IN THE HIGH COURT OF TANZANIA

IRINGA SUB - REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO. 86 OF 2023

(Originating from the District Court of Njombe at Njombe in Criminal Case No 28 of 2022)

LAVISON MPONZI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

20th & 29th February 2024

LALTAIKA, J.

The Appellant herein, **LAVISON MPONZI** was arraigned in the District Court of Njombe at Njombe charged with the offence of Unnatural offence c/s section 154(1) (a) and (2) of the **Penal Code Cap 16 RE 2019**.

It was the prosecution's story that on the 9th day of December 2021 at Nyombo village within the District and Region of Njombe the appellant had carnal knowledge of an eight-year-old girlchild [name concealed] against the order of nature.

When the charge was read over and explained to the appellant, he denied wrongdoing. This necessitated the conducting of a full trial to accord

the prosecution the opportunity to prove the allegations while allowing the appellant a chance to mount his defence.

To prove the allegations, the **prosecution paraded a total of four witnesses** PW1 Atumkaye Chongoro (grandmother of the victim) PW2 Dr. Robert Kinyamagoha (medic) PW3 ZZZ (the victim) and PW4 (Police Investigator). Three exhibits were tendered: Victim's Birth certificate (Exhibit P1) PF3 (Exhibit P2) and Cautioned Statement of the Accused (Exhibit P3). The appellant, against whom a case to answer was established after completion of the prosecution's case, stood as **the only defence witness DW1.** He tendered no exhibit.

Having been convinced that the prosecution had left no stone unturned in proving the allegation, the trial Magistrate (Hon. Kayombo SRM) convicted the appellant as charged. He proceeded to sentence him **to life imprisonment** and payment of compensation to the tune of TZS 1,000,000 (one million Tanzanian Shillings) to the victim.

Aggrieved, the appellant appealed to this Court by way of a Petition of Appeal containing four (4) grounds. Irrespective of a number of grammatical and typographical errors, I take the liberty to reproduce them for ease of reference:

1. *That the trial court erred in law and in facts when applying a wrong principle on the evaluation and assessment of evidence which adduced by the parties when looking the evidence which adduced by the prosecution in isolation and then consider whether the defence which adduced by defence side casting any doubt to the evidence adduced by the prosecution side.*
2. *That the trial court erred in law and fact in convicting the Appellant without considering that no identification parade against the accused person in order*

to leave no doubt that the alleged bandit is the one involved in the commission of the offence. Rather than relying on the dock identification.

3. *That the honourable trial court erred in law and in fact in convicting the Appellant on the basis of evidence adduced, without considering that the bid entification was not adequate/accurate so as to remove all chances of mistaken identity taking into account that the offence was committed during night.*
4. *That the senior resident magistrate erred in law and fact in upholding the conviction without considering the principle that the Appellant cannot be convicted on the weakness of her defence on the strength of prosecution evidence adduced.*

When the appeal was called for hearing on the 20th of February 2024, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, appeared through **Mr. Simon Masinga**, learned State Attorney. I take the opportunity to register my appreciation to both parties for assisting this court in its journey to perform its function of a first appellate court.

Unlike many, if not most unrepresented appellants, the Appellant in the matter at hand appeared confident, knowledgeable, and relatively well prepared. He did not opt for the learned State Attorney to proceed with his submission while reserving his right to a rejoinder if the need arose. He proceeded straight away to argue in support of his appeal as summarized in the next paragraphs.

The appellant stated that he chose to abandon the first ground. He expressed his intention to address the second and third grounds of appeal together, followed by addressing the fourth ground.

Regarding the **second ground**, he complained about the absence of an identification parade and improper identification, particularly considering the alleged incident occurred at night, where visibility was limited.

Concerning **the fourth ground**, he argued that the magistrate made an error by basing the conviction on the weakness of the defence case, indicating that the case was not proven beyond a reasonable doubt.

Having provided the above outline, he proceeded to elaborate that an identification parade was crucial due to the circumstances of the incident occurring **late at night with insufficient lighting**. Additionally, he pointed out inconsistencies in the victim's testimony, suggesting doubts about the reliability of the identification process.

In conclusion, **he emphasized the importance of proper identification**, especially in a situation where the incident took place during nighttime hours. He reiterated his argument against the magistrate's decision to convict based on the weakness of the defence, stating that it failed to meet the burden of proof required by law.

Taking up the podium, Mr. Masinga announced that the **Respondent objected the appeal**. The learned State Attorney expressed his intention to skip addressing the first ground and proceed to argue the remaining grounds individually. The submission is summarized in the next paragraphs.

Regarding the **second ground**, he countered the complaint about reliance on dock identification without an identification parade. Mr. Masinga argued that since the victim and the appellant knew each other from living in the same **house for two months**, an identification parade was unnecessary. He cited the case of **MARTIN MISARA v. R.** Crim Appeal No 428 of 2016, emphasizing the legal position that the identification parade is

required where the victim does not know the accused. He requested the dismissal of this ground.

Concerning **the third ground**, which raised concerns about improper identification, Mr. Masinga refuted the claim, asserting that all the requirements for proper identification were met. He referenced the case of **SHADRACK KUHAHA v. R.** Crim App. 139 of 2015 to buttress his argument.

Moving on to **the fourth ground**, Mr. Masinga addressed the complaint that the appellant was convicted based on the weakness of the defense rather than the strength of the prosecution's case. He argued that the conviction was indeed based on the strength of the prosecution's case emphasizing that all necessary elements were proven. He referenced the case of **MARTIN MISARA v. R.** Crim Appeal No 428 of 2016.

The appellant in his brief rejoinder pointed out that on page 9, PW3, identified as the victim, informed PW1 that she came from Kijiweni. However, on page 24, the same PW3 stated that she was taken to a nearby avocado tree and was stripped naked. This discrepancy between the testimonies of PW1 and PW3, the appellant asserted, indicates a contradiction and should not have been relied upon.

Regarding the age of the victim, the appellant disagreed with the lawyer's assertion that the age was proved. He argued that it was not proven, citing PW1, the victim's grandmother, who mentioned that the victim was born on 16/5/2003, which would make her 19 years old. In conclusion,

the appellant requested the court to consider his grounds and order his release.

I **have dispassionately considered the grounds of appeal** in the light of submissions by both parties. 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 will focus my analysis on **the third ground**, which raised concerns about improper identification. In my opinion, this ground is capable of disposing of the entire appeal.

A brief factual and contextual background to properly connect the dots in this analysis is imperative. In the night hours of the 9th day of December 2021, at Nyombo Village in Njombe, a grandmother (PW1) was awakened with the cry of one of her grandchildren (PW3, the victim). The granddaughter aged nine was allegedly holding a knife. Asked where she was coming from, she replied that she came from Kijiweni where she was taken by someone and had just been carnally known against the order of nature.

It appears from the not-so-impressively recorded testimonies of the prosecution witnesses, that the victim later mentioned that she was sodomized by the appellant, a 19-year-old (by then) local mechanic (fundi) who once lived, as a tenant, in the same compound as the victim and her grandmother. As usual, the incident was reported to the police who issued a

PF3 that would later be filled by PW2 who indicated that medically, the victim had been penetrated by a blunt object against the order of nature.

The appellant had a very brief defence to make. He indicated that he was not properly identified. He was equally brief on the third ground of appeal he raised. Notwithstanding that the whole story does not add up to me, including the allegation that the appellant used a knife to threaten the victim and after the alleged rape she left the knife with her, I choose to stick to the issue of identification.

The position of the law in our jurisdiction when it comes identification of an accused person was stated by the Court of Appeal in the landmark case of **Waziri Amani v Republic** [1980] TLR 250 in which it was held at pages 251 - 252:

> *"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of identity. It seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect, to find in the record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred for instance, whether it was day or night- time whether there was good or poor light at the scene; and further whether the witness knows or had seen the accused before or not."*

The Apex Court insisted on identification in the case of **Shamir John v Republic**, Criminal Appeal No. 166 of 2004 Mwanza Registry, (unreported) thus:

> *"It is now trite law that courts should closely examine the circumstances in which the identification by each witness was made. The court has already prescribed insufficient details the*

most salient factors to be considered. These may be summarized as follows: how long did the witness have the accused under observation? At what distance? In what light.?

The concern raised by the appellant on identification, in my opinion is very valid. I re-evaluated the evidence adduced in that regard, and I entertain no doubt that the learned trial Magistrate erred in his analysis. Had he been just a little more analytical he would have arrived at a different conclusion.

For example, the claim by the victim was that the appellant made light by burning a piece of tin **"[uliwasha] kipande cha kopo la lita kunimulika]".** It is very unlikely for a criminal let alone a rapist to make light in order to "see" (and be seen by) the victim. This defeats logic. It is equally unimaginable as the claim that he used a knife to threaten the victim and later left it with her, such a young girl. I think there is need to improve investigation and tighten the process for accepting cases for prosecution.

Be it as it may, I am equally unconvinced that the source of light described (assuming the appellant was insane enough to do so) plus the undescribed intensity of the moonlight **"kulikuwa na mbaramwezi"** was insufficient to identify the appellant leaving no doubt for mistaken identity.

All said and done, I allow the appeal. I hereby quash the conviction and set aside the sentence. I further order that the appellant **LAVISON MPONZI** be released from jail forthwith unless he is being held for any other lawful cause(s).

It is so ordered.

E.I. LALTAIKA
JUDGE
29.02.2024

Court

Judgement delivered under my hand and the seal of this Court this 29th day of February 2024 in the presence of **Mr. Alfred Stephano Maige**, State Attorney for the Respondent and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
29.02.2024

Court

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

E.I. LALTAIKA
JUDGE
29.02.2024