IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 58 OF 2022

(Arising from Moshi District Court in Criminal Case No. 241 of 2019)

HASSAN JUMA RASHID ..... APPELLANT

Versus

THE REPUBLIC..... RESPONDENT

JUDGMENT

19th January & 16th February, 2023

A.P.KILIMI, J.:

In the District court of Moshi at Moshi, one HASSAN JUMA RASHID hereinafter the "appellant" was charged of two counts namely Gang rape contrary to section 131A and unnatural offence contrary to section 154 (1) (a) of the Penal Code, Cap. 16 R.E. 2002.

On the first count it was alleged that on 13th June 2019 at Pasua area in the District of Moshi, the appellant together with another person who was not yet apprehended had carnal knowledge of one X.S (in pseudonym) a girl aged 17 years. In the second count it was alleged that on the same date and place the appellant had carnal knowledge of the same X.S a girl aged 17 years against the

order of nature. The appellant denied all the charges against him and after hearing, the trial court acquitted him on the first count but found him guilty on the second count hence he was convicted and sentenced to 30 years imprisonment. Aggrieved by the decision he has appealed to this Court on three grounds as follows:

1. That, the trial court erred in law for failure to comply with the mandatory provision of section 214(1) of the Criminal Procedure Act. CPA R.E 2022
2. That the trial court erred in law and in fact when it relied on suspicious evidence and failure by it to caution itself on the possibility of an offence being committed by another person rather than the appellant.
3. That the case against the appellant was not proved beyond reasonable doubt.

At the hearing of the appeal the appellant appeared before the Court unrepresented while Ms. Marry Lucas learned Senior State Attorney appeared for the respondent/republic. The appellant had already prepared his submission in writing to support his grounds of appeal so he prayed for the court to adopt it as part of the proceedings. There being no objection from the respondent the court adjourned the hearing for a few minutes to allow the State attorney to go through the submission of the appellant and prepare for a response thereof by oral submission.

Submitting on the first ground of appeal the appellant stated that during the proceeding at the trial court, there was a change of magistrates to preside the case, but when the latter was taking up the matter there were no reasons given. The appellant argued that the omission was fatal and prejudicial to him. He contended that it was a serious violation of the provision of the law under section 214 (1) of the CPA. To buttress this position, he has cited the case of **Havyalimana Azaria and Others vs. Republic** Criminal Appeal No. 539 of 2015.

Submitting on the second ground of appeal the appellant stated that based on the trial court record the victim (PW1) only identified Ally that she knew him before and that he was the one who escorted her from the mosque to his house. He went on submitting that as seen on page 14 of the typed proceeding the victim was recorded to have said that when she woke up she did not see any person and that she did not know Ally's friend since it was her first time to see him and that it was already night when they raped her.

The appellant further argued that from the record it was obvious that the victim being the sole eye witness did not know him. He contended further that the incident happened at night and there was no description of the type of the light and its intensity. He was of the view that although he admitted to have been in

the room, he denied to have committed the offence therefore he could not be held responsible for the offence in absence of clear evidence on how PW1 was able to identify him inside the dark room without clear description on the situation pertaining to the locus in quo. He cited the case of **Elia John vs. Republic** Criminal Appeal No. 306 of 2016 to support his contention.

Finally on the third ground of appeal, it was the appellant submission that the case against him was not proved beyond reasonable doubt. Pointing out the areas of doubt, he submitted that the case was loaded with contradictions and inconsistences which rendered the prosecution case not being proved beyond reasonable doubt. Referring to PW1's testimony at page 14 of the typed proceedings, he contended that she was not a credible witness as she gave two distinct statements when she stated that it was her first time to see the appellant and that she did not know Ally's friend yet later on her testimony she stated that she knew the appellant by the name of Hassan. It was the appellant's submission that PW1 was not credible hence her statement should have not been believed.

In reply submission, Ms. Mary Lucas apart from supporting the appeal, in respect procedural irregularity under of section 214 of CPA alleged by the appellant. She was of the view that the ground has no merit, because on the trial court's record at page 8, the successor Magistrate did address all parties on the

reasons for transfer of case, and also cited the relevant provision, and both the Republic and the accused person said they had no objection.

