IN THE HIGH COURT OF TANZANIA
(IRINGA SUB - REGISTRY)
AT IRINGA

CRIMINAL APPEAL NO.59 OF 2023

(Originating from the District Court of Makete at Makete in Criminal Case No. 16 of 2023)

KELVIN ELFAI MSIGWA.....APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGEMENT

06th & 27th March 2024

LALTAIKA, J.

The Appellant herein **KELVIN ELFAI MSIGWA** was arraigned in the District Court of Makete at Makete 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 19th day of June 2023 at about 6:00 AM at **Isapulano village** within Makete district in Njombe Region he 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 three (3) witnesses (whom I will later refer 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 the allegations, 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. I take the liberty to reproduce them irrespective of the grammatical (and related) errors:

1. *That the learned Magistrate erred in law in convicting the appellant for rape without addressing fully the content of the PF. 3 as the examination of the victim was conducted by PW3 after 24 hours.*
2. *That the learned Magistrate wrongly admitted the evidence of prosecution side without regarding that there was an omission by prosecution to summon material witnesses, i.e. the police officer who conducted inquiry to the victim.*
3. *That there was no eyewitness who confessed to have seen the appellant with the victim even the evidence of PW1... should not be taken into account as the same remained uncorroborated.*
4. *That the Appellant was tortured, threatened and intimidated by the police officer who conducted the cautioned statement which the same was not tendered before the Court.*
5. *The evidence of PW2 should not be admitted as the same was the evidence of a tender age.*

6. *That the learned Magistrate erred in law by ignoring the defense evidence of alibi by the appellant.*

When the appeal was called for hearing on the 6th of March 2024, the appellant had no legal representation thus **fended for himself**. The respondent Republic, on the other hand, appeared through **Mr. Alfred Maige, learned State Attorney** (SA).

The appellant, not being learned in law, indicated that he had nothing to add to his grounds of appeal. He asked that the learned State Attorney be allowed to proceed while reserving his right to a rejoinder in case that need arose.

Taking the podium, Mr. Maige announced boldly that he objected the entire appeal. He stated that since the appellant had dropped the first ground, he was inclined to addressed the rest of the grounds namely the 2nd to the 6th accordingly.

Regarding the second ground, Mr. Maige argued against the claim that the case was not proved beyond reasonable doubt. He cited section 3(2) of the Evidence Act Cap 6 RE 2022, emphasizing the prosecution's duty to prove the elements of the offence. He pointed out that the age of the victim,

penetration against the order of nature, and the perpetrator were established as required by law. He referred to the Court of Appeal of Tanzania's (CAT) case of **FRANK KINAMBO v. DPP** Crim Appeal No 47 of 2019 to support his argument on proving the victim's age.

He further contended that the witnesses mentioned by the appellant were not material and cited section 143 of the Law of Evidence Act Cap 6 RE 2022 to support his assertion. Additionally, he highlighted that the victim herself served as an eye witness, and her testimony was sufficient to establish the events of the case. He referenced page 7 of the proceedings to support this claim.

Addressing the third ground, Mr. Maige acknowledged that the evidence of PW1 was not weighty as it was based on hearsay. However, he disagreed that there was no eyewitness, emphasizing that the victim herself served as the eyewitness and her testimony was not challenged by the appellant during cross-examination.

Regarding the fourth ground, Mr. Maige argued against the alleged torture during the extraction of the cautioned statement, stating that the appellant needed to prove such claims in the trial court. He also mentioned

that since the cautioned statement was not tendered, it would be inappropriate to discuss issues do not present in the court records.

On the fifth ground, Mr. Maige defended the admissibility of PW2's evidence, arguing that the child was a competent witness as per section 127 (1) and (2) of the Evidence Act (TEA). He admitted a small error in the recording of the victim's promise to tell the truth but urged the court to invoke section 127(6) of the TEA to remedy the defect. He cited the case of **WAMBURA KIGINGA v. REPUBLIC** Crim App No 301 of 2018 CAT to support his argument.

Regarding the sixth ground, Mr. Maige argued against disregarding the defence of alibi, stating that the appellant failed to comply with procedural laws related to alibi reliance. He pointed out inconsistencies in the appellant's testimony and emphasized that the appellant agreed with all prosecution witnesses without cross-examining them.

In conclusion, Mr. Maige asserted that all the grounds raised by the appellant lacked merit and should be dismissed.

