**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA SUB REGISTRY**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 20 OF 2023**

(Originating from the Resident Magistrate's Court of Arusha at Arusha, delivered by Hon. H.G. Mhenga- RM, on the 17th day of May 2021 in Criminal Case No 60 of 2020)

**IBRAHIM WAZIRI KINGO** _____ **APPELLANT**

**VERSUS**

**REPUBLIC** _____ **RESPONDENT**

11th September **&** 24th November, 2023

## JUDGMENT

**BADE, J.**

Ibrahim Waziri @ Kingo (the Appellant herein) was convicted by the Resident Magistrate Court of Arusha at Arusha (the trial court) in Criminal Case No. 60 of 2020 for the offence of rape and sentenced to thirty years custodial imprisonment. Briefly, it was alleged that on 16th day of July, 2018 at Shamba la Kilimo in Ngaramtoni Area within Arumeru District in Arusha region, the Appellant had sexual intercourse with one Caroline Temu, without her consent.

Before the trial court, the prosecution side paraded a total of four witnesses to prove its case. On the other hand, the Appellant had not adduced his defense before the trial court as the hearing proceeded in his absence under section 226 of the CPA Cap 20 R.E 2019, however during the pronouncement of judgment the Appellant was apprehended and the judgment, conviction and sentence was delivered in his presence.

The Appellant being aggrieved by both conviction and sentence, brought this appeal raising ten grounds. However, during the submission in support of Appeal, the Appellant's counsel abandoned some of the grounds of appeal and submitted for the 1st, 5th, 4th and 7th grounds of appeal/

In that regard, I see no need to reproduce the grounds that were abandoned rather I will reshape and reproduce the remaining grounds which are as as hereunder:

1) That, the Appellant was wrongly tried by two magistrates as Hon. Mhenga who took over the case did not give any reasons why he took over the case from Hon. Comfort.
2) That the trial court erred for failure to see that the charge sheet is defective and unproven for being at variance with the evidence on the place where the offence was committed.

3) That the Appellant was wrongly convicted as the offence was not proved beyond a reasonable doubt.

4) That the trial court erred in law and fact to believe the guilt of the appellant even though the prosecution failed to call essential witnesses.

Hearing of the appeal proceeded in court *viva voce,* with Mr. Elibariki Maeda appearing for the Appellant while Ms. Lilian Kowero appeared for the Respondent, Republic.

Supporting the 1st ground of appeal, Advocate Mr. Maeda submitted that the Appellant was tried by two magistrates and no reason was advanced for the Magistrate who took over the matter. The counsel referred this court to the case of **Michael Paulo Mwaliko vs R,** Criminal Appeal No 422 of 2015, stressing that failure to assign reasons makes the proceedings a nullity.

On the second ground, the counsel argued that there is variance between the charge sheet and the evidence, pointing out that in the charge sheet, the area of the offense is named as Shamba la Kilimo Ngaramtoni area, while the evidence by PW1 referred the area as the farm area, while PW4 named it as shamba la Mbegu area near Tanesco. Citing the case of **Samas Mgova vs R,** Criminal Appeal No. 13 of 2020 he was adamant that where there is a variance between the charge and

evidence the prosecution is duty-bound to prove and support the charge through evidence. He added that the remedy for a defective charge is to allow the appeal and quash the conviction and sentence.

For the third ground, the counsel for the Appellant submitted that the Appellant was wrongly convicted as the offense was not proved beyond a reasonable doubt. Pointing at the identification of the Appellant, Mr Maeda picked on the evidence of PW1 the victim, and stated that she testified to have known the victim by the name Amani Waziri Kingo while the Appellant's name is Ibrahim Waziri Kingo.

He also picked on the time when the cautioned statement was taken, by pointing the evidence by PW1 who alleged to have finished her work at 20:00hrs, the doctor stated to have finished examining the witness at 01:00 hrs while PW3 stated to have recorded the Appellant's statement at 07:49 and finished at 8:30hrs meaning that the cautioned statement was recorded before the commission of the offence.

On the point of incredible evidence of PW1, he submitted that she testified to have been raped while running hence her testimony lacks clarity as it places doubt on whether the incident ever happened, summing that there are too many contradictions which entail that the offence was not proved beyond a reasonable doubt.

Concerning the last ground, Mr. Maeda made a charge on the argument that the material witnesses who were mentioned to be at the scene of the crime ought to have been summoned to corroborate the victim's evidence, insisting that the guard, the doctor, and the nurse who rescued the victim from the incident should have testified. He referenced the case of **Hemedi Said vs Mohamed Mbilu** TLR [ 1986]15.

Responding, the learned state attorney conceded on the 1st ground in that there was an omission to assign reasons by the successor magistrate, but was quick to put a stance that the remedy available is to order a retrial. Explaining further, she retorts that at the time that there was a change of magistrate, the Appellant was out on bail and had in fact jumped bail. She reasoned that this provision was purposeful in allowing the appellant to understand the reason for reassignment; and to accord the appellant the right to resummon the witness if need be. That since the appellant was not present the same cannot be said to have occasioned any injustice to the Appellant.

Arguing against the claim on the variance of the place of the offense, the learned state attorney submitted that the naming 'farm area' and 'shamba la mbegu' do not oppose the charge sheet to cause the basis of a claim, concluding that there is no violation of section 234(1) of the CPA.

Concerning the allegation that the offence was not proved beyond a reasonable doubt, the learned state attorney replied that, the naming and identification of the accused person, on PW1 naming the Appellant as Amani Waziri Kingo, she retorts that the same is a typing error on the typed proceedings, as the handwritten script named the accused correctly. She insists that there is no variance as PW1 named the Appellant even as she was testifying in the court. The learned state attorney was adamant about the typing error and asked this court to verify the discrepancy of the names from the original trial court record.

On the issue of time variation, she maintains the same to be minor and does not go to the root of the case. The factual account where PW1 is stated to have been raped while running is in her view, a slip of the pen in recording the narration, which does not dismantle the prosecution case. Responding further, he explained that PW1 and PW4 were recorded in evidence that the accused person was found on top of the complainant /victim of the offence.

On further argument, she retorts that since the record is silent on when exactly the Appellant arrived at the police station, then it can be safely assumed that the cautioned statement was taken on time as per the provision of section 50 of the CPA.

The learned state attorney insisted that the case against the appellant was proved beyond a reasonable doubt on the three ingredients of rape enumerating penetration where PW1 was clear on how the appellant penetrated her which account was supported by PW2 who examined PW1 and filed Exhibit P1 the PF3. She elaborated on the identification of the appellant, that the perpetrator was well identified as he was found *inflagrante delicto* as PW1 explained that when she was rescued the guards found the accused on top of her. Lastly, on the requirement of consent, the learned state attorney maintained that there was no consent of the person raped and thus the case was proved beyond reasonable doubt.

Retorting on the claim of non-calling of a material witness, Ms Kowero reasoned that section 143 of the TEA provides for no specific number of witnesses required by the law to prove a case, particularly because the content of the other witnesses would be materially the same as the one the court had heard and thus it served no purpose. She concludes and prays that the appeal be dismissed and if the court so pleases to order a retrial on the basis of material irregularity that has surfaced in contravention of the prescribed legal provision.

Rejoining, the counsel for the Appellant reiterated his submission in chief insisting that in his opinion, the material witnesses should have been

called, short of which a doubt is created which should have been resolved for the Appellant.

I have carefully considered the record of the trial court, the grounds of appeal, and the submission by the parties, and I am of the mind that the issues that call for the court's determination hinge on i) whether there was a contravention of the law in taking over the matter by the successor magistrate, ii) whether there is a variance between the charge sheet and the prosecution evidence, and iii) whether the offense was proved beyond a reasonable doubt.

Addressing the first issue on whether the law was contravened in taking over the matter by the successor magistrate, the respondent is of the view that despite there being an omission by the successor magistrate to assign reasons, the same is not fatal and the remedy available is to order a retrial.

In essence, the law is well settled on the succession of judicial officers. Successor judicial officers are empowered to deal with the evidence taken before another presiding judicial officer where the predecessor judicial officer is prevented from concluding the trial or suit by reason of death, transfer or other cause.

The rationale for the requirement for a successor judge or magistrate to assign reasons for taking over the hearing from the predecessor magistrate as discerned from the case of **Charles Chama and 2 Others vs The Regional Manager TRA and 2 Others,** Civil Appeal No. 224 of 2018 (unreported), is that the justification for a judge or magistrate to provide reasons upon taking over the case from another is two folds:

> **"one,** *that the one who sees and hears the witness is in the best position to assess the witness's credibility which is very crucial in the determination of any case before a court; and* ***two*** *that the integrity of judicial proceedings hinges on transparency. Where there is no transparency, justice may be compromised."*

Subscribing to the reasoning in the above-cited case, where there is a change of judicial officers, assigning reasons is to ensure compliance with the requirement of the law and allow transparency to the parties in the suit to be informed on whatever transpires in court.

In the instant appeal, upon taking over a partly heard case, the successor magistrate was obliged to provide reasons that led the predecessor magistrate not to finalize the instant matter to its conclusion. Since the reasons for taking over by the magistrate who heard the case were not advanced by the predecessor magistrate, it

could be argued there was no transparency; meaning a risk of compromising the integrity of justice was always there lurking.

However, before jumping to this conclusion, I am aware that each case must be determined separately and on its own merit by considering the material facts of the said case. In the instant appeal, the presiding magistrate only heard one witness that is PW1, and the successor magistrate took over the matter to its finality. Furthermore, when the successor magistrate took over the matter despite there not being assigned reason for taking over, the Appellant herein was not present as he absconded bail. Logically, it made no difference whether or not there was an omission to assign a reason for the file transfer as the same could not occasion any miscarriage of justice to the Appellant as he was not present in court so he could be so informed. The end could not have been prejudiced by the means and hence the omission is curable under section 388 of the Criminal Procedure Act. I surely could not see how the Appellant is prejudiced by such non-assignment of reasons for taking over the file, neither could I see how the case could not be decided to its just ends on that account. Consequently, the issue carried by the first ground of appeal fails.

Turning to look at whether there is a variance of the charge sheet and evidence, It is the Appellant's claim that the evidence does not support

the charge, particularly in the area where the incident allegedly happened. According to the prosecution witness, PW1 stated to have been raped in the Farm area, PW4 stated the area of the crime scene to be at Shamba la Mbegu near Tanesco, while the particulars of the offence state that the offence was committed at Shamba la Kilimo in Ngaramtoni area. The Respondent on the other hand is of the view that the naming of the crime scene area as 'Shamba la Mbegu' or 'Shamba la Kilimo' or 'Farm area' does not oppose the charge sheet.

I must agree with the respondent's counsel on this one as I find it that the same does not shake the prosecution evidence. This is particularly so because of the name in the charge sheet, that the area is 'Shamba la Kilimo' at Ngaramtoni; and the evidence of PW1 and PW4 despite stating the areas as 'Farm area', or 'Shamba la Mbegu' in real sense semantically and factually they refer to the same area where the incident occurred in Ngaramtoni. In my considered view, this is attributed to the custom and usage of language by the people, as 'the Farm' is in Kiswahili Shamba, and hence attaching a noun phrase to the Shamba or Farm is really for purposes of further and better identification, as Kilimo and Mbegu both refer to the purpose of this farm area ( for agriculture and/or for seeds). This discrepancy is certainly minor and does not flop the prosecution case, as allowing such will really be a mockery of justice. The second

issue carrying the second ground of appeal in variance between evidence and charge is found wanting of merits.

Regarding the third issue that carries the ground of appeal whether the offense was proved beyond a reasonable doubt to warrant the appellant's conviction by the trial court. The issue of proof of the case to the standard of proof required by law, which is beyond reasonable doubt lies on the totality of the evidence adduced before the trial court. For this see the Court of Appeal in the case of **Saganda Saganda Kasanzu vs The Republic,** Criminal Appeal No 53 of 2019 (Tanzlii).

Elaborating further on the aspects that cast doubt on the prosecution case, including identification of the Appellant in relation to the commission of the offence, the Appellant is of the view that PW1 the victim was unable to properly name and identify the Appellant as she referred him as Amani Waziri Kingo. I have perused the original trial court file, and it is my finding that the Appellant was properly identified by the Victim who named him Ibrahim Waziri @ Kingo, 'dereva boda boda.' The Typed proceeding therefore contained a clerical error which is attributed to a mistake while the person copying/ writing the script comprised of the proceedings made. The victim was indeed properly identified and named by the victim of the offence.

Responding to the issue that there was a variance in the time stated by the prosecution witness, I find this claim to have no merit. Much as the charge sheet alleged the offence to have been committed on 16th July 2018, and the said has been well elaborated by the victim PW1, it follows therefore that the evidence as to when exactly the cautioned statement was taken becomes irrelevant since that piece of evidence exhibit was not tendered before the trial court. See the Court of Appeal in the case of **Said Ally Ismail vs The Republic**, Criminal Appeal No 241 of 2008 (Unreported) where the Court succinctly guided that, not every discrepancy in the prosecution witness will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution's case will be dismantled.

Once again the Appellant attempted to fault the prosecution's evidence casting a doubt in stating that PW1 claimed to have been raped while she was running. I revisited the original trial court record, the evidence adduced by PW1 is clear that the victim stated that she ran away and the appellant followed her on the toes, grabbed her and took her to the nearby farm, and raped her. The appellant's attempt to make the testimony of the victim sounds delusional as she could not have been raped while running is unsupported by the available evidence on record. This claim is meritless and it fails.

Lastly, the Appellant alleges that the prosecution side was unable to call material witnesses which are the guard, the doctor, and the nurse. This particular matter does not deserve to detain me at all. Guided by the holding of the Court of Appeal in the case of **Tafifu Hassan @ Gumbe vs The Republic**, Criminal Appeal No. 436 of 2017 where it cited with approval the case of **Bakari Juma Ling'ambe vs Republic**, Criminal Appeal No. 161 of 2014 where it was held:

> "*It suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case (Section 143 of the Tanzania Evidence Act, Cap 6). A court of law could convict an accused person relying on the evidence of a single witness if it believes in his credibility, competence and demeanor.*"

The Appellant's claim that there are witnesses not summoned by the prosecution witnesses finds no compassion either in law or precedent.

For the reasons stated above, the Appeal is devoid of merit and the same stands dismissed. The Appellant is to serve the sentence imposed on him by the trial court.

It is so ordered.

**DATED** at **ARUSHA** this **24th** day of **November 2023**

**A. Z. Bade**
**Judge**
**24/11/2023**

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **24th** day of **November 2023**

**A. Z. BADE**
**JUDGE**
**24/11/2023**