IN THE HIGH COURT OF TANZANIA

IRINGA SUB - REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO. 93 OF 2023

(Originating from the District Court of Iringa at Iringa in Criminal Case No. 91 of 2022)

JOSHUA MKWALAKWALA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

14th & 27th 2024

LALTAIKA, J.

The Appellant herein, **JOSHUA MKWALAKWALA,** was arraigned in the District Court of Iringa at Iringa charged with one count of rape contrary to Section 130(1) &(2)(e) and 131(1) of the Penal Code Cap 16 R.E. 2022. The allegation as recorded in the charge sheet was that on the 22nd day of August 2022 at Makota Village within the District and Region of Iringa, he had carnal knowledge of a nine-year-old girl child (name concealed).

When the charge was read over and explained to the appellant (then accused) he denied wrongdoing. This necessitated the conducting of a full trial. To prove the allegation, the prosecution paraded four (4) witnesses (whom I will later refer to simply as PWs) and tendered one documentary

exhibit. Halfway through, the trial court made a finding that the appellant had a case to answer. He was placed on the witness box as the one and only defence witness (DW1).

Having been convinced that the prosecution had left no stone unturned in proving its case, the learned trial magistrate convicted the appellant as charged. He proceeded to sentence him to serve a thirty years' imprisonment term. Dissatisfied with this decision, the appellant has appealed to this court by way of a petition of appeal containing six (6) grounds. Irrespective of the many errors, I take the liberty to reproduce them for ease of reference and record keeping:

1. *That the learned Magistrate erred in law and fact to convicted and sentenced the appellant based on PW1 evidence which was contradicting itself when she said that the appellant raped her at the same time she said that she did not see anything no feel any pain at the same time of rape, hence create doubts if the act of rape happened thereto (see page 13 of the proceeding.)*
2. *That the learned trial Resident Magistrate erred in law and fact to convict and sentence the appellant without considering that prosecution side failed totally to bling before he Court of law the said ESTHER and GRACE as witnesses since they were mentioned by PW1 that they were present when the appellant followed and raped (see page 11 of the proceeding).*
3. *That the learned trial Resident Magistrate erred in law for failure to draw the adverse inference towards prosecution side as to why the victim reported the said incident to her mother and not to her grandfather/grandmother who was living together in the*

same house (see the evidence of PW2 in page 14 of the proceeding.)

4. *That the learned Resident Magistrate erred in law and fact to convict the appellant based on PW4 (a Doctor) evidence without considering that the mere lack of hymen does not constitute the offence of rape.*
5. *That the trial Magistrate erred in law and fact to convict and sentence the appellant without take that the said date of the said incident was fabricated since there was no anywhere in the evidence of PW1 mention the date in which the said act of rape occurred.*
6. *That the prosecution side failed totally to prove the case against the appellant beyond reasonable doubt.*

When the appeal was called for hearing on the 14th of March 2024, the appellant had no legal representation thus he **fended for himself**. The respondent Republic, on the other hand, appeared through **Mr. Daniel Lyatuu, learned State Attorney** (SA). The next part of this judgement is on submissions by both parties.

The appellant stated that he had fronted six grounds and proceeded to explain each of them as follows: Regarding the first ground, he complained about a contradiction, citing page 13 of the trial court's proceedings.

Moving on to the second ground, he argued that the prosecution failed to bring two important witnesses, Esther, and Grace, who were mentioned

by PW1 as present during the alleged rape of PW1. He referred to page 11 of the proceedings.

Concerning the third ground, he asserted that the magistrate erred by not questioning why the victim reported the matter to her mother instead of her grandparents with whom she was living, as testified by PW2 on page 14.

On the fourth ground, he maintained that the magistrate made an error in basing conviction on the evidence of PW4, the medical doctor, arguing that the absence of virginity does not necessarily indicate rape.

