IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB- REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 109 of 2023

[*Arising from Magu District Court Criminal Case No. 21 of 2023*]

PASCHAL NG'HUNGU.....APPELLANT

Versus

REPUBLIC .....RESPONDENT

JUDGMENT

Sept. 27th & Oct. 6th 2023

Morris, J

Mr. Paschal Ng'hungu, the appellant above, earned both conviction and sentence from the District Court of Magu in Criminal Case No. 21 of 2023. A rape case, that was. He has now appealed before this Court challenging both conviction and sentence. Briefly accounted, facts of this case are easily graspable. The appellant was charged for rape contrary to sections 130(2)(e) and 131(1) both of ***the Penal Code***, Cap 16 R.E. 2022 (the ***Penal Code***). The District Court of Magu (elsewhere, '*the trial court*') found him guilty of the offence. He was convicted and consequently sentenced to serve 30 years' imprisonment and to pay compensation of Tshs 1,000,000/= to the victim. The crime which yoked him in the wrath

of the penal law is recorded as having been committed on January 29th, 2023.

The appellant allegedly raped a 13-year girl. The offence was recorded as having been committed at Kisesa village within Magu District of Mwanza Region. The victim girl was later examined by the medical expert (PW5) who filled the requisite PF3 (exhibit P1).

This appeal was originally premised on three (3) grounds. However, for the interest of brevity and coherence they have been merged into two. The appellant faults the trial court that: **one**, it erred to convict the him while the charge was not proved beyond reasonable doubt; and **two**, it erred for not considering his defence of absence at the scene of the crime (*alibi*).

The appellant appeared in this Court unrepresented. However, Ms. Thabitha Zakayo - learned State Attorney, represented the respondent. It was the submissions of the appellant that on the date the offence was allegedly committed, he was not at the point of the crime. He claimed that he had gone to Kayenze-Magu only to return at night around 22:00 hours. Incidentally, the crime was allegedly committed at 21:00 hours.

Further, the appellant contended that that the case against him was not proved to the required standard. He argued that the evidence of medical doctor was biased as there was no *deoxyribonucleic acid* (DNA) report to prove that he was responsible for the rape. To him, the doctor did not prove his profession and designation by producing the identity card (ID). Lastly, he argued that the age of the victim also was not proved.

In reply, Ms. Zakayo submitted that defence of *alibi* should be specifically pleaded by the accused at the earliest stage of the trial. She maintained further that the appellant was duty bound to give a notice of such defence before hearing. Section 194 (4) of ***the Criminal Procedure Act***, Cap 20 R.E. 2022 (elsewhere, **the Act**) was cited to buttress her argument. Further reference was made to the case of ***Mwiteka Godfrey Mwandemele v Republic***, Criminal Appeal No. 388 of 2021 (unreported).

Regarding proving the case beyond doubt, the State Attorney argued that the offence against the appellant was fully proved by the prosecution. She submitted that both age of the victim and penetration into her private parts were adequately proved. Hence, according to her, the basic elements which constitute the offence of rape were clearly

established. For instance, the age of the victim was proved by PW5, the medical doctor who testified that the former's age was 13 years. To the respondent, the age of victim may be proved by a number of people including, the victim, parents, doctor, relatives, teacher or production of a birth certificate. I was referred to the case of ***Rutoyo Richard v Republic***, Criminal Appeal No. 114 of 2017 (unreported). The respondent's attorney also argued that there was no need to examine the accused for DNA purposes. Further, she submitted that the subject doctor (PW5) proved his credentials and no cross-examination was made by the appellant regarding PW5's qualifications.

In line with the above contentions of parties, I will start addressing the second ground of appeal. This preference is in the advantage of articulate flow of the parties' submissions and results therefrom. Accordingly, the appellant is faulting the trial court for not considering his defence of *alibi*. That is, he alleges to had been at another place different from where and/or the time when the crime was committed. This ground was opposed by the respondent. The State Attorney argued that the appellant did not give the requisite notice of such defence to the opposite party before hearing. To her, this omission transgressed the law. The

Court will thus determine the first issue as to *whether the appellant's defence of alibi was unlawfully ignored by the trial court*.

It is trite the law that, although the accused person bears no burden of proving his innocence, the accused's line of defence should be considered. In law, failure to consider the defence vitiates conviction. See the cases of ***John Mghandi @ Ndovo v R***, Criminal Appeal No. 352 of 2018; ***Semeni Mgonela Chiwanza v R***, Criminal Appeal No. 49 of 2019; ***Osward Kasunga v R***, Criminal Appeal No. 17 of 2017 (all unreported); ***Hussein Iddi and Another v R*** [1986] TLR 166; as well as sections 231 (1) and 235 of ***the Act***.

In this matter, the appellant submitted that the trial court disregarded his defence of *alibi*. This being the first appellate Court, it is clothed with the mandate to re-evaluate the evidence and establish if the defence of *alibi* was indeed overlooked during trial and in composition of the judgement. For the Court's power for re-evaluation of evidence, see ***Kaimu Said v R***, Criminal Appeal No. 391 of 2019 (unreported).

The foregoing having been said and done, I hasten state that the defence of *alibi* is governed by section 194 (4) (5) and (6) of ***the Act***. The subject section reads as;

(4) Where an accused person intends to rely upon an alibi in his defence, he ***shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case****.*

(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, ***he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.***

(6) Where the accused person raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may, in its discretion, accord no weight of any kind to the defence (bolding rendered for emphasis).

Pursuant to the foregoing provision, therefore, the accused-appellant was duty bound to give notice or particulars of the subject defence to the court and prosecution. The said notice/particulars should have been given before hearing/before closure of prosecution case, as circumstances would dictate. The obvious rationale behind such step is to give the prosecution the chance of disproving the accused's *alibi* as they discharge their burden of proving the guiltiness of the accused beyond

reasonable doubt. Otherwise, if no such notice/details are given, such defence will amount to being an afterthought.

In ***Kibale v Uganda*** [1999] 1 EA 148 it was underscored that, "A genuine *alibi* is, of course, expected to be revealed to the police investigating the case or to the prosecution before trial". Thereafter, the police or prosecution verify such defence. That is, the genuineness of *alibi* is determinable by its being disclosed at the outset. See also, ***Masanja Lupilya v R***, Criminal Appeal No. 444 of 2017; ***Masamba Musiba @Musiba Masai Masamba v R***, Criminal Appeal No. 138 of 2019; and ***Hamis Bakari Lambani v R***, Criminal Appeal No. 108 of 2012 (all unreported).

As correctly submitted for the respondent, the appellant neither gave notice of intended *alibi* before hearing nor did he notify the prosecution with particulars thereof before the latter closed its case. Therefore, to consider this defence at this stage, in my view, is equivalent to condemning the respondent unheard in such regard. Therefore, the appellant's arguments in favour of this defence lack both justification and requisite merit. I disallow it.

The other issue hereof is *whether or not the offence facing the accused-appellant was fully proved at trial*. The appellant was charged under sections 130(2)(e) and 131(1) of ***the Penal Code***. The first provision is reproduced below for ease of grasp.

> *"130(2)(e): A male person commits the offence of rape if he has sexual intercourse with a girl or a woman with or without her consent when she is* ***under eighteen years of age****, unless the woman is his wife who is fifteen or more years of age and is not separated from the man"* [emphasis added].

Therefore, to establish the offence hereof, age of the victim must be proved. Unlike the respondent, to the appellant age was not proved. I have read the proceedings of the trial court. At page 11, Paschal Moris (PW5) testified that the victim's age was 13 years. Such testimony was left unchallenged by the defence during cross-examination. As correctly submitted for the respondent, the law allows age of the rape-victim to be proved by parents, victims, doctors or teachers. Cases in this connection are, among others; ***Rutoyo Richard vs. Republic*** (supra); ***Wambura Kiginga v R,*** Criminal Appeal No. 301/2008; ***Masalu Kayeye v R,*** Criminal Appeal No. 120/2017; and ***Isaya Renatus v R*** Criminal Appeal

No. 542/2015 (all unreported). Therefore, in this case, the age of the victim was proved by the eligible person and in accordance to law.

Moreover, PW5 specifically disclosed his career as Clinical Officer working at Kisesa Health Centre. To the appellant, such witness was required to prove his designation by production of his identity card. In law, no such requirement is mandatory. Further, the appellant was supposed to raise doubt as to PW5's qualifications, say in cross examination. He, instead, asked no question apart from demanding production of the ID. Therefore, I find this ground to lack merit, as well.

The appellant also alleged that no DNA test was made to match his specimen on the victim. In Tanzania, DNA test is not a statutory requirement to prove the offence of rape. See, for example, ***Robert Andondile Komba v DPP,*** CoA Crim. Appeal No.465/2017; and ***Frank Onesmo v R*** HC Crim. Appeal No.147 2019 (both unreported)].

The prosecution needs only prove that the victim was raped. On record, the victim testified to had been raped by the appellant. After the alleged action, she stated that she ran from the washroom (crime scene) and reported the barbaric ordeal to her grandmother (PW2). Her evidence was unchallenged during cross examination. No question was asked as to

the accused's identification. Earliest mentioning of the accused by the victim, adds value to the evidence against the accused.

In ***Marwa Wangiti Mwita & Another V R*** **(2002) TLR 39**, for instance, it was held that naming of the accused at the earliest stage is one of the criteria that the accused's identification is not doubtful. In addition, in the eyes of the law, the best evidence of rape comes from the victim. See, for instance, ***Victory Mgenzi @Mlowe v R***, CA Criminal Appeal No. 354/2019; ***Vedastus Emmanuel @Nkwaya v R***, CA Criminal Appeal No. 519/2017 (both unreported); and ***Selemani Makumba v R*** [2006] TLR 379.

Furthermore, PW5 proved penetration at pages 11 and 12 of the proceedings. He also tendered PW3 (Exhibit P1). Cumulatively, therefore, evidence of the prosecution proved the charge against the appellant on the required degree. That is, the case was proved beyond reasonable doubt against him.

All in the fine, the appeal is barren of merit. The conviction and sentence of the trial court are upheld. In effect, the appeal stands dismissed accordingly.

I so order. The right of appeal is duly explained to parties hereof.

C.K.K. Morris

Judge

October 6th, 2023

Judgment delivered this 6th day of October 2023 in the presence of the Mr. Paschal Ng'hungu; the appellant and Ms. Thabitha Zakayo, learned State Attorney for respondent.

C.K.K. Morris

Judge

October 6th, 2023