubt that would have been entertained with respect to the identification of the offender by the victim in this case.

Based on the above premises, I find the 1st ground of appeal without substance.

I now proceed to delve into the 2nd ground of appeal pertaining to the alleged inconsistencies and contradictions in respect to the time of the commission of the offence. The victim (PW1) deponed in the trial court that the incident occurred around 19:00hrs. PW2 deponed that the victim informed her about the alleged sexual assault at 19:45 hours. PW2 told the trial court that upon receiving the report, she informed her husband who informed other family members who reported the crime to PW3. PW2 didn't tell the court when exactly PW3 and PW4 received the information and took necessary action to effect the arrest of the appellant herein. The appellant questioned why the information about the incident took a long time to pass from one person to another. I find that the time taken by the victim to report the crime to PW2 is only 15 minutes after she was sexually assaulted, taking into consideration the evidence on record that the alleged sexual intercourse lasted 30 minutes.

Admittedly, when PW3 and PW4 were cross-examined by the appellant, PW3 responded that he received information about the alleged rape at 21: 45 hrs whereas PW4 stated that he was informed about the crime at 22:00. Likewise, when PW3 was asked when exactly the crime was committed, he stated that the crime was committed at 21:40 hrs. During the re-examination, PW3 honestly told the court that he didn't inquire the victim about the actual time the crime was committed. Therefore, it is obvious he had presumed the time on which the crime was committed. Based on the above observations, it follows that there is inconsistency pertaining to the time of the commission of crime between the testimonies of PW1 and PW3. The question is whether the alleged contradiction is fatal to the prosecution case. This question, I hereby attempt to answer.

It is settled law that not every inconsistency and, or contradiction will make a prosecution's case to flop. See the cases; **Silas Sendaiyebuye Msagabago vs. The D.P.P.** (supra) and **Said Ally Ismail vs. Republic**, Criminal Appeal No. 214 of 2008 (unreported). In **Said Ally Ismail case,** it was specifically stated:

> *"... however, it is not every discrepancy in prosecution witness that will cause the prosecution case to flop. It is only where the gift of evidence is contradictory that the prosecutions will be dismantled..."*

The contradiction alleged by the appellant herein is in respect of the actual time of the commission of the alleged crime. However, it is gleaned from the record of the trial court that PW1 deponed in court in that she was raped on 10th April, 2022 at 19: 00hrs. PW3 clarified the fact that he didn't inquire when exactly the crime was committed. Hence, he presumed the crime was committed at 21:40. I am of the settled opinion that the actual time of the commission of the crime should be that which was deponed by the victim based on the best evidence rule. Be that as it may, it is my considered opinion that the inconsistency alleged herein doesn't dismantle the prosecution case. Likewise, I find the alleged delay in time with respect to the chain of information conveyed from PW1 to PW2, PW3 and PW4 unfounded. The time lapsed from the commission of the crime to the arrest of the appellant herein is reasonable in the circumstances of this case.

In fine, I find that, based on the evidence on record, the prosecution undoubtedly proved that the appellant had forcibly committed sexual intercourse with the victim herein who has no capacity to consent to the impugned act. The second ground of appeal, likewise, collapses.

In view of the foregoing reasons given, I find the appeal herein bereft of merit. The appeal is hereby dismissed in its entirety. The conviction and sentence entered by the lower court are hereby upheld.

I so order.

DATED at **DAR ES SALAAM** this 28th August, 2023.

O. F. BWEGOGE

JUDGE