IN THE HIGH COURT OF TANZANIA

(DODOMA SUB REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 146 OF 2023

(Arising from the decision of the District Court of Bahi at Bahi dated 01/08/2023 in Criminal Case No. 30 of 2023 before Hon. S.M. Mwalilino, SRM)

PAULO CHALO MAKASI..... APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 08th April, 2024.

Date of Judgment: 10th May, 2024.

E.E. KAKOLAKI, J.

In this appeal the appellant is seeking to displace the decision of the District Court of Bahi dated 01/08/2023 that found him guilty of the offences of Rape; contrary to sections 130(1)(2)(e) and 131(1) and Unnatural Offence, contrary to section 154(1)(a) and (2) both of the Penal Code, [Cap. 16 R.E 2022], convicted and sentenced him to thirty (30) years imprisonment on each offence. The sentence to run concurrently.

It was contended by the prosecution before the trial court that, the appellant on 11th day of July, 2023 at about 01.00 hours at Nholi village within Bahi District in Dodoma Region did have carnal knowledge of HM (victim) and

known her against the order of nature, whose names are concealed to preserve her dignity, a woman of 80 years old. When called to answer the charge, the appellant flatly denied all the accusations, the result of which the prosecution paraded in court six (6) witnesses while relying on three exhibits namely appellant's caution statement (exhibit P1) tendered by A/Insp. Masunga (PW3), victim's PF3 (exhibit P2) tendered by Dr. Emmanuel Mgaya (PW4) and accused extra-judicial statement (exhibit P3) tendered by Hon. Muya Mukasa (PW5), in proof of its case. Other prosecution witnesses were the victim or HM (PW1), victim's grandson and child of tender age whose identity is preserved (PW2) and investigator of the case one D/sgt. Nelly (PW6). On the defence side, the appellant was the sole witness (DW1) with no exhibit to rely on. After full trial and upon consideration of both sides' evidence the trial Court was satisfied that, the prosecution case against the appellant was proved to the hilt and proceeded to convict and sentence him to custodial sentence as earlier on stated above. Displeased with both conviction and sentence meted onto him, the appellant preferred this appeal in seven (7) grounds of appeal which can be reduced into four grievances going thus:

1. That, the appellant was wrongly convicted as prosecutions' case was not proved against him beyond reasonable doubt.
2. That, the trial court failed to properly scrutinize PW4's evidence in respect of the element of penetration and the causes of blood clots and bruises in the victim's vagina.
3. That, the trial court wrongly convicted the appellant basing on unprocedurally obtained and admitted appellant's caution and extra-judicial statements.
4. The trial court erred in fact and law to rely on weak visual identification evidence as the circumstances that prevailed at the scene could not offer proper identification of the appellant.

It is gathered from prosecutions' evidence (PW1) and her grandson (PW2) that, on the incident date 11/07/2022 while asleep in PW1's house, the appellant forcefully entered the house after breaking the door and found PW1 sleeping without underwear before he stripped up her gown and started having sex forcefully both in her vagina and anus. That, during performance of such acts the appellant had held in possession in one hand a mobile phone with torch light on while using the other hand to squeeze up victim's neck until when satisfied his sexual lust and ran away where PW1 seized a chance

to raise alarm and some people responded to her rescue. As the appellant is alleged to have used mobile phone torch light, PW1 and PW2 testified to have recognised him as their neighbour and PW1 further mentioned his name to the responders at the scene of crime including one Tio and then ten cell leader one Mahajile, whereby the appellant was searched and arrested and taken to Police for further investigation before he was indicted before the Court on 21/05/2023. In the course of investigation it appears the appellant recorded both cautioned and extra-judicial statements allegedly confessing to have the committed the offence of rape, the statements which were tendered in court as evidence. The victim was taken to Chipanga Dispensary and medically examined by PW4 where it was established that she had bruised vagina and anus, with clotted blood found in her anus.

Hearing of this appeal proceeded orally as the appellant appeared unrepresented while the respondent represented by Ms. Rachel Cosmas, learned State Attorney. In his submission in chief in support of the raised grounds of appeal the appellant asked the Court to consider all of his grounds which were self-elaborate and proceed to allow the appeal by setting him free.

