IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 298 OF 2008

(CORAM: MSOFFE, J.A., MJASIRI, J.A. And MASSATI, J.A.)

DARUSI GIDAHOSI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mmilla, J.)

dated the 26th day of August, 2008
in
Criminal Appeal No. 26 of 2007

JUDGMENT OF THE COURT

10th & 13th October, 2011

MASSATI, J.A.:

In the evening of 27/11/1999, **MARIA d/o LEO,** (PW1) a middle aged woman, and a resident of Masakta Village, Hanang District, Arusha Region, was walking home from a pombe shop, alone. She later realized that she had company. A man was walking behind her. When he was near her, he struck a conversation and informed her that he was going to visit her neighbour. So, they walked together for a while, not knowing what was in store for her. As she approached her house, the male

company, grabbed her, wrestled her down, ripped off her underpant, and forcefully had carnal knowledge of her amidst protests in agony. Fortunately, BAHA S/O AWE (PW3) her neighbour, heard the alarms. He and his children rushed to the scene, and rescued her, but it was rather late. On seeing PW3, the male company took to his heels leaving his traditional club behind. PW1 collected her torn underwear and the club, which she later tendered in the trial court as Exhibits PI and P2 respectively. Both PW1 and PW3 reported the atrocity to the village authorities and later to the police. To the village authorities and the police where the incidence was reported, both PW1 and PW3, consistently identified the appellant who was their village mate as that male company. On the basis of this information, the appellant was arrested on 18/1/2000 and charged with the offence of rape contrary to **sections 130 and 131** of the Penal Code Cap 16. R.E. 2002, as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998. The Babati District Court (Tuwa, DM) convicted him as charged and sentenced him to 30 years imprisonment. His appeal to the High Court (Mmilla, J.) was unsuccessful. He has now come to this Court on a second appeal.

At the hearing of this appeal, the appellant appeared in person and fended for himself. Mr. Zakaria Elisaria, learned State Attorney represented the respondent/Republic.

The appellant filed a 4 ground memorandum of appeal, and with leave, also presented his written arguments.

In the first ground of appeal, the appellant essentially complained that the complainant (PW1) was not a credible witness, because she delayed to report the crime for almost two months. According to PW2, the crime was reported on 18/1/2000 while the offence was allegedly committed on 27/11/1999.

Mr. Elisaria, who fully supported the conviction, was of the view that the delay was explained by PW1, as due to the appellant's disappearance from the village soon after the commission of the offence. In any case, he further submitted, the conviction was based on the credibility of PW1 and PW3 and not on the evidence of PW2.

This is a second appeal. Our primary concern is on points of law, but we can also reevaluate the evidence, if we are convinced that the lower courts misapprehended the substance, nature and quality of the evidence and reached a wrong conclusion resulting into injustice (See: **SALUM MHANDO v. R** (1993) TLR 170. We agree with the appellant in this case, that in some cases, delay in reporting a crime or naming a suspect may dent the credibility of a witness (See: **TULISANGEYEKO ALFRED AND 2 OTHERS v. R,** Criminal Appeal No. 282 of 2006 (unreported). But assessing credibility is in the realm of a trial court. In doing so, the court takes into account not one, but a number of factors, such as, the witness' desire to be truthful, motive, general integrity, general intelligence, opportunity for exact observation, capacity to observe accurately, firmness of memory to carry in the mind the facts observed, capacity to express what is clearly in the mind, reputation and demeanour and other surrounding circumstances among others. And under **section 127(7)** of the Tanzania Evidence Act, (Cap 6 R.E. 2002) once a trial court is convinced that the victim of a sex offence is telling nothing but the truth, it can convict on her evidence alone.

In the present case, we have scrutinized the lower court's records and we are convinced that the appellant was convicted on the basis of the credibility of PW1 and PW3 who identified the appellant as the assailant, notwithstanding the delay in reporting the crime to the police. The trial court took into account several other factors before reaching that conclusion. We agree with Mr. Elilsaria, that the lower courts did not consider the evidence of PW2 in assessing PW1's credibility. And we are satisfied that in arriving at these findings of fact there were no misdirections or misapprehensions of the evidence by the two courts below. We do not therefore feel justified to intervene. Accordingly, we find no substance in this ground of appeal and dismiss it.

In the second ground of appeal, the appellant has attacked the admissibility of the PF3 as Exh. P4, for contravening **section 240(3)** of the Criminal Procedure Act (Cap 20 R.E. 2002) Mr. Elisaria, conceded this procedural infraction, but submitted that it was innocuous because it was discarded by the High court on first appeal.

This ground is merely academic, because none of the courts below used the PF3 in convicting the appellant. In its judgment, the trial court did not even have a fleeting mention of the exhibit in its analysis of the evidence leading to the conviction, and the High court on first appeal, discarded it altogether. So, we find that the PF3 (Exh. P4) did not affect the appellant. We dismiss this ground too.

In the third ground, the appellant has complained that there was no evidence that he had absconded from the village soon after committing the offence, and therefore there was no justification for the two courts below to have so found. Mr. Elisaria, learned counsel, merely recited the evidence on record that the appellant had absconded from the village, hence the delay in his arrest.

In our view, this ground is not different from the first one, and our answer cannot be different. The delay in arresting the appellant was adequately explained by PW1. But in addition to what we observed in the first ground, we just wish to add here that although the appellant had no burden of proof to refute PW1's allegation that the appellant absconded

from the village; in his sworn testimony, he did not even try, to raise reasonable doubt that he was around the village at the material time. He just narrated how he was arrested and came to be charged. There was thus no basis on which the two courts below could have held otherwise. The ground lacks merit and is also dismissed.

In the last ground of appeal the appellant capitalized on the variance in the times of committing the crime, between that shown in the charge sheet, and that testified upon by the witnesses for the prosecution.

Mr. Elisaria conceded that there was such variance, but submitted that such variance was immaterial, vide s**ection 234(3)** of the Criminal Procedure Act.

We think, Mr. Elisaria is right. **Firstly,** it is true that there is such variance. The charge sheet alleges that the offence was committed at "about 19.30 hours," (7.30 p.m.). but PW1 said it was 5.30 p.m., and PW3 said it was 7.30 p.m. as the charge sheet alleges. But, it is also true that,

in terms of **section 234 (3)** of the Criminal Procedure Act, such variance is immaterial. For ease of reference that section provides:-

> ***"234(3)*** *– Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material, and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any limited by law for the institution thereof."*

We think that one such relevant law referred to in that section is **section 241** of the Criminal Procedure Act, that:-

> *"Except where a longer time is specially allowed by law, no offence the maximum punishment for which does not exceed imprisonment for six months or a fine of five thousand shillings, or both, shall be triable by a subordinate court unless the charge or complaint relating to it is laid within twelve months from the time when the matter of such charge or complaint arose."*

The appellant in this case was charged with rape, whose minimum sentence is 30 years imprisonment, and the maximum is life imprisonment. So it does not fall under the exception shown in **section 234(3)** of the Criminal Procedure Act. This ground is also devoid of substance and we dismiss it too.

As we have demonstrated above, there is no merit in this appeal. It is accordingly dismissed in its entirety.

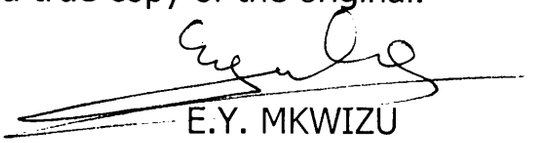
DATED at ARUSHA this 11th day of October, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A.MASSATI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL