IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 115 OF 2023

(Originating from the Judgment of the District Court of Temeke at Temeke, before Hon. W. A. Hamza – RM in Criminal Case No. 259 of 2016)

RAMADHANI MWANAKATWE @ THE BOY ..... 1ST APPELLANT

STEPHEN LAMECK @ JOHN ..... 2ND APPELLANT

HAMIS ABDALLAH @ CHINGA ..... 3RD APPELLANT

LEONARD RESPICHI NYONI @ KADO ..... 4TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

30th Oct & 10th Nov, 2023

KIREKIANO, J.:

The appellants herein were tried in the District Court of Temeke on two counts. The first count was rape Gang rape contrary to section 131 (1) (2) (e) and 131 A (1) (2) and the second count was unnatural offence contrary to section 154 (1) (a) and (2) all counts under the Penal Code Cap 16.

It was alleged that on 26/04/2016 at Tungi Primary School within Temeke District Dar es Salaam, the appellants jointly and together did have carnal knowledge of a girl aged 15 years. It was further alleged that on the very date and in the process of committing the first count the appellants did have carnal knowledge of the same girl against the order of nature. The name of the victim is on record, I shall sufficiently refer to her as "the Victim PW1"

Briefly stated the brief facts of the case are as follows. On 26/4/2016 the victim while going to recharge a cell phone met two men whom she identified as the first appellant and second appellants. This was around 21 hours. These men grabbed the victim under knife point and called their fellow informing them that they had caught the one they wanted! This time three other men joined the two. It is the prosecution case that two of them were identified as the 3rd appellant Hamis Abdallah @ Chinga and the 4th appellant Leonard Respichi Nyoni @ Kado.

The appellants then raped the victim on shift but also sodomized her. It was the prosecution's case that these people took a recording of the proceeding and threatened the victim to post the same on social media.

When released from this ordeal the victim narrated the story to her grandmother (PW2 Celina Edward).

The incident was reported at Kigamboni Police Station. The victim was examined at Kigamboni Hospital by PW3 Michael Ndunguru a medical officer. According to his examination and finding in medical examination (PF3 – Exhibit P-1), the victim was found with blood stains and bruises, in both anal and genitals parts of the victim suggesting that there was penetration in both ways.

The incident was investigated at Kigamboni Police Station. PW4 E8960 DCPL Alex testified that the police had led from the victim who knew the suspects by names and faces. The appellants were thus arrested on different occasions. As such the 1st and 4th appellant confessed in their caution statement Exhibit P2 and P3 respectively.

The appellant's defence was complete denial. They all dissociated themselves from the offence. The 1st appellant and 4th appellant said they were forced to admit the commission of the offence. The 4th appellant also raised the defence of alibi stating that on the material date, he was at Kimara where he stayed for four days from 26/4/2016.

The trial court was convinced by the prosecution case that the charge in the first count was proved beyond a reasonable doubt, as such in the second count the trial court found that the charge was proved against 1st and 2nd appellant only.

It relied on evidence of the victim to prove penetration but also identification of the appellants. It also rejected the 4th appellant's defence of alibi stating that the same was contradictory. In the end, the appellants were convicted and sentenced to life imprisonment in the first count. In the second count, 1st and 2nd appellants were equally sentenced to life imprisonment.

Dissatisfied with this decision the appellant preferred this appeal on six grounds:-

1. *That, the appellants were incorrectly convicted based on a single visual identification evidence of PW1 which was not credible and probable enough to eliminate any reasonable possibility of incorrect or mistaken identification of the appellants.*
2. *That, the learned trial magistrate erred in law for not assessing the evidence of PW1 in line with the evidence of an investigator of the case PW4, and the appellant's defence, particularly the defence of alibi which was raised by the 1st, 3rd and 4th appellants.*

3. *That, the learned trial magistrate erred in law to place reliance on invalid documentary exhibit P1 (PF3) which was not read out in the court after being admitted as evidence.*
4. *That, the learned trial magistrate erred in law and facts to act upon invalid retracted and repudiated confessional statements exhibits P2 and P3 which were obtained out of the prescribed time and which were not voluntarily made.*
5. *That, the appellants were wrongly denied the right to be heard, since they were not accorded reasonable opportunity to call the defence witnesses that they intended to call in their defence case.*
6. *That, the learned trial magistrate erred in law to convict the appellants in a case which was not proved beyond reasonable doubt by the prosecution against the appellants.*

At the request of the appellants, this appeal was heard by way of written submissions. The appellants were unrepresented while the respondent was represented by Miss Dorothy Massawe learned Principal State Attorney.

Submitting on the first ground the appellant submitted that the appellant was wrongly convicted based on identification by a single witness (PW1). It was narrated that PW1 did not explain the source of light which enabled her to identify the 1st & 2nd appellants during the night around 21 hrs.

In support of this proposition, the appellants cited the decision in **Waziri Amani v Republic** [1980] TLR 250 that possibilities of mistaken identity ought to be eliminated before evidence on visual identification could be relied upon. As such the decision **in Jaribu Abdallah v Republic [2003] TLR 201** was cited to the effect that even if the circumstances were ideal for mistaken identification there was no guarantee of unfaithful evidence.

On another aspect of identification, the appellants argued that according to the record the victim named the suspect on 27/04/2016 when the investigator was assigned the file. The appellant's line of argument if the victim knew her rapist she would have named them in her first information report on 26/04/2016.

The appellant cited the decision in **Marwa Wangiti v Republic** [2002] TLR 39 and **Jaribu Abdallah v Republic** [2003] TLR 271 thus mentioning of suspect at the earliest is the assurance of the witness's reliability.

It was thus argued that although conviction may be found on uncorroborated evidence of the victim this court should warn itself of the

danger of relying on the victim's testimony having regard to the circumstance of identification of the appellants.

In grounds number two and five the same was condensed into one thus the trial court erred in ignoring the appellant's defence of alibi and treating the same as if it was never made. It was argued that under section 194 (6) of Criminal Procedure Act Cap 20, the trial had options to decide on this evidence but the record was silent which prejudiced the appellants.

The appellants asked this court to consider the from 17/1/2017 where the trial court hastened to hear the defence case for one day and their defence was closed the next date as there were witnesses to summon.

On the third ground, the complaint was on trial court relying on the documentary exhibit PF3 which was not read to the appellants. In their submission, they added that even the caution statements exhibit P - 2 and P3 were not read out by the court.

Lastly, on ground six the appellants argued that the charge was not proved beyond reasonable doubt. In essence, the appellant complains that

the trial court should not have safely relied on the evidence of the victim which was surrounded by poor identification. As such on reasons stated on circumstance in admitting documentary exhibits if this court expunges the same then the conviction will have no legs to stand.

The respondent thought Miss Massawe responded that; on the issue of identification although PW1 did not state the source of light there was evidence that the victim was stopped by the 1st and 2nd appellants who talked to the victim before the 1st appellant called the other rapist. It was Miss Massawe's view that this witness knew the first appellant before the incident. In this, she relied on the cited case of **Waziri Amani** to the effect that this court can consider all aspects to avoid mistaken identity.

As such, argued Miss Massawe this court is requested to consider that despite the conditions for identification this did not mean that the victim couldn't identify her rapists. She cited the decision in **Phil Rukaza vs. Republic, Criminal Appeal No. 215 of 1994** Mwanza. She argued that it is on record that, she also argued that the victim was able to name the appellants to PW2 and the police at the earliest time.

On the 2nd ground, Miss Massawe responded that the victim immediately reported the incident to police the same night on 26/4/2016 She also mentioned them to PW4 when he started the investigation on 27/4/2016 the next day. In this, the requirement to name a suspect the earliest was complied with given the decision in **Marwa Chacha Wangiti & another vs. Republic [2002] TLR 39.**

He argued that count to believe the victim citing the decision in **aban Daudi vs. Republic, Civil Appeal No. 28/2001** cited in **arles Kassim @ Kitobe vs. Republic**, Criminal Appeal No. 546 of 21 that: -

> *"Credibility of a witness can also be determined by assessing the coherence of the testimony of the witness and two when the testimony of the witness is considered about the evidence of other witnesses".*

On defence of alibi, the respondent argued this court not to accord any weight to this defence given section 194 (6) of the Criminal Procedure Act due to the strength of the position case.

On the third ground, the respondent considered that the evidence in PF3 was not read to the appellants. However, she argued that the

absence of evidence by the doctor would not leave the charge without proof. She considered that the evidence ought to be expunged citing **Robison Mwanjisi & 3 Others vs. The Republic**, Criminal Appeal No. 154 of 1994.

On the fourth ground, it was argued that the trial court correctly relied on the confession statements which were retracted however the trial court conducted an inquiry and finally admitted the same.

This is the first appeal in which this court is charged to re-evaluate the evidence on record and come up with its own decision. This is the general practice and there is plenty of decision supporting this practice including Peters **v. Sunday Post Limited [1958] EA 424** and **Paulina Samson Ndawavya vs. Theresiah Thomasi Madeha, Civil Appeal No. 45/2017**

I wish to start with the first ground on identification. The complaint is that there was no credible identification of the appellants. According to evidence on record, the victim's basis of identification is that she knew the appellants before and on the fateful night around 21hrs she was stormed

by the first and second appellant. The appellant's bedrock in this aspect is that the condition was not favourable for unmistakable identity.

The learned trial magistrate in her finding on identification is reflected on page 6 of her judgement thus;

> *This court found the testimony of PW1 to have been (sic) clear proof that she identified them easily as she used to know them even before the date of the crime and the time that passed there the pictures taken of the victim which means there were enough was enough time for identification'*

The prosecution relying on **Phil Rukaza's** decision asked this court to consider the possibility that the victim might have got it right in identifying her rapist.

I have carefully considered this area of identification the same appears decisive in this appeal. The incident occurred during the night (21hrs) the evidence leading to the appellant's arrest appears to be from the victim as shown in the trial court judgment. The victim's version was basically how the first and second appellants were familiar to her before the date of the incident

In **John Jacob v. Republic,** Criminal Appeal No. 92 of 2009 (unreported) the court of appeal held: -

"When the question of familiarity especially during night time is raised, the court must first satisfy itself whether the conditions prevailing are conducive for correct identification.

In this appeal, no description was given by the victim in identifying her rapist and no evidence as to the source of light which assisted her in identifying her rapist. Both parties relied on the decision in **Waziri Amani Vs Republic,** with different perspectives.

Considering the conditions stated, it was incumbent for this witness led by the prosecutor to explain how she concluded that the people she knew were the people she saw and identified at the scene of the crime.

The court of appeal faced with a similar situation was clear that the issue of familiarity does not come into play where the conditions are not ideal for un mistaken identity. In **Kurubone Bagirigwa & Others vs Republic (Criminal Appeal 132 of 2015) https://tanzlii.org** the court of appeal citing **Chokera Mwita Vs. Republic and Issa Mgara @ Shuka Vs Republic** in the case at hand, since the explained;

It was not enough for the witnesses to merely say that they knew the appellants who are residents of Buserere, without stating how they managed to identify the

appellants at the scene of the crime. This is because it is trite law, even in recognition cases, mistaken identity is possible.

I have carefully considered the condition involved at the scene of the crime and find that the same was not conducive to an unmistakable identity. I have as such scanned the rest of the evidence on identification, the record shown on page 12 shows that PW2 did not know who raped the victim and she did not say the victims disclosed names to her.

As such in the evidence of much disputed retracted caution statements Exhibits P 2 and P3, I have taken the approach taken in ***Kashimira Sigh Vs State Pradesh AIR 1952 SC 159 at page 160 that:***

'The best way to approach a case of this kind is to assemble the evidence against the accused excluding confession and see whether conviction could be safely based on it.

There is other tangible evidence on identification linking the appellants before bringing in to aid the retracted confession statements. It is based on this reason I find that this appeal has to succeed on the first ground. I shall not therefore indulge on other grounds of appeal. In the final event,

the appeal is allowed in its entirety. Conviction and sentence passed against the appellants are set aside. The appellants are to be released from prison unless otherwise lawfully held.

A. J. KIREKIANO

JUDGE

10/11/2023

COURT: Judgment delivered in chamber in presence of the appellant and Miss Doroth Massawe, Principal State Attorney for respondent.

Sgd: A. J. KIREKIANO

JUDGE

10/11/2023