IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL No. 99 OF 2023

(Originating from Criminal Case No. 413 of 2022 of the District Court of Mkuranga at Mkuranga)

RAMADHANI RAMADHANI @ KINYAMGUNDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 14/11/2023

Date of Judgment: 17/11/2023

MWAKAPEJE, J.:

The Appellant herein was charged, convicted and sentenced by the District Court of Mkuranga at Mkuranga to serve 30 years imprisonment for the offence of rape contrary to section 130(1)(2)(e) and 131 (1) of the Penal Code, Cap. 16 [R.E.2019].

The background of this appeal is that on 31 August 2022 at about 1600 hrs at Mkuranga village within the District of Mkuranga, the Appellant had sexual intercourse with "BC" a girl of 12 years old. For purposes of decency, the name of the victim is concealed. In proving the case the prosecution side lined five(5) witnesses who are Mohamed

Mbwele (PW1); BC (PW2); Dr. Atasia Mlimakifye (PW3); Upendo Mramba (PW4); and WP 6156 D/CPL Sanura.

It was PW1's testimony that on 31 August 2022 when he returned home at around 1800 hrs, he did not see BC (PW2) at home. When he asked about her whereabouts he was told that she was sent to take food to her aunt. When he was about to inquire more, a knock at the door was heard, and it was BC. When asked where she was she muted but later PW1 called his sister PW4 to inquire more. BC opened up and told her aunt that she was with a certain man who is a carpenter in an unfinished house where she was raped. A PF3 was obtained and the same was reported to the Police.

BC informed the court that when she was sent to bring food to her aunt, she was called by the Appellant who took her to an unfinished house. Therein the Appellant undress her and himself and raped her. PW3 the Medical Doctor on the material date examined BC and she found BC's vagina was wet so was the underpants. The vagina was discharging mucus. She therefore recommended that BC was raped. PW4 on her part stated that BC was sent to her to inquire where she was. BC informed her that she was raped by a carpenter on her way to take food to her aunt. She examined her and found that her vagina was wet. She therefore,

accompanied her to the hospital and the matter was reported to the police. PW5 the investigator told the court that then investigated the matter and PW2 took them to where the Appellant was working and where he was arrested.

The Appellant, on the other hand, contended that he was out of his office. He started the work on 25 August and finished on 03 September 2022 at Kiguza. He was going to Kiguza with his fellow Carpenters every morning. On 4 September 2022, he was arrested for rape charges. The trial court after evaluation of evidence on record convicted and sentenced the Appellant accordingly. Aggrieved by the findings he appealed to this Court. The Appellant's grounds of appeal are thus:

1. *That the learned trial magistrate erred in holding the Appellant's Conviction which was predicated upon incredible and unreliable Visual identification evidence of PW2.*
2. *That the learned trial magistrate grossly erred in law and fact by convicting the Appellant relying on the untruthfully, unreliable and incredible evidence of PW2 who changed her tracks from time to time when asked to do so when asked what transpired on 31 August 2022.*

3. *The learned trial magistrate erred in law and fact by convicting the Appellant based on the evidence of PW1, PW2, and PW4 which were contradictory, unreliable and with material inconsistencies hence rendering their story highly improbable against the Appellant.*
4. *That the learned trial magistrate grossly erred in law by convicting the Appellant based on the incredible oral evidence of PW3 while failing to realize that she did not properly establish her credentials/qualifications to ascertain that she was a professional Doctor.*
5. *That the learned trial magistrate grossly misdirected herself in law by holding to the admissible oral evidence of PW3 who failed to clarify whether there was penetration of a blunt object in PW2's vagina or bruises hence rendering her evidence lacking evidential value.*
6. *That the learned trial court erred in law and fact by adding some words in the judgement which were not born on (PW2) record.*
7. *That the learned trial Court erred in law and fact by simply rejecting the defence of alibi against the Appellant.*

8. *That the learned trial Court grossly erred in law and fact by failure to observe the Case for the prosecution side was not proved beyond reasonable doubt.*

The parties argued the appeal by way of written submissions. The Appellant on his first, second and third grounds of appeal stated that a 12-year-old girl couldn't keep quiet during intercourse with a 32-year-old man in her first-time incident. He further stated that the evidence adduced by the prosecution witness was contradictory. According to PW4, it is stated that BC informed her that it was the second time the Appellant raped her while in her testimony she stated that it was her first time to have sexual intercourse. It is from this testimony and that of PW5 that the Appellant is of the opinion that the testimony of PW1, PW2, and PW4 were contradictory, unreliable, incredible and inconsistent rendering the story against the Appellant improbable.

The Appellant on the fourth and fifth grounds of appeal stated that the testimony of PW3 in her findings did not elaborate on what caused the vagina to discharge mucus in addition PW3 did not say if there were sperms, blood or bruises in the vagina since it was the first time BC was having sexual intercourse. He therefore questioned her professional qualifications.

Concerning the sixth ground of appeal, the Appellant contends that the learned trial magistrate was not justified to add words in the judgement that were neither in the proceedings nor stated in court. The trial magistrate inserted such words as "- - - - *PW3 a medical doctor who examined BC told this court that there were bruises and semen in BC's vagina.....*" The Appellant's contemplation with the addition of such words in a judgment is that his conviction and sentence were intended.

The Appellant's seventh ground of appeal is that his defence of *alibi* was despite being supported by other witnesses who tendered testimony in court that on the material date were with the Appellant at Kiguza working together. He referred to the case of **Ijali Juma Kocho vs Republic 1994 TLR 206 (CAT).**

In the last ground of appeal, the Appellant was of the view that the prosecution did not prove the case against him beyond reasonable doubt. He supported his contention with the cases of **Gabriel Simon Mnyele VS. Republic, Criminal Appeal No. 437 of 2007 (CAT) (unreported).**

The Respondent on the other hand in reply to the submission by the Appellant, stated in the first ground that the incident took place in the daylight. BC also managed to identify the Appellant since they live, the

Appellant is known, and there was enough time to observe, hence there was no way one could say there was mistaken identity. He further stated that the conditions in identifications outlined in the case of **Waziri Amani** were met.

It was the contentions of the Respondent in the second and third grounds appeal that it is true there are minor contradictions between PW1, PW2 and PW3 but the same does not go to the root of the case. The Respondent relied on the case of **Samwel Abraham @ Chuma Republic, Criminal Appeal No. 531 of 2020**. Further, the Republic stated in their submission that the best evidence to prove the case of rape comes from the victim. Reliance on this point was on the case of **Seleman Mkumba vs. Republic [2006] T.L.R. 379** that BC's evidence before the trial Court was sufficient enough to prove the offence of rape.

About the qualifications of PW3 on the fourth and Fifth grounds of appeal, the Respondent conceded but stated that the same is not fatal as it did not prejudice the accused the Appellant. The Respondent was of the View that the Appellant was given the opportunity to cross-examine PW 3 but did not question her medical qualifications. He leaned his argument on the Case of **Shomari Mohamed MKwama Republic, Criminal Appeal No. 606 of 2021 CAT at DSM**. However, the Respondent was

of the view that an eye witness entitled to credence and their testimony should be believed to be true. The Respondent referred this court to the case of **Halfan Ismail @ Mtepela VS. Republic, Criminal Appeal No. 38 of 2019, TZCA (unreported).** It was therefore the contention of the Respondent that PW3 was clear in her evidence. What she found correlates with the evidence of PW2.

The Respondent agreed with the Appellant on the sixth ground that the learned trial magistrate added in her judgment, words not in the proceeding. The Respondent was of the view that even when such words are removed, they do not affect the already available evidence which was sufficient to convict the Appellant.

On the seventh ground as far as the defence of *alibi* is concerned, the Respondent was of the view that the Appellants ought to have applied the provisions of section 194(4) and (5) of the Criminal Procedure Act, Cap. 20 [R.E. 2022] as he did not notify the court and prosecution of his intention to rely on the defence of *alibi*. The Respondent further stated that even if in **Ijali Juma Kocho vs Republic (1994) TLR 206** *alibi* was to be considered if the accused brought his witnesses those he was with. However, the Respondent was of a different view that the Appellant

brought his co-workers who have common interests. According to the prosecution, the defence of an *alibi* was an afterthought.

On the eighth ground of appeal, the Respondent contended that a case against the Appellant was proved on the standard required in criminal proceedings. According to the Respondent, the evidence of PW2 (the victim) that she was taken to an unfinished house by the Appellant, who removed her clothes and inserted his penis into her vagina proves the offence of rape because the best evidence comes from the victim as stated in the case of **Selemani Mkumba** (*supra*). It is from this submission the Respondent was of the view that the case against the Appellant was proved beyond reasonable doubt hence the appeal should be dismissed.

After considering the grounds of appeal and submissions by the parties the issue at this juncture is to find out whether a case against the Appellant was proved beyond reasonable doubt.

In determining the appeal at hand, I will address the grounds of appeal as submitted by the parties. The Appellant in in his first three grounds was contesting his conviction based on poor visual identification, unreliability of the prosecution witnesses and contradiction of prosecution witnesses.

The issue of visual identification as propounded in many decisions, especially the most prominent one of **Waziri Amani (*supra*),** is ordinarily weak and most unreliable. Therefore, courts are to act upon such evidence after warning themselves and ensuring that all possibilities of mistaken identity have been eliminated. See **Crospery Gabriel and Another versus The Republic; Criminal Appeal No. 232 & 233 of 2014: Court of Appeal of Tanzania at Bukoba (Unreported).**

The guides of visual identification in **Waziri Amani's** case require that a witness should be able to tell

(i) *How long he had the accused under observation; What was the estimated distance between the two;*

(ii) *If the offence occurred at night which kind of light existed and what was its intensity;*

(iii) *Whether the accused was known to the witness before the incident; and*

(iv) *Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like which may have interrupted the latter's concentration*

In the circumstances of case at hand, the incident took place in the daylight at 1600 to 1800 hrs as per PW2's testimony when cross-examined. PW2 stated to have known the Appellant beforehand and of course according to her testimony, she had ample time to observe the Appellant. The question of description comes in circumstances where the the witness sees the culprit for the first time. See the case of **Ayubu Zahoro v. Republic, Criminal Appeal No. 177 of 2004 (unreported).**

In the instant appeal, PW2's testimony was recorded as follows:

> *".....when I was on the way home, one person called me, I was near Kanisani Area" he called me by mluzi ("whistled"), ...I saw RAMADHANI (RAMA), and* ***my uncle told me later that the man is Rama****....., there was "a banda* ***near his workplace" Rama is a carpenter****, I* ***always see him when I pass through his carpentry workshop"*** [Emphasis supplied].

To me in the circumstances of the instant appeal were favourable and there was no question of mistaken identity. Proximity between them tells it all. She stated where the Appellant was found, where the carpentry workshop was and how she was called, where they were, the way she was seduced, and the way the duos conversed before the act:

".....Rama told me njoo huku, there was an unfished house. Rama aliniingiza kwenye hiyo nyumba na kuniambia kuwa ananipenda lakini namkatalia, alinipapasa kifuani na kwenye sehemu yangu ya kukojolea, alisema kuna kitu anataka afanye aliniambia nilale chini, nililala hapo chini, akanifunua sketi yangu na kunivua chupi kisha naye akavua suruali yake na kutoa mdudu wake wa kukojolea na kuingiza sehemu yangu ya kukojolea, sikupiga kelele alisema nisipige kelele kwani hatanifanya kwa nguvu"

Since the question of mistaken identity was raised by the Appellant, it is undisputed fact that in the circumstances of the instant appeal, PW2's testimony passed the criteria outlined in **Waziri Amani's** case. It would have been otherwise in an unfavourable conditions and in cases where the victim met with the Appellant for the first time.

On the issues of contradiction, unreliability, incredibility and inconsistency of evidence by prosecution witnesses, one has to consider the fact at issue in the present case and if the said contradictions touches the root of the case. The general principle however is that every witness is entitled credence and should be believed and his testimony accepted unless there are good cause of not believing so; see the cases of **Mohamed Said Matula v. The Republic [1995] T.L.R. 3** and

Goodluck Kyando v. R, [2006] TLR 363. In the present appeal, the trial court believed them to be true witnesses, something which I do not want to disturb at this stage of appeal.

In this appeal the Respondent has conceded there being contradictions between the prosecution witnesses i.e. PW1, PW2 and PW4. However, he was of the view that the same did not go to the root of the case, and that as humans, to err or forget is a common thing. Which I do prescribe to. In the appeal at hand, what is at stake is whether PW2 was raped and that he was raped by the appellant.

Other contradictory such as how many times to have sexual intercourse, why didn't she scream, e.t.c do not go to the root of the case; See the case of **Michael Haishi v. R. [1992] TLR 92.** All the said witnesses except PW3, in the instant appeal were informed PW2 of what transpired, hence it is possible for them to lose track. What matters is the victim's evidence; see the case of **Seleman Makumba'case (supra).** In the case of **Samwel Abraham @ Chuma vs Republic (Criminal Appeal No. 531 of 2020) [2023] TZCA 61,** it was stated that:

> "*.....,the victim was* ***consistent and coherent in her account as she gave a narration of how she was raped by the appellant and mentioned him at the earliest to her grandmother.*** . . .

In the instant appeal, BC's records in the trial court indicate that she was constant and unshakable during her testimony and even when cross examined by the appellant, she was firm and never lost track. In addition to that, it should be borne in mind that in rape cases it is not whether there were noises or not, penetration however slight that is what matters, since it constitutes sexual intercourse; see the case of **Abraham Iddi Alute alias Ngudu v R, Criminal Appeal 347 of 2017) [2019] TZCA 536; Omary Rashid alias Milanzi v R (Criminal Appeal 298 of 2021) [2023] TZCA 167; and Juma Said v R, (Criminal Appeal 449 of 2017) [2021] TZCA 530**. In fact, BC stated in her statement that the Appellant told her not to scream since the act wouldn't be performed vigorously. *"hatanifanya kwa nguvu"*. This ground is rejected.

Concerning the fourth ground of appeal, the appellant submitted that the trial court erred in relying its conviction on the testimony of PW3 who testified without his credentials established. This was the question in the case of **Filbert Gadson alias Pasco v R (Criminal Appeal 267 of 2019) [2021] TZCA 360 TanzLII** where the court of Appeal was faced with a similar situation regarding a clinical officer who went to testify in court. It was in this case that the Court of Appeal applied the definition of "*clinical officer*" as used in the case of **Charles Bode v. Republic, Criminal Appeal No. 46 of 2016 (CAT) (unreported)** adopting the

definition in *Wikipedia*. I also in the same spirit, use *Wikipedia* which defines a medical doctor as:

> *".....or simply doctor, is a health professional who **practices medicine,** which is concerned with promoting, maintaining or restoring health through the study, diagnosis, prognosis and treatment of disease, injury, and other physical and mental impairments." [Emphasis supplied]*

In section 3 of the Medical, Dental and Allied Health Professionals Act, 2017, a medical practitioner is defined as :

> *".....a person holding a degree, advanced diploma, diploma or certificate in medicine or dentistry from an institution recognized by the Council, with his level of competency and registered, enrolled or enlisted to practice as such under this Act"*

From this, I had chance to go through the trial court's records and I found that PW3 introduced himself as a medical doctor at page 17 of the typed proceedings of the trial court. In examination in chief he stated:

> *"....Medical Doctor at Kilimahewa Health Centre....My duties as a medical doctor are to treat patients and give medical advice. I have six years' experience."*

It is also settled law that in sexual offences, penetration can be proved orally by the victim and other witnesses without an expert opinion or oral evidence by experts and expert opinion cannot override oral evidence of a person who witnessed the incident and physically examined a victim of rape, and it is possible to prove penetration even in the absence of the medical exhibit; See the case of **Magina Kubilu alias John v R (Criminal Appeal 564 of 2016) [2020] TZCA 1750.** In the present appeal, the records show that PW3 he introduced himself as a medical doctor. This implied that had necessary qualifications to examine PW2 and testify in court accordingly. Hence PW3 he was a fit person to tender the PF3. I as well reject this ground of appeal as it does not hold water.

On the fifth ground that PW3 failed to clarify whether there was penetration of a blunt object in PW2's vagina or bruises hence rendering her evidence lacking evidential value. As stated earlier, it is important to note that in sexual offences penetration of a male organ into a female organ however slight, constitutes rape also evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent as per section 130 (4) (a) and (b) of the Penal Code, [Cap. 16 R.E.2019]; see also the case **Masam Kayeye**

v. Republic, Criminal Appeal No. 120 of 2017 (unreported). The findings of PW3 in the instant case on the PF3 were that there was penetration. That notwithstanding, PW2 was better placed to prove whether there was penetration or not. In the instant appeal, she did. See the case of **Patrick Lazaro and Another v R, (Criminal Appeal 229 of 2014) [2015] TZCA 296.**

Concerning the sixth ground of appeal, the Appellant contended that the learned trial court erred in law and fact by adding some words in the judgment which were not born on (PW2). I have noted the same as well at pages 2 and 9 of the trial court's judgment. The words inserted were:

> *"(a) That PW2 informed her uncle that she was somewhere having sexual intercourse with the appellant... (at page 2); and*
>
> *(b) That PW3 told the court that she found bruises on PW2's vagina. That he inserted a blunt object.....(at Page 9)"*

I agree with both the Appellant and Respondent that such words were not in the proceedings. The trial magistrate added them on her own motive which, to me, can be considered a serious breach of judicial conduct. In our judicial system, it is expected that magistrates base their judgments solely on the evidence and arguments presented by the parties involved in the case. Adding one's own words or altering the content of

what was actually said in court undermines the integrity of the judicial process. That being noted, I expunge the inserted sentences in the said judgment. Having expunged them however, the best evidence remains that of PW2 which is not affected and did not affect the ultimate findings of the said judgment.

Now turning to the seventh ground of appeal on alibi. The same was raised contrary to the procedure prescribed under section 194(4) of the Criminal Procedure Act, [Cap.20 R.E. 2022]. Section 194(4) provides:

> *"(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case."*

Where an accused person does not comply with this requirement the consequences are provided under subsection 6. Section 194 (6) provides that:-

> *"(6) If the accused raises a defence of alibi without having first furnished the particulars of the alibi to the court or to the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence".*

The trial court, notwithstanding the fact that the appellant never complied with the provision of section 194(4), at page 10 of the judgment considered his defence and accommodated the witnesses the Appellant relied on. However, their testimony was not given weight; see case of **Ijali Juma Kosho vs the Republic [1994] TLR 206.** Noting the defence I as well reject the same.

In the circumstances of this case, therefore, I am satisfied that the prosecution discharged their duty properly and proved the case against the Appellant beyond a reasonable doubt. I hereby uphold the conviction and sentence. Appeal dismissed.

THE HIGH COURT OF TANZANIA

G.V. MWAKAPEJE
JUDGE
17/11/2023

Right to appeal explained

Judgment is delivered in Court this 17 day of November 2023 in the presence of Mr. Said Seif, learned State Attorney for the Republic and the Appellant in person.

THE HIGH COURT OF TANZANIA

G.V. MWAKAPEJE
JUDGE
17/11/2023