

IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO. 45 OF 2023

(Arising from Criminal Case No. 03 of 2023 of Pangani District Court dated 31st March 2023)

JUMA MIRAJI KUVUMBA -----APPELLANT

VERSUS

THE REPUBLIC-----RESPONDENT

JUDGMENT

K. R. Mteule, J

05/02/2024 & 14/2/2024

In the District Court of Pangani in Tanga Region, the appellant was tried, convicted, and sentenced to serve thirty (30) years imprisonment for the Offence of Rape contrary to section **130 (1) (2) (a) and 131 (1) of the Penal Code (Cap 16 R.E. 2022) (Penal Code)**. It was alleged that on 20th day of January 2023 at Jasili Kambona village within Pangani district in Tanga region the Appellant did have sexual intercourse with a woman aged 70 years without her consent.

Being dissatisfied, the Appellant is challenging the decision of the District Court on the following grounds.

1. That, the learned trial magistrate erred in law and in fact by failing to notice that the ingredients of rape were not proved as required by the law.
2. That, the learned trial magistrate erred in law and in fact by failing to consider that there was no proper visual identification at the scene of crime.
3. That, the learned trial magistrate was not scrupulous to notice palpable contradiction in evidence of PW1 (the Victim) and PW2 (the Victim's daughter) regarding the exact time of the occurrence of the alleged offence.
4. That, the learned trial magistrate erred in law and in fact by failing to consider the defence of Alibi which adduced by the appellant.
5. Prosecution did not prove their case beyond reasonable doubt.

The appeal was argued by written submissions. The Appellant was unrepresented while the Ms. Betty J. Sogga State Attorney represented the Respondent.

Arguing the **first ground** of appeal, the Appellant is asserting that the learned trial magistrate erred in law and in fact in failing to notice that the ingredients of rape were not proved as required by the law. He argued that it has been settled in our jurisdiction that for the offence of rape to be established there must be a proof of penetration. He referred to the case of **Barton Mwipabile Vs. Republic, Criminal Appeal no.200 of 2009 (Unreported)**. He quoted the following words from that case:-

"Time and again: It has been said by this court that, it is not enough for the victim of rape to saying that she was raped. She must also further allege that there was penetration however slight."

Referring to the case of **Nathaniel Alphonse Mapunda and Another vs Republic (2006) TLR 395** and **Mohamed Said Matula vs Republic (1995) TLR 3**, the Appellant submitted that it is the duty of the prosecution to prove criminal cases and that the standard is beyond reasonable doubt. He further referred to the case of **Godi Kasenegala vs Republic, Criminal Appeal No. 20 of 2008 (CAT, Unreported)** submitting that in that case the Court of Appeal of Tanzania, applied the principle enunciated in **Mathayo Ngalywa @ Shabani V.R** where it was stated;

"The essence of rape is penetration of male organ into the vagina.

Subsection (a) of section 130(4) of the penal code provides ...

"For the offence of rape it is of ut-most importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence."

In insisting on the importance of proof of penetration as a vital ingredient in rape offences, the Appellant referred to **Section 130 (4) (a) of the penal code cap 16 R.E 2022**; which states:

"(4) For the purposes of proving the offence of rape-

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and"

He therefore submitted that since the ingredients of rape were not proved, it means there was no rape offence.

In the **second ground** of appeal, the Appellant is arguing that, the learned trial magistrate erred in law and in fact by failing to consider that there was no proper visual identification at the scene of crime. He

referred to the evidence of Pw1 who told the trial court that, she was surprised that the appellant caught her and pushed her to the cassava farm, took off her clothes and raped her. That the victim told the trial court that the incident took place at 17:00hrs but when examined further, told that the incident occurred at 18:00 hrs while Pw1 told the trial court that the incident took place at 19:00hrs and she was using a torch to light the place. In Appellant's view, the evidence suggests that it was dark at the scene hence, there was possibility of mistaken identity of the appellant at the scene crime.

He referred to the case of **Waziri Amani V.R (1980) TLR 250**, where the court while deciding on the question of identification said:-

"The first point we wish to make is an elementary one and this is that evidence of identification, as the court in East Africa and Ireland have warned in number of cases, is of weakest kind and most reliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated, and the court is fully satisfied that the evidence before it is absolutely watertight."

In his view, in light of the above authority, there was a doubt as to whether the appellant raped the victim.

In the **third ground of appeal** the Appellant is arguing that, the learned trial magistrate was not scrupulous to notice palpable contradiction in the evidence of Pw1 (victim) and Pw2 (victim's daughter) regarding to the exact time of the alleged rape. Referring to page 5 of the proceedings of the lower court, he submitted that Pw1 told the trial court that the incident took place at 17:00hrs.

According to the Appellant the passages quoted from the proceedings are obvious that there were palpable contradictions on to the exact time of the alleged offence. He challenged the trial Magistrate for having failed to consider the defence of *Alibi*.

In his view, the trial magistrate ought to have explicitly considered the defence and make his own specific finding.

In the **last** ground of appeal the appellant averred that the prosecution did not prove their case beyond reasonable doubt. He thus prayed for this honourable court to allow the appeal.

Disputing the appeal, the respondent responded to the grounds of appeal sequentially vide the submissions drawn and filed by State Attorney Betty Sogga.

Starting with the **first** ground of the appellant's appeal that the learned trial magistrate erred in law and in fact by failing to notice that the ingredients of rape were not proved as required by the law, Ms. Sogga expounded **Section 130(2) of the Penal Code [Cap 16 R.E 2022]**.

The section provides:

"A male person commits the offence of Rape if he has sexual intercourse with a girl or a woman".

Ms. Sogga is at one with the appellant that in proving that there was sexual intercourse, there should be a prove of penetration whether slight or deep, hence from there we get the most and outmost important ingredient to prove Rape which is penetration as stated under **section 130 (4) of the Penal Code**.

According to Ms. Sogga, PW1 was examined by PW3 who is Dr. Anganile Mwakasungula Uswege and it was discovered that her cervix had bruises especially the walls. She referred to page 11 of the trial court proceedings where such explanation is found. She added that PW3 explained further that, in her inquiry she discovered that there was a sign of slight penetration which led to bruises, and that there was also a torture, hence concluded that the victim was raped. She referred to page 14 of the trial court proceedings. She submitted that from the

above evidence of PW3, there was penetration hence that ingredient of rape was proved.

Regarding the **second ground** of appeal that the learned trial magistrate erred in law and in fact by failing to consider the propriety of visual identification at the scene of crime, Ms. Sogga SA highlighted High Court and Court some important aspects of Visual Identification as discussed in various cases. The said aspects are:

- a) Time the witness had the accused under observation.
- b) The distance at which the witness had the accused under observation.
- c) If there was any light, then the intensity of such light and
- d) Whether the witness knew the accused before

She referred to the case of **Sadick S/O Hamis @Rushikana And 2 Others Versus Republic, Criminal Appeal No. 381, 382 and 283 Of 2017, Court of Appeal of Tanzania at Tabora (Unreported)** of which LILA, J.A at page 14 quoted with approval the case of **Waziri Amani Versus Republic (1980) T.L.R 250** and another case of **Philimon Jumanne Agala @ 4 Versus Republic, Criminal Appeal No. 187 of 2015.**

Starting with the first aspect which is time the witness had the accused under observation; Ms. Sogga referred to at page 5 of the trial court proceedings, when the victim (PW1) was explaining what exactly happened on that fateful date, stating:

"JUMA who is a husband of my daughter, he has taken my child, he is my in law, he has my daughter, he stood at the cassava, I told him if you have a problem come, he said he is going at Kambana".

In Sogga's view, from the above quotation, it can be observed that, there was an ample time for discussion between the accused by then (now appellant) and the victim before the commission of the offence, which is enough for the victim to be able to identify the culprit.

She added that even the commission of the offence took sometimes for the accused person (now the appellant) to catch the victim, push her to cassava -farm, took off her clothes and took out his penis and put it to the victim's vagina. Basing on these two scenarios, Ms. Sogga is of the view that there was enough time for the victim to identify the accused person who is the instant appellant.

On the 2nd aspect which is the distance at which the witness had the accused under observation; Ms. Sogga referred to page No. 5 of the trial court proceedings which is the victim's evidence (PW1) where she stated.

"I was staying at the hut, I was surprised he caught me and pushed me to the Cassavas"

According to Sogga, the appellant and the victim were close enough which made it easier for the accused person to catch the victim and push her to the Cassava farm and therefore no doubt as to identification.

Concerning aspect No. 3 which is the light and the intensity of such light, Ms. Sogga referred to page 5, the second paragraph, first line of the proceedings, where the victim (PW1), stated that it was like 17:00 hours during sun set. In her view, this indicates that there was enough light which helped the victim to see and identify of the accused (Appellant) because the sun provided enough light for effective identification.

On the 4th which is whether the witness knew the accused person before, Ms. Sogga submitted that PW1 explained clearly in the trial Court that the accused person JUMA, is the husband of her daughter,

he married her daughter, that means he is her son in law. In Sogga's view, this means the victim (PW1) knew the accused before the commission of that offence.

Basing on the foregoing four aspects, Ms. Sogga is of the view that the second ground of appeal challenging the propriety of the visual identification, has no merit because the victim (PW1) clearly identified the accused in line with the four aspects as laid down in the land mark case of **Waziri Amani Vs Republic** (supra).

Addressing the **third ground** of appeal concerning contradictions in prosecution evidence, Ms. Sogga submitted that the best evidence in rape cases is from the victim as she is in a good position to state what happened. She referred to the case of **SELEMANI MAKUMBA VS REPUBLIC, Criminal Appeal No. 94 Of 1999, TLR 379/2006 TZCA** at Mbeya where MROSO, J.A. at page 8 stated that;

".....true evidence of Rape has to come from the victim if an Adult that there was penetration and no consent and in case of any other woman where consent is irrelevant, that there was penetration"

According to Ms. Sogga, since the victim stated clearly that she was really raped by the Appellant (accused by then) and such evidence later

being collaborated by PW3 who is the Doctor who having examined her discovered sign of slight penetration on the victim's cervix, she considered the contradiction between PW1 and PW2 as minor which do not waive the fact that PW1 (the victim) was raped by the appellant.

In the **fourth ground** of appeal that the learned trial magistrate red in law and in fact by failing to consider the defence of *alibi* which was adduced by the appellant, Ms. Sogga submitted that the trial magistrate discussed the defence of alibi in his Judgement at page 7 and stated and found **section 194 (4) and (6) of the Criminal Procedure Act [CAP 20, R.E. 2022]** to have not been complied with. She added that that provision requires that, notice to the court and to the adverse party be issued by any party who wish to rely on the defence of *alibi*.

She added that the Honourable trial magistrate went further to state that, not only the accused failed to provide notice of Alibi, but also, he didn't give any evidence be it documentary or a oral to prove that he was not at the scene of crime during the time of incident and concluded that, such defence was not water tight.

Ms. Sogga referred to the case of **EDGAR S/O KAYUMBA VS DIRECTOR OF PUBLIC PROSECUTIONS, Criminal Appeal No. 498/2017 Court of Appeal of Tanzania, at Mbeya** where Hon.

Kitusi JA addressed alibi as a defence. She quoted the words at page 16, thus:

"we wish to state that the defense of alibi that was raised by the appellant does not introduce a reasonable doubt in the prosecution's case in view of the strong evidence of eye witnesses"

She further supported her argument by the quotation from **ABDALLAH HAMIS SALIM @SIMBA VS REPUBLIC, Criminal Appeal No. 68/2008 (unreported)** of which the court stated that;

"it follows that the trial High court having believed PW1 and PW2 on the evidence of identification of the appellant, the defense of alibi died a natural death"

Basing on the above authorities, Ms. Sogga is of the view that since the Appellant (accused by then) didn't follow the procedures of relying on a defense of Alibi and that he didn't bring any evidence to prove his absence at the scene of crime, and yet the victim managed to explain before the trial court on how she identified the accused, then that defense of Alibi died a natural death.

On the **fifth ground** which is challenging the existence of proof of the case beyond reasonable doubt, Ms. Sogga referred to the case of

Masanyiwa Masolwa Vs The Republic, Criminal Appeal No. 280/2018 CAT at Shinyanga (unreported), at page 16 where it was stated:-

"Admittedly, for the offence of Rape of any kind to be established, the prosecution or who ever is seeking the trial court to believe his or her version of the facts on trial, must positively prove that a sexual organ of a male human being Penetrated that of a female victim of the sexual offence, and if the victim is an adult of over 18 years of age, a further condition is needed; proof that the victim did not consent to the sexual act"

She argued that in our case, the prosecutions managed to show how the appellant raped the victim by parading PW1 (the victim herself who explained how the accused did the act by force as he caught her without her consent, pushed her to the farm of cassava, and started accomplishing what he was intended to do (Raping her). She added that, later on, prosecution paraded PW3 (the Doctor) who explained extensively how she examined the victim and found slight penetration, and that she tendered PF3 **Exhibit P1**. That the evidence was corroborated by PW2 (Victim's daughter). According to Ms. Sogga, this evidence makes it clear that the prosecution did prove its case beyond reasonable doubt.

