IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)
AT MOSHI

CRIMINAL APPEAL NO. 50 OF 2022

(Originating from the District Court of Same at Same in Criminal Case No. 09/2022)

HUSSEIN OMARY @SEKUBA ..... APPELLANT
VERSUS
REPUBLIC..... REPONDENT

JUDGMENT

Last order: 05/06/2023
Judgment: 09/06/2023

MASABO, J:-

The appellant herein was arraigned before the District Court of Same at Same for the offence of rape contrary to section 130(1) and (2) (e) and 131(1) of the Penal Code Cap 16 RE 2019. After full trial, the trial court found him guilty of the offence, convicted and sentenced him to serve life imprisonment.

Aggrieved by the judgment and sentence, the appellant has preferred this appeal on five grounds where he has averred that the trial court grossly erred both in law and fact by convicting and sentencing him while:- **one,** the victim was not summoned for no apparent reason; **two,** the evidence of the prosecution was loaded with contradictions and inconsistencies rendering the same unreliable; **three**, his defence evidence was not considered for no apparent reason; **four,** the evidence suggests the offence was attempted rape and **five,** the case was not proved beyond reasonable doubt. Based on these grounds he has prayed that the appeal

be allowed. The conviction and sentence of the trial court be quashed and set aside and he be set at liberty.

Hearing of the appeal proceeded in writing. The appellant was unrepresented while the respondent was represented by Ms. Rose Sule, learned State Attorney.

Submitting in support of the first ground of appeal, the appellant argued that the victim of the alleged offence was not brought before the trial court to testify and no reasons was furnished for the omission. Unexpectedly, at the page 9 of its judgment, the trial magistrate stated that the victim was a child of five years and proceeded that although she was not brought to testify there is no harm because even if she was brought, she could not have known what happened as she was in deep sleep on the day of the incident. This finding, he argued, was speculative and solely based on PW1 who testified that at the fateful moment, the victim was asleep and her mind and body were not active to detect and know what had been fallen her. It was argued further that premising a conviction on such evidence was utterly wrong as it is highly improbable and inconceivable to a reasonable mind that a child of such tender age would remain asleep during a rape incidence which according to PW3 severely injured her. He concluded that, the failure to parade the victim was injurious to the prosecution's case victim as it entertains an inference adverse to the prosecution.

It was argued further that, the age of the victim was also not proved as neither her clinic card nor birth certificate was produced to prove the

existence of the child as well as the age of the said child. The court erroneously relied on mere evidence of PW1 who only stated that the child was five years old but did not mention her birthdate, month and the year. The appellant also questioned his identification. He averred that PW1 and PW2 who claimed to have identified him had given false testimony and their evidence was tainted with lies. PW1 stated that she saw the accused on bed having sexual intercourse with her daughter and he switched on the light of the house. He argued that it is a settled position that whenever a person claims to have identified another in an unfavorable circumstance like the one in the present case, the source of light and its intensity must be mentioned but this was not done by PW1. Also, PW2 first testified that when she had reached PW1's home she saw and recognized the appellant who was two paces from her and he was running from PW1's house. This witness stated that the source of light that helped her recognize the appellant was an electrical light which was from PW1's house. However, she later changed her statement and testified that when she entered the room in PW1's house to see the victim, the light was from a "Karabai" or "kibatari".

The appellant argued that, the testimony of the two witnesses raises the question as to their credibility and ought to have been cautiously treated as stated in **James Kisabo @ Mirango and Another vs Republic** Criminal Appeal No. 216 of 2006 (unreported). The court ought to have been satisfied that all possibilities of mistaken identity of the offender were eliminated. The prosecution witnesses ought to state the source of light and its intensity, the appellant's attire at the time they observed him, what made them recognize him, the lapse of time since they last saw him

to when they identified him and the size of the area illuminated by the alleged light but this was not done. In fortification, he cited the case of **John Jacob vs Republic,** Criminal Appeal No. 92 of 2009 (unreported) and argued that, the omission to prove the above facts left the prosecution's case seriously wanting. Thus, he prayed that the conviction be quashed and the sentence be set aside as the case was not sufficiently proved against him.

In her reply submissions, Ms. Rose Sule, learned State Attorney, submitted on each ground of appeal. On the 1st ground, she conceded that the prosecution did not summon the victim as its witness. She averred that the omission, notwithstanding, the evidence adduced by prosecution witnesses was sufficient to prove the offence and sustain the appellant's conviction. She relied on section 143 of the Evidence Act, Cap 6 RE 2022, in supporting her argument that, the omission to summon the victim was harmless as the law does not require a particular number of witnesses. What matters is the quality of evidence and credibility of witnesses. She supported this stance with the case of **Yohanis Msigwa vs Republic** [1990] TLR 148 and **Hassan Juma Kanenyera vs Republic** [1992] TLR 100. She further contended that, there are instances where the charge can be proved without the testimony of the victim and such circumstances include when the victim is deceased, is of tender age or has a mental illness. Further, she cited **Christopher Marwa Mturu vs Republic** Criminal Appeal No. 561 of 2019 (Unreported) and argued that, just like in the present case, the victim who was of five years old was not called as a witness but the conviction was sustained.

On the 2nd ground, Ms. Sule submitted that the argument that there are contradictions on the evidence of PW1 and PW2 is unfounded. The two witnesses testified on what they had seen. As demonstrated in the proceedings, PW1 entered her house and switched on the light only to find the appellant having sexual intercourse with the victim. She grabbed the appellant and raised an alarm. PW2 heard the alarm and responded. When she got at PW1's home she saw the appellant running out of PW1's house. The source of light was electricity light. In the alternative she argued that, in evidence contradictions are unavoidable and he law is settled that when they are minor and, as in the present case, do not go to the root of the case, they should discounted. Since the evidence of the prosecution witnesses were materially consistent and worthy to be trusted, the minor inconsistent should be ignored.

On the 3rd ground, Ms. Sule argued that the trial court sufficiently considered the defence evidence as seen at page 10 of the judgment and even if such was not the case, this court is endowed with the power to evaluate such evidence and make its independent finding as held in **Mzee Ally Mwinyimkuu @ Babu Seya vs Republic** Criminal Appeal No. 499 of 2017 (unreported).

On the 4th ground, it was submitted that, the prosecution proved the offence of rape. That, PW1's evidence rendered direct evidence which is the best evidence as per section 61 and 62 of the Evidence Act. Besides, her testimony was corroborated by that of PW2 who inspected the victim and saw semen, a swollen vagina and bruises. Also, PW3 who medically examined the victim established that her vulva had bruises and

inflammation and she was in a lot of pain. She further testified that the bruises were caused by a blunt object which did not penetrate her but traumatized her. It was argued that, since it is trite that penetration however slight is sufficient to constitute sexual intercourse as per section 130(4) of the Penal Code, there was sufficient proof that the appellant committed the offence he was charged with. **Esau Samuel vs Republic** Criminal Appeal 227/2021 (unreported), was cited in further fortification of the appeal.

On the fifth ground of appeal, the learned State Attorney was of view that the evidence by the three prosecution witnesses gave detailed evidence that sufficiently proved the offence of rape against which the appellant was charged. The trial court thoroughly weighed the evidence and trusted the witnesses. Also, PW1 did not cross examine PW1 on the important matters he is now questioning. Other than asking her what was the relationship with her husband who is his best friend, he did not cross examine further.

As to the identification of the appellant, Ms. Sule argued that the circumstances of the case eliminated all possibilities of mistaken identity. The record demonstrates that upon entering the room, PW1 identified the appellant after he had switched on the light. Also, much as PW1 did not state what light she had switched on, her statement showed that her house was not in complete darkness. More so, the incident took place for a considerable amount of time whereas PW1 fought with the appellant. Besides, it was a case of recognition rather than identification given that the appellant was familiar to PW1 as he was the best friend of her husband

which made it easier for PW1 to recognise him. Also, it was easier for PW2 to recognize him as he was her customer who often bought drinks from her shop.

Regarding the age of the victim, Ms. Sule submitted that, there was sufficient proof from the victim's mother who stated that she was five years. That evidence was credible. The failure to mention the specific birth date and month, was not injurious to the prosecution's case nor did it prejudice the appellant.

I have dispassionately considered the submissions of both parties. What is discernible from these rival submissions is that, they pose one major question that need be answered by this court, namely whether the case was proved beyond reasonable doubt. Before I delve into this question and the sub questions raised in the individual grounds of appeal, I will provide a brief account of the facts of the case and the evidence on record. As per the charge sheet filed in court, the particulars of the offence were that on 6th November 2021, at night hours at Ndungu Village within Same District in Kilimanjaro region, the appellant carnally knew the victim, a girl child aged 5 years.

Three witnesses testified in support of the prosecution's case. Asha Zahoro Omary, the victim's mother who testified as PW1 stated that, on the fateful day she came back from her bartending job at a local brew store at around 22:00hrs. Upon arriving home, she found the appellant having sexual intercourse with her daughter whom she found asleep and naked. She switched on the light and had a struggle with the appellant

who then dressed up, beat her up and ran out. She recognized the appellant as he was her husband's best friend.

Rosemary Ally (PW2) who owns a grocery almost 20 paces from PW1's house heard PW1 screaming. She locked her store and walked to PW1's house where she saw the appellant running away. She crossed paths with him at two paces. PW2 recognized the appellant as there was an electricity light outside PW1's house. Also, the appellant was the customer at her grocery. She also told the court that, after arriving at PW1's house, she entered the house which was lit up by a "karaboi" or" kibatari" and the two inspected the victim where they found that her labia was swollen and there was oil and semen around her vagina which suggested that the she was raped. They went to report the matter at police station but found the station closed. They then decided to head to hospital where the victim was admitted for the night and on the next day, she was medically examined by PW3 who found out that her labia was swollen and she had bruises around her vagina and drew a conclusion that, she was partially penetrated by a blunt object. PW3 also observed that the victim was in pain during the investigation.

The appellant's defence was a total denial. He also offered an alibi starting that on the fateful day, he was at his home with his family from around 19:00hrs to 00:00hrs when he was arrested. Prior his arrest he had called Omari Sekuba (DW2), after noting that his house was surrounded and people kept calling him out. His *alibi* was supported by the testimony of his wife Fatuma Salimu @ Abas (DW3).

With this record which I shall assess alongside the rival submission, I will now proceed to determine the appeal. As I embark on to the main question as to whether the case against the appellant was proved, it is not irrelevant, I think, to start with the law on burden and standard of proof in criminal trials. It is a cardinal law that in all criminal trials, the burden of proof rests solely on the prosecution to prove the case against the accused person and the standard required is proof beyond reasonable doubt. The burden never shifts to the accused person even when his defense is tenuous and improbable as a conviction cannot result from the weakness of the accused's defence but the strength of the prosecution's case. Underscoring this principle in **Pascal Yoya@ Maganga v Republic,** Criminal Appeal No. 248 of 2017, CAT at Arusha, the Court of Appeal of Tanzania held that;

> It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence. See the cases of **Woolmingtonv. Director of Public Prosecutions** [1935] AC 462; Abdi Ally (supra) and **Mohamed Haruna @ Mtupeni & Another v. Republic,** Criminal Appeal No. 25 of 2007 (unreported).

Back to the grounds of appeal, as observed earlier on, the appellant has premised his appeal on five grounds by which he faults the trial court's conviction and sentence. His abbreviated grounds are as follows: First, the victim was not summoned for no apparent reason; second, the evidence of the prosecution was loaded with contradictions and

inconsistencies rendering the same unreliable; third, his defence evidence was not considered for no apparent reason; fourth, the evidence suggests the offence was attempted rape and fifth, the case was not proved beyond reasonable doubt. I prefer to start with the third ground of appeal.

In this ground of appeal, the appellant has complained that his evidence was ignored whereas on the part of the respondent, it has been argued by the learned State Attorney that the appellant's defence was thoroughly considered by the trial court and in the alternative, it has been argued that even if it was not, this court can step into the shoes of the trial court, assess it and make an independent finding. The alternative argument beds very well the scope of the powers of this court when exercise its first appellate jurisdiction.

This being a first appeal, it is within the powers of this court to assess the evidence on record and make an independent finding not only of whether the appellant's defence was considered but whether or not, as per the evidence on record, the charges lied against the appellant were proved beyond reasonable doubt. As expounded in **Emilian Aidan Fungo@ Alex & George John Mwagange v Republic**, Criminal Appeal No. 278 of 2008 CAT (unreported) a first appeal is in the form of re-hearing whereby, the appellant is entitled to the first appellate court's own consideration and view of the evidence as a whole and the first appellate court is entitled to re- evaluate the evidence on record and to come out with its own conclusion which may coincide with the trial court's decision or differ altogether (Also see **Makubi Dogani v Ndogondogo Maganga,** Civil Appeal No. 78 of 2019, CAT and **Mapambano Michael**

@ Mayanga v Republic, Criminal Appeal No. 268 of 2015 CAT (all unreported).

As already intimated, the appellant's defence was twofold, comprised of a total denial and a belatedly raised *alibi* which was corroborated by his wife who testified as DW3. Both, the denial and the belated alibi were considered but found with no merit as vividly demonstrated in page 10 and 11 of the trial court judgment. From the content of these two pages, there can be no scintilla of doubt that not only was his defence fully considered but, the trial magistrate duly complied with the procedure applicable to belatedly raised alibi as set out in section 194 (6) of the Criminal Procedure Act and applied by the Court of Appeal in **Mwita S/o Mhere and Ibrahim Mhere v. R** [2003] TLR 107 where it was stated thus;

> Where a defence of alibi is given after the prosecution has closed its case, and without any prior notice that such a defence would be relied upon, at least three things are important under section 194(6) of the Criminal Procedure Act, 1985:
> (i) the trial court is not authorized by the provision to treat the defence of alibi like it was never made;
> (ii) the trial court has to take cognizance of the defence; and
> (iii) it may exercise its discretion to accord no weight to the defence.

The trial magistrate did not treat the alibi as if it did not exist. He took cognizance of it and having discussed it, he found it to be seriously lacking on merit, a finding which I subscribe tool.

I will now to the second ground in which it has been alleged that there were multiple inconsistences between PW1 and PW2's testimony as regards the source of light at the scene of the crime and from which the appellant has suggested that he was not positively identified and the case against him was thus not proved. At this juncture, it is relevant I think, to state the position of the law with regard to inconsistencies and discrepancies in the evidence. As correctly submitted by Ms. Sule, it is settled position of law that, not all inconsistencies in the prosecution's witnesses will cause its case to flop. For, the prosecution's case can only flop if the alleged inconsistencies and discrepancies are major and go to the root of the case (see **Odasi @ Bimeiifasi v. Republic**, CAT- Criminal No. 269 of 2012 (unreported); **Disckson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007, CAT and **Luziro s/o Sichone v. Republic**, CAT-Criminal Appeal No. 231 of 2010, CAT (unreported). In the latter case, the Court of Appeal of Tanzania instructively held that;

> "We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. I tis only fundamental discrepancies going to discredit the witness which count."

In my examination of the record to ascertain whether the alleged on consistence exit, I have observed that, both PW1 and PW2 stated that the offence was committed at night around 22:00. PW1 stated that when she got home and opened the door, she found the appellant molesting her daughter. She switched on the light while holding on the appellant's shirt.

The appellant resisted and they started fighting while he was struggling to dress up as he was fully naked. Later on, he managed to push her and escape. This witness told the court that she recognized the appellant easily as he was the best friend to her husband. On her part, PW2 stated that he saw the accused person running away from PW1 while holding his trouser which was not properly zipped. She told the court that, he easily identified the appellant as the area had electricity light and he was familiar to her as he used to buy drinks at her grocery shop. From this observation, which I have summarily and purposively reproduced, it is obvious that the lamentations as to discrepancies are unfounded as there is no discrepancy worth the name let alone, one that can cause the prosecution's case to flop.

As for the suggestion that he was not positively identified, the record is in line with the appellant's argument that PW1 did not disclose the source of light. All she stated is that she switched on the light. She did not elaborate the source of light and its intensity. On her part, PW2 stated the source of light but did not elaborate its intensity and size of the area illuminated by the alleged light.

It is well established, in cases where the sole evidence implicating the accused person is visual identification, conviction should not be metered unless the possibility of a mistaken identity has been eliminated. The fragility of such evidence and the need for extra care when dealing with it has been extensively canvased in **Waziri Amani vs Republic** [1980] TLR 250; **James Kisabo @Mirango and Another vs Republic** (supra); **John Jacob vs Republic** (supra); **Christopher Chacha @ Msabi &**

Others vs Republic (Criminal Appeal No. 235 of 2009) [2016] TZCA 792 and; **Rajabu s/o Issa Ngure vs Republic** (Criminal Appeal No. 164 of 2013) [2013] TZCA 461. Through these cases and similar authorities, it has been established in deciding whether the chances for mistaken identity have been fully eliminated, the court must be satisfied that there were favourable conditions for identification by looking at;

> **"...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 lighting at the scene; and further whether the witness knew or had seen the accused before or not.**These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity." [emphasis added]

Regarding the source of light when the offence was committed at night, it has been held that the source of light and its intensity must be disclosed. Addressing this point in **Byamtonzi John @ Buyoya vs Republic** (Criminal Appeal No. 289 of 2019) [2021] TZCA 385 the Court of Appeal cited its previous decision in **Hassan Said v. Republic**, Criminal Appeal No. 264 of 2015 (unreported) where it observed that;

> "It is however, now settled, that if a witness is relying on some source of light as an aid to visual identification such witness must describe the source and intensity of such light in details. The Court has repeatedly in its various decisions in this respect, emphasized on the importance of describing the source and the intensity of the light which facilitated a correct identification of the appellants at the scene of crimes. See **Waziri Amani v. Republic (supra), Richard Mawoko and Another v. Republic** Criminal Appeal No. 318 of 2010 (CAT)

at Mwanza and **Gwisu Nkonoli and 3 others v. Republic** Criminal Appeal No. 359 of 2014 (CAT) at Dodoma (both unreported)."

Further and instructively, the Court cited its another previous decision in **Issa Mgara Shuka v. Republic,** Criminal Appeal No. 37 of 2005 (unreported), where it acknowledged the different intensities of light and and the underlying need for the witness to describe the intensity of such light and the size of the area illuminated by the light as it stated thus; -

> "In our settled mind, we believe that it is not sufficient to make bare assertions that there was light at the scene of crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from pressure lamp or fluorescent tube. Hence, the overriding need to give in sufficient details of the intensity of the light and the size of the area illuminated."

I have cited these authorities as length because, as stated above, the offence was committed at night hence the question whether from the description of light provided by PW1 and PW2, it can be confidently held that the appellant was positively identified. For the following reasons, this question inevitably attracts a negative answer. The source of light at the scene is uncertain as it was not clearly elaborated. PW1 just stated that she switched on the light without stating what type of light did she switch on and what was its intensity. Did she switch on the Karabai" or "kibatari" and what was their intensity? Was there electricity inside the house and if what was the intensity of the light? PW2 elaboration of the source of light adds on to the confusion as she referred to two different sources of light

that is, the Karabai" or "kibatari" inside the house and electricity at its outside, but never disclosed the intensity of each of these sources. She also did not bother to state whether the light was located at a place capable of illuminating enough light for favourable identification of the appellant.

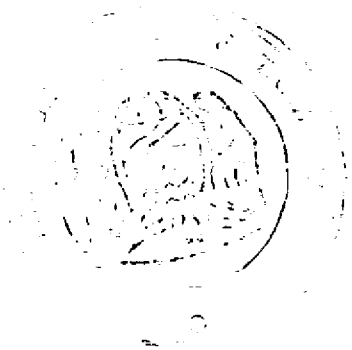
It has been argued for the respondent that, as the appellant was well known to PW1 and PW2 prior to the incident, the case should be treated as one of recognition. This argument is valid and I entirely subscribe to it. It is to be noted however that, familiarity with the accused person does not render redundant, the requirement for favorable conditions. In **Issa Mgara Shuka v. Republic (supra)** the Court of Appeal while dealing with a similar issue held that:

> "....even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally even when the witness is purporting to recognize someone whom he knows, as was the case here mistakes in recognition of close relatives and friends are often made." [emphasis mine].

Under the premises, it is obvious that the omission to elaborate the two sources of light and its intensity was injurious to the prosecution's case as it raises a reasonable doubt on whether the two witnesses properly recognized the assailant and ultimately rendered the case against the appellant unproved. The second ground of appeal is upheld and so is the fifth ground of appeal.

Based on this finding, I allow the appeal, quash the conviction and set aside the sentence of the trial court. I subsequently order the immediate release of the appellant unless he is otherwise held for a lawful cause.

DATED and DELIVERED at Moshi this 9th of June, 2023.



J. L. MASABO

JUDGE