

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA

CRIMINAL APPEAL NO. 35 OF 2023

(C/F Criminal Case No. 36 of 2022 District Court of Arumeru at Arumeru)

JAMES ELIREHEMA **APPELLANT**

VERSUS

REPUBLIC **RESPONDENT**

JUDGMENT

2nd August & 27th September, 2023

TIGANGA, J.

In the District Court of Arumeru at Arumeru (the trial court) the appellant James Elirehema was arraigned for the offence of rape contrary to section 130 (1), (2) (e) and 131 (1) of the **Penal Code**, Cap 16, R.E 2022 (the Penal Code).

According to the particulars of the offence, it was alleged that on 20th April, 2022 at Kikatiti area, within Arumeru District in Arusha Region, the appellant raped the victim, **NZ** (name withheld) a blind girl of 15 years.

According to the prosecution evidence before the trial court, the unfortunate ordeal happened when the victim, PW1 was walking home

from school in the Company of her aider and friend, PW2, Evetta. When the appellant approached them on his motorcycle and offered to carry her. She refused to go alone without her friend, the appellant affirmed, that her friend would also be taken by another motorcyclist. She therefore boarded the motorcycle telling the appellant to go slowly so that her friend can keep up with them. However, the appellant started racing and after a while he went into the bush as she could feel tree leaves striking her face. After a while the appellant stopped and started to caress her while sucking her breast, and despite her telling him to stop, he did not. She dropped from the motorcycle, and while on the ground, the appellant tore her underpants and raped her. As she shouted for help the appellant strangled her while saying;

"Serikali inaongozwa na mwanamke na mwanamke ametoa ruhusa kwamba, mwanafunzi akibebeshwa mimba, kijana anaruhusiwa kukaa uraiani kama watu wengine kwahiyo ana uwezo wa kukaa uraiani na wala asifanywe chochote"

Thereafter, the appellant left her and as she kept shouting for help, PW5 heard the voice and responded. She managed to pick the victim from a place called Mapango ya Mikuyu and because she knew her, she notified her mother PW4. The matter was immediately reported to the police and the appellant was apprehended on the same day and charged with the

offence. In his defence, the appellant pleaded innocent claiming that he was just arrested while preparing himself to attend his grandmother's funeral. He neither denied or affirmed to have raped the victim. In the end the appellant was found guilty and convicted to serve thirty (30) years imprisonment. Aggrieved, he brought this appeal raising eight (8) grounds as follows;

1. That, the appellant was wrongly convicted and sentenced basing on a defective charge sheet for being at variance with the evidence on the place where the offence was allegedly committed.
2. That, the appellant was wrongly convicted and sentenced as he was not properly identified to be the one who committed the offence.
3. That, the trial magistrate erred in failing to properly assess the credibility and reliability of PW1, the victim.
4. That, the appellant was wrongly convicted and sentenced in a case with grave procedural irregularities.
5. That, the trial magistrate erred in convicting the appellant despite grave contradictions and inconsistencies in the prosecution evidence which casted doubts that must be resolved in his favour.
6. That, the trial magistrate erred in law and fact in holding that the case was proves beyond reasonable doubt despite failure by the prosecution to call material witnesses.
7. That, the trial magistrate erred in law and fact in failing to properly evaluate the case as a result wrongly convicted the appellant.

8. That, the case against the respondent was never proved beyond reasonable doubt.

During hearing, the appellant was represented by Mr. Dickson Maturo and Mr. John Chua, learned Advocates while the respondent was represented by Ms. Caroline Assenga and Ms. Witness Msohole, both learned State Attorneys.

Supporting the appeal, Mr. Maturo submitted on the 1st ground that, the appellant was charged of committing the offence at Kikatiti area but during PW5's testimony she narrated the incident to have occurred at Maji at Chai Area which are geographically two different places. He argued further that, without amendment to the charge, the same was not proved against the appellant at the required standard as held in the case of **Thabiti Bakari vs. The Republic**, Criminal Appeal No. 73 of 2019, CAT at Dar-es-Salaam.

On the 2nd ground the learned counsel submitted that, the appellant was not properly identified by the victim as the one who penetrated her. He argued that, there is nowhere in the trial court's proceedings where the appellant was properly identified from the time of commission of the offence to the time when he was arrested at his home. He asserted that, since the victim was blind, and the appellant was not found at the scene

of the crime, PW2 who identified him on the dock ought to have explained more on how she managed to identify him. To cement this point, the learned counsel cited the case of **Mohamed Hamisi @ Bilali vs. The Republic**, Criminal Appeal No. 300 of 2021, CAT at Mtwara which emphasized on proper identification before dock identification. In that regard, he argued, without identification parade the appellant was convicted and sentenced on suspicions.

As to the 3rd ground, Mr. Maturo argued that, the victim's evidence at the trial court was unreliable as she told the court that, after the act the appellant ran away but considering the fact that she is blind, she did not elaborate more on how did she know that the appellant ran away. That, she ought to have known when the appellant left by the sound of a motorcycle and not when people approached and noted she was alone as she testified.

On the 4th ground, the Learned counsel submitted that, the procedure at the trial court was tainted with irregularities one of them being the fact that, PW2 was a dumb person, but the record does not show how she testified before the trial court.

As to the 5th ground, he submitted that, the prosecution evidence was full of contradictions and inconsistencies as the charge sheet

contradicted with the evidence adduced by PW5 regarding the place where the incident is alleged to have occurred. He also challenged PW3's testimony that, she mentioned to have found the victim with Lightness and Elieshi in exclusion of PW5 which draws inference that, PW5 was not the one who responded to the victim's shout for help. He prayed that those contradictions be resolved in favour of the appellant herein.

On the 6th ground, Mr Maturo submitted that, the case was never proved beyond reasonable doubt as the prosecution did not call all material witnesses who could have enabled the trial court to reach a fair decision. He mentioned one of them as the prosecutor and asserted that, the appellant claimed he was stayed under police custody for 21 days before take to the trial court. According to him, failure of the said investigator to be summoned draws adverse inference against the prosecution case as held in the case of **Aziz Abdallah vs. The Republic** [1991] TLR 71.

Submitting in support of the 7th ground of appeal, learned counsel averred that, had the trial court keenly evaluated the prosecution evidence it would have arrived at a different conclusion and acquit the appellant herein. And on the last ground, he submitted that, the charge against the appellant was never proved at the required standard due to

all the flaws as submitted hereinabove. He prayed that the appeal be allowed by quashing the conviction and setting aside the trial court's sentence.

Opposing the appeal Ms. Asenga submitted on the 1st ground that, there is no variance in respect of the place where the incident occurred. That, the incident occurred at Kikatiti within Arumeru District in Arusha Region. That, by PW5 saying that she found the victim at Maji ya Chai is not fatal because Kikatiti and Maji ya Chai are bordering areas and one cannot tell the demarcation between the two. Further that, PW1, PW2 and PW3 did not mention that the incident occurred at Maji ya Chai hence, PW5's variance can be cured by section 388 of the **Criminal Procedure Act**, Cap 20, R.E. 2022 (CPA) because it does not go to the root of the case.

On the 2nd ground she submitted that, the appellant was properly identified by the victim, PW1, through his voice at the Police station. Also PW2 identified the appellant as the person who took the victim on his motorcycle. That he was the last person to be seen with her hence the one responsible for the act as held in the case of **Almandi Guehi vs. The Republic**, Criminal Appeal No. 242 of 2010. Apart from that, PW3, the victim's mother identified the appellant as her maternal relative and

that, he had sent elders to reconcile the matter at home out of court which adds weight that he was the one responsible.

Ms. Asenga submitted on the 3rd and the 7th grounds jointly that, the issue of credibility and reliability of witnesses is in the domain of the trial court. That, in the appeal at hand the trial court did not commit error in relying on the testimony of the victim after thoroughly assessing her credibility and found it reliable as underscored in the case of **Goodluck Kyando vs. The Republic** [2006] TLR 363 where it was held that, every witness is entitled to credence and have his testimony believed until proved otherwise. More so, looking at the appellant's evidence, the same did not cast any doubt to the victim's testimony or rather discredit it in any manner.

On the 4th ground, Ms. Asenga submitted that, there was no fatal omission that could render the proceedings irregular or a nullity because the trial was fairly conducted and followed all standards of fair trial as held in the case of **Musa Mwaikunda vs. The Republic** [2006] TLR 387. As to PW2 disability, she argued that, PW2 had speech problem but she could communicate just fine and she was not dumb as argued by the appellant's counsel.