Furthering her submission Ms. Mary Lucas stated that, the Republic support this appeal because the case was not proved beyond reasonable doubt. She then addressed the second and third grounds together, that the prosecution was not only required to prove that the victim was penetrated as required by the law but also prove who penetrated her. She referred to PW1's testimony at page 13 of the typed proceedings where she is recorded to have said that she did not know Ally's friend and even his name, she only came to know his name after he was arrested. On this account, Ms. Mary Lucas was of the view that since the victim did not know the appellant before the trial court ought to have satisfy itself that the identification of the appellant met the requirement of **Waziri Aman v. R TLR (1980)** which was approved in the case of **Ally Miraji Mkumbi v. R** (Criminal Appeal 311 of 2018) CAT at Dsm. Where it was observed that in order the court to convict by visual identification the court must be satisfied that the evidence is water tight and all possibilities of mistaken identity are eliminated.

The learned Senior State Attorney further submitted that, the witness must state the intensity of light, the time spent to observe and also mention the culprit at the earliest stage including descriptions of the accused person. She further added, the victim said that she didn't know the appellant before, and that it was

night but proceed to say that she was able to identify the appellant by solar, but did not say the intensity of it. In additional they learned Senior State Attorney submitted that the victim said that she went to the home of PW4 early in the morning but she said nothing on identification of the appellant or him the one who raped her.

The learned Senior State Attorney continued to submit that when the appellant was arrested no description of him was given before the arrest and the victim remained in the car during the arrest. She thus argued that since the best evidence comes from the victim as it was decided in the case of **Selemani Makumba vs. Republic** T.L.R (2006) 380, the evidence of the victim as to the commission of the offence left doubt in respect of the person who committed the offence thus it is difficult to believe that it was the appellant who did the act.

Still pointing out to the doubts in prosecution evidence, the learned Senior State Attorney submitted that according to PW5 who was a medical practitioner, as he was recorded at page 26 of the trial court proceedings to have stated that he was told that the victim was raped by three people. She said this is yet another doubt that the victim failed to identify the appellant. She was of the view that due to the burden of proof principle the doubts raised are to be resolved to the advantage of the accused. Based on the stated reasons the learned state attorney prayed for the appeal to be allowed.

I have given due consideration to the grounds of appeal and the submission made by both sides. In determining this appeal I have grouped the above grounds into two group, as argued by both parties, the first group will have first ground while the second is for remaining grounds will be discussed together as they are alike.

Starting with the first group, the appellant challenged the trial court proceedings for not adhering to the legal requirement provided under section 214 (1) of the CPA. The provision reads as follows;

> *214.-(1) Where any magistrate,* ***after having heard and recorded the whole or any part of the evidence*** *in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings.*

(Emphasis added)

The relevant part of proceedings challenged is found at page 8 of the typed proceedings. The proceedings demonstrate that on 18/11/2019 the case was reassigned to Hon. Mhenga, RM for the reason that she was a new magistrate assigned to the court. Reassignment of case files is normally done by a Resident Magistrate in charge of the station. Since the reassignment was administratively done parties were not present on the day. However, on 22/11/2019 when Hon. Mhenga took over the matter all parties were present and the record show on the last paragraph of page 8 that parties were addressed in terms of 214 of the CPA. This is an excerpt from the proceeding;

> ***Court:*** *This matter has been re-assigned to me to proceed with the hearing. The parties have been addressed in terms of section 214 of Criminal Procedure Act Cap. 20 R.E. 2002 and they replied:*
>
> ***State Attorney:*** *No objection let us proceed.*
>
> ***Accused:*** *No objection*
>
> ***Court:*** *Section 214 of Criminal Procedure Act Cap 20 R.E. 2002 complied with.*

Reading the cited provision above in relation to the above quoted part of the trial court proceedings it is quite clear that parties were indeed addressed as per the requirement of the law. Be as it may, even if there could have been made

an omission as suggested by the appellant the proceeding show that by that date no witness had been heard therefore the appellant would have not been prejudiced anyhow. It is my considered view that the omission if any could have occasioned no injustice to the appellant. The cited case of **Havyalimana Azaria & Two others vs. Republic** is distinguishable in the sense that, in that case the first assigned magistrate had already recorded the evidence of five witnesses out of the six who testified in the case before the matter was taken over by another magistrate who recorded the evidence of the sixth witness after that he then prepared the judgment.

I also concede with the argument of the respondent counsel that the appellant despite complaining of the non-compliance to the provision of the law he did not explain as to how he was prejudiced by the act. In the circumstances, I find that this ground of appeal has no merit hence it is dismissed.

In regard to the second group stated herein above, the only issue to be determined is whether it has been proved beyond reasonable doubt that the appellant committed the offence charged.

According to the evidence, in my view there is no doubt that the victim aforementioned was raped and sodomized, this fact is clear from the evidence of PW5 a medical practitioner who tendered PF3 exhibit P1, these evidence

corroborated the evidence of the victim herself. I reached that stance because the best evidence in sexual offences is that of the victim as per **Selemani Mkumba v. Republic,** [2006] T.L.R 373

There is no dispute the said evil act was committed at night more than 20:00 hrs. Nevertheless, the appellant himself did not deny not being present at the crime scene on the fateful day he only denied to have participated in committing the charged offence. In those circumstances, the next point to be considered is whether the appellant was identified to commit the said offence charged with.

I am mindful, it is the cardinal principle laid down by the erstwhile Court of Appeal of East Africa in **Abdala bin Wendo and Another Vs Rex** (1953) EACA 116 and followed by this Court in the celebrated case of **Waziri Amani Vs Republic** [1980] T.L.R. 250 regarding evidence of visual identification. The principle laid down in these cases is that in a case involving evidence of visual identification, no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely watertight.

In order to eliminate the possibility of mistaken identity, courts of law have *developed a list of factors or guidelines to be considered when examining such*

evidence. The list is however, not conclusive, depending on the circumstances of each case. In **Mathew Stephen @ Lawrence v. Republic,** Criminal Appeal No. 16 of 2007, the Court of Appeal of Tanzania listed the following factors for consideration in identification cases:

> *"To exclude all possibilities of mistaken identity, the Court has therefore to consider the following.* ***First,*** *the period under which the accused was under observation by the witness.* ***Second****, the distance separating the two during the said observation.* ***Third,*** *if it is at night, whether there was sufficient light.* ***Fourth****, whether the witness has seen the accused before and if so, when and how often.* ***Fifth,*** *in the course of examining the accused, did the witness face any obstruction which might interrupt his concentration.* ***Sixth****, the whole evidence before the Court considered, were there any material impediments or discrepancies affecting the correct identification of the accused by the witness."*

I have considered the evidence tendered at the trial court and arguments of Senior State Attorney supporting this appeal, I concede with her that the victim said that she didn't know the appellant before, and that it was night but proceed to say that she was able to identify the appellant by solar, but did not say the intensity of it. This is because, there was no evidence provided on the intensity

brightness of the said solar light, or whether solar bulb was more than one or otherwise in relation to the size of the room, since in a smaller room the intensity will differ from a larger room depending on the source of the light. (See the case of **Juma Hamad vs Republic,** Criminal Appeal No. 141 of 2014 (unreported)

At page 14 of the typed proceeding the victim (PW1) in examination in chief had this to say;

> *"They both raped me. I lost my consciousness until morning. I was awake and I did not see any person. I don't know that Ally's friend. It is was the first time to see him. It was already night when they raped me. I identified both of them with the aid of solar light (bulb was on). In the house when I woke up there was no any person."*

Applying my minds to the above decision, and the quoted evidence, it is my considered opinion the said witness did not prove to the requirement of the above developed principles, thus her evidence cannot remain undaunted.

I also concede with the Respondent supporting this appeal, when she submitted that, the appellant was arrested while no description of him was given before the said arrest and the victim remained in the car during the arrest. I concede because, it is trite law that when the witness had not seen the culprit before the incident, description of the culprit is of utmost important. Furthermore,

mention of the culprit's peculiar features to the next person the witness comes across after the incident further solidifies the evidence on identification of the culprit, especially when repeated at first report to the police officer who interrogates him or anybody else. See **Waziri Amani vs Republic** (supra),

Moreover, mindful that the issue of credibility of witness is the domain of the trial court, which usually have time to test the demeanor of the witness. However, the court must satisfy the witnesses are truthful. As human beings, they are prone to being weak. Cognizant of this fact, the Court pronounced itself in **Jaribu Abdalla vs Republic,** Criminal Appeal No. 220 of 1994 (unreported) that:-

> *"In matters of identification it is not enough merely to look at the factors favoring accurate identification, equally important is the credibility of witness. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence..."*

Moreover, it was developed further by the Court of Appeal that, credibility can also be assessed by a second appellate court by looking at the coherence and consistence of the testimony of the witness (see **Sokoine Range @ Chacha and Another vs Republic,** Criminal Appeal No. 198 of 2010 (unreported). It

was evidenced at the trial that victim after the incident went to the home of PW4 early in the morning but she said nothing on identification of the appellant or the one who raped her. At page 21 of trial court proceeding PW4 had this to say in examination in chief;

> *"We stayed at the school until on 12:00 hours. Amina then went to the mosque and I went home. Later on her father came to our house asking for Amina's whereabouts. I told him we parted ways at school and Amina went to the mosque. Amina's father then left his phone number and left. On the next day (on Saturday) Amina came to our house. My mother then called Amina's parents and they came to fetch her. I did not ask Amina where he went. On Monday, when Amina came to school, I asked her where she was."*

In **Marwa Wangiti Mwita and another v. The Republic**, Criminal Appeal No. 6 of 1995, the Court of Appeal of Tanzania observed the following in relation to need to have an identified suspect named by the identifying witness at the earliest possible moment.

> *"The ability of the witness to name a suspect at the earliest possible opportunity is an important assurance of his reliability, in the same way as unexplained delay or*

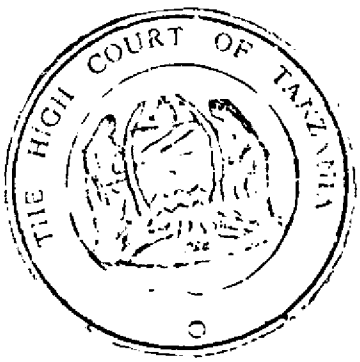
complete failure to do so should put a prudent court to enquiry"

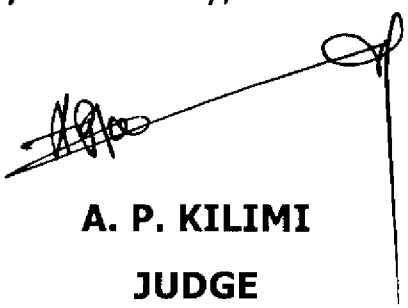
In the instant matter, after having closely followed the testimony of PW1, with respect, I am unable to come in the same conclusion reached by the trial court. I thus concede with the Learned Senior State Attorney, that the victim as witness was not credible to identify the appellant.

In view of pointed out doubts surrounding the prosecution case, I find the case against the appellant was not proved to the required standard of law proving the offence charged. Consequently, I allow the appeal and order the immediate release of the appellant unless if he is held for another lawful cause.

It is so ordered.

DATED at **MOSHI** this 16th day of February, 2023.





A. P. KILIMI

JUDGE

16/2/2023

Court: - Ruling delivered today on 16th day of February, 2023 in the presence of Applicant and Ms. Mary Lucas Senior State Attorney for Respondent.

Sgd: A. P. KILIMI

JUDGE

16/02/2023

Court: - Right of Appeal duly explained.

Sgd: A. P. KILIMI

JUDGE

16/02/2023