IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KIMARO, J.A., MASSATI, J.A., And MMILA, J.A.)

CRIMINAL APPEAL NO. 208 OF 2013

1. KASIM SAID
2. ROBERT MUSHI } ..... **APPELLANTS**
3. ISSA ISMAIL @ MBOGO

VERSUS

THE REPUBLIC..... RESPONDENT

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

(J.H. Msoffe, J.)

Dated the 24th day of February, 2004
in
Criminal Appeal No. 76 of 2003

JUDGMENT OF THE COURT

6th & 12th December, 2013

MASSATI, J.A.:

The appellants were convicted by the District Court of Arusha, of the offences of armed robbery and gang rape. They were each sentenced to 30 years imprisonment and life imprisonment for the first and second counts respectively.

The sentences were to run concurrently. They were also each ordered to compensate the victim, the sum of Tshs 100,000/=.

It was alleged in the first count that on the 14th day of February, 2003 at about 3.00 hrs at TCA area in Arusha Municipality, the trio robbed Jumanne Selemani of his cash Tshs. 200,000/=, a cellphone, a waist belt, and a cap, all valued at Tshs 365,000/= by threatening him with a machete (panga). In the second count, it was alleged, that the appellants, at the same time and place did forcefully have sexual intercourse with Nasra, the wife of Jumanne, not only without her consent, but also that she was then 17 years of age. The appellants denied the charges.

What happened is this. On that day, at around 10.00 pm Jumanne Selemani and Nasra who were husband and wife, decided to go out to celebrate Valentine Day. Accompanied by one Ayubu Mashina, they proceeded to a night club called, Triple A. At around 3.00 a.m. the three came out with a view to going home. As they came out they saw a group of youths, whom the witnesses said they identified three of them. The said youths were armed with machetes and knives. With the aid of such weapons, they were not only able to rob Jumanne of his properties mentioned above, but also abduct Nasra out of her husband's sight to a place called Kambi ya Fisi where the trio gangraped her. Nasra was found

lying helpless the following morning by the roadside by a good samaritan, who offered her a piece of light cloth (khanga) with which she covered her now otherwise naked body. Naked, because all her apparel had also been robbed of her by the gangsters. That is from where the husband picked her, took her to the Central Police Station and eventually to Mount Meru Hospital where she was admitted for three days. After taking statements from Jumanne Selemani, Nasra, and Ayubu Mashina, the police rounded up these appellants and accordingly charged them as aforesaid.

At the trial, Jumanne testified as PW1. He told the trial court that with the aid of light, he was able to identify the person who robbed and took his wife away, and how he searched for his wife that night, only to find her the next morning in a hopeless condition. PW1 also said that he knew some of the appellants from before. Nasra, who testified as PW2, informed the trial court of her ordeal from the moment she was taken away from PW1, to her horrifying experience of being gangraped and sodomized. She also said that she recognized her abductors with the aid of light and that she knew one of them. She tendered the PF3 and Hospital discharge card as Exh P1 and P2 respectively. Ayubu Mashina testified as PW3. His testimony was to the effect that while out of Triple A Club, he,

PW1 and PW2 were attacked by robbers. With the aid of light from the club, he was able to identify the attackers, and witnessed how PW2 was abducted. The case was investigated by E 6442 DC Valentino who took the witnesses statements and interrogated the first and second appellants but did not arrest any of them.

In their sworn testimonies, the first appellant (DW1) denied the charges, and said that he was arrested on 26/2/2003 while the offences were alleged to have been committed on 14/2/2003. In cross examination, he admitted to know PW2, and witnessed her being manhandled by a group of 4 men. When he raised an alarm the gangsters threatened him with clubs and swords that forced him to chicken out and run for safety. But he did not identify any of the thugs. The second appellant who testified as DW2 said that he was arrested on 22/2/2003, but denied to have committed the offences. DW3, the third appellant, also told the trial court that he was arrested on 26/2/2003 but didn't know any of the complainants or ever having been to Triple A on the day in question.

On the basis of this evidence the two courts below found that the appellants were sufficiently identified by the victims of the crime, and

thereby entered the respective convictions and meted out the sentences. The appellants have now come to this Court to challenge those findings.

At the hearing of the appeal, the appellants appeared in person, unrepresented. The first appellant filed a petition of appeal comprising three grounds. The first is that he was not sufficiently identified. The second is that the lower courts did not properly evaluate the evidence on record and so arrived at the wrong verdict. The third is that the PF3 (Exh P1) was admitted contrary to section 240 (3) of the Criminal Procedure Act Cap 20 RE 2002 (the CPA). The second and third appellants filed a joint petition of appeal which contains 9 grounds, and an additional 2 grounds that made a total of 11 grounds. In the first five grounds, the appellants challenge the finding as to their identification. In the 6th ground, the appellants challenge the credibility of PW2. In the 7th ground, they pound upon the fact that the prosecution case was pregnant with contradictions. In the 8th ground, the admissibility of the PF3 (Exh P1) is put to task for contravening section 240 (3) of the CPA. And in the 9th ground, the sentence imposed upon the 17 year old 3rd appellant, is being challenged as illegal. In the additional grounds, the first is an elaboration of the 6th ground of appeal on why PW2 should not be believed. The remaining

ground attacks the first appellate court for not considering the defence case. It is on the basis of those grounds that the appellants beseech this Court to allow their appeals.

The respondent/Republic, did not support the convictions. Instead, it supports the appeal. Arguing for the respondent, Mr. Marcelino Mwamunyange, learned State Attorney, submitted generally that the evidence for the prosecution was not only deficient, but also fraught with material contradictions. In his view the credibility of the witnesses is lessened by several facts. Although they claim there was light at Triple A Club, it is not certain where exactly the crimes were committed. If robbery was committed between Triple A and the Saw Mill where the witnesses were headed to get a taxi, how far was it from the "light" he asked. Even more confusing, is that while the charge sheet alleges that the offences were committed at TCA, both the witnesses identify the places as Triple A for the robbery and in the case of rape, PW2 said she was raped at Kambi ya Fisi. Were all those places the same as that disclosed in the charge sheet, wondered the learned counsel. But what made the evidence of identification worse, was the witnesses' failure to mention any of the suspects whom they claimed they knew, to any one else, even to the

police, before they were arrested. And if they knew them before why did it take almost two weeks to have the suspects arrested. To add weight to his argument, Mr. Mwamunyange referred us to the decision of this Court in **MUSSA MUSTAPHA KUSA & ANOTHER V R**. Criminal Appeal No. 51 of 2010 (unreported).

The learned State Attorney also agreed that the PF3 was admitted contrary to section 240(3) of the CPA, and so should be expunged from the record. Lastly he also submitted that even in the offence of gang rape PW2 was not forthright by which means or source of light, she was able to recognize those who raped her. That makes her evidence suspect. So for those reasons, Mr. Mwamunyange asked us to allow the appeal.

The question of the admissibility of the PF3 (Exh P1) need not detain us. It is now settled law that if section 240(3) of the CPA is contravened in admitting any medical report the evidence would have been illegally admitted and so, such exhibit is subject to being expunged (See **ISSA HAMIS LIKAMALIKA V R.** Criminal Appeal No. 125 of 2005 (unreported). But in terms of section 178 of the Evidence Act, the irregular admission of any evidence does not vitiate a trial or lead to the quashing of a conviction,

if, there is some other evidence on record that could be considered independently of the irregularly, admitted evidence. In the present case, apart from Exh P1, there was also the evidence of identification which formed the basis of the convictions by the lower courts.

The main issue in this appeal therefore is whether the appellants were adequately identified? This is a question of fact and as alluded to above, the two lower courts concurrently found that the appellants were so identified. The question here, is can we interfere with that finding of fact, this, being a second appeal?

