THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA
AT MBEYA
CRIMINAL APPEAL NO. 131 OF 2023

(Originating from the District Court of Mbarali at Rujewa, in Criminal Case No. 293/2020)

EDSON MFIKWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 9 November 2023 & 17 November 2023

SINDA, J.:

The appellant Edson Mfikwa was charged with and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code (Cap 16 R.E 2022) (the **Penal Code**). The District Court of Mbalari at Rujewa (the **Trial Court**) sentenced him to life imprisonment.

The particulars of the offence are that on 20 August 2022 at Iheha village within Mbarali District in Mbeya Region, the appellant willfully and unlawfully did have sexual intercourse with the victim (her name hidden to prevent her identity) a girl aged seven (07) years old.

The brief facts of the case are that on 20 August 2020 during night hours the victim was called by her fellow children Yeremia and Erick that they have to go to their great father. They went up to the local bar where they

found the accused person who sent Erick and Yeremia to one Mkomole and remained with the victim. He took her to the place where shoes are being repaired at the banana trees. The accused undressed the victim and himself, layed the victim down, took his penis and inserted it to the victim's vagina promising to give her money. The victim refused since she was experiencing pain but the accused continued raping her. She started crying. After the accused was done, she sent the accused back home and told her sister on the incident. She was taken to the police and later brought to the hospital for examination. She was found to have bruises at the area between the vagina and her anus meaning she was penetrated. After the test her vagina had liquid which was found to be dead spermatozoa. The victim was sewn up at her vagina and returned home. The appellant was arrested and sent to Madibira Police station where he was interrogated by PW4, the appellant through his cautioned statement admitted to have raped the victim on the day.

Against that decision, the appellant appeals on a number of grounds which can be consolidate into the following:

1. That: The Trial Court erred in law when it convicted the appellant relying on the evidence of SM1 which is against section 27 (2) of the Evidence Act Cap 6 R.E 2022 because there is nowhere in the proceedings where the age of SM1 shown.

2. That: The Trial Court erred in law when it convicted and sentenced the appellant to life imprisonment without proof of the birth certificate or clinic card of SM1, not only that but even SM2 did not

mention the age of SM1. Also, the attendance and student registration book of SM1 were not delivered. The punishment is big against the law.

3. That: The Trial Court erred in law when it convicted the appellant without carefully examining SM1's evidence that she did not properly explain the circumstances of the scene. That SM1 was with Yeremiah and Eric when the appellant sent them to a person named Mkomole. These two people were not called to testify and also SM1 maybe was raped by drunkards and not the appellant.

4. That: The Trial Court erred in law when it convicted the appellant without discussing and analyzing the identification made at night by SM1 and how far the area was from the neighbors' houses that when SM1 shouted they could not hear.

5. That: The Trial Court erred in law when it convicted the appellant relying on the cautioned statement Exhibit PE2 without realizing that the statement lacked coherence from an independent witness and was also outside the legal time limit.

6. That: The defense of the appellant was not considered in the decision of the Trial Court.

At the hearing of the appeal on 9 November 2023, the appellant appeared in person, unrepresented. The respondent was represented by Mr. Julieth Katabaro, learned State Attorney.

The appellant requested the Court to consider his grounds in the petition of appeal as presented in the Court. He opted for Ms. Katabaro to reply to them first so that he could rejoin in case any such need arose.

Ms. Katabaro began by opposing the appeal. Ms. Katabaro submitted grounds number one and two together.

In relation to the first and second grounds that there is nowhere in the proceedings where it shows the age of SM1. Ms. Katabaro stated that the appellant misdirected himself to refer to section 27(2) of the Evidence Act Cap 6 R.E 2022 (the **TEA**). The learned state attorney stated that in relation to statutory rape age is an essential element to prove the offence of rape under section 130 (1) and (2) (e) of the Penal Code. In the proceedings at the Trial Court the victim (**PW1**) did not mention her age but the doctor (**PW3**) mentioned the age of the victim when giving her evidence. She stated that the victim was seven years old.

The learned state attorney referred to the case of ***Andrea Bulali vs The Republic***, Criminal Appeal No. 95 of 2020, where at page 12 the Court referred to the case of ***George Claude Kasanda vs DPP,*** Criminal Appeal No. 376 of 2017) (2020) TZCA 76; (27 March 2020) (Tanzlii) where the Court of Appeal stated its position in respect of proof of age of the victim for offences committed under section 130 (1) (2) (e) of the Penal Code where it stated that:

" We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or where available by production of a birth certificate…."

She added that this shows that evidence as to proof of age can be given by the victim, relative, parent, medical practitioner or where available birth certificate. In the case at hand, it is clear that the medical doctor gave proof as to evidence of the age of the victim. She urged the first ground of appeal be dismissed.

Submitting on the third ground that the law is clear on sexual offences, the important evidence is that of the victim. In the Trial Court typed proceedings (the **Proceedings**) PW1 on page five (5) shows that when the appellant was raping her, they were only two at the banana farm. The learned state attorney referred to the case of ***Seleman Makumba vs The Republic***, Criminal Appeal No. 94 of 1999 (unreported) at page 8 the Court held that true evidence of rape must come from the victim if an adult there was no penetration and no consent and in case of any other women where consent is irrelevant that there was penetration.

In the present case, the victim state in the Proceedings that the appellant raped her by inserting the penis in the victim vagina. This shows that penetration took place, and this is collaborated by the evidence of the

doctor. The doctor PW3 stated that when she was examining the victim, she had bruises which confirm that there was penetration. The ground is not watertight because for the offence of rape for other witnesses to be called it was not necessary because they were not required to establish the offence of rape.

Submitting on the fourth ground, that the trial magistrate erred in law convicting the appellant on relying on the identification of PW1 while it was at night and the crime scene was how far from the neighbours that they did not hear when she cried for help. Ms. Katabaro referred to page five (5) of the Proceedings to respond to the ground.

On page five (5) of the Proceedings the victim explained that when they arrived at the bar, she found the appellant who directed Erick and Yeremia to go to see Mkomole. The victim remained with Edson who asked her to escort him to the place where they repair shoes. This explanation shows that the victim knew the appellant before he raped her. As such, the identification by the victim that the appellant is the one who raped her was obvious because the victim knew the appellant. PW1 evidence is collaborated by the evidence of PW2 the mother of the victim. PW2 said that she knows the appellant because he was the daughter of their aunty Sengoli. Also, the Trial Court asked questions to the victim, and she stated that the appellant used to visit their house. The appellant was known to the family. She prayed the Court to dismiss the appeal.

Submitting on the fifth ground on the cautioned statement was not made before a justice of peace and are out of time as provided by the law. Ms.

Katabaro relied on PW4 to respond to the ground. PW4 took the cautioned statement before the Trial Court. On page 10 of the Proceedings PW4 explained the rights to the appellant when recording the statement. However, the appellant did not call any person. When he was interrogated, the appellant admitted raping the victim.

PW4 read the statement to the appellant who signed it. On page 11 of the Proceedings when PW4 prayed to submit the cautioned statement as an exhibit, the appellant did not object. This means he agreed to what was explained to him. She supported her submission refereeing to the case of ***Salum Mohamed @ Mndia vs The Republic***, Criminal Appeal No. 321 of 2021 CAT Dodoma (unreported). She stated that in the above case the Court of Appeal of Tanzania held that:

> "we are mindful of the obvious rule that failure to object an admission of exhibit is tantamount to an admitted fact. See ***Maige Nkuba vs The Republic***, Criminal Appeal No. 551 of 2016 and ***Ayubu Andimile @Makipesile v The Republic***, Criminal Appeal No. 503 of 2017 (both unreported).

She argued the Court to dismiss the appeal.

In rejoinder, the appellant did not have anything useful to add.

I have considered the instant appeal, the grounds in support thereof, the submissions of both sides, the record of this appeal and the law.

I will start with the fourth ground of appeal that the identification evidence from PW1 was not watertight which I think is crucial in determining the fate of the appeal.

On this ground, Ms. Katabaro argued that the victim (PW1) positively identified the appellant. She stated that the appellant was known to the family. The victim explained that when they arrived at the bar, she found the appellant, who directed Erick and Yeremia to go to see Mkomole. The victim remained with Edson, who asked her to escort him to the place where they repaired shoes. This explanation shows that the victim knew the appellant before he raped her. She submitted that the identification by the victim that the appellant was the one who raped her was obvious because the victim knew the appellant. She argued that PW1's evidence corroborated with the evidence of PW2, the victim's mother. PW2 testified that she knew the appellant because he was the daughter of their aunty Sengoli. She added that the Trial Court asked questions about the victim, and she stated that the appellant used to visit their house.

The issue raised is whether PW1 properly identified the person who raped at night at the place where they repair shoes. Was the evidence given by PW1 watertight to the extent of leaving no possibilities of mistaken identity? This is the question I now turn to determine.

In line with the case of ***Waziri Amani vs. Republic*** [1980] T.R.L 250, it is a settled law on visual identification evidence that such evidence is of the weakest kind which in order to found conviction must be absolutely watertight. Factors that should be considered in determining whether

visual identification evidence is water tight or not include; the time the witness had the accused under observation, the distance at which he observed the accused, the conditions on which such observation occurred, if it was day or night time, whether there was good or poor lighting at the scene, whether the witness knew or had seen the accused before.

It is also settled that although relevant and admissible, the eyewitness visual identification evidence is still of the weakest kind and most unreliable which should be acted upon with great caution. Before the court can act on such evidence, it must satisfy itself that the conditions were favourable for a proper identification. The evidence must be watertight and all possibilities of mistaken identity must be eliminated. It has to be insisted that the principle applies even in cases of visual identification by recognition as it is in the instant case - see ***Issa s/ Ngara @ Shuka v. Republic***, Criminal Appeal No. 37 of 2005, ***Magwisha Mzee Shija Paulo v Republic***, Criminal Appeal No. 467 of 2007 and ***Shamir s/o John v Republic***, Criminal Appeal No. 166 of 2004 (all unreported).

In ***Shamir s/o John*** (supra) the Court cited the case of ***Philimon Jumanne Agala @ J4*** v. Republic, Criminal Appeal No. 187 of 2015 (also unreported) in which it was observed, among other things, that:

> *"Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the court should always be aware that mistakes in recognition o f dose relatives and friends are sometimes made." (Emphasis added)*

Guided by the above legal principles and pronouncements, I now turn to the evidence given by PW1 and on other witnesses relevant to the question of identification including the appellant. My task is to objectively evaluate and scrutinise the evidence and satisfy ourselves if the said evidence is watertight to justify the Trial Court finding that it was the appellant who raped PW1 or not.

I should also let it be known that as it was found by the Trial Court, the fact that PW1 was raped was sufficiently proved. I find that the evidence from PW1 supported by that of PW2 and PW3 leaves no doubt that PW1 was raped. The only issue which calls for my determination, is whether it was the appellant who raped PW1. Since the determination of the above posed issue to the greater extent depends on the evidence that was given by PW1, I find it necessary to reproduce it.

The relevant evidence appearing at page 5 of the Proceedings state as follows:

> *"I study at standard I at the Ihehe primary school, my mother is Esther Chaula. On 20 August 2022 Yeremia came at home to call me and Erick that we have to got to our great father whose name is Deo Mhezi. We went up to the local bar area (kilabuni) where we found Edson who sent Erick and Yeremia to one Mkomole and then I stayed back with him (Edson) who told me to go to the place where they used to repair shoes. He was following back, when he reached where I was he undressed me and himself. He layed me*

down and took his penis entered it to the place which I use to urinate (vagina). The place has banana trees. Edson promised to give me money but I refused since the act was painful to me. We were only two me and Edson when he was raping me. I started crying when he entered his penis into my vagina, when he finished he sent me home. Edson is the accused person before this court. I know him he lives at Atina area. When I reached home I told my sister on the incident which the accused did to me. Jestina's mother then sent me to the hospital."

The above is all what PW1 testified. Although I agree with Ms. Katabaro that from the evidence on record there is no dispute that PW1 and the appellant knew each other well and also that the appellant was named to PW2, still we find that when the guidelines on visual identification evidence as set in ***Waziri Amani*** (supra) are applied to the instant case, the evidence given by PW1 that it was the appellant who raped her is not watertight to the required standard. From the evidence given by PW1 the possibilities of mistaken identity or of someone impersonating the appellant cannot be ruled out altogether.

First of all, the evidence from PW1 was too brief that it left out a lot of important issues of facts unexplained. Apart from PW1 not telling if when she got at the local bar and at the place where they repair shoes there was any light let alone its source and intensity. PW1 did not also tell if when she got at the local bar the appellant was alone or not. All what she said is that when she got at the local bar the appellant sent Erick and Yeremia to one Mkomole and she stayed back with the appellant who told

her to go to the place where they repair shoes, and the appellant was following back. It should be borne in mind that there is no evidence to the effect that the appellant was at the local bar. The appellant testified that on 20 August 2022 he went to sell vegetables and returned home late. He ate and went to sleep. Later came people who awakened him and started beating him. They sent him to the village office and told him that he raped a child. He admitted at the village since he was beaten by the citizens.

Again, PW1 did not tell how familiar the appellant was to her that she could have recognized him even in total darkness. It is also surprising why the distance between the local bar and the place where they repair shoes was not stated, that when he cried for help while being raped, they did not hear. It is very unfortunate that there are so many crucial facts which needed to be explained and which signify that the case was poorly investigated. The shortcomings do also render the visual identification evidence from PW1 not watertight. There were possibilities of mistaken identity that PW1 might have been raped by someone else and not the appellant considering the incident occurred near a local pub. Thus, the fourth ground of appeal has merits and accordingly allowed.

As such, I do not wish to determine the rest of the grounds as they all fall short at juncture.

For the reasons I have stated, I allow the appeal. I consequently quash the conviction and set aside the sentence imposed on the appellant. It is also ordered that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

The right of appeal was explained.

DATED at MBEYA on this 17 day of November 2023.

A. A. SINDA
JUDGE

The Judgment is delivered on this 17 day of November 2023 in presence of the appellant who appeared in person and Ms. Katabaro counsel for the respondent.

A. A. SINDA
JUDGE