Submitting on the 6th and 8th grounds jointly, the learned State Attorney informed the Court that, the case against the appellant was proved at the required standard, as in rape cases, the best evidence comes from the victim and as per section 127 (6) of the **Evidence Act**, [Cap 6 R.E. 2022] (the Evidence Act), the victim properly established what happened to her. She also cited the case of **Godi Kasenegala vs. The Republic**, Criminal Appeal No. 10 of 2008 CAT at Iringa where Court of Appal quoted the case of **Selemani Makumba vs. Republic** which observed that in proving sexual offence cases, victim's evidence is of utmost important and the key element is whether there was penetration. That, in the appeal at hand, there is enough proof from the victim herself that she was penetrated as supported by PW4's testimony as a medical doctor who examined her and tendered exhibit P1.

Regarding calling other witnesses, Ms. Asenga submitted that, section 143 does not provide for a number of witnesses required by the court to prove any fact. That, the summoned witnesses were enough to prove the offence against the appellant herein.

Lastly on the 5th ground, Ms. Asenga submitted that, the contradictions raised by the appellant's Advocate do not go to the root of the case. Also the appellant did not cross examine on the contradictions

raised which is tantamount to have accepted all the facts adduced by prosecution witness. She prayed that, this appeal be dismissed with cost for want of merit.

In his brief rejoinder, Mr. Maturo reiterated his earlier submission and maintained that the appellant was erroneously convicted as the case against him was never proved at a required standard.

After going through appellant's submissions and trial courts' proceedings and judgment, the issue for consideration is whether the case against the appellant was proved beyond reasonable doubt.

Starting with the 1st ground regarding variance between the charge sheet and the evidence. Going through the charge sheet, the same shows that, the incident occurred at Kikatiti area within Arumeru District. None of the prosecution witness except PW5 told the Court that, the incident occurred at Mikuyuni Area at Maji ya Chai but the victim and her friend PW2 were from Chemchem Primary School at Kikatiti. In the circumstances, the victim was taken from Kikatiti to Maji ya Chai which are geographically boarded and there is no line which demarcates them. As rightly argued by the respondent's counsel, as much as I concede that the charge sheet slightly varied with the evidence, I do not find it fatal

because the same is so minute and it does not shake the prosecution case hence can be cured by section 388 of the CPA. This ground fails.

On the 2nd ground regarding the identification of the appellant that, he was not properly identified. The law is clear that, for identification to hold water, necessary principles must be met for instance, intensity of light, distance between the identifying witness and identified person, descriptions of the one identified etc. as was correctly propounded in the most famous judicial jurisprudence of **Waziri Amani V. R** [1980] TLR 250 where the court emphasized on proper identification so as to avoid all possibilities of mistaken identity. It is also necessary for the trial court to have ascertained the credibility of witnesses alleging to have properly identified the suspect. In **Jaribu Abdallah vs R.**, (2003) TLR 271–Court of Appeal of Tanzania correctly and authoritatively held that:

"In matters of identification, it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of the witnesses."

In the present appeal, the record is clear that the victim managed to identify the appellant by his voice when she went to the police station. Considering the fact that, the victim was blind more corroboration was needed as held in the case of **Mohamed Bakari & 7 Others vs.**

Republic [1999] TLR 134. That corroboration was through PW2 who identified the appellant as the person who took the victim with his motorcycle on the 20th April, 2022 and was the last person to be seen with her. Further move the victim's evidence is clear that, it was the person who took her in the bush, that person is non other than the appellant according to PW2. Also, the matter was promptly reported to the authorities, the appellant was apprehended on the same day. It is therefore my considered opinion that, the appellant was properly identified. This ground also fails.

On the 3rd ground, appellant's counsel challenged the reliability of the victim's evidence. In the In the case of **Crospery Ntagalinda @ Koro vs. R**, Criminal Appeal No. 312 of 2015, CAT at Bukoba (unreported), the Court of Appeal among other things stated:

"Every witness is entitled to credence and his testimony believed unless there are good and sufficient reasons for not believing the witness."

In the appeal at hand, appellant's counsel challenge the unreliability of the victim's evidence is because she did not say how she knew the appellant left until people arrived. He argued, she ought to have narrated that, she knew the appellant left after she heard the motorcycle leaving as neither the appellant nor the motorcycle were found at the crime scene.

Going through the proceedings, the victim's narration regarding how he left was as follows;

*"... I detected the area of incident to be a bush because there were leaves touching me and there was "mabonde mabonde" I detected that when I was moving to rescue and shout. I knock a tree, one James was pushing me so I detected that, he is nearby me, I was also pushing him, so I touched his clothes, **I shout for help, he run away**" (emphasis added).*

Looking at the evidence, the victim did not explain how the appellant run away. Had the appellant wanted to know more about that fact he would have cross examined her on the same. Considering there is no any other factor he challenged in respect of victim's credibility, I find her evidence reliable and the trial court did not err in relying on it. This ground fails.

