THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 7594 OF 2024

(Originated from the decision of the District Court of Chunya at Chunya in Criminal case No. 81 of 2023)

ERICK MWAKILEMBE....................................... APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT

Date: 8 May 2024 & 4 June 2024

SINDA, J.:

The appellant was charged with and convicted of the offence of rape contrary to section 130 (1) (2) (b) and 131 (1) of the Penal Code (Cap 16 R.E 2022) (the **Penal Code**). The District Court of Chunya at Chunya (the **Trial Court**) sentenced him to thirty (30) years imprisonment.

The particulars of the offence are that on 7 May 2023 at Mwanyangala Hamlet Mawelo village within Chunya District, Mbeya Region, the

appellant did have sexual intercourse with one XYZ, a woman of twenty-two (22) years old (the **Victim**) without her consent.

The brief facts of the case are that on 7 May 2023, around 16:00hrs, the Victim was taking care of the livestock in the bush. The appellant asked her for directions to Lupatingatinga. Then, the appellant pulled the Victim near the bush. The appellant took off the Victim's underwear and ripped off her skirt and raped her. The appellant ran away. The Victim stated that on the date of the incident, the appellant was wearing a white car wash and green gun boots. She told her in-laws, who saw the appellant prior to the incident. The matter was reported to Chunya Police Station at Chunya. The Victim was given PF3 and examined at Chunya Hospital. She later identified the accused at the dock.

The appellant denied committing the offence. He claimed to have been arrested on the material date around 19:00hrs at the grocery of a person called Sele by Militiamen, who took him to the police station. On the next day, he was sent to court for the offence of rape. The appellant was convicted and sentenced to serve thirty (30) years imprisonment.

Against that decision, the appellant appeals on a number of grounds which can be consolidated into the following:

1. The trial court erred in law when it convicted and sentenced the appellant, relying on the evidence of PW1, PW2, and PW3, without solving the issue of identification done by these two witnesses.
2. That the trial court erred in law when convicted and sentenced the appellant on the absence of PF3 and the doctor who examined PW1and observed that there was penetration in her private parts as per section 130 (4) (a) of the Penal code Cap 16 R.E 2022.
3. That the trial court erred in law when convicted and sentenced the appellant relying on the evidence of PW1, PW2 and PW3, which was contradictory and full of doubt on the guilt of the appellant.
4. That, the trial court erred in law when convicted and sentenced the appellant taking into account that if PW1 was reported the said allegation to the police station and given the police first description of the said rapist, why when the appellant was arrested the identification parade was conducted to proof the said rapist by PW1.
5. That the trial court erred in law when convicted and sentenced the appellant by believing the evidence of PW1 that the said rapist cut off her skirt whenever the said skirt was not tendered to prove the same.

6. The trial court erred in law when it convicted and sentenced the appellant without considering the appellant's defence whenever the prosecution failed to prove it as per law.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent was represented by Ms. Anastasia Sayi, learned State Attorney. The appellant opted to hear first from the respondent and reserved his right to make a rejoinder, if any.

Ms. Sayi began by supporting the appeal based on grounds one and four, which concern the issue of identification.

Ms. Sayi argued that the identification parade was not conducted to confirm that the appellant committed the offence as required by the law. Ms. Sayi stated that the Victim, in her testimony on page 8 of the proceedings of the Trial Court (the Proceedings), stated that she was taking care of the livestock when the accused showed up and asked her the directions to Lupatingatinga. She further stated that while they were talking, the appellant pulled her to the bush and raped her.

Ms. Say contended that it is clear that the Victim did not know the accused before the incident of rape. In the testimony of the Victim, she identified the appellant on the dock. She added that in such circumstances, it is

important for the identification parade to be conducted so that the Victim can identify the accused as the act happened during the day.

Ms. Sayi maintained that in the matter at hand, the identification parade was not conducted. She further mentioned that the way the Victim described the appellant was not enough. She argued that the Victim relied on the evidence of clothes which is not enough as clothes are very common.

Ms. Sayi argued that because the Victim failed to explained on the features of the accused person, it is clear that the accused was not properly identified. She referred to the case of **Hamisi Ramadhani Lugumba vs R,** Criminal Appeal No. 565 of 2020 (CAT at Dodoma) and the case of Masana Sabai@ Mairo and another vs R, Criminal Appeal No. 180 of 2020 (HC at Musoma) to cement her argument. She stated that as per the evidence of the Victim, she did not explain when the incident took place and failed to describe the accused.

In rejoinder, the appellant did not have anything useful to add.

I have considered the instant appeal, the grounds in support thereof, the submissions of both sides, the record of this appeal and the law.

As Ms. Sayi rightly argued, I will start with the first and fourth grounds on identification, which I think are crucial in determining the fate of the appeal.

In line with the case of ***Waziri Amani vs Republic [1980] T.R.L 250, it is a settled law on visual identification evidence that such evidence is of the weakest kind, which, in order to found conviction,*** must be absolutely watertight. Factors that should be considered in determining whether visual identification evidence is watertight or not include; the time the witness had the accused under observation, the distance at which he observed the accused, the conditions on which such observation occurred, if it was day or night time, whether there was good or poor lighting at the scene, whether the witness knew or had seen the accused before.

It is also settled that although relevant and admissible, the eyewitness visual identification evidence is still of the weakest kind and most unreliable which should be acted upon with great caution. Before the court can act on such evidence, it must satisfy itself that the conditions were favourable for a proper identification. The evidence must be watertight and all possibilities of mistaken identity must be eliminated. It has to be insisted that the principle applies even in cases of visual identification by

recognition as it is in the instant case - see ***Issa s/ Ngara @ Shuka v. Republic***, Criminal Appeal No. 37 of 2005, ***Magwisha Mzee Shija Paulo v Republic***, Criminal Appeal No. 467 of 2007 and ***Shamir s/o John v Republic***, Criminal Appeal No. 166 of 2004 (all unreported).

In ***Shamir s/o John*** (supra) the Court cited the case of ***Philimon Jumanne Agala @ J4*** v. Republic, Criminal Appeal No. 187 of 2015 (also unreported) in which it was observed, among other things, that:

> *"Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made." (Emphasis added)*

In this case at hand, it was stated by PW1 at the trial court that on the material day while she was feeding livestock at the bush she met with appellant and he raped her, from the evidence in record though the offence was committed during day time but appellant was stranger to PW1 (victim). In the case of the case of Omari **Iddi Mbezi and 3 Others vs Republic**, Criminal Appeal No. 227 of 2009 the court held that:

"The witness should describe the culprit or culprits in terms of body build complexion size, attire or any peculiar body features to the next person that he comes across ***and should repeat those descriptions at his first report to the Police on the crime, who would in turn testify to that effect to lend credence to such***

witness's evidence..., ideally, upon receiving the description of the suspect(s) the Police should mount an identification parade to test the witness's memory and then at the trial the witness should be led to identify him again."

Also, the Court had an opportunity to address the weight to be accorded to dock identification in the case of **Francis Majaliwa Deus & 2 Others vs Republic**, Criminal Appeal No. 139 of 2005 (unreported) which adopted the reasoning **Gabriel Kamau Njoroge v Republic** (1982-1988) I KAR 1134, where the Kenya Court of Appeal stated:

> *"Dock identification is worthless (the Court should not rely on dock identification) unless this had been preceded by a properly conducted identification parade."*

Guided by the above legal principles and pronouncements, in this case, as per evidence from the Victim, she identified the appellant at the scene of the crime through his clothes She also described the clothes to PW2. I agree with Ms. Sayi that the identification of the appellant by PW1 to PW2 regarding the description of the appellant was not enough because clothes are common and may attract mistaken identification.

The record shows that the incident was reported at Chunya police station, but PW1 did not describe the appearance of the appellant at the police station before the appellant was arrested for enabling the police to

conduct an identification parade after arrest. The Victim identified the appellant at the dock; as stated in the above cases, I find that the identification of the appellant by the Victim at the dock was useless. An identification parade was not conducted before, so the appellant was not properly identified as the law required.

It is the settled position of law that the best evidence came from the victim. This was provided in the case of **Seleman Makumba vs Republic [2006] TLR 379** which held that:

> *"True evidence of rape has to come from the victim, if an adult, that there is penetration and no consent, and in case of any other women, where consent is irrelevant, there is penetration"*

Unfortunately, in this case, the evidence from the Victim, which was expected to be the best, leaves many questions about identification. As already stated above, the appellant was a stranger to the Victim. No identification parade was conducted for the purpose of proper identification.

As such, I do not wish to determine the rest of the grounds as they all fall short at juncture.

For the reasons I have stated, I allow the appeal. I consequently quash the conviction and set aside the sentence imposed on the appellant. It is

also ordered that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

The right of appeal was explained.

Dated at Mbeya on this 4 day of June 2024.

A. A. SINDA
JUDGE

The Judgment is delivered on this 4 day of June 2024 in the presence of the appellant who appeared in person and Ms. Imelda Aluko, learned State Attorney for the respondent.