Moving to the fifth ground, he claimed that the court failed to consider that the case was fabricated, emphasizing that PW1 never mentioned the date of the alleged rape. On the last ground, he contended that the prosecution failed to prove the allegations against him, highlighting doubts and the alleged fabrication of the case.

He expressed concern that the victim should not have had to travel to the sixth village to report the matter, given that she was with her grandmother in Makota village while her mother was in Mpwapwa Village. In conclusion, he prayed to be set free as he believed the allegations against him were untrue.

No sooner had the learned State Attorney, Mr. Lyatuu, taken the podium than he announced that he objected the entire appeal. He indicated that he would address the 1st and 4th grounds together, while the rest would be argued separately.

Regarding the 1st and 4th grounds, Mr. Lyatuu argued that the appellant's concern about how the victim felt after the alleged rape is not a legal requirement for proving rape. He emphasized the significance of the victim not being a virgin, citing the medical test conducted by PW4, the medical doctor, which concluded that the victim had been penetrated in her private parts by a blunt object, as documented on page 25 of the proceedings.

On the second ground, Mr. Lyatuu objected to the complaint about the failure to summon material witnesses. He asserted that there is no specific number of witnesses needed to prove a particular fact according to section 143 of the Evidence Act Cap 6 RE 2022 (TEA). He also pointed out that during the preliminary hearing, the appellant admitted to being present at the location on the day in question, as recorded on page 5 of the proceedings.

Addressing the 3rd ground, Mr. Lyatuu suggested that a child of the victim's age might be selective about whom she confides in for sensitive issues. He argued that it was more natural for the victim to confide in her mother than her grandparents. He emphasized the prompt reporting of the matter by the victim on the same day, citing the requirement as established in the case of **NGARU JOSEPH AND MNENE KAPIKA V. REPUBLIC** (Crim Appeal No 172 of 2019, CAT Mbeya p. 18). He also dismissed the assertion about the appellant going to the sixth village away, considering it a new fact not raised during the trial.

Regarding the 5th ground, Mr. Lyatuu agreed that the victim did not mention the date during the proceedings. However, he pointed out that the appellant did not cross-examine her, indicating acceptance of the date mentioned on the charge sheet. He referenced the case of **NYERERE NYAGUE v. REPUBLIC** (Crim Appeal No 67 of 2010, CAT Arusha p. 13) to support his argument. Additionally, he noted that PW2 had established the date as recorded on page 14 of the proceedings.

On the last ground, Mr. Lyatuu was quick to dismiss it as without merit, stating that the allegations were proved beyond reasonable doubt. He

highlighted that the victim recognized and mentioned the appellant at the earliest stage, and PW4, the medic, proved penetration and tendered a PF3 to that effect. In conclusion, Mr. Lyatuu prayed for the dismissal of the appeal in its entirety.

In his rejoinder, the appellant, noting his age of 35 compared to the victim's age of 9, questioned the possibility of the rape occurring without resulting in death, considering the difference in their private parts. He claimed that the case was fabricated by the victim and her mother due to a land dispute, as he has no relatives. He denied the allegations throughout and prayed to be set free, expressing his dissatisfaction with the treatment he received.

I have dispassionately considered the rival submissions in the light of the grounds of appeal. I have also scrutinized the court records. It is pertinent first and foremost to point out my exact role as the first appellate court. This would be a guidepost against crossing a procedural line.

In our procedural law, the role of a second appellate court is akin to rehearing. See **LEORNARD MWANASHOKA V. REPUBLIC** Crim Appeal No 226 of 2014 CAT. This means that I can reevaluate the entire evidence

adduced in the trial court and come up with an entirely different interpretation if necessary.

The appellant was arraigned for rape of a nine-year-old. It appears in the records that the victim and the appellant are relatives. They were both living with their grandparents. Like other members of the community in rural parts of Iringa, the appellant and his relatives had a tendency of going to the nearby bush to collect wild fruits known locally as **Msasati.** It is during one of those visits that the appellant allegedly raped the little girl.

On witnesses, I have gone through the testimonies of all the prosecution witnesses, and I must say that the testimony of one witness stands out. It is not difficult to notice that in addition to the expert evidence of the medical doctor, the plausibility of the prosecution's story was enhanced by PW3 Victoria Nyalusi, a champion of children rights who took up upon herself to advice the family of the victim on what next after the rape. This reminds me of a quote attributed to Albert Einstein: "The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing." It appears Ms. Victoria Nyalusi was trained by

a local NGO to advocate the rights of women and children in her local area. I have no doubt she is a passionate child rights defender.

On evidence, I have keenly examined the oral evidence of the victim and compared it with that of PW3. It does not take much thought to realize that the victim, despite her tender age and living with her grandparents, appeared intelligent and consistent. She recounted for example that a few days before her uncle raped her, he had shown her his penis and told him it was a machine "hii ni machine." This takes me to specific issues raised by the appellant in his grounds of appeal before I conclude with relevant principles informing the verdict.

On the first ground, the appellant invited this court to consider a contradiction that the victim did not feel pain after the alleged rape. He took the issue further in his rejoinder where he claimed that since he was 37 and the victim was only 7 if rape had taken place she would have been hospitalized. I cannot buy that line of reasoning. The law provides that penetration is an essential element in rape cases, but such penetration must not result in tattered private parts or hospitalization. It is sufficient, however slight.

The only possible interpretation I can give it that the appellant was acting tactfully. He started with showing his penis to the child, then a slight not-so-painful carnal knowledge and, who knows he would have proceeded to unimaginable levels of sexual abuse backed with threats.

Mr. Lyatuu correctly argued that the prosecution had the discretion to decide which witness would add value to its case. Although the other two girls were mentioned by PW1 as present during the alleged rape of PW1, the word present here does not mean that they were eyewitnesses when the actual act was taking place.

It is common knowledge that the bond between many if not most children of the age of the victim and their mothers are very special. I see no logic in drawing a negative inference since the victim allegedly reported the rape to her mother several miles away and not to her grandparents with whom she was living. More importantly, I think it made no difference because as stated earlier, the whole process of seeking justice for the little girl was championed by PW3 a dedicated activist against children and gender-based violence (GBV).

On the rest of the grounds, I am convinced that the appellant is trying to fault credibility of the witnesses (including the medical doctor) and proof of the case at the required standards. Without making this judgement unnecessarily long, I am inclined to state that the lower court believed the victim as a credible witness and concluded that the appellant had raped her. I would have reached the same conclusion. In **SELEMANI MAKUMBA V R** [2006] T.L.R. 379 the Apex Court stated that in rape offences, if the evidence of the victim is believed by the court, it is enough to warrant conviction. Furthermore, in **MARWA WANGITI MWITA AND ANOTHER V. R** [2002] T.L.R. 39 the importance of the victim mentioning the suspect at the earliest was emphasized.

Finally on principle, our criminal justice requires that the prosecution case is proved beyond reasonable doubt. This duty rests on the prosecution. See **WOODMINTON V. DPP** [1935] AC 462. The term proof beyond reasonable doubt has not been defined in statutes. In the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219 the CAT held that

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a*

remote possibility in his favour which can easily be dismissed."

In the matter at hand, there has been a seamless connection between testimonies of prosecution witnesses and the documentary evidence tendered (PF3). In my reasoned opinion, the entire process spanning from family sensitization by the GBV activist to the arrest and arraignment of the appellant and subsequent trial and conviction was compliant to our criminal justice. The minor errors identified have neither prejudiced the appellant nor shaken the prosecution's case. I see no reason to reverse or vary the trial court's decision.

In the upshot, this appeal is hereby dismissed in its entirety for lack of merit.

It is so ordered.

E.I. LALTAIKA
JUDGE
27.03.2024

Court

Judgement delivered this 27th day of March 2024 in the presence of Ms. Rehema Ndege, learned State Attorney for the Respondent and the Appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
27.03.2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA
JUDGE
27.03.2024