Resisting the appeal Ms. Cosmas argued that, the appellant was correctly convicted and rightly sentence as the prosecution managed to prove both offences of rape and unnatural offence to the required standard when shown in respect of the offence of Rape that, the appellant engaged in sexual act with a woman (PW1) who was not his wife and without her consent. And further in respect of second count that, the appellant sexually known the victim against the order of nature. According to her PW1's evidence as found at page 7 of the proceedings was to the effect that, the appellant whom she recognized assisted by phone torch light that was on, had forceful penetrated her in both vagina and anus and her evidence corroborated by her grandson PW2 who observed the whole episode, and whose evidence is found at pages 9-12. She went of submitting that, the said direct evidence as per section 62 of the Evidence Act, [Cap. 06 R.E 2022], is further corroborated with evidence of PW4 (the doctor) who examined the victim and the PF3, exhibit P2 to the effect that, PW1 was raped and known against order of nature when observed bruises both in her vagina and anus. It was her submission therefore that, two the elements of penetration and lack of victim's consent were proved by the prosecution beyond reasonable doubt as the law is very clear under section 130(4)(a) of the Penal Code, that penetration however

slight it is, is sufficient to prove sexual intercourse and further that, the best evidence in sexual cases comes from the victim.

As to the element of identification of the accused person in which the appellant laments the trial court relied on visual identification despite of being weak Ms. Cosmas countered that, appellant's identification by PW1 and PW2 was watertight as it was that of recognition which is more satisfactory, assuring and reliable than that of a stranger as it was held in the case of **Abdallah Kondo Vs. R**, Criminal Appeal No. 322 of 2015 (CAT) at page 25 when referred to the case of **Athuman Hamisi @ Athumani Vs. Republic**, Criminal Appeal No. 288 of 2009, since both witnesses were known to the appellant as their neighbour in the village. That in this case, PW1 and PW2 who are reliable witnesses identified him using phone torch light which was in possession of the appellant himself and managed to mention him at the earliest possible time to the responders to the scene, the information that lead to his immediate arrest hence overruling the possibility of mistaken identity. The learned State Attorney relied on the case of of **Abdallah Kondo Vs. R**, Criminal Appeal No. 322 of 2015 (CAT) at page 25 when referred to the case of **Athuman Hamisi @ Athumani Vs. R**, Criminal Appeal No. 288 of 2009 (CAT) to support her submission in that,

the ability of the witness to mention the suspect at the earliest possible time is an important assurance of his reliability.

On the complaint of unprocedural recording and admission of both caution and extra-judicial statements she said, there was no any procedural irregularity as the same were legally recorded and properly admitted in court. She recounted that, before admission of the caution statement exhibit P1, an inquiry was conducted hence legally admitted and properly relied on by the trial court to convict the appellant. As to extra-judicial statement she argued the eight (8) CJ's Instructions to Justice of Peace when recording suspect's extra-judicial statements as spelt in the case of **Japhet Thadei Msigwa Vs. R**, Criminal Appeal No. 367 of 2008 (CAT-unreported) were followed to the letter as can be observed in statement exhibit P3. She added, if anything the appellant never cross examined PW5 on any procedural irregularity in recording the said statement hence accepted the testimony of both PW3 and PW5 and contents of exhibit P1 and P3. On the effect of failure to cross examine she relied on the case of **Issa Hassan Uki Vs. R**, Criminal Appeal No. 126 of 2017 (CAT). As the best evidence also comes from the suspect or accused who confesses his iniquities, it was her submission that, according to the appellant's confession in both exhibits P1 and P3, no doubt

he is the one who raped the victim (PW1), the evidence which corroborated by evidence of PW1 and PW2 to the effect that PW1 was raped and sodomised without her consent hence proof of both offences. She thus prayed the court to dismiss this appeal for want of merit.

In rejoinder the appellant had nothing material to add other than pleading the court to give detailed analysis of the evidence adduced before the trial court against the raised grounds of appeal and proceed to allow this appeal.

I have given considerable thought to the submission by the parties and spared enough time to revisit the record as well as the relevant law in a move to establish the truthfulness of appellant's grievances. It is the law in criminal matters that, the prosecution always carry the burden of proof of the offence which its standard is beyond reasonable doubt as per section 3(2)(a) of the Evidence Act, [Cap. 06 R.E 2022] since the accused's duty is to raise reasonable doubt only. See also the cases of **Mohamed Said Matula Vs. R** [1995] T.L.R. 3 (CA) and **Aburaham Daniel v. R**, Criminal Appeal No. 6 of 2007, (CAT-unreported). It is also trite law that this court being the first appellate court is seized with powers to re-evaluate the evidence before the trial court and come up with is own findings. See the cases of **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 and

Kaimu Said Vs. R, Criminal Appeal No. 391 of 2019 (CAT-unreported). However, it is important to not that such powers must be exercised with great caution to see whether there was justification by the lower court in arriving to a certain conclusion. See the case of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424. Guided with the above stated principles I am not set to determine this appeal in which the main issue is whether it is merited or not.

In this case in which the appellant was faced with two counts of Rape; contrary to sections 130(1)(2)(e) and 131(1) and Unnatural Offence, contrary to section 154(1)(a) and (2) both of the Penal Code, the prosecution was duty bound to prove the following, one, the victim was penetrated in both vagina and anus, second, the sexual intercourse was without her consent and third that, it was the appellant who perpetrated the offence (identification) bearing in mind that the offence was committed at night. To start with the issue of penetration, having glanced at the evidence of prosecution witnesses supported with the PF3 exhibit P2 like the trial court this Court is satisfied that, the victim PW1 had her vagina and anus forceful penetrated. It is settled law that, the best evidence in sexual offences comes from the victim. See the cases of of **Selemani Makumba Vs. R** [2006] TLR

379 **Jacob Mayani Vs. R**, Criminal Appeal No. 558 of 2016 and **Fahadi Khalifa Vs. R**, Criminal Appeal No. 573 of 2020 (both CAT) Tanzlii. It was PW1's evidence in this case that, when the appellant broke into her house he fell her down in a missionary position while stripping up her gown and holding her by neck before he started playing with her private parts using his penis as she was not put on underwear, hence penetrated in both her vagina and anus. She said later on creamed and people responded before she was taken to Chipanga Dispensary, examined and given medicine. In my profound view such evidence is sufficient enough to prove existence of penetration to PW1. However, there is corroborative evidence of PW4 who also tendered the PF3 exhibit P2 to the effect that, when examined PW1, she was found to have clotted blood in both her vagina and anus together with small bruises, something which proves that she was penetrated. Evidence of PW4 and exhibit P2 was well analysed by the trial court in its typed judgment at page 8 and concluded to have proved forceful penetration of victim's vagina and anus, the findings which I have no reason to doubt and fault. With such analysis I also find the complaint by the appellant in the second ground above is redundant as it needed no clarification to establish how the blood clots were found in both PW1's vagina and anus.

As to whether there was consent by PW1 or not, I think this issue need not detain this Court as it was properly addressed by the trial court in its judgment at page 8 where it correctly concluded that, there was none since the accused/perpetrator used force to penetrate PW1 vagina and anus hence no consent. The conclusion in my view finds its justification from PW1's evidence that, during commission of an offence the perpetrator held her by neck and forceful penetrated her in both vagina and anus. As the two ingredients were established by the prosecution to the required standard I find the 1st and 2nd grounds of appeal wanting in merit and dismiss them.

Next for determination is the 3rd ground as to whether the caution and extra-judicial statements were procured and admitted procedurally. To start with the caution statement, it is Ms. Cosmas' submission that the same was legally procured as exhibited by the trial Court proceedings when conducted an inquiry to establish voluntariness in recording it. It is true as per the trial court's ruling at page 21 of the proceedings that, appellant's assertion of torture was rejected hence admission of the statement after the findings were entered that was it was voluntarily made. It is the law and I need not cite any authority that admission of the document is one thing and according it weight is another thing. In this matter having scanned the contents of the

said caution statement (exhibit P1) there is no dispute that the same was recorded under section 58 of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the CPA). The law under section 53(b) of the CPA mandatorily requires the Police officer interviewing the suspect to inform him first of the offence facing him before proceeding to record his statement. The said section 53(b) of the CPA reads:

> ***53***. *Where a person is under restraint, a police officer shall not ask him any questions, or ask him to do anything, for a purpose connected with the investigation of an offence, unless-*
> *(a) N/A.*
> *(b) the person has been informed by a police officer, in a language in which he is fluent, in writing and, if practicable, orally, of the fact that he is under restraint and* ***of the offence in respect of which he is under restraint****; and (Emphasis supplied).*

As alluded to above the provision is coached in mandatory terms that, the suspect must be informed of the offence he is facing. In the present matter as per exhibit P1, the appellant was informed that he is facing the offence of Rape (Kubaka) without mentioning the provisions of the law in which he was accused to breach. That aside there is no indication that the offence of

Unnatural Offence was mentioned to the appellant before recording the said caution statement. The omission in my humble view is fatal as violated appellant's rights of being informed of the offences he was facing before recording his statement. Further to that, the recording officer having recorded the statement failed to certify at the end of the statement to the effect that, what he had recorded is in accordance with the said subsection as mandatorily provided under section 58(6)(b) of the CPA which reads:

> *(6) Where a police officer is satisfied that there is no further additional statement, alteration or correction to the statement, he shall cause to be written at the end of the statement a form of certificate in accordance with prescribed form and shall-*
> *(a) N/A.*
> *(b) **certify under his hand at the end of the statement, what he has done in pursuance of this subsection**. (Emphasis supplied).*

Had the trial magistrate considered those conspicuous defects in the caution statement, I am certainly sure he would not have accorded it any weight. Since the defects are fatal as noted above the only remedy is to expunge the caution statement from the record, the order which I hereby enter.

Having so done I move to consider genuineness of the extra-judicial statement in which Ms. Cosmas convincingly argued was recorded in full

compliance of the CJ's Instruction to Justice of the Peace in recording extra-judicial as exhibited in the same statement exhibit P3. It was held in the case of **Japhet Thadei Msigwa** (supra) that, when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter. The said instruction as enumerated in the above cited case are:

(i) The time and date of his arrest

(ii) The place he was arrested

(iii) The place he slept before the date he was brought to him

(iv) Whether any person by threat or promise or violence he has persuaded him to give the statement.

(v) Whether he really wishes to make the statement on his own free will.

(vi) That if he make a statement, the same may be used as evidence against him.

The object of compliance with CJ's instruction is in two fold. **One**, to make the suspect aware of consequences if at all he decides to make the statement. And **second**, to enable the Court to understand the circumstances under which the statement was recorded whether it was voluntarily made or not, as none observance of all steps renders witness evidence inadmissible and untrustworthy. See the cases of **Japhet Thadei**

Msigwa (supra) and **Republic Vs. Miriam Steven Mrita and Another**, Criminal Session Case No. 103 of 2018 (HC-unreported) Tanzlii. In the present matter a critical look of exhibit P3 revealed that, despite of admission of the said statement without appellant's objection the same was recorded in violation of CJ's Instruction as enumerated above. To mention few omissions in the statement, **one**, the same does not indicate the recorder to have asked the appellant whether any person by threat or promise or violence persuaded him to give such statement and **second**, the recorder did not inspect the appellant's body to establish whether he was tortured before or had any wound or scar on his body so as to get assurance that, he was free agent to record the statement. It is was held **Japhet Thadei Msigwa** (supra) that, non-compliance of the said CJ's instructions renders the statement to have been involuntarily taken. In this matter since the said extra-judicial statement (exhibit P3) violated CJ's instruction, I hold is rendered fatally defective as it was involuntarily recorded the remedy of which is to expunge it from the record, the order which I hereby enter too. With the above findings I find the 3rd appellant's ground of appeal to be meritorious.

Lastly is on evidence of visual identification by PW1 and PW2 which the appellant contends in the 4th ground above that was so weak to ground his conviction given the circumstances that prevailed at the scene of crime. To the contrary Ms. Cosmas submitted that, the same was watertight as the identifiers were known to the appellant before hence evidence of recognition and further that, in such identification were assisted by the phone torch light that was in appellant's possession. Such identification coupled with the fact that, they mentioned PW1's assailant at the earliest possible time, she argued is an assurance of the reliability of the said witness hence strong visual identification evidence.

Visual identification evidence is known to be one of the weakest kind and most unreliable evidence in which the court is warned to deal with caution. In the case of **Godfrey Lusian Shirima Vs. R**, Criminal Appeal No. 40 of 2021, Tanzlii, the Court of Appeal restated the guidelines in dealing with evidence of visual identification where it said:

> *"…this Court has stated the legal principles governing the evidence of visual identification. These include;* ***one,*** *such evidence is of the weakest kind and most unreliable and should be acted upon cautiously after the court is satisfied that the evidence is watertight, and all possibilities of mistaken identity*

are eliminated. ***Two,*** *even if it is evidence of recognition that evidence must be watertight. In that regard, where the offence is committed at night, and the question of light is in issue, there must be clear evidence as to the intensity of the said light and that bare assertions, would not do.* ***Three,*** *in matters of identification, conditions for identification alone, however ideal they may appear are no guarantee for truthful evidence. (See* ***Mohamed Shabani v. R,*** *Criminal Appeal No. 41 of 2009;* ***Magwisha Mzee & Another v. R,*** *Criminal Appeal Nos. 465 and 467 of 2007;* ***Shadrack Kuhaha v. R,*** *Criminal Appeal No. 139 of 2015;* ***John Jacob v. R,*** *Criminal Appeal No. 92 of 2009; and* ***Daniel s/o Paul @ Meja v. R,*** *Criminal Appeal No. 307 of 2016 (all unreported)."*

Applying the principles in the above cited case to the circumstances of this case it evident to this Court that the fact that, PW1 and PW2 were known to the appellant before and mentioned his name soon after the incident is not sufficient evidence to establish beyond reasonable doubt that their identification of the appellant was water tight. I will explain why? It is in PW1's evidence that, when raping and knowing her against the order of nature the appellant was in possession of a mobile phone with torch light on in one hand while the other hand held her by neck and at the same time his penis playing with his vagina and anus. There is no explanation on the

direction of the said torch light. Meaning both PW1 and PW2 did not state whether the said phone torch light was directed toward appellant's face so that they could easy recognize. It would be different if the appellant had uttered any words during performance of such illegal act so that she recognized him by voice, but in her own evidence PW1 said during that act the appellant did not utter any word.

Furthermore the intensity of such torch light and size of the room in which the said illegal sexual acts took place were not explained to the court for the same to determine whether it was good or poor to enable unmistaken identity. The need to have intensity of the light and the size of illuminated area was emphasized in the case of **Baya Lusana Vs. R**, Criminal Appeal No. 593 of 2017 (CAT-unreported), where the Court observed thus:

> *"it is not sufficient to make bare assertions that there was light at the scene of the crime and in addition, the intensity of the light and the area illuminated must be clearly stated.*

On the need of the torch light to be flashed against the identified person the Court of Appeal in the case of **Michael Godwin and Another vs R,** Criminal Appeal No. 66 of 2002, had this to say:-

> *"...Second what is more, it is inconceivable that PW1 or PW2 were able to identify the bandits when the bandits were flushing the torch light at them (PW1 and PW2).* ***It is common knowledge that it is easier for the one holding or flushing the torch to identify the person against whom the torch is flushed.*** *In this case, it seem s to us that with the torch light flushed at them, (PW1 and PW2), they were more likely dazzled by the light. They could therefore not identify the bandits properly. In that case, as Mr. Mbago, correctly conceded, the possibility of mistaken identity could not be ruled out."* (Emphasis added)

Comparing the circumstances of this case to what had happened in the above cited case since neither PW1 nor PW2 gave reliable evidence on whether the torch light faced the appellant when identifying them, despite of evidence of recognition, under the circumstances that prevailed on the incident day, I find no justification in the trial court's conclusion that visual identification by PW1 and PW2 was free from mistake of identity. I so hold as under the circumstances where the rapist uttered no word and the said torch light was not directed towards his fact, it was difficult for the identifiers to render unmistaken identification of the assailant. Consequently I hold appellant's identification was not watertight hence no proof that, he is the

one who committed the offence charged with. The fourth ground of appeal is therefore has merit.

In view of the above stated reasons, I find this appeal meritorious and proceed to allow the same. Consequently appellant's conviction is quashed and the sentence meted on him set aside. It is hereby ordered that, he should be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

Dated at Dodoma this 10th May, 2024.

E. E. KAKOLAKI
JUGDE
10/05/2024.

The Judgment has been delivered at Dodoma today on 10th day of May, 2024, in the presence of the appellant in person, Ms. Faudhiat Mashina, State Attorney for the respondent and Ms. Veradina Matikila, Court clerk.
Right of appeal explained.

E. E. KAKOLAKI
JUGDE
10/05/2024.


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DARES SALAAM DISTRICT REGISTRY