THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 188 OF 2023

(Originated from the decision of the District Court of Rungwe at Tukuyu, Criminal case No. 110 of 2016)

MESHACK ANOKI MWAKANYAMALE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 17 April 2024 & 4 June 2024

SINDA, J.:

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

The particulars of the offence are that the appellant, on 30 June 2016 around 21:00hrs at Igogwe Village within Rungwe District in Mbeya

Region, did have carnal knowledge of a girl aged 10 years old (the **Victim**).

The brief facts of the case are that on the material day, the wife of the appellant visited the Victim (**PW1**) and PW3 at their home and invited them for dinner. They agreed and went to the appellant's house. The wife of the appellant ordered the Victim to go buy cigarettes for the appellant. On the way back from the shop, the Victim met with the appellant who raped her. PW1 reported the incident to PW4, who examined her private part and found that it was not normal. They reported the matter to the police station and were given PF3. She went for treatment at Makandana Hospital, and after examination, it was discovered that PW1 was raped. The appellant denied committing the offence. He averred that the case was framed against him. The appellant was convicted and sentenced to serve 30 years imprisonment.

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

1. He pleaded not guilty to the said offence, stating that he did not commit it.
2. That he was not found/arrested for committing the said crime.

3. None of the prosecution witnesses (PW2, PW3, and PW4) testified to the said incident beyond the shadow of doubt; they had only hearsay evidence.
4. That, the trial magistrate erred in law and fact by not considering the contradiction of statement between the prosecution witnesses PW2 (doctor) before the court that he examined the victim and found her vagina swollen and had bruises out it while having pain, but he observed no sperms such evidence can't hold water for the case at hand.
5. The trial magistrate erred in law by not considering prosecution witnesses PW2, PW3, and PW4.
6. That, the trial court erred in law when it convicted and sentenced the appellant without resolving the issue of visual identification of the appellant.
7. The trial court erred when it convicted the appellant without considering the defence evidence, as the charge was not proved to the required standard.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent was represented by Mr. Rajab Msemo,

learned State Attorney. The appellant opted to hear first from the respondent and reserved his right to make a rejoinder, if any.

Mr. Msemo began by opposing the appeal. He prayed to argue grounds number one, two and three together.

He submitted that the appellant was charged with the offence of rape. He argued that the best evidence is that of the victim. He referred to the case of **Selemani Makumba vs R**., TLR 379 to support his argument.

He submitted that the Victim stated that the appellant was her uncle. He committed the offence in a place where there was light, and the Victim recognised the appellant because he knew him. He submitted further that the evidence of the witnesses PW2, PW3, and PW4 collaborated with the evidence of PW1. He added the evidence of the witnesses did not contradict each other.

Regarding the fourth ground, Mr Msemo contended that on the offence of rape, the presence or absence of semen is not a sufficient ground of appeal. Mr Msemo maintained that penetration, whenever slight, is enough to prove the offence of rape. He stated that in this case, the doctor (**PW2**) explained how he examined the Victim and found that she was penetrated.

In relation to the fifth ground, he submitted that the best evidence is that of the Victim, which was collaborated with the evidence of PW2, PW3 and PW4.

Arguing on the sixth ground, Mr. Msemo referred to the case of **Waziri Amani vs Republic,** 1980 TLR 250 to support his argument. Mr. Msemo contended that the Victim explained how she identified the appellant as her uncle. Mr. Msemo stated that the Victim said the place where she was raped had light. That is why she identified the appellant. Therefore, the identification was proper and there were no mistakes in identification.

Submitting on the seventh ground, he submitted that in the judgement of the Trial Court, the testimony of the appellant was considered. He also submitted that the offence was proved beyond reasonable doubt because the Victim explained how she was raped and was collaborated by the evidence of PW2, PW3 and PW4. Also, the Victim identified the appellant as the person who raped her, and she named him at the earliest opportunity. The age of the victim was also proved through the testimony of the PW2, the doctor. He prayed for the appeal to be dismissed.

In rejoinder, the appellant prayed his grounds to be admitted. he submitted that if the sperm were found in the vagina, this could prove

that he raped her, but they were not found. The appellant further stated the Victim said the place had enough light, but the investigation did not go to the scene of the crime, as the incident happened at 9 pm.

