IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA SUB- REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 50 OF 2023

(Arising from Biharamulo District Court at Biharamulo in Criminal Case No. 153 of 2021)

MIKIDADI SALUMU ..... APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

7th February & 23rd February 2024

A.Y. Mwenda, J

On 01.11.2021, the appellant appeared for the first time before the District Court of Biharamulo. In the first count he was charged for rape contrary to Section 130(1)(2) (e) and 131(3) of the Penal Code, [Cap 16 R. E 2019]. In this count, the prosecution alleged that on 20th day of October,2021, at Nyakanazi village within the District of Biharamulo in Kagera Region the appellant had sexual intercourse with the victim (name withheld), aged 09 years old. On the second count he was charged for Unnatural offence contrary to Section 154(1) (a)(2) of the Penal Code, [Cap 16 R.E 2019]. The prosecution alleged that on the same date of 20th of October, 2021 at about night hours at Nyakanazi village within Biharamulo District in Kagera Region he had canal knowledge of the victim (name withheld), a girl aged 09 years against the order of nature.

When the charge was read to him, he pleaded not guilty to both counts. As such hearing commenced where the prosecution paraded its witnesses, one of them being the victim (a star witness) who stood as PW1. On his part, the appellant fended his case and at the end of the judicial day, the court convicted him for both counts. He was then sentenced for life imprisonment for each count the sentence which had to run concurrently.

Aggrieved by the conviction meted against him, the appellant preferred the present appeal with the following grounds, to wit.

1) That the was no sufficient evidence to prove that the victim she was (sic) studying at Nyakanazi "B" Primary school at standard (ii) and the age of victim was not proved as the law requirements. (sic) (Beyond reasonable doubt)
2) That the voire dire test was improper conducted (sic) c/s 127 (2) of the Tanzania Evidence Act.
3) That the trial magistrate erred relying on bruises and injuries in the PF3 which does not prove the offence as required to the laws of the land.
4) That the trial magistrate erred in law and fact by convicting and sentencing the appellant in the base (sic) of a planted case on the appellant.

5) That the presiding magistrate erred in law and facts in holding that the prosecution proved their case beyond reasonable doubt.
6) That the presiding magistrate erred in law and fact by convicting and sentencing the appellant on weakness of his defence.

At the hearing of this appeal, the appellant was in attendance without any legal representation whilst the respondent (the republic) was represented by Mr. Elias Subi, learned State Attorney.

When he was invited to submit in support of the grounds of appeal, the appellant had nothing to say. He merely prayed the grounds of appeal to form part of his oral submissions. Otherwise, he prayed this appeal to be allowed and an order releasing him from prison to be issued.

On his part, Mr. Elias Subi did not oppose this appeal. He supported this appeal on the ground that the identification of the victim's assailant at the scene of the crime is doubtful. The learned State Attorney commenced by submitting that the prosecution's case was not proved beyond reasonable doubt. He said that the incident in question occurred at night, but no witness testified how the victim's assailant was identified. The learned state Attorney stressed that the witnessed ought to have described the source of light which enabled them to identify the assailant. He was of the view that failure to address the issue of

identification entail the assailant was not identified at the scene of the crime. The learned State Attorney also doubted the victim's assertion that her assailant was familiar to her as he was her mother's customer. He opined that even if the assailant was familiar to her, she ought to have mentioned the conditions which favoured her identification. To support his stance, the learned state Attorney cited the case of HEKIMA MADAWA MBUNDA V. R, CRIMINAL APPEAL NO. 566 OF 2019 and rested his case by praying this appeal to be allowed.

Based on the submissions above, the issue for determination is whether the prosecution proved its case beyond reasonable doubt.

In the cause I have gone through the records and noted the following. As indicated in the charge sheet and the prosecution's witnesses, the incident in question occurred at night. From the record, it was the victim's (PW.1's) testimony that on 20.10.2021 at night hours, while at home with her brother (PW2), came the appellant who asked her to go buy cigarettes for him. According to her, she heeds and while returning home, she found the appellant standing outside the house under the trees where there were no houses. She testified further that the appellant called her to where he was standing and by force, he raped her through both her lower part of the body's orifice. It was also PW2's testimony that on the night in question the appellant came at home and asked the victim to go buy some cigarettes for him. However, PW2 did not testify as at what time the appellant left after the victim had gone to buy cigarrete. On top of that he did not describe the source of light at their house.

Regarding what befell the victim outside the house, PW2 did not witness the appellant raping the victim. He just heard from PW1.

I have considered the evidence above and, as it was rightly submitted by the learned state attorney, the prosecution's case heavily relied on visual identification at night. Before analysing the same, it is apposite to highlight albeit briefly the legal position regarding identification at night. That cannot be fulfilled without referring to the landmark case of WAZIRI AMANI V. R [1980] TLR 250. In this case the Court held inter alia that.

> "...evidence of visual identification...is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated, and the court is fully satisfied that the evidence before it is absolutely watertight."

In the above case, the Court highlighted conditions for consideration regarding identification at night. The same are time spent in observation; the distance between the assailants and the identifier, the source, and brightness of light as well as whether there were any impediments at the scene of crime or not.

In the present appeal, PW1 and PW2 testified that the appellant went at their home at night hours and beseeched the victim to go buy cigarettes for him. They however did not tell the source of light which illuminated their house.

They also failed to tell as for how long did they keep the assailant under observations. The public prosecutor ought to have led the witnesses on the said issues relating to identification at night, which he did not. Even if the witnesses would have described the source of light in that house, still there would be a problem since, according to the victim, the incident took place outside the house under the trees where the source of light was not disclosed. This court is mindful that the victim asserted that the appellant was familiar to her as he was her mother's customers. However that alone is not sufficient to cover the aspect of identification at night. The law is clear that even recognizing witnesses often make mistakes or deliberately lie. This position was stated in the case of HEKIMA MADAWA MBUNDA & ANOTHER V. THE REPUBLIC, CRIMINAL APPEAL NO. 566 OF 2019. In this case, the Court had to say the following.

> "In our instance case, PW1 simply said she identified the appellants. She did not go further to explain in detail how she was able to do so. Much as it was dispute that the appellants were not strangers yet that is no guarantee that there could be no chances of a mistaken identification. Cognizant of that possibility the court has consistently held that even in identification by recognition, chances of a mistaken identity still obtain. Once such case is in MACELO MWITA AKA MASELLE & ANOTHER V. REPUBLIC, CRIMINAL APPEAL NO 63 OF 2005 where the

Court was categorical that the principles in WAZIRI AMANI case(supra) applies even in cases of recognition evidence..."

From the foregoing, it suffices to say that failure to explain the principles above, entails that the appellant was not identified at the scene of the crime. Since identification of the appellant at the scene of crime was key but not describe, the prosecution's case remains shaky.

That said, I find the present appeal merited. I hereby allow it, quash the conviction meted and set aside the sentences pronounced in respect of both counts. I also order an immediate release of the appellant from prison unless he is lawfully held.

It is so ordered.

A.Y. MWENDA

JUDGE

23.02.2024

Judgement delivered in chamber under the seal of this court in the presence of Ms. Gloria Rugeye learned State Attorney and in the presence of Mr. Mikidadi Salumu the Appellant.

HIGH COURT OF TANZANIA RUKOBA

A.Y. MWENDA

JUDGE

23.02.2024