The Appellant, on his part, stated that he had not committed the offence and explained that he had been in the shamba cultivating at the

time. Upon returning home, he claimed to have visited his younger brother and engaged in a game of football. He recounted being arrested by the police while engaged in these activities and taken to the police station. Despite asserting his innocence to the magistrate, he expressed disbelief that his explanation was not accepted.

He insisted that he had not been present at the scene of the alleged crime and expressed confusion as to why he was being accused. Additionally, the Appellant mentioned that his uncle had attested to his innocence, yet the authorities persisted in detaining him. He recalled having a phone with him and recounted a situation involving the pastor wanting them to carry bricks before being abruptly taken away in a police car. He described being subjected to physical assault upon arrival at the police station, initially resisting their accusations but eventually yielding after enduring further mistreatment.

I **have dispassionately considered the grounds of appeal, submission by the learned State Attorney and the appellant's response.** More importantly, I have carefully examined the lower court records. I do not entertain any doubt in asserting at this earliest stage that

the current appeal emanates from a case that falls far below the requirements of a proper criminal conviction. I am inclined to use the OWEP tool to analyse and clarify a few issues and substantiate my assertion.

On the offence, there is no doubt that rape is a very serious allegation especially when it involves a child of tender age. I say this to emphasize the need for trial courts to ensure that when dealing with rape or any other offence that attract a longer sentence, they become extraordinarily careful no matter how long the trial takes. The chargesheet presented does not disclose the age of the victim. Nevertheless, the learned Magistrate proceeded with the trial and only when the victim was summoned, did the trial Magistrate ask her how old she was. Tenets of fair trial require that a charge sheet fully describes the offence to enable the accused prepare for his/her defence. This takes me to the next state namely witnesses.

A total of three prosecution witnesses were paraded during trial. I am alive to the fact that there is no number of witnesses required to prove the offence of rape and any other offence in that regard. Although the evidence of the victim is considered best evidence, the Court of Appeal of Tanzania had warned against taking it as gospel truth, uncritically. I have gone

through the lineup of PW's, and I can say that this is where the prosecution case botched. A huge gap is left unfilled. I will explain.

The story of the three witnesses could be summed up as follows: PW2 the victim is alleged to have been raped at 6:00 in the morning. PW1 (victim's mother) comes back from shamba at undisclosed time and her daughter complains of pain in her private parts. PW2 proceeds to take her to PW3 the medical practitioner who fills a PF3 indicating that the victim's private parts had been penetrated against by a blunt object. That's it. No further investigation!

It appears to me from reading between the lines of extremely brief witness testimonies recorded by the learned Magistrate, that all along, the victim did not mention the appellant. The most confusing part is that PW1 decides to take her to the social welfare officer [no name is given] who allegedly interrogates the victim, and she [the victim] mentions the appellant. The so-called interrogator was never summoned in court. Be it as it may, one can easily infer that PW1 seems to be throwing the ball to an imaginary person (social welfare officer) to avoid direct involvement in implicating the appellant. I think, had the learned trial Magistrate assessed

the situation critically, such escapism should have raised a red flag on plausibility of the prosecution story. I move on to the next part on evidence.

As far as evidence is concerned, it appears that conviction was based on oral evidence of the victim 'corroborated' by that of the medical practitioner. In dealing with offences as serious as rape, the learned trial magistrate should have taken a few more steps to evaluate the oral evidence of the victim. Unfortunately, the entire proceeding of the trial court (including preliminary hearing) is only 11 pages. Is this expertise in word economy or taking judicial function lightly? I do not intend to answer that question but invite the learned trial Magistrate to conduct self-evaluation to find out whether his style should be emulated or avoided.

To be fair, I think presiding over a criminal offence attracting a jail term of thirty years should be taken as the most serious of businesses. In the matter at hand, the entire evidence of the victim is recorded in three paragraphs. She does not say whether it was dark when she was allegedly raped at 6:00 AM. She does not say where her parents were then. I see no useful information related to the appellant except an allegation that he was wearing a "bucta" whatever that means! This is indicative of lack of interest

or motivation (or both) on the side of the prosecution to assist the court in discovering the truth. It is also indicative of the trial court's readiness to ground conviction based on extraordinarily weak evidence.

Moving on to the principle section, I have gone through the six grounds of appeal, and I have no doubt that they all aim at faulting proof of the prosecution case at the required standard. 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 this case, the prosecution failed to discharge this duty as required by law.

Said and done, I allow the appeal. I hereby quash conviction and set aside the sentence of thirty years imprisonment. I order that the appellant

KELVIN ELFAI MSIGWA be released from jail forthwith unless he is being held for any other lawful cause(s).

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 Mr. Alfred Maige, 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.