

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 59 OF 2023

(Originating from Criminal Case No. 10 of 2022, the District Court of Arumeru by Hon. G.A. Mwankuga, RM, dated 1st day of January 2023)

ELIAS s/o ROBERT @ NDOSI APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

02/11/2023 & 14/11/2023

KINYAKA, J.

The Appellant is aggrieved by the conviction and sentence made by the District Court of Arumeru on 03/01/2013. Before the District Court of Arumeru, the Appellant was charged with the offence of rape contrary to sections 130 (1) and (2) (e) and 131 of the Penal Code Cap. 16 R.E. 2019. He was sentence to serve thirty years imprisonment in jail. The Appellant preferred two grounds of appeal in his memorandum of appeal filed in court on 06/06/2023. Later, on 17/10/2023, the Appellant, lodged additional five

grounds of appeal, making a total of seven grounds of appeal which are reproduced below: -

1. That trial Magistrate erred in law and in fact when he held that the charges against the Appellant were proved beyond reasonable doubt;
2. That the learned trial Magistrate erred in law and fact by failing to evaluate and consider the evidence adduced by the Appellant during the trial hence reached into erroneous decision;
3. That the learned trial Magistrate erred in law and in fact in not finding that there was delay in arraigning the appellant before the court as it is required by section 32(1) of the CPA, hence in violation of Article 13(6)(e) of the Constitution of the United Republic of Tanzania;
4. That the learned trial magistrate erred in law and in fact in not finding that there was contradiction between PW3 and Exhibit P2;
5. That the learned trial magistrate erred in law and in fact in not finding that there was variance between the charge and the evidence in respect of the name of the victim;
6. The learned trial Magistrate erred in law and in fact in not finding that the evidence of PW4 failed to prove that the victim of the offence was not mentally fit; and

7. That the trial Magistrate erred in law and fact in not finding that the victim of the offence was not credible as per section 127(6) of the Evidence Act.

At the hearing of the appeal, the Appellant appeared in person and the Respondent was duly represented by Ms. Alice Mtenga, State Attorney. The Appellant opted to submit on the additional five grounds of appeal, that is the third up to the seventh grounds of appeal as reproduced above. The Appellant stated that the first two grounds of appeal are accommodated in the five grounds of appeal. The Parties' submissions will therefore be in respect of the third to eighth grounds above.

The Appellant's contention in respect of the first ground of appeal is that he was arrested on 31/11/2021 but was arraigned in court on 28/02/2022. He stated that the prosecution violated section 32(1) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (herein after, the "CPA") that requires an accused person to be arraigned in court within 24 hours after he is arrested. According to him, justice was delayed and therefore was denied his right to be heard under Article 13(6)(a) of the Constitution of the United Republic of Tanzania as amended (herein after, the "Constitution").

Submitting on the second ground, the Appellant stated that PW3 informed the court that the Appellant took the victim to a far place where no one could hear the victim shouting. He stated further that the map of the scene where the offence was committed (Exhibit P2), show that the place of commission of offence was nearby peoples' residences. He argued that there were clear contradictions between the evidence of PW3 and Exhibit P2.

On the third ground, the Appellant submitted that there is difference of names of the victim in the charge sheet and proceedings of the trial court. He stated that on page 7 of the proceedings, the victim is Ivony Simoni Nyiti, on page 14, the doctor informed the court that she received a patient known as Ivony Giliadi Ninti, and on page 1 of the judgement of the trial court, the victim was named as A. G., which does not tally with the names of the victim on page 7 and 14 of the proceedings. He argued that as the prosecution did not amend or rectify the charge sheet, section 234(1) of the CPA that require amendment of a charge sheet when there are variations, was violated.

In the fourth ground, the Appellant attacked the decision of the trial court for disregarding the fact that the doctor (PW4), failed to state the mental condition of the victim. This anomaly, according to the Appellant, affected the truthfulness of the testimony of PW4. He concluded that PW4 was not truthful.

The Appellant faults the decision of the trial magistrate in the fifth ground for ignoring the fact that, the evidence of the victim was not credible as required under section 127(6) of the Evidence Act. He stated that credibility of the witness can be tested at the evaluation of the evidence of the witness or when the evidence of the witness is evaluated in analyzing the evidence of other witnesses. According to the Appellant, on page 8 of the proceedings, the victim answered few questions asked by the prosecutor and the answers were not related to the questions asked. The Appellant stated further that the victim did not manage to answer any question. He concluded that the evidence of the witness was not sufficient to justify conviction because PW2's evidence did not prove that she was raped, and that the person who raped her was the Appellant. The Appellant concluded by a prayer for quashing the conviction and sentence.

In opposing the appeal, the Counsel for the Respondent disagreed with the first ground of appeal on the reason that investigation takes time to complete depending on the nature and circumstance of a particular offence. She stated that the offence of rape had police bail, and if he was not granted bail, the Appellant should have informed the trial court upon being arraigned to court. Counsel submitted that there is nothing in the record to suggest that the Appellant raised such complaint before the trial court. She was of the view that section 32(1) of the CPA was not violated.

Responding on the second ground, the Counsel stated that on page 11 of the proceedings, PW1 testified that, the victim was taken to a far place where she could not be heard when shouting. She stated that the evidence is corroborated by evidence of the victim (PW2) on page 8 that she was raped at an unfinished building and that, although she shouted, no one went there for help. She argued that PW3's testimony that the place was far meant that it was a place where no one could hear any shouts. She concluded that there was no variance of evidence between PW3 and Exhibit P2.

Submitting against the third ground, the Counsel admitted that there are differences in the names of the victim in the record of the trial court, but it was the manner in which the evidence was recorded. She submitted that the name 'A. G.' in the charge sheet and which was adopted by the trial magistrate on page 1 of the judgement, are initials of the name Aivon Giliadi. She stated that the prosecution normally write initials of names in order to protect the identity of the victim. The Counsel submitted that the name Ninti was an error but the names Ivony Simon Nyiti refers to the same victim as appears in the victim's birth certificate (Exhibit P1) with a full name of Aivon Giliadi Simon Nyiti.

The Counsel stated that irrespective of the difference in recording of the victim's names, the Appellant was not prejudiced or denied his rights to understand the nature and seriousness of the offence for him to defend himself. She stated further that the Appellant was availed with the charge sheet, he was present when the victim was testifying, and was present when Exhibit P1 were tendered. She concluded that the Appellant did not cross examine on the different names of the victim before the trial court, therefore his ground of appeal is an afterthought.

In her opposition to the fourth ground, Counsel stated that PW4 was a doctor who admitted the victim upon being raped. She stated that nowhere in the proceedings, PW4 testified to be a doctor specialized in mental diseases. Counsel argued that the role of PW4 was to prove if there was penetration which she proved through her oral testimony and corroborated by Exhibit P3 before the trial court.

In respect of the fifth ground, Counsel insisted that the evidence of the victim was reliable and sufficient to prove commission of the offence by the Appellant. Counsel stated that immediately after she was raped, the victim was able to immediately mention the name of the Appellant and took her mother to the Appellant's residence. According to the Counsel, the evidence of the victim was credible and was corroborated by the evidence of her mother found on page 5 of the proceedings. Counsel submitted that the questions that the victim did not respond or responded differently were asked after she had sufficiently testified on how she was raped, and the silence or the alleged different answers did not water down or contradict her evidence.

Counsel added that in taking the evidence of the victim, the trial court exercised caution of the victim's history of epilepsy. The trial court was satisfied that the testimony of the victim was the truth. Counsel insisted that even if PW2 was suffering from epilepsy, she was aware of the rape, the manner in which she was raped and the person who raped her, being the Appellant. Counsel concluded by praying for dismissal of the appeal.

In his rejoinder, the Appellant submitted that the victim found him at his home. He stated that the victim mentioned his name when her mother (PW1) asked her about the person who raped her but he is not the one who raped her. He also stated that the case is fixed against him by some people from his village but he did not commit the offence. He prayed for the court to do justice.

Upon completion of the submissions by the parties, I now move on to determine whether the conviction and sentence of the Appellant by the trial court was proper and correct both in law and fact.

In the first ground, the Appellant complains on the prosecution's delay to arraign him in court from 31/11/2021 to 28/02/2022, contrary to section 32(1) of the CPA and Article 13(6) (e) of the Constitution. It is not uncommon for investigation to take time in criminal cases. This normally depends on the circumstance of the each case and the challenges surrounding the investigation. I find the omission to be a minor irregularity which cannot vitiate proceedings of the trial court. I am fortified by the decision of the Court of Appeal in **Makenji Kamura v. R., Criminal Appeal No. 30 of 2018**, on page 8 and 9, which quoted its decision in **Jaffari Salum @Kikoti versus v. R, Criminal Appeal No. 370 of 2017** (unreported), where the Court of Appeal held:-

*'This is not the first time we are dealing with an issue like this. We were confronted with an akin situation in **Jaffari Salum @Kikoti versus v. R, Criminal Appeal No. 370 of 2017** (unreported), where, like in this case, the appellant faulted the judgment and proceedings of the trial court on account that he was arraigned to the trial court after 39 days from the date of his arrest and detention contrary to section 32(1) of the CPA. We held that, the omission was a minor irregularity which could not vitiate the judgment and proceedings of the trial court. Guided by that authority, we dismiss the second ground of appeal.'*

I also find that, the offence against the Appellant had police bail. If the Appellant was not granted bail, the Appellant should have informed the trial court upon being arraigned in court. I find nothing in the record to suggest that the Appellant raised such complaint before the trial court. I find that section 32(1) of the CPA and Article 13(6) (e) of the Constitution were not violated. There is no merit in the first ground of appeal and is dismissed.

The second ground of appeal faults the decision of the trial court for not finding weakness in the prosecution case based on the contradiction between PW3 that the Appellant took the victim to a far place, and Exhibit P2, a sketch map, showing that the incidence took place at unfinished building. The alleged evidence of PW3 is found on page 11 of the proceedings of the trial court. During cross examination of PW3 by the Appellant, PW3 referred to PW1's complaint to the police that the Appellant took her daughter to a far place where she could not be heard even if she screamed. I find that the testimony was not of PW3, but a hearsay from the victim's mother. Further, there is nowhere in the testimony of the victim's mother (PW1) that the Appellant took the victim to a far place. Again, Exhibit

P2 is corroborated by the evidence of PW2 on page 8 of the proceedings that, the Appellant took her to unfinished building. I find that there is no variance between the testimony of PW3 and Exhibit P2. The second ground has no merit and is dismissed.

The Appellant's complaint in the third ground is the variance between the charge and evidence in respect of the name of the victim. The Appellant contended that the prosecution violated section 234(1) of the CPA for its failure to amend the charge. I agree with both the Appellant and the learned State Attorney that there are differences of the names of the victim in the record. However, I disagree that the differences are substantial that affected the Appellant's rights in the trial, or that would require the prosecution to amend the charge under section 234(1) of the CPA. Section 234(1) provides:-

'234.-(1) Where, at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of

the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just. '[Emphasis added]

I entirely agree with the learned State Attorney that the name A.G. in the charge sheet was a short form of the victim's name Aivon Giliadi with a purpose to protect the identity of the victim; the name Ivony Giliadi Ninti was a typing error in the names 'Ivony' and 'Ninti' which did not affect the merit of the case and did not prejudice the Appellant; and the names Ivony Simoni Nyiti and Ivony Giliadi Nyiti refer to the victim whose full name in her birth certificate (Exhibit P1) is Aivon Giliadi Simon Nyiti. Based on the fact that the Appellant knew the victim as his neighbour, he was able to identify him during the proceedings, and that he was accorded the right to cross examine and defend his case, I find that the differences did not go to the root or merit of the case, and did not prejudice the Appellant. The third ground is dismissed for lack of merit.

In the fourth ground, the Appellant faults the evidence of PW4, the doctor, for failure to prove that the victim of the offence was not mentally fit for his

failure to state the mental condition of the victim. The Appellant argued that PW4's testimony was not truthful. The evidence of PW4 is found on page 14 of the proceedings. In respect of the Appellant's complaint, the testimony of PW4 is reproduced below:

*'..... I conducted medical examination and fill a PF3, which I can recall because it bears my handwriting, stamp of the office and my signature, this is the one I have recalled it as I said it bears my handwriting and signature as per exhibit **the victim came with a complaint of rape, she is suffering from epilepsy, she was not mentally fit. She came six hours after she has been penetrated by a blunt object, there is evidence of penetration, there was no bruises in her vagina, blood, there was anal intact, we found sperms, there is evidence of vaginal penetration. The victim is disabled her brain is distorted; she is not mentally fit.**' [Emphasis added]*

The oral testimony of PW4 above show that the victim was suffering from epilepsy, was not mentally fit, disabled and had a distorted brain. These were his findings when he observed the victim. In determining this ground, I asked myself, whether the condition of the victim at the time she was observed by PW4, including her epilepsy, mental unfit condition, and distorted brain, affected PW4's examination of the victim culminating to the procurement of

Exhibit P3? I am of the finding that the mental condition or epilepsy of the victim did not affect PW4's examination and his findings in respect of the ingredient of the offence of rape, the penetration.