This Court, has pronounced severally that in a second appeal, the Court would normally only deal with questions of law and rarely interfere with concurrent findings of fact, provided that those findings of fact are based on the correct appreciation of the evidence. But, if there are any misdirections, or non directions or misapprehension of the nature, substance and quality of the evidence on record, resulting in an unfair conviction, this Court is duty bound to intervene. (See **SHIHOBE SENI AND ANOTHER V R** (1992) TLR. 330, **MICHAEL HAISHI V R.** (1992) TLR 92, **SALUM MHANDO V R.** (1993) TLR. 170)

On the issue at hand, to wit visual identification the major premise is that although no hard and fast rules can be laid down to determine questions of identity, this Court, has over the years, developed a number of tests for the guidance of trial courts. These include:-

i. Evidence of visual identification is of the weakest kind and most unreliable and should not be acted upon unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. (See **WAZIRI AMANI V R.** (1980) TLR 250. Where it was held that questions of duration of incident, distance, time of the day, familiarity, and existing impediments to sight were cited as among relevant factors to be considered.

ii. That is so, even if that evidence is of that of recognition (See **HASSAN JUMA KANENYERA V R.** (1992) TLR.

iii. The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reability; in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. (See **MARWA WANGAI AND ANOTHER V R.** (2002) TLR 39.

iv. When it comes to issues of light, clear evidence must be given by the prosecution to establish beyond reasonable

doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. Bare assertions that "there was light" would not suffice (See **MAGWISHA MZEE AND ANOTHER V R** Criminal Appeal No 465 and 466 of 2007 (unreported).

v. Even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source of light, and its intensity is of paramount importance. This is because even in recognition cases mistakes are often made (See **ISSA MGARA @ SHUKA V R** Criminal Appeal No. 37 of 2005.

vi. The fact that a witness knew the suspect before that date is not enough. The witness must go further and state exactly how he identified the appellant at the time of the incident, say by his distinctive clothing, height, voice (See **ANAEL SAMBO V R.** Criminal Appeal No. 274 of 2007 (unreported)

vii. The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all prevailing conditions to see if, in all the circumstances there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been

dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness.

viii. In very case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of the highest importance of which evidence ought always to be given, first of all of course by the person who gave the description or purports to identify the accused, and then by the person to whom the description was given. (**R. vs. M.B. ALLUI (1942)** EACA. 72.

ix. In matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. Favourable conditions for identification are no guarantee against untruthful evidence (See **JARIBU ABDALLAH V R** (2003) TLR 271.

x. Naming a suspect is in itself a description.

xi. Where a suspect is arrested at the scene of crime or pursued from there and arrested immediately thereafter, the question of identification does not arise.

xii. Dock identification is worthless unless this has been preceded by a properly conducted identification parade

(See **FRANCIS MAJALIWA AND TWO OTHERS V R.** Criminal Appeal No. 139 of 2005 (unreported).

This list of tests is not exhaustive, but these are among the most dominant features that one is bound to encounter when dealing with evidence of identification. The application of these tests would depend on the circumstances of each case. The circumstances may dictate which test or tests to apply.

In the present case the first appellate court was satisfied that PW1, PW2 and PW3 sufficiently identified the appellants for four reasons. First, the time spent by the robbers in committing the offences. Two, PW1 and PW2 knew the appellants. Three, the short distance at which the witnesses observed the appellants. And lastly, the electricity lights from the night club and the neighboring houses.

To begin with the fourth factor, with respect, we do not know why the learned first appellate judge came to conclude that there was electricity lights from the Night Club. All that PW1, PW2 and PW3 said was that there was "light". There was no indication as to the source or intensity of that light. In principle, a bare assertion of there being "light" is not enough.

Coming to the first factor, there is no indication from any of the witnesses as to how long the whole incident lasted. They were not led to estimate the time the incident lasted. So, the first appellate Court arrived at that conclusion presumably by inference only. In the second factor, the first appellate Court was satisfied that the prosecution witnesses knew the appellant before the date of the incident. The evidence of record does not wholly support that finding. Although PW1 claimed that he knew the first appellant, and recognized the 3 guys, he is also on record to have said that "it was my first day to see them." This contradiction dents PW1's credibility especially when he later swallows his own words when he answers a question from the 3rd appellant.

"*it was not my first time to see you at Triple A.*"

As to PW2, she told the trial Court that prior to the day of the incident, she had known only the first appellant, and not the other appellants. As to PW3, he told the trial Court that he only knew the first and third appellants. So, it is not at all that true that PW1 and PW2 "*knew the appellants quite well before the date of the incident*" as the first appellate court found.

But that leads us to another test. If PW1 and PW2 knew the appellants as the High Court found, when and to whom did they mention their names? Even PW4 the investigator who testified, did not tell the court whether the appellants' names were even mentioned by those witnesses, and if not, why and how were they arrested, and arrested almost two weeks after the incident? If we accept PW1's explanation that he was nursing his wife, the wife was admitted in hospital for only three days. There is evidence that, after being discharged, she also gave her statement. The question is, did those witnesses mention the appellants in their first reports or statements to the police; if they truly knew who committed the atrocities to them? We have no evidence to believe so. In the third factor, again the first appellate court found that the distance at which the offences were committed favoured easy identification. This is nothing but guess work and misplaced inferences. This doubt could easily have been obviated by a sketch plan by PW4 who visited the scenes of crime. In the absence of such sketch plan, and estimates from witnesses themselves it was dangerous and indeed undesirable for the first trial court to have stepped into the shoes of witnesses and itself estimate the distances.

Before we wind up we wish to comment on one matter. As seen above in listing up what the High Court called matters for sufficient identification, the court mostly drew inferences to estimate the time, the distance, and conclude that the light was sourced from electricity. The law (S 122 of the Evidence Act) is that in certain circumstances, a court may draw certain inferences from established facts even if witnesses do not so conclude. These are called primary facts. It is from the established facts that an inference may be drawn.

In the present case, the questions of distance, time, and type of light belonged to the category of primary facts. There should therefore first have been direct evidence from the witnesses on the said matters, before the court concluded whether they were conducive to favourable identification, which is an inference. As there was no direct evidence from PW1, PW2 and PW3, on the distance, time, and type of light, the inferences drawn by the first appellate court were unjustified, and were nothing more than conjecture.

Given the above discrepancies and misapprehension of the evidence we do not, with respect, agree with the lower courts that the appellants

were sufficiently identified by the witnesses. We therefore set aside that finding of fact. This would have been sufficient to dispose of this appeal.

But before we pen off, we wish to observe that the charge sheet could as well be defective. The charge alleges that both offences were committed at TCA area at 3.00 am. Evidence is not clear where exactly this place is. According to the witnesses the armed robbery took place near Triple A club, whereas the gang rape was committed in the banana plantations at Kambi ya Fisi. Are all these places synominous to TCA? The evidence is not clear whether it was possible that both offences were committed at the same time? On the face of it, it is clear the evidence is at variance with the charge sheet. This would have necessitated an amendment of the charge sheet. (See section 234 of the CPA).

In the absence of the amendment could it be said that the appellants underwent a fair trial?

Since the parties did not address us on this point, we shall say no more on this point.

For the above reasons we agree with the appellants and Mr. Mwamunyange, that since the appellants' convictions rest on the evidence of visual identification, and since as postulated above, the lower courts did not properly evaluate the said evidence, the convictions are not safe. We therefore allow the appeal. The convictions are quashed and the sentences set aside. We order that the appellants be released forthwith from custody, unless they are otherwise lawfully held.

DATED at **ARUSHA** this 10th day of December, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

S.A MASSATI
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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

E.Y MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL