IN THE HIGH COURT OF TANZANIA

IRINGA SUB - REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 92 OF 2023

(Originating from the District Court of Iringa at Iringa

in Criminal Case No. 104 of 2022)

NASSORO BENJAMINI FWENI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

14th & 27th March 2024

LALTAIKA, J.

The Appellant herein **NASSORO BENJAMINI FWENI,** 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 was that on the 7th day of August 2022 at **Ikuvilo village** within the District and Region of Iringa he wilfully and unlawfully had carnal knowledge of a girl child aged nine (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 a total of four witnesses (whom I will later refer simply as PWs) and tendered one exhibits. Halfway through the trial, a *prima facie* case to answer was established

against the appellant. He moved to the witness box as the first defence witness (DW1) followed by one **Paulo Meeda Simon** (DW2).

Having been convinced that the prosecution had left no stone unturned in proving the allegations, the learned trial magistrate convicted the appellant as charged. He proceeded to sentence him to serve a thirty years' imprisonment term and condemnation to pay TZS five million (5,000,000) as compensation to the alleged victim. Dissatisfied with this decision, the appellant has appealed to this court by way of a petition of appeal containing the following grounds:

1. *That the learned trial Magistrate erred in law to take over and continue with this case without provide (sic!) the reasons why the first magistrate (his predecessor) failed to complete the trial (see page 28 of the proceeding.)*
2. *That the learned Resident Magistrate erred in law and fact for believing that the evidence of PW2 was trustful and credible without considering that the victim said that it was the second time to be raped by the appellant, hence create doubts as to why she didn't disclose it when she was raped at the first time if it was real happen (sic!).*
3. *That the learned trial Resident Magistrate erred in law and fact to convict and sentence the appellant relying on PW5 evidence without considering that his findings were insufficient to prove*

penetration (i.e. no place states if the victim's vagina seems to be penetrated by blunt object (sic!) see page 29 of the proceedings.)

4. *That the learned trial Magistrate erred in law n sentence the appellant (sic!) without considering that the said eyes witness (sic!) failed to testify before the Court of law, hence the evidence of PW2 lack corroboration since there was no the said offence (sic!) thereto.*
5. *That the learned trial Resident Magistrate erred in law and fact to convince and sentenced the appellant based on contradictory and inconsistence evidence (sic!) adduced by PW1 and PW5.*
6. *That the evidence of PW2 was taken contrary to section 12(2) of the Tanzania Evidence Act since her promise was incompetent.*
7. *That the trial Magistrate erred in law and fact for failure to considering the defense (sic!) of the appellant the same in his mitigation.*
8. *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 **fended for himself** without legal representation. The respondent Republic, on the other hand, appeared through **Mr. Hubert Ishengoma, learned State Attorney** (SA). The next part of this judgement is a summary of submissions by both parties.

The Appellant who appeared composed, started off with the first ground by stating that the case had been presided over by two different magistrates. He pointed out that initially, the case was before Hon. Kessy, who had already heard four witnesses from pages 1 to 28. When Hon. Mkasiwa took over, it was not clarified why the change occurred, whether Hon. Kessy was sick, transferred, or deceased. The Appellant expressed dissatisfaction with not being informed about this matter, emphasizing his right to be notified. He also criticized the trial magistrate for not summoning the witnesses afresh to observe their demeanour, which he believed compromised the fairness of the trial. Consequently, he prayed to be acquitted.

Concerning his second ground, the Appellant contested the victim's claim of being raped for the second time, arguing that she wouldn't have felt pain if it was her second experience. He further asserted that her family members would have noticed any physical signs such as limping. He highlighted inconsistencies in her testimony about sleeping with her mother, urging the court to disregard her evidence and accept his grounds.

Moving on **to the third ground,** the Appellant challenged the credibility of the medical doctor's evidence, pointing out discrepancies

regarding the victim's condition and the timing of the examination. He argued that the doctor's findings contradicted the records and the victim's parents' narrative, thus urging the court to disregard this evidence and accept his ground.

On the **fourth ground,** the Appellant questioned the credibility of an alleged eyewitness, PW5, who was found to be too young to assist the court effectively. He argued that this undermined the testimonies of other witnesses, PW1, PW2, and PW3, and prayed for their evidence to be disregarded.

Regarding **the fifth ground,** the Appellant highlighted contradictions between testimonies of the victim's father and the doctor, suggesting that the former had fabricated evidence to secure a conviction. He also pointed out inconsistencies between PW1 and PW2 regarding the amount of money allegedly given to the victim, indicating a lack of credibility in their accounts.

Similarly, on the sixth ground, the Appellant contested the victim's credibility, citing her failure to promise to tell the truth as required by law. He argued that her evidence should be dismissed due to her alleged inability to distinguish between truth and lies.

Concerning the seventh ground, the Appellant claimed that the trial magistrate did not consider his evidence or mitigation, including his denial of the allegations and his health status. He argued that his actions of distancing himself from the incident early on should be taken as proof of his innocence.

On the eighth ground, the Appellant maintained that the prosecution had not proven its case, citing doubts raised earlier and the failure to summon essential witnesses. He emphasized that crucial witnesses, such as the victim's brother and mother, were not called upon, **despite the victim's claim of sleeping with her mother.** In conclusion, the Appellant prayed for all his grounds to be accepted, leading to the allowance of his appeal.

Mr. Ishengoma, the learned State Attorney, started off with **a bold declaration that he objected the entire appeal.** He addressed the grounds argued by the Appellant in the following manner:

Regarding the first ground, Mr. Ishengoma argued against the Appellant's claim that the successor magistrate did not provide reasons for taking over the case. He cited section 214 of the Criminal Procedure Act Cap 20 RE 2022, which allows for such transfers without a mandatory requirement for disclosure of reasons. He disagreed with the assertion of

prejudice, suggesting that any potential issues could be addressed under **Section 388 of the Criminal Procedure Act Cap 20 RE 2022 (the CPA).**

On the second ground, the learned State Attorney dismissed the Appellant's assertion of doubt regarding the victim's testimony about previous rape incidents, stating that the number of counts an accused is arraigned for depends on the available evidence, and it is the prosecution's prerogative to decide.

Regarding the third and fourth grounds, Mr. Ishengoma disagreed with the Appellant's claims regarding the lack of proof of penetration and corroboration. He cited the well-known Court of Appeal of Tanzania's (the CAT) case of **ANTHONY TITO V. REPUBLIC** Crim Appeal No 605 of 2021 CAT to support his argument that corroboration was not necessary in sexual offense cases, and the evidence of the victim alone could suffice for conviction.

On the fifth ground, he rejected the Appellant's contention of contradiction between witnesses. Regarding health issues, Mr. Ishengoma tactfully avoided going into the details of doctor-patient relationship

emphasizing that in any case, such contradictions were not material to the case of rape.

Moving on to the sixth ground, Mr. Ishengoma refuted the claim that the evidence of PW2 was in violation of the Evidence Act, stating that the witness had complied with the requirements of the act.

Regarding the seventh ground, he disagreed with the Appellant's assertion that the defence was not considered, citing a statement from the trial magistrate [in the impugned judgment] indicating otherwise. On the eighth and final ground, Mr. Ishengoma argued against the claim that the case was not proved beyond reasonable doubt, emphasizing the essential elements of rape and the victim's age.

I have **dispassionately considered the rival submissions**. My role as the first appellate court is akin to rehearing. It is incumbent upon me to reevaluate the entire evidence and come up with my own findings, if necessary, See **LEORNARD MWANASHOKA V. REPUBLIC** Crim Appeal No 226 of 2014 CAT. To widen the horizon, I will consider the grounds of appeal while making use of the OWEP (Offence, Witnesses, Evidence and Principles) tool of analysis to incorporate uniqueness of the appeal.

Rape may be broadly categorized into two namely statutory and non-statutory. Statutory rape is having carnal knowledge with a child. This encompasses all forms of rape that is stranger rape, acquaintance rape, gang rape, alcohol and drug induced rape and vengeful rape. Non statutory rape on the other hand is carnal knowledge of a woman without her consent. It includes marital rape. It should be noted that in statutory rape offences, proof of the age of the victim is vital. See **OMARY HASHIMU V. R**. [2022] TZHC TANZLII where the Apex Court cited with approval this Court's case and stated (Ngwembe J, as he then was) emphasizing that even punishment depends on the age of a woman. In the matter at hand, the alleged victim was 9 making it a statutory rape. More importantly, the appellant has not raised any objection on the age of the victim neither during trial nor as a ground of appeal.

On witnesses, it cannot be emphasized that from time immemorial, witnesses are an essential part any dispute whether civil or criminal. One of the ten commandments handled down to the Israelites through Moses admonishes that no one should falsely testify against their neighbour "*Usimshuhudie Jirani yako Uongo.*"

I have keenly assessed the credibility and reliability of the witnesses paraded by the prosecution to prove the allegations. I must admit that this is where I think the weakest link lies. The story goes like this: the father (PW1) was told by the son (Not summoned) who was told by his sister (PW3) that their youngest sibling was raped by the appellant. It appears from the records that both PW3 and the "brother" are children of tender age. The only adult (father of the victim) reported the matter to village authorities who advised him to report the matter to the police. The victim appeared before a medical practitioner who later tendered a PF3. I must emphasize that I found this "link" too weak to ground conviction. I will dig this deeper. Keep reading.

Initially, it was alleged that the appellant raped the victim in the presence of her friend who happens to be the appellant's younger sister. The learned trial magistrate recorded **on page 10 of the proceedings "XX was there too while Nassoro was raping me."** When I read that statement, I thought it was a slip of the pen. However, I found it repeated in the judgement thus "She [the victim] told this court that at the time she was raped, XX the younger sister of the victim was also present, and she felt pain..." I am tempted to think that both learned Magistrates failed to employ

their imagination to assess whether such a claim was humanly possible in the first place. How can the appellant, a man in his twenties, rape the victim, a nine-year-old in the presence of his own younger sister of the same age?

Moving on to **the evidence section,** the trial court needed to ascertain that the offence was committed in the first place before moving on to tick off the box on penetration and other elements of the alleged offence. This is where many lower courts err in both fact and law. To be fair, there is usually no direct link between medical proof of penetration with an accused person. This is because, when a victim of rape is taken to a medical practitioner, all attention is on the victim. The purpose of the medical examination is to find out "damage" in the victim's private parts. However convincing the result may be, a court of law must still ensure that such result link the accused with the alleged offence. In other words, a PF3 should not be uncritically accepted.

In the matter at hand, I think the learned trial magistrate tried to cross the bridge before reaching the river. This is evident from the four issues he came up with for determination. His first issue is" Whether there was proof of penetration..." He proceeded to make a finding to the affirmative based

on the victim's assertion "corroborated" by the PF3 that was admitted as Exhibit P1. As I pointed out earlier, the victim's assertion that she was raped in the presence of her friend should have alerted the learned trial Magistrate to be more critical.

This brings me to the last part namely principle where I will link the above analysis with selected grounds of appeal that I strongly believe, can dispose of the entire appeal. There is no doubt as correctly argued by Mr. Ishengoma that it is the prerogative of prosecution to parade a witness of their choice. In the exact words of the Court of the CAT in **YOHANIS MSIGWA V. R.** [1990] TLR 14 "It is upon the prosecution to choose which witness to produce and which evidence to tender."

I do not claim expertise in prosecution, but I cannot stop wondering. What prevented the prosecution from summoning the mother of the alleged victim and instead paraded the appellant's younger sister who in any case totally failed to assist the court? If, as argued by the Appellant, the victim used to spend the night with her mother, why summon the father and leave the mother behind? I do not only draw a negative inference but leave the questions to the prosecution to ponder.

The Appellant, in his 7th ground of appeal complains that "That the prosecution side failed totally to prove the case against the appellant beyond reasonable doubt." Premised on the above OWEP analysis, I agree with the appellant.

It is a cannon principle of our criminal law that the standard of proof for criminal cases is beyond reasonable doubt. The phrase is not defined in the statute. However, in M**AGENDO 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."*

Said and done, I allow the appeal. I hereby quash conviction and set aside the sentence. I order that the appellant **Nassoro Benjamin Fweni** be released from prison forthwith unless he is being held for any other lawful cause.

It is so ordered.

E.I. LALTAIKA
JUDGE
27.03.2024

Court

Judgement delivered under my hand and the seal of this court 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 fully explained.

E.I. LALTAIKA
JUDGE
27.03.2024