IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB-REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 7289 OF 2023

(Originating from the District Court of Mufindi at Mafinga
in Criminal Case No. 53 of 2022)

BASIL HOVE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 06/05/2024
Date of Judgement: 29/05/2024

LALTAIKA, J.

The Appellant herein was arraigned in the District Court of Mufindi at Mafinga charged with two counts of 1. Rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code Cap 16 RE 2022 and 2. Unlawful Child Removal c/s 40 and 51 of the Child Act No 21 of 2019.

When the charge was read over and explained to the appellant (then accused), he denied wrongdoing. This necessitated the conducting of a full

trial. Having been convinced that the prosecution had proved the case beyond reasonable doubt, the learned trial Magistrate convicted the appellant as charged. He proceeded to sentence him to 30 years imprisonment for the first count and three years' imprisonment for the second count. The sentences were ordered to run concurrently.

Dissatisfied, the appellant has appealed to this court on the following *grounds:*

1. *That the trial Magistrate erred in law and fact to convict the appellant who was beaten and forced to sign caution (sic) statement.*
2. *That the trial Magistrate erred in law and fact to convict the appellant basing on evidence adduced by PW2 who does not show any evidence that was reported to the local government of Mlimba Village.*
3. *That the trial Magistrate erred in law and fact to convict the appellant without considering the evidence adduced by the appellant.*
4. *That the trial Magistrate erred in law and fact to convict the appellant basing on evidence adduced by PW1 which she was teached (sic!) to mention the appellant.*
5. *That the trial Magistrate erred in law and fact to convict the appellant while the prosecution side failed to prove whether PW1 and appellant stayed together.*

6. That, the trial prosecution side failed to prove the case beyond reasonable doubt.

When the appeal was called on for hearing on **the 6th of May 2024**, the appellant appeared in person, unrepresented. The Respondent republic, on the other hand, appeared through Mr. Daniel Lyatuu, learned State Attorney.

Mr. Lyatuu stated that he had thoroughly reviewed the grounds of appeal and the court records. He expressed his position by supporting the first count while objecting to the second count.

Regarding the first count, Mr. Lyatuu explained his support for the appeal by highlighting a significant discrepancy. He pointed out that the prosecution failed to specify the exact date on which the offence was committed, leading to a variance between the charge sheet and the victim's (PW1) testimony. The charge sheet indicated that the offence occurred on August 15, 2022, whereas PW2's evidence suggested that the rape took place on September 5, 2022, as documented on page 4 of the proceedings.

According to Mr. Lyatuu, PW2 categorically stated that August 15, 2022, was the date she was taken by the appellant. They travelled

throughout the night and stayed at an undisclosed location for a week before the appellant brought her to his home, where the offence occurred. Consequently, Mr. Lyatuu emphasized, the offence was committed a week later, and the specific date was not mentioned in the charge sheet. He argued that this variance was critical and could be deemed fatal, referencing the case of **Abubakari Rashid v. Republic**, HCT, Dar Crim Appeal No. 24 of 2021, p. 9, which cites several CAT cases.

The learned State Attorney averred that the CAT considered such discrepancies to be fatal as they hinder the accused from adequately defending themselves based on the original charge. Mr. Lyatuu noted that the prosecution had the opportunity to amend the charge at any time before the closure of their case. Furthermore, he mentioned that the failure to plea was justified due to the defective nature of the charge.

Transitioning to the second ground, Mr. Lyatuu stated that he did not support it and requested the court's permission to address the grounds related to this issue in detail. He proposed to respond to the grounds in a specific sequence: addressing the second and fourth grounds together, the

fifth and sixth grounds together, and then discussing the first and third grounds separately.

Addressing the first ground, Mr. Lyatuu acknowledged the appellant's complaint regarding the admission of a cautioned statement, despite the appellant's claim of being beaten and forced to sign it. He argued that this ground should be dismissed because the appellant did not object when the statement was tendered and did not mention the alleged beating, as noted on page 12 of the proceedings. Mr. Lyatuu emphasized that the absence of an objection at the time the statement was presented undermined the appellant's current claim.

On the second and fourth grounds, Mr. Lyatuu contended that the appellant failed to cross-examine the witnesses on these points, thereby accepting their testimonies by default. He supported this argument by citing the case of **Nyerere Nyague v. Republic**, CAT, Arusha Crim Appeal No. 67 of 2010, p. 15, which established that failure to cross-examine a witness on a particular aspect is tantamount to accepting their testimony on that point.

