

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA SUB – REGISTRY)

AT MBEYA

CRIMINAL APPEAL No. 115 OF 2023

*(Originating from the District Court of Mbozi at Vwawa, Criminal Case No. 24 of 2023
before Hon. V.D.Changwe dated 26.6.2023)*

KEFA VUMILIA @ MWAMBOGOLO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

11th December, 2023 & 11th March, 2024

POMO, J.

The appellant in this appeal, Kefa Vumilia @ Mwambogolo, was charged and convicted of the offence of attempted rape, as per section 132 (1) (2) (a) of the Penal Code Cap 16 Revised Edition 2022, and subsequently sentenced to serve 30 years in prison. Dissatisfied with the decision of the district court, he is now appealing on the following grounds:

- 1. The trial court erred in law and fact by entering judgment in favor of the respondent without adequate identification of the appellant.*

2. *The trial court erred in law and fact by convicting the appellant based on a caution statement that lacked corroboration.*
3. *The trial court erred in law by admitting the caution statement without following the proper procedural guidelines.*
4. *The trial court erred in law and fact by convicting the appellant without proving the case beyond a reasonable doubt.*
5. *The trial court erred in law and fact by failing to adequately analyze and evaluate the weak and uncorroborated evidence presented by the prosecution, thereby rendering an erroneous decision.*
6. *The trial court erred in law and fact by relying on hearsay evidence presented by the prosecution.*
7. *The trial court erred in law and fact by improperly shifting the burden of proof onto the appellant.*

This appeal was argued through written submissions. The appellant, represented by Ms. Gladness Luhwago, a learned advocate, presented their case. The respondent, represented by Prosista Paul, a learned State Attorney, argued on behalf of the Republic.

Ms. Luhwago, submitting on behalf of the appellant, prayed to adopt the grounds of appeal as presented in the petition of appeal. She commenced with the first ground, emphasizing that it pertains to the

fundamental issue of the appellant's identification. Ms. Luhwago pointed out that it is the duty of the prosecution to establish how the appellant was identified as the perpetrator of the offence he was charged with. She referenced the case of **Hassan Hussein vs. Republic**, Criminal Appeal No. 41 of 2022 CAT at Kigoma (Unreported), where it was emphasized that before the court can rely on visual identification evidence, it must ensure that the conditions for proper identification were favorable, with watertight evidence and all possibilities of mistaken identity eliminated.

Ms. Luhwago argued that in the present case, there was no concrete and corroborated evidence to dispel doubt regarding the identification of the appellant as the individual who attempted to rape the victim. She emphasized that there was no evidence presented regarding the conduct of an identification parade to identify the appellant. Referring to the trial court proceedings, she noted that the victim testified that she did not know the appellant until his relative brought his photo before her. Ms. Luhwago questioned why the victim was not provided with multiple photos or pictures of different individuals to aid in identification, asserting that the absence of such measures creates reasonable doubt regarding the appellant's identification.

Further, Ms. Luhwago highlighted testimony from PW2, who indicated that the identification of the appellant was based on rumors and

lacked clarity regarding where, when, and how the appellant's photo was obtained. She argued that the evidence provided by PW5, the WEO, also failed to clarify these crucial details, as the victim stated she did not know the appellant. She contended that the evidence presented did not demonstrate clear recognition and identification, creating reasonable doubt that should favor the appellant.

Additionally, Ms. Luhwago questioned how PW2 to PW5 managed to identify the appellant when they were not present during the commission of the crime. She highlighted inconsistencies, such as the appellant wearing a piece of cloth on his face during the crime, yet the victim was not present at the time of arrest to confirm his identity to PW2-PW5. Overall, she argued that the evidence presented by the prosecution failed to establish clear and reliable identification of the appellant as the perpetrator, creating reasonable doubt that should be decided in favor of the appellant.

Ms. Luhwago addressed the second and third grounds together, asserting that the cautioned statement was improperly admitted into evidence, and notably, it was not corroborated. She contended that during the trial, the appellant rejected the caution statement, which obligated the trial court to conduct an inquiry to confirm its legality. She cited the

case of **Christian Ugbechi vs. Republic**, Criminal Appeal No. 274 of 2029, CAT at Dar es Salaam (unreported), where it was stressed that such an inquiry is essential for establishing the voluntariness of the cautioned statement.

Ms. Luhwago argued that the trial court's handling of the objection to the cautioned statement was illegal and procedurally flawed. She averred that no witnesses were sworn before adducing evidence regarding the voluntariness of the caution statement, which is a critical requirement as per the cited case law. She asserted that this failure was fatal, necessitating the expulsion of the cautioned statement recorded as exhibit P1.

Furthermore, Ms. Luhwago pointed out that the state attorney, at page 15 of the record, testified on behalf of a witness who subsequently testified without being sworn in. She argued that this conduct amounted to the state attorney assuming the role of a witness, which she deemed to be a fatal error. To reinforce her argument, she cited the case of **Amos Alexander@ Marwa vs. Republic**, Criminal Appeal No. 513 of 2019 CAT at Musoma (Unreported), which underscored similar procedural irregularities.

Ms. Luhwago addressed the fourth and fifth grounds together, asserting that the prosecution's evidence was weak and lacked corroboration, leading to the failure of the trial court to properly evaluate the evidence and establish the case beyond a reasonable doubt. She underscored the settled principle that in criminal cases, the prosecution bears the burden of proving both that the offence was committed and that the accused is the one who committed it. She cited the case of **Nyanchobe Ryoki @ Gunza vs. Republic**, Criminal Appeal No. 250 of 2029 CAT at Mwanza (Unreported), to support this assertion.

She argued that the evidence presented by the prosecution in this case was insufficient to meet the burden of proof beyond a reasonable doubt. She contended that the prosecution failed to provide strong and corroborated evidence linking the appellant to the offence of attempted rape. Moreover, she pointed out that the trial court neglected to adequately evaluate the weak evidence presented, thereby failing to establish guilt beyond a reasonable doubt.

Ms. Luhwago further submitted that within the trial record, the testimony of PW1 provided a clear account of the events, indicating that the victim identified the appellant after being shown a picture by her relatives. This narrative was corroborated by PW2, PW3, PW4, and PW5.

However, she emphasized that the evidence presented by these witnesses was purely hearsay and lacked corroboration.

Ms. Luhwago underlined the reliance of the trial court on the perceived weaknesses of the appellant's case, which she deemed to be a fatal error and contrary to legal principles. She cited pages 7 and 8 of the trial court judgment, where it was noted that the appellant failed to cross-examine the prosecution witnesses and challenge their exhibits. Consequently, the trial court concluded that the appellant committed the offence. She stressed that in criminal trials, an accused individual can only be convicted based on the strength of the prosecution's case and not due to weaknesses in the defence. To support her argument, Ms. Luhwago cited the case of **Omar Rashid vs. Republic**, Criminal Appeal No. 405 of 2021 CAT at Tabora (Unreported) and **Mwita and others vs. Republic** [1977] TLR 54, which underscored the principle that convictions must be based on the prosecution's case's strength rather than the weakness of the defence. This, she contended, further underscored the inadequacies in the prosecution's case and the improper basis for the appellant's conviction.

Ms. Luhwago advanced the sixth ground, contending that the court relied on hearsay evidence presented by the prosecution witnesses, which is legally flawed. She referred the case of **Ndaisenga Vicent vs.**

Republic, Criminal Appeal No. 523 of 2021 CAT at Kigoma, where it was established, that courts cannot base convictions on hearsay evidence due to its lack of evidential value.

Ms. Luhwago argued that the evidence provided by PW2 to PW5 did not include direct observation of the appellant's attempted rape of the victim. Despite this, she asserted, these witnesses presented hearsay evidence, which lacked independent corroboration. She stated that the hearsay evidence provided by PW2, PW3, PW4, and PW5 was not substantiated by concrete, independent evidence.

In her final argument, Ms. Luhwago contended that the prosecution improperly shifted the burden of proof onto the appellant, contravening established legal principles. Citing the case of **Amos Alexander Marwa vs. Republic**, Criminal Appeal No. 513 of 2019 CAT at Musoma (Unreported), she avowed that in criminal cases, the burden of proof squarely rests on the prosecution and never shifts to the accused. This principle is also enshrined in section 3 (2) of the Tanzania Evidence Act, [Cap 6 R.E. 2019]

Ms. Luhwago asserted that in this case, the burden of proof was indeed shifted to the appellant, which she deemed to be fatal. She urged the court to recognize this violation of legal standards and to quash the conviction and sentence, thereby setting the appellant free.

In response to the first ground raised by Ms. Luhwago, Ms. Paul argued that there is no dispute regarding the occurrence of the offence for which the appellant was charged, which took place during daylight hours at 14:00 hours on 5.3.2023. She referred to the testimony of PW1, who claimed to have recognized the appellant on the day in question, describing his attire as a red shirt, short jeans, and a piece of clothing on his head with the inscription "Bob Marley." Ms. Paul contended that the appellant and PW1 spent enough time together at the scene of the incident, allowing the victim to clearly recognize the appellant.

Ms. Paul further referred to PW1's testimony, stating that the appellant dragged her from the river to the bush, where he proceeded to undress her underpants and question her about her identity before attempting to rape her. After the incident, PW1 immediately ran home and recounted the events to her mother and brother, providing a detailed description of the appellant's appearance and clothing. Efforts were then made to apprehend the appellant based on this description, leading to his arrest after his photo was shown to the victim, who confirmed his identity as her assailant. She argued that the appellant was subsequently identified by PW1 both at the village office and at the police station.

She concluded her submission by asserting that the appellant was indeed well identified, and his failure to cross-examine PW1 to challenge

her credibility further supported this assertion. To bolster her argument, she referred to the case of **Nyerere Nyangue vs. Republic**, Criminal Appeal No. 67 of 2010 CAT at Arusha (Unreported).

In addressing grounds two and three of the appeal concerning the admission of the caution statement, Ms. Paul acknowledged that it was indeed wrongly admitted due to the improper conduct of the inquiry surrounding its legality. As a result, she conceded that the cautioned statement should be expunged from the record.

In response to the fourth and fifth grounds of the appeal, she argued that the case was adequately proven by the testimony of five witnesses. She referred to PW1's account as the victim, who detailed the events of the incident, stating that she was washing clothes at the river when the appellant forcibly dragged her into the bush, covering her mouth. In the bush, the appellant proceeded to remove PW1's underpants and attempted to rape her, which she described in detail. She submitted that the true evidence of rape comes from the victim, citing the case of **Suleman Makumba vs. Republic**, (2006) TLR 379.

She further asserted that PW1's testimony was strong and remained unshaken, making her the best evidence for the prosecution. She pointed out that the appellant did not cross-examine the prosecution witnesses, implying his acceptance of their testimony. She argued that the court

thoroughly analyzed the evidence and correctly concluded that the prosecution had proven the case beyond a reasonable doubt.

Regarding the appellant's defence, Ms. Paul noted that it was brief and amounted to a total denial of the allegations. However, during cross-examination by the prosecution, the appellant admitted to having no conflicts with the victim or her relatives and expressed willingness to seek forgiveness.

On the sixth ground, he argued that the prosecution evidence was not hearsay evidence. For example, she said, PW2 and PW5 adduced evidence that they are the ones who participated in looking for the appellant and arrested him. After the arrest, the appellant while at the Ward Executive office of Mlangani Ward, he confessed before them to commit the offence and asked for forgiveness. She argued that the court relied heavily on the evidence of the victim to convict the appellant whereby her evidence was corroborated by the evidence of other prosecution witnesses.

In response to the seventh ground of the appeal, Ms. Paul urged the court to dismiss it on the basis of its lack of merit. She argued that the appellant was convicted based on the strength of the prosecution

witnesses, particularly the testimony of PW1, who provided a detailed account of the events that transpired on the material day.

In her rejoinder, Ms. Luhwago contested Ms. Paul's assertion regarding the evidence provided by PW1. She pointed out that upon review of the trial court proceedings, there is no mention of the appellant wearing a piece of cloth labelled Bob Marley, nor is there any indication of the amount of time spent during the commission of the incident. She argued that the only information reflected in the proceedings is that PW1 did not know the appellant prior to the incident and only identified him after seeing his photo, as stated on page 8 of the proceedings.

Ms. Luhwago reiterated the principle that an accused individual can only be convicted based on the strength of the prosecution's case, not the weaknesses of their defence. She argued that the failure of the appellant to cross-examine the victim should not be grounds for entering a conviction.

Furthermore, Ms. Luhwago contended that under the circumstances of the case, an identification parade should have been conducted since the victim herself admitted that the appellant was not well identified. She emphasized the necessity of proper identification procedures to ensure the fairness of the trial process.

In response to the concession made by the counsel for the respondent regarding the second and third grounds, Ms. Luhwago expressed appreciation. However, she argued that even with the cautioned statement expunged from the record, the remaining evidence, particularly that of PW1, is insufficient to establish the appellant's guilt. She emphasized that the testimony of PW1 alone is not substantial enough to prove the appellant's guilt beyond a reasonable doubt.

Additionally, Ms. Luhwago criticized the evidence provided by PW2 to PW5, characterizing it as oral accounts lacking merit due to its lack of corroboration and status as hearsay evidence. She asserted that without corroborating evidence to support their testimonies, the accounts provided by these witnesses should not carry significant weight in establishing the appellant's guilt.

In relation to the fourth and fifth grounds, Ms. Luhwago reiterated her earlier arguments presented in her initial submission. She urged the court to maintain its consideration of the points she raised previously and to disregard any rebuttals presented by the respondent's counsel.

Regarding the sixth ground, Ms. Luhwago reiterated her position that it was fatal for the court to rely on hearsay evidence, particularly the testimony of PW2 and PW5 regarding the manner of the appellant's arrest. She argued that the reliance on information obtained from PW1, which

was based on rumors and untruthful information, rendered their evidence highly unreliable.

Ms. Luhwago stressed that the appellant's admission of guilt before PW4 should not be considered as meritorious evidence, especially in light of the circumstances surrounding the manner of his arrest and the hearsay nature of the information provided by PW2 and PW5. She asserted that the cautioned statement, which was improperly admitted, does not contribute to strengthening the prosecution's case.

In her response to the last ground, Ms. Luhwago asserted that the submission made by the respondent lacks merit. She argued that the prosecution failed to provide substantial evidence to support the conviction, and the respondent's counsel focused solely on the appellant's failure to cross-examine the prosecution witnesses rather than addressing the merits of the ground of appeal. She criticized the trial court's decision to shift the burden to the appellant, stating that this was erroneous and unjust. She emphasized that justice demands a fair evaluation of the evidence presented, and the trial court's reliance on the weakness of the appellant's defence instead of the strength of the prosecution's case was improper.

In conclusion, Ms. Luhwago urged the court to allow the appeal, accentuating that the prosecution's failure to provide sufficient evidence

and the improper shifting of the burden to the appellant warrant a reversal of the conviction.

I have thoroughly reviewed the trial court record, the appeal petition, and the written submissions from both parties, and I sincerely appreciate the effort put forth.

With the concession by the Republic that the cautioned statement was improperly admitted and subsequently I expunged from the record.

I will now shift focus to addressing the first, fourth, and fifth grounds of appeal.

The crux of this case revolves around the identification of the appellant. It is well-established principle that evidence based solely on visual identification is often considered weak and unreliable. Courts should only rely on such evidence when they are fully satisfied that all possibilities of mistaken identity have been thoroughly eliminated. This fundamental principle was underscored by this Court in the landmark case of **Waziri Amani v. Republic** (1980) TLR 250.

The key issue in this case, though not addressed in the trial court's judgment, revolves around the identification of the appellant. As the first appellate court, it is incumbent upon this court to re-evaluate the evidence and draw its own conclusions, as established in the case of **Paulina**

Samson Ndawavya vs. Theresia Thomas Madaha, Civil Appeal No 45 of 2017 CAT at Mwanza (Unreported), cited (supra) at page 17.

From the proceedings of the trial court, as evidenced at pages 7 and 8, PW1 stated that she did not know the accused before the incident occurred. The only description she provided to her mother and PW2, her brother, was that the individual who attempted to assault her was a young man wearing a shirt resembling the color maroon and short jeans. This description provided by PW1 appears to be the sole description given.

However, PW2 claimed to have been informed by PW1 that the assailant was black and had pieces of cloth covering his face. Additionally, according to PW5's testimony on page 18 of the proceedings, PW1 informed him that she did not recognize the accused because he was not a resident of Mbewe. PW1 further described the accused to PW5 as wearing short jeans, having a piece of cloth with the label "Bob Marley" on his head, and being tall.

It is worth noting that PW5 visited PW1's house on 15.3.2023, and PW5 is the village executive officer of Mlangali ward, where the appellant resided, while the incident occurred at Mbewe village in Itaka suburb. The question arises as to how they identified the appellant several days later.

PW2, who was the first to track the appellant, had a description of a young man wearing a maroon shirt, short jeans, and his face covered

with a piece of cloth. It is pertinent to question how identification could be possible if the assailant's face was covered, even if the incident occurred during broad daylight.

From PW1's account of the identification, it appears that she provided different descriptions to PW2 and PW5, as elaborated on. There seems to be a lack of a clear link between the appellant and the case. Furthermore, PW4, the police officer, failed to testify regarding the description of the accused, if it was provided by PW1 at the police station at all.

Also, since he was a stranger to her, it was crucial for identification parade to have been conducted after a prior description on the appearance of the said person. To point him as she did without unclear prior description is, in my view, not sufficient to prove beyond reasonable doubt that the accused person was exactly the person she saw at the scene. In fact, it is so unsafe to convict the accused person in this case basing on such kind of evidence because there are persons who look alike. That is why, in identification parade, people who look alike, or of the same age, height and appearance are kept together for the identifying witness to pick amongst them, the one he identified at the scene of crime.

Indeed, the circumstances surrounding the arrest of the accused raise more questions than answers. It is particularly puzzling how PW1 could assert that the appellant was not a resident of the area, given that she had no prior knowledge of him before the incident. This raises doubts about the accuracy of her statement and suggests that her identification may have been influenced by factors other than a clear recollection of the events.

Furthermore, PW2's testimony indicates that the arrest of the accused was based on information obtained from children and rumors circulating in the area. Relying solely on such hearsay and unsubstantiated information to effect an arrest raises serious concerns about the reliability of the witnesses leading to the arrest of the appellant.

At this juncture, on ground sixth and seventh, I align with the submission of the counsel for the appellant that the burden of proof was shifted to the appellant, resulting in his conviction. It is crucial to delineate the legal standard for proof in criminal cases at this stage. It is well-established legal precedent that in criminal cases, the burden of proof rests upon the prosecution, which must meet the standard of beyond reasonable doubt. This principle finds support in the case of **Wilfred**

✓ 67.

Praygod @ Msangi v. Republic, Criminal Appeal No. 285 of 2010 CAT (unreported), where the court explicitly stated:

"In a criminal case, the burden of proof lies on the prosecution to prove the case beyond reasonable doubt. The burden never shifts (Section 3(2)(a) of the Evidence Act, Cap 6, R.E. 2002)."

[See also: **Woolmington V Director of Public Prosecutions** 1935 AC 462 and **Boniface Siwanga V Republic**, Criminal Appeal No. 421 of 2007 CAT (unreported)]

I am aware that there are number of authorities which state that failure to cross examine a witness is the acceptance of what has been testified. However, I firmly adhere to the principle that every case must be judged based on its unique circumstances. This position is supported by the precedent set in the case of **Charles Bode vs. Republic**, Criminal Appeal No. 46 of 2016 CAT at Dar es Salaam (unreported). Furthermore, it is crucial to emphasize that the mere absence of cross-examination or defence by a witness does not, in itself, establish the prosecution's case beyond reasonable doubt. Concrete evidence is essential for such a determination. Therefore, the appellant's plea for forgiveness cannot serve as grounds for conviction, especially considering the absence of details regarding the appellant's arrest or the linking of the appellant, who

resides in a different village, without proper identification, which varied among witnesses PW1 to PW5. In fact, the record fails to demonstrate the efforts undertaken by the witnesses until two weeks later when they allegedly identified the appellant. Consequently, it was erroneous for the trial court to rely solely on the failure to cross-examine and the weaknesses in the defence's case to convict the appellant, thus shifting the burden from the prosecution to the appellant.

That said, I find this appeal is merited, and therefore, allow it. consequently, I hereby set aside the trial court conviction and sentence. Further, I order the Appellant be released from custody forthwith unless held therein with other lawful cause. It is so ordered

Right of Appeal explained

Dated at Mbeya on this 11th Day of March, 2024



MUSA K. POMO

JUDGE

11/03/2024

JUDGMENT delivered in presence of the Appellant represented by Mr. Yona Nicholous, learned advocate and Ms. Upenda Lyimo and Ms. Julieth Katabora, learned state attorneys for respondent republic

SGD: A.P. SCOUT

Ag. DEPUTY REGISTRAR

11/03/2024