In respect of the offence charged against the Appellant, PW4 testimony that there was penetration and sperms in the victim's vagina, corroborated by Exhibit P3, justified the prosecution evidence that there was penetration and sperms found in the victim's vagina. After all, PW4 was entrusted to examine the victim and establish whether the victim was raped and not the state of her mental condition or epilepsy. Whether the victim had epilepsy or was mentally ill at the time of examination by PW4, it could not affect PW4's examination to establish penetration and presence of sperms in the victim's vagina. In respect of the offence that the Appellant was charged and convicted of, PW4's evidence and Exhibit P3 were sufficient to prove penetration, and I cannot find PW4 to have been untruthful. I dismiss the fourth ground for lack of merit.

The Appellant faults the decision of the trial court in not holding that the evidence of the victim was not credible as required under section 127(6) of

the Evidence Act. He contended that the victim failed to answer some questions and she answered other question inappropriately. He argued that, the victim was not able to prove that she was raped and he is the perpetrator of offence. I should first consider the observation of the trial court on page 4 of the judgement on the caution that it exercised in taking the evidence of the victim, due to her medical condition of epilepsy. To me, this means that the trial court exercised caution in taking and relying on the evidence of the victim to convict the Appellant for the offence charged.

Again, in the last paragraph of page 6 through to 7 of the judgement, the trial court assessed whether, the evidence of the victim was worth of credit. Upon assessing the evidence of the victim, which was corroborated by PW4 that there was penetration and sperms in the victim's vagina and Exhibit P2, the trial court was satisfied that the victim was speaking the truth and the evidence was not tainted with any doubt.

It is crucial at this juncture to find out whether there was any doubt in the evidence of the prosecution that was relied by the trial court to convict the Appellant. The Appellant has casted doubt on medical condition of the victim.

I had had ample time to read the proceedings, and I have found that the evidence of the victim was intact. At no point it was alleged, found or recorded that when the victim was being raped, or when she informed her mother of the incident and the person who raped her, or when she took her mother to the Appellant's residence, or when she was giving evidence in court, she suffered any medical condition, be it epilepsy or mental illness.

The fact that she failed to answer questions, does not affect her clear evidence that was credible to prove that she was raped by the Appellant. I find that the victim's decision to remain silent was due to the nature of the questions asked that required her to mention her private parts or to narrate what exactly she told her mother regarding the part of her body that the Appellant inserted his penis. The information that she was required to give had been given by her, or informed her mother, and she did not want to repeat by stating exactly how she was raped. I also find that her silence to some questions and the different answers she gave did not contradict her clear and consistent evidence that she was raped by the Appellant. I find that the evidence of the victim was credible.

The Appellant's compliant that the victim failed to prove that she was raped and the person who raped her was the Appellant, does not convince me. In addition to the evidence of the victim which I have held to be credible, the victim was able to mention the person who raped her at the earliest opportunity when she returned home. The victim was able to take her mother to the Appellant's residence. This proves that the victim knew the Appellant very well. I am guided by the decision of the Court of Appeal in **Marwa Wangiti Mwita and Another v. R. (2002) TLR 39**, where on page 5 of the decision, it was observed that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability. I find that the victim's evidence was reliable and sufficiently established that she was raped by the Appellant. The fifth ground of appeal is also dismissed for lack of merit.

In view of the above, I am of the finding that the prosecution evidence established the offence against the Appellant beyond any reasonable doubt. I find that the conviction and sentence of the Appellant by the trial court to be proper in the circumstances, and I hereby uphold them. Consequently, the appeal is devoid of merit, and it is dismissed in its entirety.

It is so ordered.

Right of Appeal fully explained.

DATED at **ARUSHA** this 14th of November 2023.




H. A. KINYAKA

JUDGE

14/11/2023