On the third ground, the appellant asserted that his defense was not considered. Mr. Lyatuu disagreed, referring to the judgment on pages 4 and 5, and 8 and 9, which showed that the court had indeed analysed the defense evidence. He noted that the court explicitly addressed the appellant's claim that he took the child but was unaware she was a student. The court found this explanation insufficient, stating that ignorance of the law is not an excuse. Mr. Lyatuu argued that the court had duly considered and addressed the appellant's defense.

Regarding the fifth and sixth grounds, which involved the appellant's complaint about the inability to prove the case beyond a reasonable doubt, Mr. Lyatuu disagreed and provided several reasons to support his position. Firstly, he outlined that the victim testified about being deceived by the appellant into believing he had found a job for her in Mlimba. On the date she was picked up by her father, PW2's testimony was consistent and clear. Secondly, the victim's age was established as 15 years old, providing further context to the gravity of the offence.

Mr. Lyatuu proceeded to aver that thirdly, the victim testified that her parents had not given consent for her to leave their home, thereby proving

a lack of consent. He substantiated his argument by referencing additional pieces of corroborating evidence. He pointed to the testimony of PW2, the victim's father, who detailed how he reported his daughter's disappearance to the Mtaa Authorities. He also highlighted the appellant's own admission, where he conceded to taking the victim to a place called Mlimba.

Lastly, Mr. Lyatuu referred to the appellant's cautioned statement (P2), where the appellant admitted to committing the second offence. He argued that this collection of evidence provided a comprehensive and compelling case that the second offence was indeed proven.

In conclusion, the learned State Attorney submitted that the second offence was sufficiently supported by the evidence presented, and therefore, he recommended that the appeal be dismissed with respect to the second offence. He proceeded to suggest that since the second count had only been partly served, the appellant was eligible for a noncustodial sentence.

The appellant, on his part, indicated that he had nothing to add to the submission of the learned State Attorney but chose to leave to the Court to do what it considered just.

I have dispassionately considered the learned State Attorney's submission in the light of the grounds of appeal. I have also taken a rather keen interest in examining the lower court records. I am inclined to say without any hesitation that Mr. Lyatuu's opinion is robustly constructed, leveraging inconsistencies in the prosecution's case to support the first ground of appeal while systematically dismantling the appellant's claims on the remaining grounds.

Additionally, his use of legal precedents and careful analysis of witness testimonies and procedural aspects make a persuasive case for partially upholding and partially dismissing the appeal. This balanced approach reflects a meticulous application of legal principles to the facts at hand, ensuring that justice is served based on a thorough examination of all evidence and arguments.

It appears that the appellant had indeed committed the offence described under the first count. He removed a 15-year-old girlchild from her home place without consent of, most likely one parent, the father, in the pretext that he found a job for her at Mlimba. I have read the relevant records and I get the impression that the accusation for rape came as an

afterthought due to bitterness of one of the parents and his desire to "teach him the lesson" not to remove children unlawfully in the future.

The learned State Attorney did his very best to take this court through not so clear records to comprehension of the full picture of what transpired in Mufindi. He is probably aware of the Court of Appeal's position as articulated in the case of **Marko Patrick Nzumila & Another v. Republic**, Criminal Appeal No. 141 of 2010 CAT (unreported) that "...in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale of justice have to be considered." It is not desirable for a State Attorney to concentrate on one side only to the detriment of justice.

Premised on the above I make the following ordered:

1. The conviction and sentence of 30 years imprisonment meted by the trial court for the first count of rape is hereby quashed and set aside. For avoidance of doubt, I hereby Order that I hereby order that the Appellant **BASIL HOVE** be released from prison forthwith.
2. As for the second count, whose sentence of three years imprisonment has been partly served, I order that the remaining 24 months be served under **Community Service Act No 21 R.E.**

2019. The suitability of the appellant to such a noncustodial sentence has been confirmed by relevant authorities.

It is so ordered.

E.I. LALTAIKA
JUDGE
29/05/2024

Court

Judgement delivered under my hand and the seal of this Court this 30th day of May 2024 in the presence of **Ms. Muzzna Mfinanga**, learned State Attorney for the Respondent and the Appellants who have appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
29/05/2024