As to the 4th ground, Mr. Maturo argued that there was grave procedural irregularity at the trial court because PW2 was a dumb person, but the record does not show how she testified before the trial court. This will not detain me much as the proceedings do not show that PW2 was dumb. The only piece of evidence showing PW2's disability is when PW3, the victim's mother said;

"...there is her fellow schooling together in a "special unit" (kitengo maalum) who assist her to go to school, namely Evetta

*she is not blind, **but she had problem in speech**" (emphasis added)*

From this excerpt, the only disability PW2 had was in respect of her speech and looking at page 10 to 11 she gave her sworn testimony in which even the appellant cross examined her and she replied thereto. Court record is always presumed to accurately represent what actually transpired in court as held in the case of **Emmanuel Denis Masha & Two Others vs. The Republic**, Criminal Appeal No. 188 of 2018, CAT at Dsm, the Court of Appeal had this to say;

*"We also need to make a reminder here, that court proceedings are too sacred to be disbelieved easily, and we have had occasions to say this in many cases, such as in **Flano Alphonse Masalu @Kingu**, (supra) which the learned State Attorney cited to us and others. In **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018 (unreported) where we stated at page 12:*

"It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record".

*Other cases on that point were cited in the case of **Alex Ndendya** (supra) and they are; **Halfan Sudi v. Abieza Chichili** [1998] T.L.R 527 and the earlier case of **Shabir F. A. Jessa v. Rajkumar Deogra**, Civil Reference No. 12 of 1994" (unreported).*

In the circumstances, there was no any irregularity in how PW2's testimony was taken. This ground also crumbles.

Regarding the 5th ground, appellant challenges the contradiction by PW3 that she met with Elieshi and Lightness who informed her what happened to her daughter while PW5 told the court that she is the one who rescued the victim and was the one who told her mother what happened. Going through the victim's testimony, she told the trial court that two women, her teacher and a motorcycle rider came for her rescue. In the circumstances, there was more than one person who responded to her cry for help. Be as it may, It is my considered opinion that, it does not matter who told the victim's mother what happened to her, this mere variance does neither goes to the root of the case nor does it invalidate the fact that the victim was sexually assaulted . this ground also fails.

On the 6th ground, the appellant challenged the prosecution for not summoning the material witness i.e. the investigator. This will not detain me much since the law is clear in terms of section 143 of the Evidence Act that, there is no specific number of witnesses required for the prosecution to prove any fact. See **Yohanes Msigwa vs. Republic** [1990] T.L.R. 148. What is important is the quality of the evidence and not the number of witnesses. In sexual offence cases, the quality of

evidence needed is that which prove the offence at the required standards and even a sole testimony of the victim can warrant a conviction. The essential ingredient to be proven in rape offence is "penetration" as has been underscored in numerous court decisions. In the case of **Jilala Justine vs. The Republic**, Criminal Appeal No. 441 of 2017, CAT at Shinyanga (unreported) the Court observed that;

*"... It is a trite legal principle that, in sexual offences the best evidence is from the victim while other prosecution witness may give corroborative evidence. See: **Selemani Makumba v. The Republic**, [2006] T.L.R. 379, **Galus Kitaya v. The Republic**, Criminal Appeal No. 196 of 2015 and **Godi Kasenegala v. The Republic**, Criminal Appeal No. 10 of 2008 (both unreported). However, the victim's evidence will be relied upon to convict if the same is found credible..."*

This essential ingredient was sufficiently established through PW1's narration which I find credible as the appellant did not manage to cast doubt on her evidence which was corroborated by that of PW2, PW3 and PW5. Apart from that, PW4, a medical doctor who examined the victim's genitalia and came up with the same conclusion that, the victim was penetrated by a blunt object. He also tendered PF3 which was admitted as exhibit P1. As a result all the material and important witnesses

summoned at the trial court managed to prove the case against the appellant at the required standard. This ground also crumbles.

On the 7th and 8th grounds, I find the case against the appellant was proved at the required standard hence, I find no need to quash the trial courts findings. I hereby dismiss the appeal and uphold the trial court's decision.

It is so ordered

DATED and delivered at **ARUSHA** this 27th day of September, 2023.



A handwritten signature in black ink, appearing to read "J.C. Tiganga", is written over a horizontal line.

J.C. TIGANGA

JUDGE