IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., KILEO, J.A. And ORIYO, J.A.)

CRIMINAL APPEAL NO. 306 OF 2007

JOHN PASCHAL.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Bwana, J.)

dated the 17th day of July, 2007
in
HC Criminal Appeal No. 71 of 2004

JUDGMENT OF THE COURT

23 & 27 August, 2010

ORIYO, J.A.:

The appellant was charged before the District Court of Babati with the offence of **Rape** contrary to sections 130 and 131 of the Penal Code, Cap 16, R.E. 2002. The particulars of the charge as it appeared in the charge sheet read as follows: -

> *"That John Paschal charged on 11th day of April, 2003 at about 15.00hours at Hurui Village within Babati District and Manyara Region, did have carnal knowledge with one Mariam d/o Victory a girl of 15 years old."*

The appellant denied the charge and the prosecution called four witnesses to prove the charge. The trial court found the charge to have been proved beyond reasonable doubt. It convicted the appellant and sentenced him to a term of imprisonment of thirty (30) years.

The appellant was aggrieved and he appealed to the High Court at Arusha against the conviction and sentence. His appeal was unsuccessful, hence this second appeal.

The appellant lodged in this Court a Memorandum of Appeal with four grounds of appeal, on 12/8/009. When the appeal was called on for hearing, with leave of the Court, the appellant presented two additional grounds of appeal, making a total of six grounds of appeal. The issues raised were condensed as follows: -

(i) He was convicted on fabricated and contradictory evidence without calling the police investigator to testify.

(ii) Section 240 (3) of the Criminal Procedure Act was not complied with before admitting PF3.

(iii) The appellant defence was not considered and the burden of proof was shifted to the appellant.

At the hearing of the appeal, the appellant appeared in person, as was the case in the courts below. The respondent Republic was represented by Mr. Prosper Rwegerera, learned State Attorney.

Before we proceed to the merits of the appeal it is appropriate at this stage to state briefly the circumstances which led to the appellant's prosecution and conviction.

Mary Victory (PW1), the complainant was 15 years old when the offence was committed. According to the evidence on record, on the 11th day of April 2003 at about 3.00pm in the afternoon, the complainant was grazing cattle in a bushy area. The appellant appeared carrying a machete and a stick. He asked PW1 to:

"give him the vagina because it is the property of men."

When PW1 refused, the appellant assaulted her. He forcefully held her neck, fell her down, undressed her and proceeded to rape her. PW1 cried for help and some people responded by coming to her aid. These included PW2, Lucas Ona; PW3, Celina Qway and PW4, Joseph Dawite.

PW3 was the first to arrive at the scene. According to PW3's own version, she stated that: -

> *"...**when I approached the area there was long grass and saw the grass swinging.**"*

And on reaching the spot she found the appellant:

> *"...**lying on the victim while knowing her carnally and the victim was crying while the accused squeezed her neck.**"*

PW3 and the appellant knew each other before the incident as they were neighbours/village mates. She called out the appellant's name and remarked.

> ***"What are you doing John?"***

This prompted the appellant to get up. He then took hold of his machete and used it to scare off PW3 who in turn raised an alarm. Other people

responded to PW3's alarm including PW2 and PW4. On seeing the other people, the appellant ran away and escaped across a river to the other side. By then PW1 was lying on the ground unconscious, naked and bleeding from her private parts. At PW3's urge, PW2 and PW4 suspended their efforts to pursue the appellant and returned to the scene so as to try and rescue PW1's life. They took her to her parents where she regained consciousness in the night. The next day she was taken to the Ward Office where the incidence was reported and she was issued with a letter of identification/introduction to Galapo Hospital. At the hospital she was medically examined, treated and issued with a Medical Report, Exhibit "P1". On 13/4/2003, the appellant was arrested when he was hiding among the banana plantations. He was taken to the Police and eventually charged in court on 15/4/2003.

As already indicated above, the appellant, DW1, vehemently denied having had any sexual relationship with PW1. At the close of the prosecution case, DW1 stated that he would testify on oath and that he would call two witnesses. However on 1/3/2004, the appellant informed the court that he had elected to testify without calling witnesses.

Besides the appellant's denial of the offence, he alleged the existence of grudges between him and PW3 over his own shamba.

Submitting on the grounds of appeal generally, the learned State Attorney supported the conviction and sentence of the appellant.

Starting with the issue of identification, Mr. Rwegerera submitted that the overwhelming evidence on record that the appellant raped PW1 was watertight and left no doubts whatsoever on the identity of the appellant. He stated that the conditions for identification were favourable at the scene as it was in broad daylight; and PW3 witnessed the appellant raping PW1. Further, he stated that PW2 and PW4 also visited the scene and found the appellant at the scene threatening PW3 with a machete.

On the alleged contradictions in the prosecution witnesses' testimonies, the learned State Attorney stated that he found no such contradictions. Further he contended that even if there were any, they were minor and did not affect the prosecution case. He referred to minor

discrepancy found in PW1's testimony in answer to cross-examination question put to her by the appellant in that the appellant was arrested at the scene of crime while the other prosecution witnesses testified that he was arrested two days later. Mr. Rwegerera explained it as a minor lapse expected from PW1 in view of the fact that she was not aware of events at the scene after she became unconscious.

As for the complaint that the appellant was convicted on fabricated evidence without summoning the police officer who investigated the case to testify, it was Mr. Rwegerera's submission that in terms of section 143 of the Evidence Act, Cap 6, R.E. 2002, the number of witnesses to prove a fact is immaterial. It was therefore in the discretion of the prosecution to call the number of witnesses it thought sufficient to prove its case. He stated that failure to summon the investigator to testify had no adverse consequences to the prosecution case because there is other sufficient evidence on record.

With regard to the existence of grudges between the appellant and a prosecution witness, the learned State Attorney contended that the

allegation is baseless because it was not substantiated at the trial. He stated that besides the testimony of PW3 there were other testimonies of PW2 and PW4 which corroborated that of PW1.

As for the complaint that the trial court failed to comply with the provisions of section 240 (3) of the Criminal Procedure Act, Mr. Rwegerera conceded the omission. However he was quick to add that the omission did not prejudice the appellant's case because there was other independent evidence which was sufficient to convict. He referred us to the Court's decision in the case of **Japhari Juma vs Republic**, Criminal Appeal No. 104 of 2006 (unreported).

Lastly, the learned State Attorney touched on the appellant's complaint that his evidence at the trial was not considered and that the burden of proof was shifted to him. He dismissed it as untenable because there is no evidence on record that at anytime the burden of proof was shifted to the defence or that his evidence was not considered.

Mr. Rwegerera urged us to dismiss the appeal as lacking in merit.

After reviewing the evidence on record and the submissions by parties, we are of the view that the crucial issue in this appeal centres on the identification of the appellant. Both courts below reached a concurrent finding of fact that the appellant had sexual intercourse with PW1. The two courts below reached that finding after believing the evidence of PW1 which was materially corroborated by PW2, PW3 and PW4 who identified the appellant at the scene. And further PW3 and the appellant knew each other before the date of the incident as they reside in the same village.

Both the learned trial magistrate and the learned judge on first appeal emphasized the fact that the appellant was identified in favourable conditions, at 3.00pm when it was broad daylight. The prosecution witnesses positively identified the appellant at the scene as the appellant spent a long time and was in close proximity with PW1 from the moment he was asking for sex from PW1 to the time he took in raping her until he escaped from PW2, PW3 and PW4 leaving no possibility of mistaken identity. Besides, PW3 knew the appellant prior to the date of the incident as villagemates. At the scene PW3 shouted out the appellant's name JOHN, when she found him raping PW1 because he was a person she

knew well before. PW2 and PW4 also testified to have found the appellant at the scene.

In this regard, we are fortified by the decision of the Court in the case of **Waziri Amani vs Republic** [1980] TLR 250 where it was stated as follows:

> *"...in a case involving evidence of visual identification, no Court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely watertight."*

The guiding principles set out in that case are reflected in many other decisions of this Court including **Raymond Francis vs Republic** [1994] TLR 100, **Rizali Abdallah vs Republic**, Criminal Appeal No. 110 of 006 (unreported); **Maselo Mwita and Another vs Republic**, Criminal Appeal No. 63 of 2005 (unreported), **Aidan Mwalulenga vs Republic**, Criminal Appeal No. 2007 of 2006 (unreported).

Guided by the principles set out in **Waziri Amani** (*supra*) we are satisfied that the appellant was sufficiently identified by all four prosecution witnesses as the person who raped PW1 on the material date. Their evidence leave no doubt that the appellant was visually identified by them positively so as to leave no doubts. There was ample opportunity to identify him and their evidence of identification was watertight.

Regarding the appellant's complaint that the conviction was based on fabricated, insufficient evidence; it has no merit at all. As stated above the appellant was sufficiently identified at the scene without leaving any doubts that he is the person who raped PW1 on the material date. PW1's testimony was corroborated by that of PW2, PW3 and PW4.

However, on the failure of the trial court to comply with Section 240(3) of the Criminal Procedure Act; Mr. Rwegerera conceded that the Medical Report of PW1, Exhibit "P1" was admitted without informing the appellant of his right to have the author thereof summoned for cross-examination by the appellant. The relevant provision states as hereunder:

> *"240. –(3) when a report referred to in this section is received in evidence the court may, if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provision of this subsection."*

In **Japhari Juma vs Republic**, (*supra*), in similar circumstances as in the present appeal, this Court said the following: -

> *"In this case, the law was not complied with and in the circumstances the PF3 was of little value."*

Similarly, in the instant case, the Medical Report admitted as Exhibit "P1" has been rendered of little value. But, again, as it was held in **Japhari Juma** (*supra*), and as already stated, even without the Medical Report, there is ample evidence on record to prove that PW1 was raped by the appellant. The uncontroverted oral testimonies of PW1, PW2, PW3 and PW4 suffice to convict the appellant.

The visual identification by the prosecution witnesses left no doubts as to the correct identity of the appellant as the one who raped PW1 on the material date.

In the result, and for the foregoing reasons, we find no justification to fault the courts below. The appellant was rightly convicted as charged and sentenced.

We find no merit in the appeal and we accordingly dismiss it.

DATED at **ARUSHA** this 25th day of August, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

(E. Y. MKWIZU)
DEPUTY REGISTRAR
COURT OF APPEAL