

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBIA SUB- REGISTRY)**

AT BUKOBIA

CRIMINAL APPEAL NO. 4 OF 2023

(Arising from Karagwe District Court at Kayunga in Criminal Case No. 120 of 2022)

ANORD PASCHAL APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

14th March & 15 March 2024

A.Y. Mwenda J.

Before Karagwe District Court at Karagwe the appellant was arraigned for rape contrary to Section 130(1), (2) (e) and 131 (1) of the Penal code, [Cap 16 R.E 2019]. The prosecutions alleged that on the 10th May 2022 at Chamchuzi village within Karagwe District in Kagera Region, the appellant unlawfully, had carnal knowledge with DD (the actual name concealed for her protection), a girl of twelve (12) years old. He pleaded not guilty as such, the trial commenced. The prosecution paraded five witnesses and tendered two documentary exhibits whilst in defence, the appellant had only one (1) witness who is himself. Having considered the evidence on record and various laws, the trial court was satisfied that the prosecution proved its case beyond reasonable doubt. As such the appellant was convicted and sentenced to serve a term of thirty (30) years jail

imprisonment. Aggrieved he came before this court armed with a petition of appeal containing eight (8) grounds which read as follows;

- 1) That, the trial magistrate erred in law and fact convicting the appellant while the victim denied the fact that the appellant being the one raped her until she was coached. (sic)
- 2) That, the trial magistrate erred in law and in fact convicting the appellant while PF3 was tendered by unregistered nurse, that is to say PW4 was not qualified medical personnel to be referred to as a medical practitioner.
- 3) That, the case was fabricated against appellant due to other disputes and after denying to pay a bribe of TZS 445000 when arrested at his hair cutting saloon.
- 4) That, the learned magistrate erred in law and in fact when failed to shake the credibility of evidence adduced by the prosecution side as to evidence of PW1, PW2, PW3 and PW4.
- 5) That the trial magistrate erred in law and in fact failed to elaborate points for determination and reasons for decision on his judgment. (sic)
- 6) That, the whole proceeding was marred by procedural irregularities.

7) That for the sake of justice the proof of DNA test was vital due to the fact that the victim did not know the person raped her in the first instant.

8) That, the case was not proved beyond reasonable doubt.

At the hearing of this appeal, the appellant was present in person. On the respondent's side, Ms. Gloria Rugeye learned state attorney appeared for the Republic (Respondent).

When he was invited to submit in support of grounds of appeal, the appellant prayed the said grounds to be adopted to form part of his oral submissions. Otherwise, he prayed this appeal to be allowed and an order releasing him from prison to be issued.

In her response, Ms. Gloria Rugeye, learned State attorney, informed the court that the republic supports this appeal based on doubtful identification of culprits at the scene of crime. She submitted that during trial PW2 (the victim) testified that she was raped by the accused person (now the appellant). The learned state attorney submitted that before the trial court, the victim testified that she identified the accused person (now the appellant) by his attire (a red T-shirt and jeans), that he was holding sandals (open shoes), and that he had big eyes. She further submitted that PW3 (the victim's brother) arrested the appellant based on the description he got from the victim that the appellant had kiduku hair cut style and that he was wearing open shoes. Ms. Gloria submitted that

after such information the appellant was arrested by PW3 and conveyed to the victim for confirmation if he was the one and she replied in affirmative.

According to the learned state attorney, since the appellant was a stranger to the victim, her identification of the assailant by itself was not enough to connect him with the crime even if the incident took place on a broad day light. She was of the view that since the appellant was a stranger then, identification parade ought to be conducted. To support this point, he cited the case of RASUL AMIR KARAN @ JUMA & 3 OTHERS VS REPUBLIC, CRIMINAL APPEAL NO. 368 OF 2017. She thus concluded her submissions stating that the prosecution's case was not proved beyond reasonable doubt and prayed this appeal to be allowed.

Having summarized the submissions from both sides, the issue for determination is whether the present appeal is meritorious.

At the outset, it is important to point out that in criminal cases, the burden of proof lies on the prosecution and the standard deployed is beyond reasonable doubt. See Section 3(2) (a) of the Evidence Act [Cap 6 R.E 2019] and the case of MOHAMED MATULA V. REPUBLIC [1995], TLR 3.

Also, in rape cases such as the present one, the prosecution is bound to prove the victim's age where consent is immaterial and forceful sexual intercourse for an adult (lack of consent), penetration and the person responsible (identification). In the present matter, there is no dispute that the victim was under age and that she was raped. The evidence to that effect is from the victim herself. The remaining issue for determination is identification of her assailant.

Regarding the person responsible for rape, as it was rightly submitted by the learned state attorney, there is doubt regarding the appellant's identification. This is so because, since the appellant was a stranger to the victim then identification through attires (i.e. clothes he was wearing, and that he had open shoes), description that he had big eyes and dock identification was not enough. In the circumstances of this case, this court is of the view that identification parade ought to be conducted. This position has been stated by the Court of Appeal in the case of RASUL AMIR KARAN @ JUMA & 3 OTHERS VS THE REPUBLIC, CRIMINAL APPEAL NO. 368 OF 2017 where the Court, while citing with approval the case of MUSSA ELIAS & 2 OTHERS VS REPUBLIC, CRIMINAL APPEAL NO. 172 OF 1993 where the Court held inter alia that;

"It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial."


In the same footing, this court being guided by the position above, is of the view that although the incident occurred on a broad day light still, conducting identification parade was inevitable.

From the above analysis Since the conviction of the appellant solely based on identification of a stranger and dock identification, this court is thus in

agreement with the learned state attorney that the prosecution did not prove its case beyond reasonable doubt to warrant conviction before the trial court.


That said, this appeal is hereby allowed by quashing the conviction and sentence passed is set aside. The appellant is to be set free forthwith unless he is lawfully detained in custody.

It is so ordered.


A. Y. Mwenda
Judge

15.03.2024

Judgment delivered in chamber under the seal of this court in the presence of Mr. Anord Paschal the Appellant and in the presence of Ms. Matilda Assey the learned state attorney for the republic.

 
A. Y. Mwenda
Judge

15.03.2024