

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)**

AT DODOMA

CRIMINAL APPEAL NO. 96 OF 2022

*(Appeal from the conviction and sentence of the District Court of Kondoa in
Criminal Case No. 56 of 2021 Hon. M. M. Mvungi-RM)*

RICHARD IBRAHIMU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Date of last order: 28/8/2023

Date of judgment: 28/11/2023

KHALFAN, J.

Richard Ibrahimu, hereinafter referred to as the appellant, was arraigned before the Kondoa District Court (hereinafter referred to as the trial court), charged with one count of rape contrary to sections 130(1) (2)(a) and 131 (1) of the Penal Code [CAP 16 R.E 2019 now R.E 2022].

It was the prosecution's case that, the appellant on 27th July 2021 at Kambini area in Paranga village within Chemba District did have sexual intercourse with an adult woman without her consent. For the purpose of

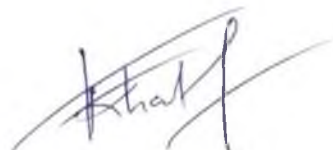


hiding her identity, the woman shall be referred to as PW1 or simply the victim.

The appellant pleaded not guilty, hence full trial ensued. In the attempt to prove their case beyond reasonable doubt the prosecution called a total of five witnesses and tendered one documentary exhibit. The appellant was the sole witness for the defence. After hearing the parties, the trial court was convinced that the case against the appellant was proved to the hilt hence it convicted and sentenced him to serve 30 years imprisonment.

A brief factual background leading to the arraignment of the appellant before the trial court is necessary. It goes thus; in the night of 27/7/2021 while the victim was enjoying her slumber, the door of her house was pushed open by a person she identified to be the appellant herein. After getting inside, the appellant suppressed the victim on the bed and grabbed by her neck threatening her that if she would raise alarm, he would kill or slaughter her.

PW1 narrated that after a struggle, the appellant had undressed his trouser and inserted his penis into the victim's vagina. After the appellant has satisfied his sexual gratification, he fled away. PW1 stated that she cried

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for help whereby PW2 responded but on his arrival, he found the appellant had already left.

In his testimony, PW2 narrated that he heard the victim's crying for help, he therefore rushed to the victim home and he was able to see the appellant running away from the victim's house. PW2 asked the victim what had happened and the latter informed the former that she was raped by the appellant.

The report was made to the police and the victim was taken to Chemba District Hospital where she was attended by PW3 an assistant medical doctor. She narrated that she examined the victim's vagina and found that she had bruises on labia minora as well as cervical OS which suggested that a blunt object had penetrated the victim's vagina. PW3 tendered before the trial court the victim's PF3.

PW4 a militia arrested the appellant and took him to Chemba Police station where he was interrogated by PW5. PW5 told the trial court that in the course of the interrogation the appellant admitted to have raped the victim.



In his defence, the appellant denied to have committed the offence and he claimed that the case against him was fabricated.

Having heard the parties, the trial court convicted the appellant and sentenced him as I have indicated above.

The appellant was aggrieved with both conviction and sentence meted out against him hence he preferred the instant appeal with eight grounds of appeal which can be paraphrased as follows:

- 1. The prosecution did not prove the case beyond reasonable doubt.*
- 2. The trial court failed to draw an inference adverse to the prosecution for failure to tender the appellant's cautioned statement.*
- 3. There was contradiction between the evidence of PW1 and PW5 regarding time and date.*
- 4. The trial court wrongly relied on exhibit P1.*
- 5. There was no proper identification of the appellant.*
- 6. There was delayed arraignment of the appellant as he was arrested on 27/7/2021 and arraigned on 11/8/2021.*
- 7. The appellant's defence was not considered.*
- 8. The conduct of the appellant was not taken into account as it shows that he never committed the offence.*



When the appeal was called on for hearing, the appellant appeared in person while the respondent was represented by Mr. Henry Chaula learned state attorney.

When the appellant was called upon to expound the grounds of appeal, he prayed for the court to adopt them to form part of his submission. He had nothing further to elaborate.

On his part, Mr. Chaula resisted the appeal. He submitted that the case against the appellant was proved beyond reasonable doubt since there was evidence by the victim which was corroborated with that of PW2. He contended that PW1 was able to identify the appellant to be her rapist. The identification evidence was supported by that of PW2. There is also the evidence of PW3 who received and attended the victim and her evidence proved that there was penetration of the victim's vagina by a blunt object.

As to the second ground, Mr. Chaula pointed out that the said allegations lack merits since the witnesses were called to testify and they were able to prove the offence.

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On the third ground, Mr. Chaula contended that contradiction complained of was minor and it did not go to the root of the matter hence he urged the court to disregard it.

Responding to the fourth ground of appeal, Mr. Chaula maintained that penetration was done by a blunt object and penis can be also a blunt object. Regarding the complaint of identification, Mr. Chaula maintained that there was correct identification of the appellant as PW1 was able to identify the appellant by the aid of solar light. Mr. Chaula pointed out that it is immaterial as to how big the room was.

As to the delayed arraignment, Mr. Chaula maintained that no injustice was caused to the appellant with such delayed arraignment. The learned state attorney maintained that the appellant's defence was considered by the trial court.

Referring to the last ground, Mr. Chaula contended that it lacked merits as the appellant could not escape since he had nowhere to go. He therefore urged the court to dismiss the appeal for lack of merits.

The appellant had nothing to rejoin.



Having gone through the record and rival submissions of the parties, the point for determination is whether the appeal has merits.

In determining the appeal at hand, this court sitting on the first appeal has the duty in form of rehearing to reappraise the evidence on record and where possible the court may come out with its own findings. This salutary principle of law was underscored in the case of **Nykwama Ondare @ Okware vs Republic** Criminal Appeal No. 507 of 2019 Court of Appeal of Tanzania at Musoma (unreported).

The first ground of appeal is general one; its determination is dependent on the determination of other grounds of appeal. It is settled law that the best evidence in sexual offences comes from the victim herself. This position of the law was underscored in the case of **Selemani Makumba vs Republic**, [2006] T.L.R 379 The Court of Appeal of Tanzania stated as follows:

"The true evidence of rape has to come from the victim if an adult that there was penetration and no consent and in the case of any other woman where consent is irrelevant that there was penetration."



In the instant matter, PW1 claimed to have been raped, in which she stated that her assailant inserted his penis into her vagina. This piece of evidence is corroborated by that of PW3 the medical doctor who attended the victim and found some bruises which might have been caused by a blunt object. Hence, in reference to the victim's evidence, it is without doubt that she was raped. I have taken into account the arguments by the appellant that a penis is not a blunt object but rather stiff body flesh and found the same lacking merits. Therefore, outright, the fourth ground of appeal lacks merits.

Having found that the victim was raped, the next point for determination is whether it is the appellant who committed such offence which essentially is the appellant's gist of complaint in ground 5 of the appeal.

Going by the record, it is without doubt that the alleged offence was committed in the night. Thus, the evidence on visual identification comes into play. The law is well settled on the import of visual identification and conditions for relying upon it and for a court to find conviction. There is a plethora of decisions to the effect that such evidence should not be relied upon unless the court is satisfied that the evidence is watertight and all

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possibilities of mistaken identity are eliminated (See: **Waziri Amani vs Republic** [1980] TLR 250, **Emmanuel Luka and Others vs Republic**, Criminal Appeal No. 325 of 2010 and **Omari Iddi Mbezi and 3 Others vs Republic**, Criminal Appeal No. 227 of 2009 and **Taiko Lengei vs Republic**, Criminal Appeal No. 131 of 2014 (both unreported))

In the case of **Waziri Amani vs Republic** (supra), the Court of Appeal laid down some guidelines for consideration in establishing whether the evidence of identification is impeccable. These include:

- i. The time the culprit was under the witness observation,*
- ii. Witness's proximity to the culprit when the observation was made, the duration the offence was committed,*
- iii. If the offence was committed in the night time, sufficiency of the lighting to facilitate positive identification,*
- iv. Whether the witness knew or had seen the culprit before the incident and description of the culprit.*
- v. Furthermore, mention of the culprit's peculiar features to the next person the witness comes across after the incident further solidifies the evidence on identification of the culprit, especially when repeated at his first report to the police officer who interrogates him.*



In the instant matter, the victim narrated that she was able to identify the appellant by the aid of solar light and she said that the light was very bright. She said that she knows the appellant as he is her neighbor. Moreover, the victim stated that there was a struggle which lasted for a while before the appellant raped her. The victim was able to identify the appellant by the clothes he wore on the fateful night. Apart from the victim's evidence, there is evidence of PW2 who responded to the alarm raised by the victim, he stated upon arriving at the victim's house he saw the appellant running out of the victim's house and he (PW2) was able to identify the appellant by aid of the solar lights that were outside the victim's house.

I am of the settled mind that the appellant was properly identified at the scene of the crime. Thus, I am of the settled view that it is the appellant who raped the victim. I have considered that in his defence, the appellant told the trial court that he does not have any grudges with the victim, hence I find there was no way the victim could implicate the appellant with such serious a offence.

That being so, the fifth ground of appeal lacks merits and it is accordingly dismissed. Equally, the second ground of appeal follows suit



because the evidence of the victim was sufficient to establish the offence in the absence of the appellant's cautioned statement.

Concerning the complaint that there was a delayed arraignment of the appellant, it is not in dispute that the appellant was arrested on 27/7/2021 and he was arraigned before the trial court on 11/8/2021. There was no explanation as to why there was a delay to arraign the appellant before the trial court. However, the appellant was required to cross examine PW5 on that aspect since he was the investigator of the case, and he took the case file to the national prosecution office at Kondo. Nevertheless, I am of the settled view that there is no way such delayed arraignment caused injustice to the appellant. Therefore, the sixth ground of appeal lacks merits and it is accordingly dismissed.

As to the contradictions pointed out by the appellant between the evidence of PW1 and that of PW5, I find such complaint lacking in merits. The reason is that PW1 stated clearly that the incident happened on 27/7/2021 at 00.00 hours while PW5 was handed the case file on 27/7/2021 at 12.00 hours. These are different hours of the same day. The contradiction, if any, is very minor and does not go to the root of the matter. The third ground of appeal lacks merits and the same is accordingly dismissed.



On the seventh ground of appeal in which the trial court is being faulted for not taking into account of the appellant's defence; I am satisfied that the appellant's defence was taken into account as vividly seen on page 17 through 18 of the typed judgment by the trial court. Indeed, the trial court considered the appellant's claim that the case against him was fabricated and found that there was no evidence to prove the appellant's claims. Consequently, the seventh ground of appeal lacks merits and it is hereby dismissed.

As to the appellant's conduct after the commission of the offence, I am at one with the submissions by Mr. Chaula that it has nothing to do with the case at hand. Therefore, the eighth ground of appeal lacks merits and it is hereby dismissed.


Lastly, this brings to the first ground of appeal which the appellant claimed that the case against him was not proved beyond reasonable doubt. Basing on my brief analysis while addressing the fifth ground of appeal as well as other grounds, I am of settled view that the case was proved beyond reasonable doubt and appellant was properly convicted and sentenced.



In the upshot and for the foregoing, I find the appeal lacking in merits the same is dismissed in its entirety. The conviction and sentence meted out against the appellant by the trial court are hereby upheld.

It is so ordered.

Dated at Dodoma this 28th day of November 2023.

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F. R. KHALFAN,

JUDGE