Referring to the case of **Republic V. Meridian Boastice Mwale & 3 Others, Criminal Session case No. 77 of 2017**, citing the case of **MAGENDO PAULO & SHABAN BENJAMIN V. R** [1993] TLR 219 at page 25, Ms Sogga concluded that the trial Magistrate after observing the evidence from both sides, laid down a point of controversy as to whether the prosecution managed to prove its case beyond reasonable doubt, and after analysing the whole evidence and applying legal principles found the evidence by the prosecution to have indeed proved the case beyond reasonable doubt.

Having gone through the submissions of the parties, I now determine the merits of the Appeal. This will be done by framing issues to address the grounds of the appeal seriatim.

In the **first ground** of appeal the issue is whether the ingredients of rape were met. The applicant challenged the findings of the Trial Court which confirmed existence of penetration. The Appellant's argument is that the prosecution did not prove penetration which is a vital ingredient to prove a rape offence. The Respondent's Attorney is disputing this assertion arguing that the evidence of PW1 and PW3 proved penetration. I agree with both parties on the application of the Laws and the authorities on the importance of penetration as a ground

to confirm the offence of rape. The principle that penetration must be established however slight it may be is well developed in case laws. See **Barton Mwipabilege Vs. Republic, Criminal Appeal no.200 of 2009 (Unreported) cited supra**. What I noticed from the parties is that their debate is centred on whether there was sufficient evidence to prove penetration.

The trial Magistrate was convinced with the evidence of the victim (PW1) who stated that she was raped by the accused. The words of PW1 were thus:

"JUMA who is a husband of my daughter, he has taken my child, he is my in law, he has my daughter, he stood at the cassava, I told him if you have a problem come, he said he is going at Kambana. I was staying in a hut I was surprised he caught me, pushed me to cassava farm, took off my clothes, took out his penis and put it in my vagina, when I wanted to shout, he held my mouth. He caught me and made me his wife. He has sexual intercourse with me."

It was the above piece of evidence from the victim which firstly established existence of penetration. The other evidence is from the Doctor who examined the victim and filled the PF3 (**Exhibit P1**). As noted by Ms. Sogga in her submissions, the medical examination confirmed some bruises caused by slight penetration. In my view,

PW1's explanation and the medical report tendered by PW3 constitute sufficient evidence to prove penetration. In this regard, I do not agree with the Appellant that penetration was not proved. As such, ground No. 1 of the Appeal fails.

The **second ground** of appeal is challenging visual identification. According to the Appellant, there is serious contradiction on the time of incident which creates a possibility of mistaken identity hence raising a doubt in the matter. Ms. Sogga considered the contradictions as minor which needed to be ignored.

I wish to point out that identification is a vital aspect in proving criminal matters. It is a long standing position of the law that Courts are warned on diligence in relying on visual identification. See **WAZIRI AMANI.V.R (1980] TLR 250; and AUGUSTINE KENTE .V.R [1982] TLR 122**. In **Waziri Amani** supra, the court held:

"The first point we wish to make is an elementary one and this is that evidence of visual identification, as Courts in East Africa and England have warned in a number of cases is of the weakest kind and most unreliable . It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are

eliminated, and the Court is fully satisfied that the evidence before it is absolutely watertight. "

From the above quotation, it is apparent that visual identification must be relied upon if all possibilities of mistaken identity are cleared.

In the instant matter, it is already found that the victim was actually raped. The issue which remains is who raped the victim. Was there a clear identification which left no possibilities of mistakes? I agree with Ms. Betty that the best evidence Rule requires the victim of rape to be trusted as she is normally on the best position to tell what happened. The Appellant herein is challenging the visual identity trying to suggest a mistaken identity. His argument is based on contradictory evidence of Pw1 and Pw2 on the time when the incident occurred. Pw1 stated that at 17:00 hours the Accused person who is her son in law (married to her daughter) went to her and stood at cassava farm and she called him to go to her if he had a problem. It was from there, according to PW1, that the accused dragged her into cassava farms and raped her and run away after hearing her daughter calling.

The evidence of PW2 who is the daughter of the victim and the wife of the accused person told the trial court that she left home Kipumbwi at 17.00 hrs leaving the accused with her mother and upon arrival at

Kambona, she saw the accused person and questioned him why was he there while he was to cook porridge for her mother who was at Kipumbwi. She told him that she was going home since the accused person was still at Kambona but the accused asked her to wait for him so that they may go together but PW1 decide to go alone. She explained further that she arrived home at around 19.00hrs and found her mother missing in her hut and she heard screams in the cassava farm and upon lighting a torch she saw her mother with her hands tied by her head cloth (Mtandio). From this evidence, I agree with the Appellant's submissions that there is a serious contradiction on the issue of time. PW1 stated that the incident took place at 17:00hrs and when examined by the Court she stated that it was at 18:00hrs. At the same time PW2 stated that she arrived at home at 19:00hrs and had to light a torch to look at her mother (PW1) who was already raped in the cassava farm by the culprit said to have run away when Pw2 called her mother. Since PW1 stated that the culprit run away when PW2 arrived, this suggests that the incident occurred at around 19:00hrs which is the time when PW2 arrived which meand, she found the rape act still ongoing because PW1 said the culprit run away when he heard PW2 calling. Further to that, PW2 left the accused person at Kambona while PW1 said he run away when her daughter called her on arrival from

Kambona. This entire scenario suggests a possibility of mistaken identity. I cannot imagine a possibility of having the accused person being left at Kambona and at the same time being in cassava farm raping PW1. The lighting of torch is an indication that it was dark and someone needed extra light to see things clearly.

In light of **Waziri Aman's** case cited supra, I am to exercise diligence and caution in relying on the visual identification. In this regard, I do not agree with Ms. Sogga SA that the variation of evidence on the timing of the incident amounted to minor contradictions which should be ignored by the trial court. In my view, the contradiction goes to the roots of the case, and it raises a serious doubt as to whether it was the accused person who raped the victim. Much as I agree with her on the four aspects she listed as factors prerequisite for the court to rely on visual identification as extracted from the cases of **Sadick Hamis @ Rushikana and 2 Others Versus Republic, and Philimon Jumanne Agala @ 4 Versus Republic**, I do not agree that the aspect of light and intensity of such light was properly ascertained to the extent of clearing the possibility of mistaken identity. It appears that there is more possibilities of having the incident to have occurred at 19hrs than 17hrs as suggested by the Ms. Sogga, SA. This doubt ought

Court:

Judgment delivered this 14th Day of February 2024 in the presence of the Appellant and Mr. James Rugaimukamu for the Respondent. Right to further Appeal is explained.

KATARINA REVOCATI MTEULE

JUDGE

14/2/2024

to have been observed by the trial court. Due to the above analysis the second ground of appeal is found to have merits.

In the third ground the Appellant is challenging reliance of contradictory evidence of Pw1 and Pw2. The above analysis also answers the third ground of appeal affirmatively. This is because the contradiction in evidence is what created the doubt in the identification of the culprit. It is already found that there were contradictions which created a reasonable doubt as to whether it was the accused person who raped the victim. This rendered the matter to be clouded with possibilities of mistaken identity. Therefore, ground No. 3 succeeds.

In the **fourth ground** of Appeal, the Appellant is trying to fault the trial court asserting failure to consider the defence of alibi raised by the accused person. I agree with Ms. Sogga that defence of alibi is not an automatic evidence in criminal cases. The person intending to rely on it must issue a notice to that effect in accordance with the law. See **section 194 (4) and (6) of the Criminal Procedure Act [CAP 20, R.E. 2022]**. It is apparent in the trial court judgment that the defence of alibi was considered by the trial court at page 7. I agree with Ms. Sogga that there was no procedure which was complied with by the defence to make the defence of alibi valid. Therefore, the trial

Magistrate was correct in not relying on such a defence. This ground therefore lacks merit.

On the fifth ground of appeal, I refer to the discussion in the third ground which found that there was a possibility of mistaken identity in the matter. It automatically responds to the 5th ground that the matter is not proved beyond reasonable doubt.

From the foregoing, it is my conclusion that the findings in the third ground makes this appeal to have merits since the prosecution did not prove its case beyond reasonable doubt. As such, I allow the appeal. I quash and set aside the judgment, conviction and sentence of Pangani District Court in Criminal Case No. 3 of 2023. The accused person is set at liberty unless lawfully held for another offence. It is so ordered.

Dated at Tanga this 14th Day of February 2024.



A handwritten signature in blue ink, appearing to be "Ks", is written above the name of the judge.

KATARINA REVOCATI MTEULE

JUDGE

14/02/2024

Court:

Judgment delivered this 14th Day of February 2024 in the presence of the Appellant and Mr. James Rugaimukamu for the Respondent. Right to further Appeal is explained.



A handwritten signature in blue ink, appearing to read "Ks", is positioned above the printed name of the judge.

KATARINA REVOCATI MTEULE

JUDGE

14/2/2024