IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 147 OF 2012

FUNGILE MAZURI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mchome, J.)

dated 22nd day of July, 2005
in
Criminal Appeal No. 53 of 2003

JUDGMENT OF THE COURT

25th& 29th July, 2013

JUMA, J.A.:

The appellant FUNGILE MAZURI was charged and convicted by the District Court of Kwimba of the offence of rape contrary to section 130 and 131 (1) of the Penal Code as amended by the Sexual Offences Special Provisions Act, 1998 [ACT NO. 4 OF 1998]. The charge sheet alleged that on 27th September, 2000 at around midnight at Nyahomango village in Kwimba District, he had carnal knowledge of Rose d/o Andrew without her consent. The District Court sentenced him to thirty years in jail and twelve

strokes of the cane. He was aggrieved with his conviction and sentence and appealed to the High Court. The appellant complained to the first appellate court that the trial magistrate ought to have considered that *koroboi* was not conducive for positive identification. The first appellate court dismissed his appeal, hence this second appeal.

The appellant has in his eight grounds of appeal to this Court, identified areas where he thinks that the learned Judge of first appellate court had erred in law. In a nutshell, these areas of grievance are:

(i) significance of the arrest of the appellant three days after the alleged rape;

(ii) failure to evaluate the evidence claiming that the complainant was able to visually identify the appellant because of their mutual familiarity;

(iii) cautioned statement should not have been admitted without the same being shown to the appellant;

(iv) probative value of the evidence of visual identification of the appellant by way of *koroboi*;

(v) failure to comply with the mandatory provisions of section 240 (3) before admitting medical examination report (PF3); and

(vi) failure to conduct the Preliminary Hearing.

At the hearing of the appeal the appellant appeared in person and unrepresented. The appellant had nothing much to submit on after placing his total reliance on his grounds of appeal. The respondent Republic was represented by Mr. Victor Karumuna, learned State Attorney.

We should perhaps point out here that some of the grounds of appeal which the appellant has brought before us were not raised before the High Court. Out of his eight grounds of appeal, only two grounds on visual identification were canvassed at the High Court sitting as the first court of appeal. Although we are vested with jurisdiction to hear appeals from or revise proceedings or decisions by the High Court in the exercise of its original, appellate or revisional and/or review jurisdictions, we cannot always decide on any issue which was never decided by the High Court (see, for example: CRIMINAL APPEAL NO. 112 OF 2006, **JAFARI MOHAMED VS. THE REPUBLIC (CAT at Dodoma)** (unreported). All the

same, since the learned State Attorney has responded to these complaints, we shall too.

Before we look at the submissions of the appellant and the learned State Attorney appearing before us, we deem it expedient at this stage to recapitulate the background facts leading up to this second appeal. It was around 02:00 a.m. on 27th September 2000, Rose Andrea (PW3), the complainant had retired to bed. She was alone at home. Her husband Juma Kengele had two wives, and had gone to sleep at his senior wife's house, about two kilometres away. PW3 was awakened by a knock at the door. She asked who it was. She could hear people outside running away. Moments later, there was yet another knocking at her door. She went to the door and once again asked who it was. Still later, there was yet another knock, this time at the window. PW3 saw the appellant who was already inside the house having broken into the house through a window. The light from *koroboi* assisted her to identify the appellant. The appellant seized his moment by shutting her mouth while pushing her down. PW3 had only one piece of *kanga* cloth on. She went down crashing on cooking pots and utensils. Appellant lay on her, pulled her underpants down before

using one hand to push his penis into her genitalia. He immediately ejaculated. Then the appellant was soon gone.

Immediately after her ordeal, PW3 went to report to the local commander of the vigilante (sungu sungu). Seleleko Kasabuku (PW2) the local sungu sungu commander confirms that indeed PW3 went to his house to report that the appellant had broken into her house and raped her against her will. PW3 asked the complainant to sleep at his place till morning. In the morning of 27th September, 2000, William Nevi (PW1) the local ten cell chairman, who gave the complainant an introduction letter to report the matter at the Ukiriguru police station. C. 7639 D/CPL Justus (PW4) of Ukiriguru police station confirmed that on 29th September, 2000 the complainant reported at the police station that she had been raped by the appellant who was still in the custody of the sungusungu. The complainant was issued with PF-3 to seek medical examination. Meanwhile three days later on 2nd October 2000, PW4 took the appellant's cautioned statement. In his defence testifying as DW1, the appellant explained that he was working in his farm when the sungusungu came to arrest him,

before taking him to police station. He denied any role in the offence of rape.

From the outset, Mr. Karumuna indicated that he was supporting the conviction of the appellant and the sentence. All the same, the learned State Attorney agreed with the appellant that his cautioned statement was wrongly admitted and should be expunged from the records because the appellant was never asked if he objected to its admission. Mr. Karumuna also supported the appellant's ground of appeal contending that the PF-3 was erroneously admitted in evidence when it was tendered by the complainant as exhibit P1, and should also be expunged. Records of the proceedings show that in violation of clear provisions of section 240 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002; the appellant was not given an opportunity to accept or object to the PF 3 before it was admitted.

While admitting that the preliminary hearing envisaged under section 192 of the Criminal Procedure Act was not conducted, the learned State Attorney hastened to point out that the appellant's rights to a fair hearing were not violated because he had and took up the opportunity to testify in

his own defence. Mr. Karumuna insisted that the appellant was not prejudiced in any way by lack of preliminary hearing.

We have always restated that the intention of the legislature in enacting section 192 of the CPA on holding of preliminary hearing was to accelerate and speed up trials in criminal cases (see- CRIMINAL APPEAL NO. 109 OF 2002, **1. JOSEPH MUNENE, 2. ALLY HASSANI VS. THE REPUBLIC (CAT at Arusha) (unreported)**. We have further restated that criminal proceedings can be said to have been vitiated by the omission of the trial court to hold preliminary hearing only when upon perusal of the record it is shown that the appellant's trial was either delayed or caused extra costs or prejudiced the appellants: (see-**1. JOSEPH MUNENE, 2. ALLY HASSANI VS. THE REPUBLIC (supra)**. Mr. Karumuna is with due respect correct, there is nothing on the record to show the appellant suffered any delay or extra costs or any other prejudice on the appellant because of the failure to conduct the preliminary hearing.

Despite conceding to the two grounds on cautioned statement and evidence medical examination report, Mr. Karumuna submitted that the

remaining evidence, in particular that of visual identification of the appellant by the complainant, remains intact to sustain the conviction of the appellant. Elaborating what he described as sufficient evidence of visual identification, Mr. Karumuna referred to *koroboi* lamp, that the incident took some time to enable the complainant to identify his assailant. This was when the appellant was undressing the complainant, while embracing her in struggle provided sufficient opportunity to observe the appellant and identify him.

From the submissions, there is no dispute that the complainant was raped and both courts below made a concurrent finding thereon with the trial court making a finding that there was penetration. The central issue for our determination is whether the appellant was positively identified as the person who raped the complainant. There was also a concurrent finding of fact that the appellant was visually identified by the complainant as the intruder who not only broke into her room, but also raped her.

The general rule is that this Court will be slow and hesitant to disturb concurrent findings of facts by two courts below. It will only disturb the

concurrent findings if these findings are for example unreasonable or where it is evident that some material points or circumstances were not considered (see for example CRIMINAL APPEAL NO. 95 OF 2012, **PASCHAL JACOB MUSHI VS. THE REPUBLIC** (CAT at Arusha) (unreported). We shall therefore seek to find out whether there is any cause for us to interfere with concurrent findings of facts. Since the appellant was convicted on the basis of visual identification at night, we shall use as point of reference the principles this Court has set down to guide reliance on evidence of visual identification at night.

We begin from our settled legal premise that the evidence of visual identification is the weakest kind of evidence and the most unreliable, and courts should not act on it without first dealing and eliminating all possibilities of mistaken identity: **WAZIRI AMANI V. R (1980) TLR 250** and CRIMINAL APPEAL NO. 39 OF 2000, **MASUMBUKO CHARLES VS. THE REPUBLIC** (CAT at Dar es Salaam) (unreported). The next premise is the established legal principle that when faced with cases which on the whole depend on evidence of visual identification, courts should identify

whether there are conditions that favour a correct identification (see for example, **MASUMBUKO CHARLES VS. THE REPUBLIC** (supra).

Through many of its decisions, this Court has expounded on how, depending on the circumstances of each case, courts can satisfy themselves that all possibilities of mistaken identity are removed. By for example insisting on evidence that elaborates the nature of the light in question, indicating source of light that was used to facilitate identification, in terms of brightness of that source of light or its intensity sufficient to enable to identify the assailant or intruders properly. How the victim identified her assailant/intruder is yet another consideration, for example was it by appearance, or voice, or way of walking etc or several of these combined?): (CRIMINAL APPEAL NO. 39 OF 2000, **MASUMBUKO CHARLES VS. THE REPUBLIC** (CAT at Dar es Salaam) (unreported).

In her evidence appearing on page 4 of the record, the complainant has clearly indicated that it was a *koroboi* (wick lamp) which was the source of the light she used to positively identify the appellant. And that was about all she said about the light. She stated:

"There was koroboi. With the help of that light, I identified the accused well."

And later on page 5, while being cross examined by the appellant, she stated:

"Light was on".

Although in her evidence the complainant went on to testify on what followed between the time her assailant broke in, and the time the intruder left; she did not explain the brightness of that source of light or its intensity. Further, she did not seize the moment of her being in the witness box to explain her familiarity with the appellant and whether in fact the appellant lived in the same village or whether she knew him by his appearance, or voice, or way of walking etc or several of these combined. With due respect, these elaborations must come from the victim herself at least to guard against later embellishments of evidence, courts should not wholly rely on what the victim or eye-witness later tells other witnesses.

The next question we address ourselves to, is whether the two courts below, were properly guided by established principles governing visual

identification at night to convict? Beginning with the trial court, its finding appears on page 10 of the record and that states:

> *"…. The question for determination here is whether the charge against the accused has been established beyond all reasonable doubt? Inside the complainant's house that night, there was koroboi burning. From the time the culprit burst into the complainant's house to the time he went away after successfully forcing the sexual intercourse with the complainant, the complainant managed to identify the rapist as the accused. I think this piece of evidence should be accepted. There was ample time within which to do so with the help of the koroboi light. From the scene that same night, the complainant went straight to her sungusungu commander (PW2) and named the accused. She was sure of what she was doing….."*

It is clear from above excerpts that the trial court skipped the questions regarding intensity of the light, its proximity and prior familiarity if any, between the appellant and the complainant. The trial court believed that the ample time the complainant was together with her assailant in her

room during the alleged rape, facilitated her positive identification using light sourced from a burning wick lamp.

The learned Judge of the first appellate court agreed with the trial court's finding. On page 15 of the record, Mchome, J. (as he then was) states:

> *"....The complainant named the appellant immediately to the sungusungu-chairman and the ten-cell-chairman. He described him as wearing only a pair of long trousers. They live in the same village. The appellant admits to have been at a "gongo' drinking party with the complainant earlier that night. So the trial court believed that rape was committed, and that the appellant was properly identified.*
>
> ***Even if the light were weak (which is not the case in this case anyway)** when a burglar rapes his victim and during the act of rape the victim is in the best position to identify the rapist. It is very difficult if not impossible for her to mistake the identity of her assailant."*
>
> [Emphasis added].

The judgment of the High Court suggests two remarkable conclusions. First, even if the light sourced from the *koroboi* was weak, which was not, it did not matter. With due respect, this observation is against the spirit and tenor of the principles insisting on evidence regarding intensity or otherwise of the source of light that was used for visual identification at night. The learned Judge secondly believed that since during the act of rape the victim found herself in a very close sexual proximity with the assailant, she was best placed in the circumstances to identify the rapist. With due respect, we cannot disagree more. Adequate clarification of nature of the intensity of light goes hand in hand with other factors facilitating proper identification, like proximity, familiarity etc that would assist positive identification.

From the foregoing, we think there is justification for this Court on second appeal to interfere with the concurrent findings of facts by courts below. It is not possible from evidence on record to conclude that all possibilities of mistaken identity had been removed.

As a result we allow this appeal. The appellant shall be forthwith released from prison unless otherwise lawfully held.

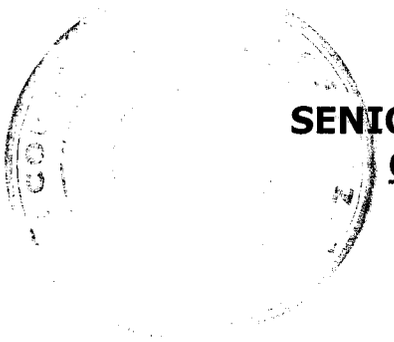
DATED at **MWANZA** this 27th day of July, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original



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