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

CRIMINAL APPEAL NO. 48 OF 2023

(*Originating from Criminal Case No. 59 of 2022 of Bariadi District Court*)

TATI EVARIST.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 26th October, 2023
Date of Judgment: 3st November, 2023

MIRINDO, J.:

Late in the night of 30th June 2022, a primary school girl (NM) aged 14 years was sleeping with her siblings. The door of their room was pushed, she woke up, switched on the solar light, and a man entered. The man hurried towards her, took off her pants and raped her. She screamed for help; her parents who were in the next house responded. The man rushed out from the children's house and was seen by NM's parents as he tried to run away. Both NM and her mother recognised the man as Tati Evarist whom they knew before because he had been living with one of their neighbours for almost seven months. The next day, NM, was taken to Nkololo Dispensary where she

was medically examined: her sexual organ were bleeding and it was teared towards her anus. She also had abdomen pain.

Tati was first arrested in the same night by Mwano people who took him to a village executive officer where the appellant slept. The next day the appellant was arrested by a police officer from Nkololo Police station and was later taken to Bariadi Police station where he was interrogated. He was charged before Bariadi District Court for of rape of NM contrary to subsection (1) and (2) of section 130 and 131 (1) of the Penal Code [Cap 16 RE 2022] of a primary school girl aged 14 years. He was sentenced to a mandatory minimum sentence of 30 years imprisonment and ordered to compensate NM, 1,000,000 Tzs.

The appellant was not satisfied with by the decision of Bariadi District Court on the grounds that the prosecution did not prove the charge of rape beyond reasonable doubt. In his Petition of Appeal, the appellant states that: there was weak identification evidence, prosecution witnesses were unreliable and key witnesses were not called by the prosecution. The appellant had no legal representation at the hearing of this appeal, adopted his eight grounds of appeal and did have much to add. The respondent was represented by Leonard Kiwango, learned state attorney.

In connection with the appellant's complaint that NM's testimony that she was raped for ten minutes was unreliable, Mr. Kiwango argued that where

the appellant is facing a charge of statutory rape what matters is the proof that the victim was raped, age of the victim and the author of the act of rape. The time spent in raping NM is irrelevant. The learned state attorney argued that all aspects of statutory rape were proved beyond reasonable doubt. There was evidence from NM herself and a clinical offer, (the fourth prosecution witness) that NM had abdomen pain, her sexual organ was bleeding, and was teared towards the anus. The age of NM was proved by NM herself and her mother. Mr. Kiwango argued that it has been held in **Victory s/o Mgenzi @ Mlowe v Republic** (Criminal Appeal 354 of 2019) [2021] TZCA 149 (30 April 2021) that there different ways of proving the victim's age including the evidence of a parent and medical practitioner as was the case here.

The sixth ground of appeal is that there was sufficient proof of the distance between the house where NM was sleeping with her siblings and where her parents were sleeping. Mr Kiwango argued that this ground was baseless because the distance was stated by the first prosecution witness to be about four human footsteps. With due respect to the learned to the learned state attorney, the distance stated was in relation to where the appellant was at the time, she was seen by the first prosecution witness.

Mr Kiwango dismissed as baseless the eight grounds of appeal that the charge was defective since it contained insufficient information on the time the offence was committed. He argued that it is not a legal requirement that

charge sheets to indicate hours in cases of rape. He concluded that in any case the appellant was not prejudiced by the omission to state the duration. The omission was curable under section 388 of the Criminal Procedure Act [Cap 20 RE 2022]

In convicting the appellant, the trial court was satisfied that the identification of the appellant was watertight since there was solar light and the appellant was someone they knew before as one of their neighbors. Mr Kiwango took the same view before this Court. He argued that the appellant was properly identified by the first and second prosecution witnesses. Both witnesses stated that solar light enabled them to recognise the appellant whom they knew before because he was their neighbour for some time. NM, the second prosecution witness, mentioned the name of the appellant to his parents at the earliest opportunity. For this reason, NM was reliable and there was no case of mistaken identity.

In his seventh ground of appeal, the appellant complains that key witnesses were not called in particular those who responded to the alarm. In response to this ground, Mr. Kiwango argued that according to section 143 of the Evidence Act [Cap 6 RE 2022], the number of witnesses is irrelevant in a criminal case. What matters is the weight of the evidence. In this case, the prosecution was satisfied that the number of witnesses brought in Court was sufficient to prosecution's case. He dismissed the ground as baseless. It has

never been the rule under section 143 that the prosecution may omit to call key witnesses simply because their number does not matter.

