IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., MAIGE, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 417 OF 2020

RAMADHANI KASIMU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Cour of Tanzania at Arusha)

(Mzuna, J.)

dated the 10th day of July, 2020
in
Criminal Appeal No. 64 of 2019

JUDGMENT OF THE COURT

4th & 13th December, 2023

MWARIJA, J.A.:

The appellant, Ramadhani Kasimu was charged in the District Court of Ngorongoro with the offence of rape. According to the charge sheet, he was charged under s. 130 (2) (e) and 131 (1) of the Penal Code, Chapter 16 of the Revised Laws. It was alleged that, on 27/3/2019 in the evening at Mugongo Village within Ngorongoro District in Arusha Region, the appellant did have carnal knowledge of "N.A", a girl aged six (6) years. For the purpose of hiding her identify, she shall hereinafter be referred to as the victim or PW4. The appellant denied the charge but after the trial court had conducted a full trial, it found him guilty and consequently,

convicted and sentenced him to life imprisonment. He was aggrieved by the decision of the trial court and thus appealed to the High Court. His appeal was unsuccessful hence this second appeal.

The background facts giving rise to the appeal may be briefly stated as follows: On 27/3/2019, Severina Kamega (PW3) noticed that the victim was walking with difficulty. When asked by PW3 as to what had happened to her, the victim replied that someone *"did bad thing"* to her, meaning that someone did have carnal knowledge of her. In her evidence, PW3 testified that the matter was immediately reported to the Village Executive Officer. Later on, she went on to state, the appellant was arrested at Matanda area followed by the arrest of two other suspects. It was PW3's further evidence that, in the presence of a group of people, the victim identified the appellant among the three suspects.

The Village Chairman, Patrick Geledi (PW2) was also informed of the incident on 28/3/2019. According to his evidence, when he questioned the victim who had been taken before him, she told him that she was raped by the appellant. On the next day, that is on 29/3/2019, the appellant was arrested and taken to police station.

At the police station, the victim was interviewed by Benezeth Bwikilo (PW1), a Social Welfare Officer. According his evidence, the victim told

him that she was raped by the appellant. After that information, in the company of WP 11544 PC Lucia (PW6), PW1 took the victim to Hospital for medical examination. At the Hospital, she was examined by Dr. Angela Meipuki (PW5). In her evidence, PW5 testified that, upon examining the victim which she did two days after the date of the incident, she found that she had bruises in her vagina and concluded that the victim was raped. PW5 found also that the victim had fungus in her private parts. On her part, the victim (PW4) gave evidence that, on the material date, someone called and asked her to buy a cigarette for him. When she went back, that person *"did bad thing"* to her (raped her). She said that she knew that person by the name of Rasi.

In his defence, the appellant disputed the evidence adduced by the prosecution. He testified that, he had grudges with the victim's neighbours and thus framed the case to victimize him. He tressed that the evidence was cooked.

In its decision, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. It relied on the evidence of PW3 and PW2 to the effect that, the victim named and identified the appellant as the person who raped her. It also acted on the victim's evidence, supporting its finding with the case of **Ndikumana Philipo v. Republic,** Criminal Appeal No. 276 of 2009 in which the principle that the

true evidence of rape has to come from the victim was underscored. As to the appellant's defence, the trial court found that it did not raise any reasonable doubt in the prosecution case.

The decision of the trial court was upheld by the High Court on appeal. Like the trial court, the learned first appellate Judge found that the appellant was properly identified by the victim. He found that, although three suspects were arrested, the appellant was identified among them. He reasoned that, from the circumstances of the offence, whereby the victim had named the place where the offence was committed and because the offender was with the victim alone, his identification was properly made and thus it was not necessary to conduct identification parade. The learned first appellate Judge found further that, the victim had known the appellant before the date of the incident allegedly because, as testified by PW3, he was the victim's neighbnour. He was also of the view that, since the victim had been found to be a credible witness, by virtue of what was stated in the case of **Selemani Makumba v. Republic**, [2006] T.L.R. 379, that the true evidence of rape has to come from the victim, the evidence of the victim sufficiently proved the case against the appellant beyond reasonable doubt.

In this appeal, the appellant had initially raised a total of 10 grounds of appeal. At the hearing however, he abandoned grounds 1, 2 and 7.