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

First, in cases of rape, it is the settled position of law that the best evidence comes from the victim. This was provided in the case of **Seleman Makumba vs Republic** (supra), 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"*

Now, discussing the above issue of whether the case was proved beyond reasonable doubt against the appellant. It was the evidence from the prosecution that on the material date, the appellant's wife ordered the Victim to go and buy cigarettes. On the way back from the shop, the Victim met with the appellant, and then the appellant raped her. It is also clear from the evidence on record that the offence was committed at night.

Considering the circumstance, I find that another point to address is whether the Victim, identified the appellant properly from the scene of the crime.

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, the evidence of PW1 reveals that though the offence was committed during the night, there was sufficient light from Mwampiki and Mama Enjo's houses. Also, there was light from the mailing machine, which enabled the Victim to see the appellant well. The Victim gave him a cigarette, and he refused. Then he pulled her to the banana plant and raped her. This proves that the distance was very close between the Victim and the appellant. Also, the Victim had enough time to observe the appellant. The appellant was also well-known to the Victim even before the incident. The Victim stated the appellant is the husband of Sara. His name is Meshaki, and he is my uncle. I, therefore, find that there were no possibilities for mistaken identification. The identification was watertight.

Also, in the case of **Marwa Wangiti Mwita v. Republic**, [2002] TLR 39 where it was stated that:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way an unexplained delay or complete failure to do so should put a prudent to inquiry."*

In this case, the Victim named the suspect to PW4 at the earliest stage that the appellant raped her. This proves the reliability of PW1 testimony.

The appellant in ground number two complained that he was not arrested while committing the crime. In my view, this ground lacks merit. It is not always that the accused will be found/arrested while committing an offence. I agree with the respondent that an offence of this nature is committed privately, so the best evidence comes from the victim. The Victim mentioned the appellant as the one who raped her.

Concerning the fact that the evidence of PW2, PW3 and PW4 was hearsay. Section 62 (1) of the Law of Evidence Act [Cap 6 R.E 2022] requires oral evidence to be direct. I have gone through the court records, and PW2 was a doctor who examined the Victim and found that she was penetrated. PW3 narrated how she and the Victim were taken by the appellant's wife from their home to the appellant's house. PW3 also stated

the things she observed while she was at the appellant's house, including the fact that when the Victim was ordered to go and buy a cigarette, then the appellant followed her. PW4 checked the Victim's private parts and found that it was not normal, and she sent the Victim to the police station.

In that regard, I find that their evidence was not hearsay evidence. Also, this being the case of rape, the best evidence comes from the Victim and can ground conviction without corroboration; the evidence from PW2, PW3 and PW4 was just for corroboration. This ground also lacks merit.

Regarding the contradiction in the evidence of PW2 alleged by the appellant that PW2 examined the Victim and found her virginal swollen with bruises but no sperm. In my view, failure to find sperm in a Victim's virginal can not be termed as a contradiction. Section 130 (4) (a) of the Penal Code states that for the purposes of proving the offence of rape, penetration, however slight, is sufficient to constitute sexual intercourse necessary to the offence.

In this case, PW2 stated that he found the Victim's virginal swollen and had bruises. The Victim's hymen was perforated. The Victim also stated that the appellant raped him. I, therefore, find this ground also lack merit.

The appellant also complained that his defence was not considered. I have gone through the court records. The appellant made his defence on pages 19 to 20 of the typed proceedings of the Trial Court that the case was framed against him, and on the alleged date and time the offence was committed, he was already asleep. He wondered how he could rape the Victim in the presence of his wife. The appellant's defence was considered in the judgment of the Trial Court. The Trial Court found that there was no evidence from the prosecution which stated that the accused raped the Victim in front of his wife, as testified by the appellant during his defence. Also, the appellant failed to call any witnesses to prove that at the material time and date, the offence was committed, he was sleeping. In my opinion, I find that the Trial Court considered his defence but accorded no weight to exonerate him from liability.

In conclusion, I find that the entire appeal has no merit and is hereby dismissed.

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.