In **Lubeleje Mavina and Another v R**, Criminal Appeal 172 of 2006 (2008), the Court of Appeal held that the prosecution is duty bound to call a witness who was a first responder to crime scene and failure do so casts doubt to the prosecution case. In the present appeal, NM was sleeping with her siblings in the same room but none of them was called as a witness. The siblings were expected to be among the key witnesses but none of them was called without any explanation from the prosecution side. Similarly, both the first and second prosecution witness consistently testified that the appellant was chased by Mwano people and slept at the house of the Village Executive Officer (perhaps of Gubeshi Village). None of the Mwano people were called to testify to confirm that the appellant was caught at the scene of crime. This was important to rebut appellant's denial being arrested by Mwano people.

These omissions cast doubt on the prosecution case as was held in **Gallus Faustine Stanslaus Wasiwasi and another v R**, Criminal Appeal No.231 of 2007 (2010):

> *The non-calling, as witnesses of **neighbours** who came to the scene of crime gives rise to doubts as to whether or not the appellants were the culprits. No explanation was given by the prosecution why even a single **neighbour** was not called as a witness.* [Emphasis original].

These were critical omissions in view of the fact the appellant denied challenged the truthfulness of his arrest during the cross-examination of the first prosecution witness and in his defence. NM claimed that the appellant was arrested near his home while the appellant claimed that he was arrested at home. In these circumstances, it was important to call some Mwano people and the village executive officer to clarify this discrepancy. This critical omission forestalled the appellant's defence of *alibi*. The Court of Appeal, speaking of a similar critical failure to call material witnesses in **William Kitonge alias Mwita v R**, Criminal Appeal No.185 of 2010 observed that:

> *This being a criminal case we have found ourselves in full agreement with the contentions of both counsel in this appeal that the husband of PW1 Fatuma was an essential prosecution witness in proving the alleged robbery and the identity of the robbers. That he and the neighbours were not called for unexplained reasons, necessarily leads us to only one irresistible inference. It is that if they had been called as witnesses, they most likely would have belied the two witnesses on both issues.*

Without the evidence of siblings, Mwano people involved in the arrest, the Village Executive Officer in whose house it was alleged the appellant slept the prosecution did not discharge its burden of proof. There is some reason to doubt the plausibility of the prosecution's story. This is a fit case to draw an adverse inference in the absence of an explanation why these key witnesses were not called at the trial.

In further support of the appellant's conviction, Mr Kiwango drew attention of this Court to the fact that the appellant confessed while at Bariadi

Police Station. At page 5 of the typed proceedings of the trial court, the third prosecution witnesses testified in part that:

> *…..On 2/7/2022 I was at Bariadi station at the investigation office, then I was called by the OCCID David Mawingo, he gave me the file with No. BAR/IR/1192/2022 with the offence of rape and the victim was one….[NN] and the accused was Tati Evarist, in the file there was the instruction of OCCID, I went to read and found that the offence was committed at Gibeshi Nkololo on 30/6/2022 around 23.00 hrs.*
>
> *At that time the accused was at the Police custody I discovered that the person did commit such offence since he was interrogated and he admitted to have committed the said offence and the victim identified him using the solar light…..*

Given that the prosecution did not produce in court a cautioned statement, it is fair to assume that the confession referred to was an oral one. In order for the oral confession to ground conviction, it must have been made voluntarily before a reliable witness: **Posolo Wilson alias Mwalyego v R**, Criminal Appeal 613 of 2015, Court of Appeal of Tanzania (2018); **Martin Manguku v R** [2007] TLR 63 at 67. Was the third prosecution witness reliable? It appears that she was not the one who took the confession and, in these circumstances, her credibility cannot be fairly judged.

Had the trial magistrate directed herself on the missing links in the prosecution evidence, she would have concluded that there was reasonable doubt in the prosecution's case. It is an established principle of evidence law that the accused is entitled to benefit of doubt: **Abdallah Jeje v R**, Criminal Appeal 195 of 2007, Court of Appeal of Tanzania at Mwanza (2011); **Raphael**

Kinashi v R, Criminal Appeal 67 of 2002, Court of Appeal of Tanzania at Arusha (2004).

In light of the above analysis, I allow the appeal. I quash the conviction, set aside the sentence and the compensation order imposed by Bariadi District Court. I order that the appellant be set at liberty immediately unless lawfully detained in prison for another cause.

F. M. MIRINDO
JUDGE
03/11/2023

Order: Judgment delivered this 3rd day of November, 2023, in the presence of the Appellant in person and Mr Leonard Kiwango, learned state attorney. B/C Ms. Sumaiya Hussein- (RMA), present.

Right of appeal explained.

THE HIGH COURT OF TANZANIA

F. M. MIRINDO
JUDGE
03/11/2023