**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB - REGISTRY**

**AT MBEYA**

**CRIMINAL APPEAL NO. 186 OF 2023**

*(Originated from the decision of the District Court of Mbeya at Mbeya, Criminal case No. 88 of 2022)*

**SEBASTIAN MWITA@ BOIKA..... APPELLANT**

**VERSUS**

**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 (1) (2) (e) and 131 (1) of the Penal Code (Cap 16 R.E 2022) (the **Penal Code**). The District Court of Mbeya at Mbeya (the **Trial Court**) sentenced him to twenty-eight (28) years imprisonment.

The particulars of the offence are that on 3 May 2022 at Tenya - Ilomba within the District and Region of Mbeya, the appellant did have carnal knowledge of XYZ (the **Victim**) without her consent.

The brief facts of the case are that on 3 May 2022, while heading home from church, the Victim (**PW1**) and her daughter got on a Motor Tricycle

(**Bajaj**) from Ilomba to Shewa. In the Bajaj, there was a driver (**PW3**) and another passenger, the appellant. After a short drive, the appellant told them to go in another direction to pick up another person. The Victim requested to drop off from the Bajaj but PW3 and the appellant told her it won't take much time. They headed in the direction the appellant advised. Suddenly, the appellant ordered the driver to switch off the Bajaj. The appellant told them that they were captured and should not make noise to alert people. The appellant took their belongings and told the driver to drive to a place called Makaburini and he raped Victim.

Upon arrival at home, the victim narrated the incident to her mother who took her to a police station at Ilomba. They were issued with a PF3 and went to the hospital for examination. At the hospital, the Victim was examined and found that she was sexually penetrated. The appellant denied the allegations. He was convicted and sentenced to serve twenty-eight (28) years imprisonment.

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

1. That the Trial Court erred in law to convict the appellant without understanding the evidence of PW1 and SM2 regarding identification.

2. That the trial court erred in law in convicting the appellant without considering the fact that if the appellant stole many things, including the phone, then why were the police concerning cybercrime not involved to know who used that phone because he was supposed to be responsible for this offence?
3. That the trial magistrate erred in law to convict the appellant relying on evidence of PW1 and PW2 while no anywhere stated that the appellant's penis penetrated to victim's virginal; they said that he said lay down and urinated on his back.
   (a) He urinated what?
   (b) Why PW2, who holds a child of PW1 did, not take any steps considering the fact that the offence was committed near to civilian’s houses
   (c) Why PW3 did not inform the incident at the police station regarding that offence.
4. The trial magistrate erred in law by relying on evidence of PW1 and PW3 while there was no prior information on the suspect's description of their appearance at the police station to conduct an identification parade. He was convicted of relying on dock identification in court.

5. The trial magistrate erred in law in convicting the appellant relying on PF3 tendered by PW4, who was not a doctor, and there was no proof that the doctor was searched and not found.
6. That the trial magistrate erred in law when the convicted appellant relied on a cautioned statement while PW5 failed to prove its validity/legality.
7. That appellant's defence was not considered.

At the hearing of the appeal, the appellant appeared in person, unrepresented. Mr. Rajab Msemo represented the respondent, learned State Attorney.

The appellant read all his grounds of appeal, as stated in the petition of appeal, and prayed the court consider them.

Mr. Msemo prayed to consolidate grounds one and four in relation to the identification. He referred to the case of **Waziri Amani vs. Republic [1980] T.R.L 250** to support his argument. Mr. Msemo argued that there must be no mistake in identifying the accused person. He added that the Victim and PW3 explained how they identified the appellant through the light of the Bajaj.

Turning to the second ground of appeal, Mr. Msemo submitted that the appellant was not charged with the offence of theft but rape. There was

no reason to track the phone. Therefore, there was a need to bring the police on cybercrime.

Regarding the third ground, Mr. Msemo argued that page 8 of the proceedings of the Trial Court (the **Proceedings**) shows how the appellant told the Victim to lie down and rape her. He added, therefore the issues raised are not important as PW1 explained how she was raped.

On the fifth ground, Mr. Msemo submitted that the trial magistrate did not rely only on the PF3. He argued that the appellant was convicted because of the evidence of PW1 and PW3, who were at the scene of the crime.

Mr. Msemo contended that the PF3 was issued by a doctor (**PW4**). He submitted in this matter the appellant was not addressed under Section 240 (3) of the CPA. He referred to the case of **Ali Mohamed Mkupa vs. R**, Criminal Appeal No. 2 of 2008 (CAT at Mtwara) that the PF3 can be expunged if section 240 (3) of the CPA was not followed. He maintained that it is true that PF3 would have supported the commission of the offence, but rape is not proved by medical evidence alone. He argued that the testimonies of PW1, PW2 and PW3 are also enough. He added in criminal cases the best evidence is that of the victim. We pray the fifth ground is also dismissed.

Submitting on the sixth ground, Mr. Msemo argued that in the proceedings on page 31, the appellant said he didn't give the caution statement and didn't sign it. He submitted that in the trial within the trial, it was proved that the caution statement and the handwriting were the same. In his defence, he said he signed documents. Mr Msemo stated where the accused lies, which means he collaborates with what the prosecution said.

In relation to the Seventh, Mr. Msemo submitted that the High Court is the first appellate court that can evaluate the evidence and reach a conclusion. In his opinion, the appellant's evidence was considered.

In rejoinder, the appellant added that the testimony of PW1 and PW3 are contradictory because PW1 said the accused captured them without a weapon while PW3 said the appellant had a weapon when he was raping the Victim.

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 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.

In this case, PW1 and PW3 testified at the Trial Court that the offence was committed at night. They identified the appellant through the light from the Bajaj. However, the witnesses did not state the brightness of the light.

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 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 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, the record shows that the appellant was a stranger to both PW1 and PW3. They both testified that the appellant was not known to them before the incident, and no specific description or features of the appellant were given by the witnesses. The prosecution stated that PW1 narrated the incident immediately to PW2, and they reported the matter to the police station.

Going through the court record, I find that PW1 never gave any description of the appellant to PW2 or at the police station. Also, PW3 stated that he identified the appellant through his colour at the police station. However, the appellant's colour was not described anywhere at the police or in court when he adduced evidence.

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.