**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB-REGISTRY**

**AT MBEYA**

**CRIMINAL APPEAL NO. 194 OF 2023**

*(Originating from the District Court of Mbeya at Mbeya, in Criminal Case No. 157 of 2022)*

**HURUMA FURAHA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 18/03/2024*
*Date of Judgment: 14/05/2024*

**NDUNGURU, J.**

In the District Court of Mbeya at Mbeya, in criminal case No. 157 of 2022, the appellant, Huruma Furaha was charged then convicted and sentenced thirty years imprisonment for the offence of rape contrary to sections 131 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2022.

It was stated in the particulars of the offence that on 2nd day of August, 2022 at Mtakuja village in Imalilo Songwe within the District and Region of Mbeya the appellant did have canal knowledge of EI (to

disguise her identity, thereafter referred to as the victim or PW1) a girl aged 16 years. The appellant denied the charge, at the end of trial however, the trial court found him gilt, convicted him and sentenced him for thirty (30) years imprisonment.

Aggrieved, the appellant approached this Court with the appeal at hand raising 6 grounds of grievances which are drafted in *Kiswahili* language but they can be summarized as follows:

1. That the trial Magistrate of the District Court erred in law when he convicted the appellant without considering that the case was not proved to the required standard.
2. That the trial Magistrate of the District Court erred in law when he failed to consider the availability of light in identifying the ravisher.
3. That the trial Magistrate of the District Court erred in law when failed to analyse properly the evidence such that there was no alarm raised, if the victim was raped.
4. That the trial Magistrate of the District Court erred in law when he did not consider that there was no identification parade and the appearance of a perpetrator was not described to the police.
5. That the trial Magistrate of the District Court erred in law when convicted the appellant while the evidence of PW2 did not

establish if the appellant involved in commission of the offence also the evidence of the issuer of the PF3 did not mention the name of the victim than mentioning one Maria Isaack.

6. That the appellant's defence evidence was not considered.

At the hearing of the appeal, the appellant appeared in person, unrepresented while Ms. Imelda Aluko, learned State Attorney represented the respondent/Republic.

When he was invited to expound his grounds of appeal, the appellant did not have any substantial comment than praying his grounds of appeal to be considered.

On the other side, submitting against the appeal, Ms. Aluko argued the 1st, 2nd and 4th grounds conjointly that the prosecution proved the case at the required standard through the evidence of PW1 and that the appellant was properly identified as PW1 was able to narrate what befallen her. Also, that the appellant was known to the victim even before the incident date since they were neighbours at PW1's business place. She referred at page 5 of the typed proceedings for her contention.

On the 3rd ground of appeal, Ms. Aluko contended that the victim narrated how she was penetrated by the appellant. That, the victim's evidence was corroborated by PW2 who medically examined her and proved she was penetrated.

With regards to the 5th and 6th grounds, Ms. Aluko argued that evidence of both sides was considered, thus that, the defence evidence was also considered. She summed up that, the appellant's complaints lack in merits. She therefore, prayed for dismissal of the appeal.

Having considered the grounds of appeal, the submissions by the learned State Attorney the record and the law. The major for determination is whether the appeal has merits. In resolving the pertinent issue, I find it apt to merge all the grounds of appeal into one, that is whether the charge against the appellant was proved beyond reasonable doubt where complaints such as whether or not the appellant was identified will be accommodated. In resolving this complaint therefore, I will subject the entire evidence adduced by the parties before the trial Court under scrutiny bearing in mind that this is the first appellate court in which determination of appeal goes in the form of a rehearing. See **Siza Patrice v. Republic**, Criminal Appeal No. 19 of 2010 Court of Appeal of Tanzania at Mwanza (unreported).

The guiding principle in relation to the above issue is he who alleges must prove set under section 110 of the Evidence Act, Cap. 6 R.E 2022. Moreso, the principle in criminal cases that a burden of proof lies upon the prosecution and it is beyond reasonable doubt. And it never shifts to the accused person. See the holding in **Pascal Yoya @Maganga vs Republic,** Criminal Appeal No. 248 of 2017 Court of Appeal of Tanzania (Unreported).

Generally, in rape cases like the one at hand is that the best evidence comes from the victim. This is in accordance with section 127 (6) of Cap 6 and the Court of Appeal decisions in a number of cases including the case of **Selemani Makumba v Republic** [2006] TLR 379. **Edward Nzabuga v. Republic**, Criminal Appeal 6 No. 136 of 2008, Court of Appeal of Tanzania at Mbeya (unreported).

In the case at hand the victim (PW1) told the trial court that on the incident day, on 02/08/2022 was released by her mother from the market to go home to cook. That when she opened the gate, one pushed her, forcefully pulled her underpants while holding her mouth then inserted his penis in her private parts. That, thereafter that person left her and run away. That she saw some blood and she felt little pain.

PW2, a medical doctor testified that on 02/08/2022 about 11:00PM he attended PW1 and examined her. That he found blood dots on her underpants and she had bruises also, she had no hymen suggesting that she was penetrated with blunt object.

PW3, the victim's mother said that on the material date at 08:00 pm she was phone called and informed that PW1 has been raped by a boy. She rushed home took PW1 to police then to hospital.

Rehema Venance, PW4 told the trial court that on the incident day at 08:00PM she heard someone, whom she later on found to be PW1 crying. That PW1 told her that one person who she knew by face as they are neighbours at the working place has raped her. Then that she relayed that information to PW3 by phone and they took the victim to the hospital.

PW5, a police officer at Mbalizi police station testified that on 04/08/2022 he was given a file for investigation. Having interrogated the appellant about the accusation of rape he denied. Also that the victim said to have been raped by the appellant.

In his defence evidence the appellant denied to have committed the offence he said that the accusation against him was mere suspicious

as the offence was committed at night. He only admitted to be the neighbour to PW1 and PW3 at the market place.

According to the above evidence especially, that of the victim and PW2 (the Doctor) who examined the her, it is undisputed that PW1 was raped. It follows a question whether the evidence as above summarized established beyond reasonable doubt that it was the appellant who raped the victim. In my view, the answer is in negative for the following reasons;

**One**, PW1 in her evidence said nothing about identifying the appellant and how she identified him. What I have noticed, PW1 was only led to identify the appellant on the dock. According to PW3 and PW4 the incident occurred during night hour, at 08:00 PM. On that fact, it is expected for the prosecution to have led evidence as to the identification of the appellant in as far as the light and intensity of it as concerned. It was however, observed by the trial court in the impugned judgment that the victim explained how she was raped during the day time and how she identified the perpetrator. With due respect there is no such evidence concerning day time. PW1 neither mention the time at which the offence was committed nor explain if and how she identified the assailant.

**Two**, PW2 only established that he found blood stains and bruises in the victim's vagina but, he did not say anything if the victim mentioned to him anyone to be a perpetrator.

**Three**, PW3 only stated what she was informed to have happened to her daughter (the victim). PW3 did not tell anything about identifying the appellant as it was said by PW4 that the victim told her that the soon after the incident that the appellant was identified as he worked near to where the victim and her mother do they business. PW1 and PW3 only testified that when PW1 opened the gate a boy pushed the gate and raped her. Also, PW3 did not testify if the PW4 when phoned her said anything about the victim to have identified the assailant by face.

**Four,** PW4 gave evidence that the victim told her that she was raped by a person she knew by face, and that she used to see him at their work place of work. Such testimony however, was neither given by the victim herself nor PW3. Considering that the place of work of the victim is that of PW3. It would have been expected for PW4 disclosing that information as soon as she informed about PW1 being raped.

**Five,** according to PW5's evidence, the victim said she was raped by one Huruma Furaha. In this evidence the name of the appellant was

mentioned for the first time in the entire prosecution evidence. However, PW5 did not say if he was himself told by the victim or he heard from another person since his statement was so general and had never been given by another witness.

**Six,** as correctly complained by the appellant no evidence was adduced to explain how the victim described the perpetrator to those, whom she gave the information. Indeed, the prosecution evidence was uncertain and left much to be desired. It was again, not described why a person well identified and known to the victim and PW3 became difficult to be arrested until three days from the date of the incident lapsed. According to the appellant, he was arrested on 05/08/2022, while the incident was alleged to occur on 02/08/2022. Why the delay and no any other witness said the date of arrest than PW5 said that on 4th was handed with the appellant for interrogation as he was already arrested. It is settled position that unexplained delay to arrest a suspect cast doubt on the veracity of the witnesses; see - **Wambura Marwa Wambura vs Republic** (Criminal Appeal No. 115 of 2019) [2022] TZCA 429 (14 July 2022) **(Tanzlii).**

For the above reasons, the appellant's appeal has merits. Thus, I quash the conviction and set aside the sentence. I order for the immediate release of the appellant from custody.

Ordered accordingly,

**D.B. NDUNGURU**

**JUDGE**

**14/05/2024**