IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A.,And MANDIA, J.A.)

CRIMINAL APPEAL NO. 241 OF 2007

COSMAS ALPHONCE ..... 2nd APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Moshi)

(Munuo, J.)

dated the 3rd day of May, 2000
in
Criminal Appeal No. 94 of 1999

JUDGMENT OF THE COURT

24th & 26th February,2010

RUTAKANGWA, J.A.

The appellant and one Jerome s/o John were arraigned before the District Court of Moshi with the offence of Attempted Rape. The charge was laid under sections 130 and 131 (i) of the Penal code. They were convicted as charged and sentenced to a prison term of thirty (30) years each. Their joint appeal to the High Court against

conviction and sentence was dismissed. Convinced of their innocence, they jointly lodged this appeal.

The appellant and Jerome had jointly lodged a thirteen-point memorandum of appeal. However, before the appeal was scheduled for hearing, Jerome John passed away while in prison on 10th July, 2008 and his appeal formally abated. There remained only Cosmas Alphonce who shall be referred to as the appellant, hereafter.

Following the death of Jerome, the appellant lodged an additional memorandum of appeal listing four grounds of complaint. All in all, having scrutinized both memoranda of appeal, we are satisfied that all the complaints boil down to two major issues. These are, first that the two courts below erred on the facts and in law in acting on totally unreliable recognition on evidence of the alleged victim, PW1 Scholastica Michael. Secondly, on the totality of the evidence, the prosecution failed to prove its case beyond reasonable doubt.

We are aware that this is a second appeal. As such our jurisdiction to interfere with the concurrent findings of facts arrived at by the two courts below is very much circumscribed. We are supposed to deal with questions of law. But we can interfere if it is shown that there was a misapprehension of the substance, nature and quality of the evidence by the courts below resulting in an unfair conviction see, for example, **SALUM MHANDO v R [1993] T.L.R. 170 and ABDALLA MUSA MOLLEL @ BANJOO**, Criminal Appeal No. 31 of 2008 (unreported). To justify our interference and/or non interference we shall have to look briefly at the nature and quality of the evidence that led to the appellant's conviction and how the courts below apprehended it.

The incriminating evidence came from PW1 Scholastica. She told the trial court that on 29th November, 1998 at about 19.00 hrs. she had gone to a shop situated close to her home to buy medicines for her child. On her every back she saw a group of about ten (10) young men ahead of her in a maize farm. As she was crossing a furrow separating her home and the shop, she was roughed up by

those youths. One them hit her on the face, while another one fell her to the ground. She was then undressed and three youths began to undress themselves. Before they could sexually assault her, two women approached the scene and her assailants took to flight. The two women were PW2 Maria Sirili and PW3 Maria Daudi.

Both PW2 Maria and PW3 Maria told the trial court that they nearly witnessed the incident which they said took place at 19.45 hrs. They found PW1 Scholastica half naked and they gave her a piece of khanga to cover herself and they led her to her home. Both witnesses categorically stated that PW1 Scholastica told them that she had not been raped, but "some young men" had robbed her of a wrist watch, a pair of trousers which she was putting on and cash Tshs 8,000/=. PW1 Scholastica never told them the names of those robbers who subsequently turned into near rapists as she reported to PW4 Modest Rimoi, later. To PW4 Modest, PW1 Scholastica reported that it was the appellant, the deceased Jerome and one Serafin Peter who had attempted to rape her. She never reported the robbery.

On the basis of this allegation, the appellant and Jerome were arrested, charged and convicted as already shown.

The appellant and Jerome denied the charge and each one raised a defence of alibi.

In convicting the appellant and Jerome the learned trial Principal District Magistrate in a sketchy judgment, discarded the evidence of PW2 Maria and PW3 Maria without assigning any reason. Instead, he said:-

> "... I will only have to rely on PW4 the chairman who said he was given the names of the suspects. His evidence fully corroborates that of PW1 and I accept her evidence that the two accused are among those who wanted to rape her on the material day..."

It is worth observing here that in the High court, the respondent Republic did not support the conviction of the appellant. It was its view that the prosecution had failed to prove its case. The learned first appellate judge disagreed.

In dismissing the appellants' appeal, the learned judge first conclusively found that they had been positively identified by PW1 Scholastica at the scene of the crime. She thus said:-

> " In the present case the complainant knew the appellant and a co- accused who is at large from before for they are co-villagers. It was at 7.00 p.m ***before darkness fell so visibility and the conditions*** of identification were favourable for none of the parties or even PW2 and PW3 who were the first to respondent (sic) to the victims cry for help suggested that there was darkness or poor visibility ..." [Emphasis is ours].

In order to reach a fair and objective decision in this appeal, we have opted to first assume that there was an attempt to rape PW1 Scholastica, although her first report to PW2 and PW3 negates this assumption. Our concern will be primarily on the identity of the culprits. Were the appellant and Jerome positively identified by PW1 Scholastica as her assailants?

The learned judge answered the above posed question affirmatively. She predicated her answer on the conceded fact that PW1 Scholastica and the identified assailants were village mates and visibility was clear paving way for an unmistaken identification. While we share the learned appellate judge's certitude that the appellant and Jerome were known to PW1 Scholastica as they went to school together, we respectfully differ with her in her unqualified assertion that darkness was yet to set in and the "conditions of identification were favourable". We have found no iota of evidence on record to sustain this assertion.

On the totality of the prosecution evidence, the assault on PW1 Scholastica took place between 7.00 p.m and 7.45 p.m. It was already night time. The evidence of the three prosecution witnesses is stark silent on whether there was light from any source which would have enabled PW1 Scholastica to make an unmistaken identification of her assailants. The matters were complicated by the fact that the incident allegedly took place in a maize farm and involved about ten (10) people. Under these circumstances the conditions could not be easily described as having been favourable.

It is trite law that where a witness is testifying about identifying another person in unfavorable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity .... etc: see' **CHALY SCANIA** v. R., Criminal Appeal No. 69 of 2005 (CAT), **HAROD SEKACHE @ SALEHE KOMBO v. R.,** Criminal Appeal No. 13 of 2007 (both unreported). PW1 Scholastica's evidence does not show

her wrist watch and cash Shs 8000/=. Had the appellant been one of those " young men" she would not have failed to mention him to the two witnesses who also happened to be their village mates. That PW1 Scholastica failed to do so, a fact which the two courts below failed to appreciate in their evaluation of her evidence, leaves us with no flicker of doubt on the fact that she actually never recognized the appellant among the youths who allegedly attempted to rape her. We should hasten to point out here that we have used the word "allegedly" deliberately. This is because her immediate report, to PW2 and PW3, was that her assailants, whoever they were, had not sexually molested her in any way. They had only "robbed" her of her personal property, she had said.

All said, we have found ourselves constrained to accept the appellant's grievances, which are shared by the respondent Republic that his conviction was based on very weak visual identification evidence which locked any cogency. We are, therefore, unable to sustain his conviction.

In fine, we allow this appeal in its entirety. The conviction of the appellant is accordingly quashed and set aside as well as the prison sentence of thirty years. The appellant should be released from prison forthwith unless otherwise lawfully held.

DATED at ARUSHA this 26th day of February, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.MJASIRI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL