IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 227 OF 2011.

1. ANYELWISYE MWAKAPAKE
2. AMBROSE NOMBO @ZUNGU ..... **APPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Kaganda, J.)

dated 13th day of December, 2006
in
Criminal Appeal No. 2 of 2005.

JUDGMENT OF THE COURT

20th & 26th March, 2012.

MASSATI, J.A.:

The appellants were convicted of the offence of gang rape under section 131A(a) and (2) of the Penal Code as amended by the Sexual Offences Special Provisions Act, 1998. They were sentenced to life imprisonment. Their appeals in the High Court

escaped. The matter was reported to the local authorities and then to the police where she was given a PF3 and got treated. Investigation led into the arrest and arraignment of three youths, including the appellants. The third accused was acquitted by the trial court.

The first appellant has filed 8 grounds of appeal to attack the findings of the lower courts. These can be classified into two major groups. The first group consists of the first, second, fifth, and sixth grounds that seek to challenge the courts' finding on the identification of the appellant. The second group consists of the third, fourth, seventh and eighth grounds which seek to impugn the lower courts finding on the credibility of the prosecution witnesses, and the finding that the prosecution had proved its case beyond reasonable doubt.

On the other hand, the second appellant filed 9 grounds of appeal which again, could be grouped into two major categories. There are those that seek to challenge the findings on

physical abuse on the way before they dragged her to Litembo Guest House. He went on to submit that her evidence alone was sufficient to support the conviction. But, if need be, it was corroborated by PW2, Pw1's workmate who also identified the appellant as their regular customer at their bar. Over and above all, there was also PW4, the doctor who examined and treated PW1 on her injuries and trauma. He admitted however, that there was a discrepancy as to the dates between PW1 and PW4, but said that this was immaterial, drawing inspiration from the case of **SHIHOZE SENI AND ANOTHER v R** (1992) TLR.330.

As to the second appellant Mr. Mwavanda also submitted along similar lines, as in the 1st appellant's case. He said that, he too, was sufficiently identified by PW1 and PW2 and there were no material contradictions to diminish the value of their evidence. This was corroborated by the evidence of PW4.

After this, Mr. Mwavanda, urged us to dismiss the appeal.

what this Court said in **RAYMOND FRANCIS v R** (1994) TLR 103 that:-

> *"It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance".*

We are aware that this Court has set certain guidelines on determining issues of visual identification, in **WAZIRI AMANI v R** (1980) TLR.250, and numerous other cases, but these guidelines were not meant to be exhaustive. The Court is under obligation to consider the circumstances of each case and make its own determination as the justice of each case demands. (See **EMMANUEL LUKA AND TWO OTHERS v R** Criminal Appeal No.326 of 2010) (unreported).

Benchmarked by these guidelines, we think that, the following factors are material in determining the issue of identification in the present case:-

9. PW2 watched the beatings from a distance of only about 10 paces.

10. PW2 described the attackers and identified them to PW3, the sungusungu commander; which led to their arrest.

All the above facts considered, we agree with Mr. Mwavanda that there was no possibility of mistaken identity. We therefore find no reason for faulting both the trial court and the first appellate court in their findings on visual identification. We are satisfied beyond any reasonable doubt, that the appellants were identified.

In their second ground of complaints, the appellants have also claimed that the evidence of PW1 was not corroborated. We have a very simple answer to this. In sexual offences once the trial court believes that PW1 was a credible witness, as it did in this case; corroboration was not required as a matter of law. This might have been the position of the law before the

witness. We have no reason to interfere with the finding. So, on that ground, her evidence alone was sufficient to sustain the conviction of the appellant.

But if there was any need for corroboration at all, that evidence is available in the form of PW2 and PW4. PW2 saw and identified the appellants as the ones who dragged away PW1. PW1 said that she was raped by the appellants. And PW4 and Exh.P'B' showed that PW1 had sustained bruises and swellings on her vulva, and buttocks among other parts. She was also found to have puss discharge from her vagina. As it held in **NGUTIMUKIZA v UGANDA** (1999) IEA 220, medical evidence showing that the complainant's vulva was inflamed and the presence of sperms in her vagina was sufficient to prove penetration.

Another piece of complaint from the appellants was the failure to call staff from the guest house to testify. There is, we think, no doubt that one of them would have added more weight

forward to testify. We therefore also find this complaint devoid of substance.

For all the above reasons, we find that the joint appeal is devoid of substance. It is accordingly dismissed in its entirety.

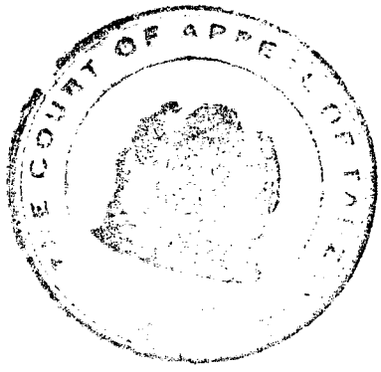
DATED at **IRINGA** this 23rd day of March, 2012.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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



(J. S. Mgetta)
DEPUTY REGISTRAR
COURT OF APPEAL