The remaining grounds upon which the appeal is predicated are hereby paraphrased as follows:

3. *That, the High Court erred in law and fact in upholding the appellant's conviction which was based on the evidence of the victim (PW4) recorded in contravention of s. 127 (2) of the Evidence Act, Chapter 6 of the Revised Laws.*
4. *That, the High Court erred in law and fact in failing to find that there was uncertainity as regards the date of commission of the offence due to the variance between the charge and the evidence of PW4 on that aspect.*
5. *That, the High Court erred in law and fact in sustaining the decision of the trail court while the appellant's conviction was based on weak and unreliable identification evidence.*
6. *That, the High Court erred in law and fact in failing to find that, the trial court had wrongly acted on exhibit P1 because its contents were not read out in court after its admission in evidence.*
7 *. . . . N/A*
8. *That, the High Court erred in law and fact in sustaining the appellant's conviction while*

the evidence of PW1, PW2, PW3, PW5 and PW6 acted upon by the trial court to found the appellant's conviction was totally hearsay.

9. *That, the High court erred in law and fact in sustaining the appellant's conviction while the case against him was not proved beyond reasonable doubt.*
10. *That, the High court erred in law and fact in failing to find that the trial court did not consider the appellant's defence.*

On the date of hearing of the appeal, the appellant appeared in person, unrepresented. On its part, the respondent Republic was represented by Ms. Amina Kiango, learned Senior State Attorney assisted by Mr. Charles Kagirwa, learned Senior State Attorney, Ms. Tusaje Samwel, Mr. Stanslaus Halawe and Ms. Helena Sanga, all learned State Attorneys.

For reasons which will be apparent herein, we wish to start with the 4th, 5th and 9th grounds of appeal. In the 4th ground, the appellant challenges the competence of the charge by arguing that, the same is at variance with the evidence. It was his submission that, whereas it is stated in the charge that the offence was committed on 27/3/2019, the witnesses gave contradictory evidence on that fact. He made reference

to the evidence of PW3, PW4 and PW5 contending that, their evidence varied as regards the date on which the offence was committed. He submitted that, while on his part, PW4 stated that she was carnally known by the appellant on 27, without mentioning the month and the year, PW3 said that he saw the victim on 27/3/2019 and noticed that she was limping. When she questioned her, the victim explained that she was raped by the appellant two days before the date on which she met PW3 who noticed that she was walking with difficulty.

The appellant argued further that, the evidence of PW5 differed with that of PW3 because, according to PW5 who examined the victim on 29/3/2019, the victim was raped two days before the date of her medical examination, meaning that the offence was committed against her on 27/3/2019. Relying on the cases of **Mustafa Darajani v. Republic,** Criminal Appeal No. 277 of 2008 and **Abel Masikiti v. Republic,** Criminal appeal No. 24 of 2015 (both unreported), the appellant urged us to allow this ground of appeal and hold that the charge against him was not proved.

In reply to the submission made in support of this ground of appeal, Ms. Kiango argued that, the failure by PW4 to mention the month and the year on which the offence was committed against her is not a fatal irregularity because the witness was a child of tender age. The learned

Senior State Attorney submitted that, in any case, the fact that the offence was committed on 27/3/2019 was not disputed by the appellant at the trial. She submitted thus that, the cases cited by the appellant are not applicable because in the case at hand, the date of commission of the offence was ascertained.

We need not be detained much in deciding this ground of appeal. As submitted by the learned Senior State Attorney, during the trial, the appellant did not dispute that the offence was committed on 27/3/2019 as stated in the charge sheet. In our considered view, the contradictory evidence of PW3 that, the offence was committed on 27/3/2019 but at the same time stating that she was told by PW4 that she was raped two days before she met her on 27/3/2019, goes only to the credibility of PW3's evidence but not to the root of the case. The position is that, although PW4 did not state the month and the year in which the offence was committed but only named the date, the evidence of PW5 who conducted medical examination on the victim, shows clearly that the offence was committed on 27/3/2019. There is therefore, no variance between the charge and the evidence such as to render the charge defective as alleged by the appellant. We find this ground to be devoid of merit.

With regard to the 5th and 9th grounds of appeal, starting with the 5th ground, the appellant argued that, the prosecution evidence did not prove that he was the person who raped the victim. He contended, **first,** that the victim did not give the description of the culprit, **secondly,** that from the evidence of PW3, the victim pointed out the appellant among the three arrested persons and that shows that she did not name the appellant prior to his arrest. **Thirdly,** that the evidence of the purported identification of the appellant among the three persons was invalid because the same was not obtained from identification parade. The appellant stressed that the prosecution had failed to adduce evidence on how and at whose instance the three persons were arrested. Relying on the cases of **Marwa Wangiti Mwita** [2002] T.L.R 39 and **Jaribu Abdalla v. Republic**, Criminal Appeal No. 220 of 1994 (unreported), the appellant argued that, since the prosecution did not conduct an identification parade, the trial court erred in relying on insufficient evidence of identification to convict him.

On the 9th ground, the appellant argued that, the evidence of PW4 that she was raped by the appellant is doubtful because she only named the culprit by one name of Rasi. He argued further that, since from the evidence of PW5, the victim was found with fungus in her private parts, the possibility that the bruises were caused by the fungus could not be

eliminated and in that regard, there is reasonable doubt that she was raped.

In response, Ms. Kiango opposed the arguments made by the appellant. She argued that, the prosecution evidence sufficiently proved the offence to the required standard. According to the learned Senior State Attorney, since both the trial court and the High Court had believed PW4 as a credible witness, this Court should find that the case against the appellant was proved beyond reasonable doubt. She argued further that, the evidence of PW4 was supported by the evidence of the other witnesses who, by virtue of what was stated in the case of **Goodluck Kyando v. Republic** [2006] T.L.R. 363, deserve to be believed unless there are good reasons to disbelieve them.

We have duly considered the submissions of the appellant and the learned Senior State Attorney on grounds 5 and 9 of the appeal. The crucial issue here is whether or not there was sufficient identification evidence linking the appellant with the offence. In answering the issue, we find it instructive to begin by looking at the principle regarding the probative value of evidence of visual identification as stated in the famous case of **Waziri Amani v. Republic** [1980] T.L.R. 250. In that case, the Court observed *inter alia* as follows:

> *". . . evidence of visual identification, as Courts in East Africa and England have warned in a number of cases,* ***is of the weakest kind and most unreliabie.*** *It follows therefore, that no court should act on evidence of visual identification* ***unless all possibilities of mistaken identity are eliminated*** *and the court is fully satisfied that the evidence before it is absolutely watertight."*
>
> *[Emphasis added]*

In the case at hand, PW4 was the only witness who, according to her evidence, identified the appellant. Both the trial and the first appellate courts believed her evidence. It is trite rule of practice that the Court cannot interfere with concurrent findings of facts by two courts below unless it is shown that there has been a clear misapprehension of evidence, violation of a principle of law or practice and where such a finding has resulted into a miscarriage of justice. See for instance, the cases of **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 and **Felix Kichele and Another v. Republic,** Criminal Appeal No. 159 of 2005 (both unreported).

In his finding that the appellant was properly identified, concurring with the trial court, the learned first appellate Judge held as follows in his judgment at page 66 of the record of appeal:

"PW3 said the appellant and the victim are neighbours. The offence was committed at day time. I am satisfied she knew her well even without describing his physique and attire.

I say so because, as well submitted by the learned State Attorney, PW4, the victim, identified the appellant as the person who did bad thing to her after she was sent to buy him cigarettes. She even mentioned the place where the incident happened, that is the appellant's home . . . Even the argument that the victim never knew him did not feature at the trial court. It is too late over the day to raise it on appeal."

The learned Judge went on to observe as follows:

"I have taken note of the fact that there were arrested three persons but the victim identified the appellant as the one who raped her. The record is silent who monitored such identification. This defect however does not create any doubt such that the need for conducting identification parade should be relevant in a situation where identification was not at issue."

Having gone through the evidence of PW3 and PW4 as regards the appellant's identification, we find, with respect, that the two courts below misapprehended the evidence. In her evidence, even though she named the appellant as Rasi, PW4 did not state that she had known him before

the date of the incident. This is also clear from the evidence of PW3. According to her evidence, the victim identified the appellant, who was one of the three persons suspected to have raped her. The three persons were arrested after the incident. The relevant part of PW3's evidence at pages 10 and 11 of the record of appeal is as follows:

> *"She [PW4] identified the accused in front of many people who were there."*

When she was re-examined, the witness said that:

> *"They were arrested three people, but the victim identified the accused persons (sic) the one who raped her."*

Apart from the prosecution's failure to lead evidence on what led to the arrest of the three persons, the purported evidence of identification of the appellant *"in front of many people"* as adduced by PW3, would not in our considered view, be acted upon as a valid evidence of identification. In the particular circumstances of this case, if was necessary to conduct identification parade.

On the basis of the above stated reasons, we find that, contrary to the holding of the learned first appellate Judge, the evidence of identification relied upon by the prosecution is tainted with serious doubts hence unreliable. We thus allow grounds 5 and 9 of the appeal and find that, the case was not proved beyond reasonable doubt. The finding on

these grounds suffices to dispose of the appeal and there is thus no need to consider the remaining grounds of appeal.

In the event, we allow the appeal, quash the conviction and set aside the sentence. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

DATED at **ARUSHA** this 12th day of December, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2023 in the presence of the appellant in person and Mr. Stanslaus Halawe, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL