IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB-REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO. 40101 OF 2023

(Originating from District Court of Kilolo at Kilolo in Criminal Case No. 32 of 2022)

NULASI SALES KALINGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 21/06/2024
Date of Judgement:28/06/2024

LALTAIKA, J.

The appellant herein **NULASI SALES KALINGA** was arraigned in the District Court of District Court of Kilolo at Kilolo charged with one count of rape c/s 130(1) and (2) (e) and 131(1) of the Penal Code Cap 16 R.E. 2022. It was the prosecution's allegation that on the 14th day of April 2023 at **Kisinga Village within Kilolo District** in Iringa Region he unlawfully had carnal knowledge of a fourteen-year-old girl (name concealed to protect her identity)

When the charge was read over and explained to the appellant (then accused), he denied wrongdoing. This necessitated the conducting of a full trial. The prosecution paraded **five witnesses** and tendered **one exhibit**. Halfway through the trial, a *prima facie case* was entered against the appellant, and he was placed on the witness box as (DW1) and two more witnesses (his wife and his son).

Having been convinced that the prosecution had proved the case beyond reasonable doubt, the court convicted the appellant as charged and proceeded to sentence him to serve thirty (30) years in prison and pay TZS 500,000/= as compensation to the victim. Dissatisfied, the appellant appealed to this court by way of a Petition of Appeal containing seven grounds. Irrespective of a few grammatical and typographical errors, I take the liberty to reproduce them for ease of reference and record keeping purposes, as hereunder.

1. *That, the learned trial Magistrate erred both in law and fact to convict and sentence the appellant based on PW2 evidence without considering that the same was doubtful since she states that the incidence of 14.06.2023 was the third time this create doubts as to why she did not report the first and the second incidence to her aunt.*
2. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant without considering that the prosecution side failed*

to summons the material witness who were village Executive Officer and the Village Chairperson as they were the first persons to be furnished with the information whom they sent militiamen to arrest and interrogate the appellant before take him to Police Station (see the evidence of PW1 and PW3).

3. *That, the learned trial Magistrate erred in law and convict and sentence the appellant by relying on his cautioned statement without considering that the same was recorded out of time since the appellant was arrested on 15.06.2023 in the morning and taken to Police Station within the same day according to the evidence of the PW3 at page 19. Hence the evidence of PW4 at page 23 that he received the appellant on 16.06.2023 at 14.00hrs in null and void completely thus the cautioned statement was taken contrary to the law.*
4. *That, the learned trial Magistrate erred in law and fact to failure to evaluate deeply and considering the evidence of PW5 and his PF3 since he states clear that he interviewed the victim and the victim told him that she was know carnally by her two relatives whom he did not remember their names it was in the year 2020. Hence create doubts in the eyes of the law. See the evidence of the PW5 at page 28, 4th paragraph.*
5. *That, the learned trial Magistrate erred both in law and fact to convict and sentence the appellant without considering the PW5's findings that he victim's hymen was removed sometimes in the past and not this year 2023. This fact depicts that the ingredients of rape on the basis of 72 hours rule was not fulfilled.*
6. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant relying only on the prosecution evidence without considering defence side evidence that the case was planted and factricated by the victim's guardian for their personal benefit.*
7. *That, the prosecution side failed totally to prove the case against the appellant beyond reasonable doubts.*

When the appeal was called for hearing earlier today, the Appellant appeared in person. The respondent Republic on the other hand, appeared through **Mr. Sauli Makori**, learned State Attorney. The Appellant, not being learned in law, opted to reserve his rights to a rejoinder while paving the way for the learned State Attorney to respond to the grounds hitherto filed.

Taking up the podium, Mr. Sauli announced unhesitatingly that he objected the appeal. He proceeded to submit that having gone through the grounds he decided to address the 1st 3rd 4th and 5th grounds conjointly and move on to the 2nd, 6th and 7th separately.

Starting with the 1st, 3rd, 4th and 5th grounds, Mr. Makori asserted that the complaint was centred on evidence adduced by prosecution witnesses. He argued that the victim in the matter at hand was 13 years old. She testified as PW2 as recorded on page 12, 13, 14 and 15 of the trial court proceedings. She mentioned that she was raped more than two times. She indicated that on 14/6/2023 it was the third time she was raped. She explained that when she was raped, the appellant was taking his penis and insert in her private parts. This time he gave her TZS 2000/= When the victim was found with TZS 300 and asked where she got the money, she

explained the incident of rape and she was given the money. Mr. Makori emphasized that on page 13, the victim explained that the appellant threatened to kill her if she disclosed the matter.

With regards to PW3 Leonard Luhwago, Mr. Makori submitted, he proved the age of the victim that she was 13 years old. The said witness, averred the learned State Attorney, had testified how the victim was found with the TZS 300 and disclosed the act. He proceeded to the village office, then to the police station and the hospital to conduct medical test. Mr. Makori firmly submitted that the victim delayed in reporting the incident to PW3 because she was threatened by the appellant.

Delving deeper into the art of connecting the dots to show how the evidence of the victim was allegedly corroborated by that of other witnesses, and credibility of such witnesses, Mr. Makori asserted that as for PW4 the police officer, the complaint is that the cautioned statement was taken out of time. The said witness F9723 CPL Juventus, Mr. Makori argued, had testified that he recorded the cautioned statement on 16/6/2023 at 15:00 to 16:00 and that the appellant was locked up at 14:00. He emphasized that

the cautioned statement was recorded on time and same was admitted as exhibit P2.

As for PW5, the medical doctor one Selemani Hassani Jumbe, Mr. Makori averred, testified that 16/6/2023 he admitted the victim and took the test. On page 28 the witness explained that after examining the private parts he found that she had hymen and no lacerations. This made him curious, and she asked her why she was not virgin, and she stated that she had already been raped by two brothers in 2020. The learned State Attorney, when prompted by this court, admitted that the victim did not mention the two brothers who allegedly raped her.

It was Mr. Makori's submission further that although the victim was allegedly raped in 2020, the appellant had no right to continue committing the same offence. Since the victim clearly pointed out that the appellant had inserted his penis in her private parts, she had proved penetration which was an important ingredient of the offence. As for the reasons for the delay, Mr. Makori reiterated that the victim clearly stated that she was threatened and that such an explanation was sufficient. To support his argument, he referred the case of **Wambura Kigingav. Republic** Crim Appeal No 301 of

2018 CAT, Mwanza where the Apex Court indicated that threat is sufficient reason for delay in reporting the matter.

Winding up on the grounds of appeal, Mr. Makori stated that the evidence of the victim should be accorded more weight because sexual offences take place in secrecy. He referenced the apex Court cases of **Frank Kinambo v. DPP** Crim App No 47/2019 CAT, Mbeya and **Godi Kasenegala v. Republic** Crim Appeal No 10 of 2008 CAT, Iringa. To that end, the learned State Attorney prayed that the 1st , 3rd , 4th and 5th grounds be dismissed for lack of merit.

Transitioning to the 2nd ground of appeal, Mr. Makori clarified that the complaint was inability to summon important witnesses particularly the Village Chairman and Village Executive Officer. It was the learned State Attorney's submission that none of these were eyewitnesses. Moreover, averred Mr. Makori, the prosecution had no obligation to call a certain number of witnesses. He prayed that the ground be dismissed.

On the sixth ground, Mr. Makori stated that he strongly disagreed with the complaint that the defence evidence was not considered. He referred to page 10 of the impugned judgment and asserted that the court asked itself

why the appellant gave the victim the money as an entry point to discuss his version of the story. Nevertheless, Mr. Makori asserted, this court can enter into the shoes of the lower court and re-evaluate the evidence and come up with its own version. He referred the case of **WAMBURA KIGINGA (supra)** to support his argument and prayed that the ground is dismissed.

Moving on to the last ground, Mr. Makori asserted that it was a very general one on alleged inability of the prosecution to prove the case beyond reasonable doubt. He emphasized that the prosecution needed to prove, among other things, penetration. This was proved, averred Mr. Makori, as recorded on page 13 to 14 when the victim was testifying as PW2.

The second element that needed to be proved was age of the victim. He asserted that this was also proved by PW3 as recorded on page 6 where he stated that the victim was 13 years old. Moreover, Mr. Makori reasoned, the evidence of the medical doctor corroborates the evidence of P3. He prayed that the appeal in its entirety is dismissed for lack of merit.

The Appellant, on his part, prayed earnestly that his grounds of appeal be accepted and that he is set free. To be truthful, the appellant confidently asserted, he never committed the offence. He admitted that he indeed gave

the victim TZS 2,000. He emphasized that he gave her the money in front of his wife who had told him that their son had gone to school without a pen.

In an obviously painful state, the appellant added that his family lived near the main road. The victim passed by, and he sent her to take the money to their son. He later asked his son whether he was given the money and he denied. It was allegedly in the attempt to make a follow up of the money from the victim's mother that it was all turned against him. and even talked to her mother. She promised to call her for interrogation.

The appellant emphasized that both his wife and his son testified during trial, but the court disbelieved them. He found it illogical that the victim mentioned that he raped her three paces from the main road as an impossibility. The appellant recounted that due to insufficiency of evidence, the prosecutor initially suggested they went back for mediation because the child disclosed that she was coached by her aunt. He prayed that the court considers his grounds of appeal and set him free.

I have dispassionately considered the rival submissions. I have also keenly examined the lower court records. Mindful of the fact that this is the first appeal, procedural practice in our country is permissive that I can

reevaluate the entire evidence adduced in the trial court and come up with a different finding if the need so dictates. In other words, a second appeal is a form of rehearing. See **LEORNARD MWANASHOKA V. REPUBLIC** Crim Appeal No 226 of 2014 CAT.

I must emphasize that Section 130(4)(a) of the Penal Code Cap 16 RE 2022 specifies that penetration, however slight, is sufficient to constitute the sexual intercourse necessary to the offence of rape. The appellant's account and the evidence presented do not substantiate any act of penetration. The fact that the appellant gave money to the victim in the presence of his wife for a legitimate reason (i.e., to give their son money for a pen) cannot be construed as an act of penetration. The Court of Appeal of Tanzania in **JOHN MAKOLOBELA KULWA AND ANOTHER V. R.** [2002] TLR 296 had the following to say:

> *"A person is not guilty of a criminal offence simply because his defence is not believed. Rather a person is found guilty and convicted of a criminal offence because of the strength of the prosecution case that has proved the case beyond reasonable doubt"*

As a matter of fact, the appellant's wife and son testified during the trial, corroborating his account that the money was given for a legitimate reason. Their testimonies were dismissed without adequate justification. The victim's claim that she was raped near the main road is implausible, given the public nature of the location. This inconsistency casts doubt on the reliability of her testimony. Furthermore, the appellant mentioned that the victim disclosed she was coached by her aunt, a statement initially acknowledged by the prosecutor who suggested mediation. Such coaching further undermines the credibility of the victim's allegations.

The appellant provided a logical and consistent explanation for his actions (giving money to the victim to pass on to his son). The prosecution's failure to disprove this explanation further emphasizes the presence of reasonable doubt. The evidence presented by the prosecution fails to meet the standard of proof required in criminal cases, which is beyond a reasonable doubt. The appellant's narrative, supported by credible testimonies from his wife and son, raises significant doubts about the prosecution's case.

Premised on the above, I allow the appeal. I hereby quash conviction and set aside the sentence. I order that the Appellant **NULASI KALINGA** be released from prison forthwith unless he is being withheld for any other lawful purpose.

It is so ordered.

E.I. LALTAIKA
JUDGE
28.06.2024

Court

This judgement is delivered under my hand and the seal of this court this 28th day of June 2024 in the presence of Mr. Sauli Makori, learned State Attorney for the Respondent and the Appellant who have appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
28.06.2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA
JUDGE
28.06.2024