IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 94 OF 2007

1. **JOSEPH MKUMBWA**
2. **SAMSON MWAKAGENDA** } .... **APPELLANTS**

VERSUS

THE REPUBLIC ....**RESPONDENT**

(Appeal from the Decision of the High Court of Tanzania at Mbeya)

(Lukelewa, J.)

Dated the 9th day of October, 2006
In
DC. CRIMINAL APPEAL NO. 122 OF 2004 C/F. 138/2004

JUDGMENT OF THE COURT

17 & 23 June, 2011

MASSATI, J.A.

TUSEKELEGE NGONYA (PW1) and MARIA IPOPO (PW2) were, at the material time, residents of Igurusi village, along the Tanzania-Zambia highway, in Rujewa District, Mbeya Region. They were both peasants and petty business persons, dealing in buying and selling of rice. By a special arrangement they would secure their capital from CHALI RAMADHANI

(PW4) (who described them as his customers) as and when they needed it. The latter owned a milling machine. On 27/6/2002, PW1 and PW2 were at PW4's business premises, when a man (the agent) approached them with a sample of rice. The agent promised to send them to a place called Luhanga Shatanda, where there was more of the merchandise. They finally agreed that, they would meet the man at a place called Utengule two days later.

On 29/6/2002, PW4 gave the two women some shs 1,500,000/= each as capital for the purchase of the rice. PW1 and PW2 hired a car to Utengule in the company of three other persons ("the escortees") together with empty sacks. They met the agent who advised them to leave the sacks with the wife of the local area chairman. He then led them through a path that he said led to Luhanga Shatanda where the rice was. At some point on the way, they stopped. The agent said that he was going to fetch some water. He returned and led them through what he described as a short cut. The short cut passed through a bush. As they were walking, they saw two men walk behind them. They were armed with bush knives and clubs. When they reached them, they assaulted one of the escorting men. He took to his heels. PW1 and PW2

were ordered to strip naked. The attackers then raped PW1 in turns. PW2 was not raped, but she was ordered to open her legs wide as she lay supine, from where the bandits searched for money. The women were robbed of all the money, a bed sheet, underpants, bras, skirt and a blouse and waist beads. PW2 also ended up with a broken hand. The robbers then disappeared. The women reported the incident to Chimala Police Station. Both were issued with PF3's and taken to hospital for treatment.

It was contended by the prosecution that it was the appellants who committed the atrocities on the women. So, after the police had completed their investigation, the appellants and other persons were arrested and charged with the offences of robbery with violence and gang rape. The District Court of Mbarali, convicted the appellants as charged, and sentenced them to 15 and 30 years each for the respective offences. They appealed to the High Court, but their appeals were unsuccessful. In addition, their sentences of 30 years imprisonment for gang rape were enhanced to those of life imprisonment each. They have now decided to appeal to this Court against the convictions and sentences.

At the hearing of the appeal, the appellants appeared in person and fended for themselves. Mr. Tumaini Kweka, learned State Attorney appeared for the respondent/Republic.

Each of the appellants lodged a separate nine ground memorandum of appeal. The grounds were more or less similar, and could be concretised into five major ones. **First,** that there was no identification parade, and generally, their identification was not watertight. **Second,** that the doctrine of recent possession was misapplied. **Third,** the cautioned statement of the first appellant was suspect and was not properly admitted. **Fourth,** the offence of rape was not proved beyond reasonable doubt. And, **fifth** and last, the PF3's were wrongly admitted as exhibits. The appellants adopted those grounds at the hearing. Mr. Kweka on the other hand, supported the conviction for the offence of robbery but declined to support the conviction for rape. He also submitted that on the evidence, the appellants should have been convicted for the offence of armed robbery and properly sentenced to 30 years, instead of 15 years imprisonment for robbery with violence. He therefore prayed for the enhancement of the sentence along the lines

taken by the Court in **IDDI SALUM v. R** Criminal Appeal No. 29 of 2009 (unreported).

In support of the conviction for the offence of robbery, Mr. Kweka submitted that although PW1 and PW2 were attacked at day time (about 18.00 hrs) and the incident lasted for about 2 hours at close encounter, and although the witnesses said they described the assailants to the village Executive Officer, the said village Executive Officer did not testify. Further, as there was no other evidence of the description of the appellants to the police, and in the absence of an identification parade, and the delay in their arrest; (three months later) the evidence of visual identification by itself was not watertight. He went on to submit however, that this was corroborated by the cautioned statement of the 1st appellant (Exh. P27) in which he confessed to have committed the offences and implicated the 2nd appellant. He admitted, however that Exh. P27 required corroboration if it is to be used to sustain conviction of the 2nd appellant in terms of section 33(3) of the Evidence Act (Cap 6 R.E 2002). Mr. Kweka also conceded that the PF3s were admitted contrary to the dictates of section 240(3) of the Criminal Procedure Act (Cap 20 RE 2002 (the CPA). But in addition, he argued, the 1st appellant also orally

admitted to have committed the offences in the presence of PW4. He said that the oral confession rhymed with the testimonies of PW1 and PW2 and so it is nothing but the truth. But the learned State Attorney conceded that the two courts below did not properly invoke the doctrine of recent possession because the piece of wrapper (kitenge) found with PW7 was not the subject of the charge.

On their part, the appellants insisted that they were not properly identified as there was no identification parade. They also said that the 1st appellant's cautioned statement was taken on 26/9/2002 while he was arrested on 12/9/2006 and was in custody all the while. They also complained that they were charged in court on 9/10/2002 with 6 other persons with the same offence. Besides, they were not found with any property that belonged to PW1 and PW2.

Against the conviction for the offence of gang rape, Mr. Kweka submitted that there was no evidence of penetration which was an essential ingredient of the offence and refered to us the decisions of **GODI KASENEGALA v. R.** Criminal Appeal No. 10 of 2008 and **Ex. No. 139690 DANIEL MSHAMBALA v. R.** Criminal Appeal NO. 183 of 2004 (both unreported).

Admittedly, in convicting the appellants, the lower courts used four pieces of evidence namely, visual identification, recent possession, the PF3s of the victims and the cautioned statement of the 1st appellant (Exh. P. 27) Mr. Kweka did not address us at length on the invocation of the doctrine of recent possession, but we feel obliged to say something about it, because the appellants had raised it in their memoranda of appeal, and we think that it is a point of law on which the two courts below did not properly direct their minds.

The position of the law on recent possession can be stated thus. Where a person is found in possession of a property recently stolen or unlawfully obtained he is presumed to have committed the offence connected with the person or place where-from the property was obtained. For the doctrine to apply as a basis of conviction, it must positively be proved, **first** that the property was found with the suspect, **second,** that the property is positively the property of the complainant; **third** that the property was recently stolen from the complainant; and lastly that the stolen thing in possession of the accused constitutes the subject of a charge against the accused. It must be the one that was stolen/obtained during the commision of the offence charged. The fact

that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements (See **ALLY BAKARI AND PILI BAKARI v. R.** (1992), TLR. 10 which was followed in **SALEHE MWENYA and 3 OTHERS v. R.** (Criminal Appeal No. 66 of 2006 and **ALHAJ AYUB @ MSUMARI & OTHERS v. R.** Criminal Appeal No. 136 of 2009 (both unreported).

In the present case, the trial court received in evidence several articles seized from the appellants as Exh. P3 to 26 from PW5. These include the kitenge (Exh. P 24) allegedly robbed from PW2 (and identified by PW7) and shs 177,000/= (Exh. P26) seized from the first appellant. The search was conducted on 26/9/2002. The first problem is that none of Exhibits P3 to 25, constituted part of the charge. The charge was for robbing shs 3,000,000/=. But this was committed on 29th June, 2002, and Exh. P26 was found with the first appellant three months later. In our view, this, in the case of money, cannot be said to be recent enough to invite the invocation of the doctrine of recent possession. More so, when the money had no special marks that any of the owners identified in court. As for Exh. P24 (the kitenge) that PW7 was found with, it was a misdirection on the part of the first appellate court to have found that the

doctrine applied in the circumstances, because there "was no adverse claim to the kitenge by the first appellant", because first, it was not the first appellant who was found in its possession and secondly, it did not constitute the subject of the charge. Besides, this did not relieve the prosecution of their burden to prove the other elements of recent possession. We are thus satisfied that the two courts below did not properly invoke the doctrine of recent possession against the appellants.

The next piece of evidence that was relied upon by the lower courts were the PF3s. The first appellate court found that, this evidence provided corroborative evidence of penetration, an essential element in the offence of rape. It was therefore used to find that the offence of rape was proved beyond reasonable doubt.

It is settled law that for an offence of rape, let alone gang rape, there must be unshakeable evidence of penetration. As Mr. Kweka has rightly submitted, this Court has held (in **Ex. No. 139690 SSGT DANIEL MSHAMBALA v. R.** (supra) that it is too general a statement for a victim of rape to merely say that she was "raped". But this is exactly what PW1 in the present case said on p 17 of the record.

"...He unddressed all the clothes and remained steak (sic) naked. The 1st accused starting raping me,...The second accused was the third person to rape me."

Those words without more do not prove penetration. And so it cannot safely be said that the offence of rape was proved to the standard required by law.

The relevant PF3 was tendered by PW1 as exhibit P1. Although the appellants were recorded to have had no objection to its reception as evidence, this did not relieve the trial court of its duty in law to inform the appellants of their right to call the doctor who prepared the document, under section 240(3) of the CPA which provides that, if a court receives any medical report as evidence, it may call the author of the report, and, shall do so, if the accused demands, but in any case the court has a duty to advise him of his right to call him.

In numerous occassions, this Court has held that if such report (PF3) is received in evidence without complying with the mandatory provisions of that section, it should not be acted upon, even if no objection was made to its production. (See **ALFEO VALENTINO v R**

Criminal Appeal No. 92 of 2006 and **THOMAS MLAMBIVU v. R.** Criminal Appeal No. 134 of 2009 (both unreported)). We therefore agree with Mr. Kweka that, Exhs, P1 and P2 were improperly admitted, and so should be expunged from the record. In the result not only was the offence of rape not proved but also, (if there was any need) there was no corroboration.

Next, we come to the evidence of visual identification of the appellants by PW1and PW2. Mr. Kweka has already admitted that this piece of evidence was not watertight. We entirely agree with him.

The first appellate court, correctly in our view, directed itself on the law on visual identification; citing the case of **WAZIRI AMANI v. R.** (1980) TLR. 250. In concluding that the identification of the appellants was watertight, the learned judge reasoned:-

> "In the case at hand the incident occurred at day time. It was about 18 pm as the sun was setting. The accused person was observed at very close range by PW1. Both witnesses described the first appellant as the person who was more active among the three bandits. He was the first person to rape PW1. He was the one who beat and broke

> the left hand of PW2. He also forced PW2 to open her legs wide to enable him search money on her vagina. He is the person who said that this woman is HIV positive. Under the above conditions although the two witnesses saw the appellants for the first time I am satisfied ....that the witnesses made a correct identification".

> "There was no need of holding identification parade in the circumstance (sic) as the incident occurred at day light and it involved only three bandits"

The learned judge went on to cite **K. Mrenga v R.** (1983) TLR. 158, in support of his view that an identification parade was not necessary where there is enough light to enable the accused to be identified.

It is true that **WAZIRI AMANI'S** case (supra) is one of the landmark cases on the question of visual identification. But as the Court also observed in that case, the factors listed therein were not exhaustive and that in each case all the circumstances surrounding it must be

considered. In a number of cases therefore, before and after **WAZIRI AMANI,** other factors have been added to the list as necessitated by the peculiarities of each set of circumstances. Thus in **JARIBU ABDALLAH v R.** Criminal Appeal No. 220 of 1994 (unreported) it was held:

> "…. In matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."

And that

> "Eye witness testimony can be a very powerful tool in determining a person's guilt or innocence. But it can also be devastating when false witness identification is made due to honest confusion or outright lying"

(See ***MENGI PAULO SAMWEL LUHANA & ANOTHER v R.*** Criminal Appeal No. 222 of 2006 (unreported).

So, where the suspects are strangers to the victims as in the present case, courts have insisted that such witnesses ought to give a detailed description of suspects to persons to whom they first report *(see **R v Mohamed Bin Alhui*** (1942) 9. EACA 72) and that:

> " The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his credibility in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry.".
>
> (see **MARWA WENGAJI MWITA AND ANOTHER v R** Criminal Appeal No. 6 of 1955 (unreported).

Now, let us look at the chronology of events and the peculiar features in the present case. The crimes were allegedly committed on 29/6/2002. According to the charge sheet that is on record, the offence was committed at about 19:00 hours (that is about 7:00 p.m.) but according to PW1 and PW2 this took place at about 18:00 hours (i.e. .p.m.). According to PW2, the incident was reported to the Luhanga

Village Executive Officer (VEO). It is not clear whether they gave any description of the suspects. But what is more disturbing is that the VEO never testified. PW2 told the trial court that on that day, it was their first time to meet the appellants. The next day was on the day of their arrests. The prosecution case is silent as to when the appellants were arrested, but according to the appellants (whose evidence was not challenged) they were arrested between 12/9/2002 and 13/9/2002. This means that they were arrested nearly 3 months after the incident. According to the record, initially, persons other than the appellants were charged with the offence until much later when the appellants were joined. The only irresistible inference is that the police were not sure who they were looking for in connection with the commission of these offences, neither did they have a description of the suspects from PW1 and PW2.

PW1 and PW2 had gone to the scene of crime with at least 3 other persons but none of them was called to testify. If they were called they would have lent independent support to the evidence of identification of the suspects. According to PW1 and PW2 from that day, they next met the appellants in police custody and later in court where they purported to

describe the appellant's attires. It has been held that dock identification or identification in police custody without a previous identification parade is of little or no value (see **MUSSA ELIAS AND 2 OTHERS V R.** Criminal Appeal No. 172 of 1993 **and OMARY ISSA V R.** Criminal Appeal No. 11 of 1989 (both unreported). With due respect to the first appellate court, we think, in the circumstances, an identification parade was necessary, even where the witnesses alleged that there was enough light to enable the appellants to be identified, because after the lapse of three months between the commission of the offence and the next time they saw them in the police custody, their memories could not have remained the same.

Although Mr. Kweka has conceded that the evidence of visual identification of the appellant, was not watertight, he has argued that, that evidence was corroborated by the cautioned statement of the 1st appellant (Exh P. 27) which also implicated the 2nd appellant. Indeed both courts below, found the statement voluntary and contained the truth. But the appellants maintained, both here and in the High Court, that the statement was not voluntary. The first appellate court found that the attempt by the 1st appellant to repudiate the statement was an afterthought, but proceeded to find, rightly so in our view, that the

statement was a repudiated confession and that it required corroboration before it could be acted upon. However, the court went on to find that, Exh. P 27 contained nothing but the truth because it led to the discovery of new properties which had been purchased with the proceeds of the stolen loot. He also found that it could also be acted upon to convict the second appellant" if corroborated" but unfortunately he made no finding on whether there was such corroboration.

We first wish to restate that the purpose of corroboration is not to give validity or credence to evidence which is defective, suspect or incredible but only to confirm or support that which is sufficient, satisfactory, and credible (see **AZIZ ABDALLAH v R**. (1991) TLR. 71). In this case, Mr. Kweka has admitted and we agree, that the evidence of visual identification of the appellant was deficient. Therefore, it cannot be corroborated. Even if it was not deficient or discrepant, the evidence of visual identification could not be corroborated by the cautioned statement (Exh P27) because as the first appellate court correctly observed, having been repudiated, it itself, requires, corroboration and it is now settled law that evidence which, requires corroboration cannot corroborate another. (see **ALLY MSUTU v R**. (1980) TLR 1).

But, we have kept on asking ourselves whether the cautioned statement was voluntary and whether it was properly admitted? The trial court's record shows that when Exh P27 was about to be admitted in evidence the appellants were asked and they replied that they had no objection, but after its admission the first appellant sought to repudiate it during cross examination of PW5. That, we agree, was not the right time to object to its admissibility. A cautioned statement should ordinarily be objected to before it is admitted (see **SHIHOZE SENI AND ANOTHER v R.** (1992) TLR. 330). It is also true that a statement will be presumed to have been voluntarily made until objection is made to its admissibility by the defence (see **SELEMANI HASSAN v R.** Criminal Appeal no. 364 of 2008 (unreported).

But we think that, that presumption does not go with the weight to be attached to every such evidence. Admissibility of the evidence is one thing; its weight or probative value is another. In evaluating the weight to be attached to an alleged confession, a trial court has the duty to look at all the surrounding circumstances. It also has to see whether the law has been complied with in extracting the statement. Thus in **STEPHEN**

JASON & OTHERS v R. Criminal Appeal No. 79 of 1999 (unreported) this Court warned:

> "Where an accused claims that he was tortured and is backed by visible marks of injuries it is incumbent upon the trial court to be more cautious in the evaluation and consideration of the cautioned statement, even if its admissibility had not been objected to; and such cautioned statement should be given little if not , no weight at all".

In the present case, the trial court and the first appellate court should have considered all the circumstances and chronology of the events in the case as a whole. First, the appellants were arrested nearly three months after the commission of the offence. From the prosecution evidence, the circumstances and the persons who arrested them are not known. But according to the 1st appellant, he was arrested on 12/9/2002. If that is true, it took the police two weeks up to 26/9/2002 to get a cautioned statement from him. There is no explanation at all, let alone a

reasonable one for this delay. The trial court should therefore have been on alert here. As this Count remarked in **MORRIS AGUNDA & 2 OTHERS V R.** (Criminal Appeal No. 100 of 1995 (unreported) (where the accused was arrested on 21.1.1982 but his cautioned statement was taken on 28.2.82.).

> "........there is no explanation or apparent reason for the delay, in our view an alleged confession made after such considerable and unexplained lapse of time is not consistent with the view that the confession was made voluntarily."

By parity of reasoning, we think Exh. P27 which was extracted two weeks after the 1st appellant's arrest without explanation for the delay is not consistent with the view that the confession was voluntary. It did therefore deserve little or no weight at all.

That observation was valid in 1982 but the position of law has since been confirmed by statute with the enactment of the Criminal Procedure Act in 1985 (the CPA). Under section 50(1) of the CPA , there

are now set up limitation periods for which interviews can be taken. It provides:

> "50 (1) For the purposes of this Act the period available for interviewing a person who is in restraint in respect of an offence is-
>
> (a) subject to paragraph (b) the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence,
>
> (b) if the basic period available for interviewing the period is extended under section 51 the basic period so extended".

In our view, a person is deemed to be taken under restraint when he is arrested in respect of an offence, and that is when the basic period commences.

Section 48 of the CPA provides for the exclusion of certain periods in the accrual of time for basic periods. As the CPA is the statute that was in operation when the appellants were arrested, the prosecution had to explain the delay in terms of either sections 48(2) or 50(i) (b) of the Act. That explanation is lacking. It leads to the conclusion that since the statement (Exh. P 27) was taken two weeks after the first appellant was arrested and put in restraint, it was taken contrary to section 50 (i) (a)of the CPA. It is now settled that statements taken without adhering to the procedure laid down in sections 48 to 51 of the CPA are inadmissible (see **JANTA JOSEPH KOMBA & 3 OTHERS v. R.** Criminal Appeal No. 95 of 2006 (unreported). It follows therefore, that Exh P27 was not properly admitted. It should therefore be expunged from the record.

There is then, the testimony of PW4, who told the trial court that he heard the 1st appellant orally confess to the commission of the offences. It was also his evidence that the appellant did this at the time of his arrest, and in the presence of a large crowd of people. It is not, however, clear from his evidence, who was the appellant confessing to, and why did the recepient of that confession not give his testimony? Who arrested the appellant? If it was the police, was the appellant cautioned before he

started confessing as the CPA demands? What was the rank of the police officer, if any? Was he, in law, able to receive a confession, let alone orally? If the appellant confessed voluntarily on the day of his arrest, why did it take two weeks for the police to reduce it in writing? If the appellant confessed that they were 3 who committed the crimes why did the police round up and charge 8 persons? To us, the alleged oral confession was highly implausible; especially when such evidence comes from PW4.

It will be recalled that this is the witness whose money was robbed, and was not therefore free from bias, because of his vested interests in recovering it. So, his evidence was suspect and prone to exaggeration and should therefore, have been treated with a lot of caution and in practice it should have been corroborated by some other independent evidence. Such corroborative evidence was not forthcoming in the present case.

After expunging and critically evaluating Exh. P2, Exh P. 27 and the credibility of PW1 and PW2 on visual identification of the appellants, and PW4 on the alleged oral confession from the 1st appellant, we are settled

in our minds that there is no other cogent evidence on record, on which the appellants' convictions could rest.

For the above reasons, we allow the appeal. The convictions on both counts are quashed and the sentences set aside. The appellants are to be released forthwith from prison unless they are otherwise lawfully held.

It is so ordered.

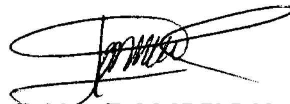
DATED at **MBEYA** this 21st day of June, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



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