IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MMILLA, J.A.)

CRIMINAL APPEAL NO. 116 OF 2007

SALUM OMARY & 3 OTHERS .....APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Conviction of the High
Court of Tanzania at Dodoma)

(Mjasiri,J.)

dated 31st day of July, 2006
in
Criminal Appeal No. 58 of cf. 59,60 & 61 of 2003

.....

JUDGMENT OF THE COURT

13th & 18th March,2013

RUTAKANGWA, J.A:

On 25th September, 2002 at around 23.00 hrs., PW1 Amina Shabani and members of her household, were rudely awakened by bandits who invaded their home. By the reckoning of PW1 Amina and her sister, PW2 Hawa Shabani, the bandits, who were flashing torches and armed with pangas (machetes), were not less than ten in number.

PW4 No. F.128 D.C. Elias and PW5 No. E.6831 D.C Matiku (the investigators) casually put it, and subsequently charged. Before the District Court of Singida District (the trial court), the above named suspects faced one count of Robbery with violence and two counts of Gang Rape, which they denied.

In their evidence, PW1 Amina, PW2 Hawa and PW3 Hamida, told the trial court that they easily identified the accused persons as the robbers and rapists being aided by torchlight emanating from the torches which were in the possession of the bandits. Each accused denied committing the alleged offences in their evidence and raised defences of alibi.

Relying on the purported visual identification evidence of PW1 Amina, PW2 Hawa and PW3 Hamida, the learned trial Resident Magistrate had no difficulties in holding that the prosecution had proved its case beyond reasonable doubt. The accused persons were accordingly convicted on all counts as charged. On the Robbery count, they were each sentenced to fifteen (15) years imprisonment, and they all received a sentence of thirty years imprisonment on each Gang Rape count. In addition, each one was ordered to pay Tshs. 20,000/= to PW1 Amina and

Upon gaining entry into the house by breaking in, the bandits threatened to kill the occupants unless they kept quiet. After assaulting them, the bandits began searching the entire house for merchandise as PW1 Amina had a shop in the house. They managed to take possession of a weighing scale, a sony radio, a rechargeable lamp, a sewing machine, six iron sheets, clothes and cash money Tshs. 75,000/=, all valued at Tshs. 475,000/=. Not satisfied with the loot, the bandits turned on PW1 Amina and PW2 Hawa and allegedly raped them in turns and then disappeared. The robbery and rapings were witnessed by PW3 Hamida Ismail, who by then was aged 11 years.

Following the alarms raised by these witnesses, their neighbours gathered to find out what was amiss but, the bandits had already escaped. These witnesses told the gathering that they had managed to recognize Juma Kimbui, Musa Rajab, Salum Omari, Kasenya Ramadhani, Saidi Jumanne and Masumbuko Ibrahim, all their villagemates, among the bandits. PW1 Amina who had sustained a cut wound during the assault on her, together with PW2 Hawa, were sent to hospital but after reporting the incident at Singida Central Police Station and each one obtaining a PF3. The named suspects were eventually arrested "by the villagers," as both

PW2 Hawa as compensation. The accused persons' consolidated appeals to the High Court, sitting at Dodoma, against the convictions and sentences were dismissed, hence this appeal.

After the institution of this appeal, appellants Musa Rajab and Masumbuko Ibrahim, died. Their appeal abated and this left us with Salum Omary, Kasenya Ramadhani, Saidi Jumanne and Juma Kimbui as the 1st, 2nd , 3rd and 4th appellants respectively.

Each appellant lodged his own memorandum of appeal. Admittedly, the memoranda of appeal are understandably, having been drawn by lay hands, detailed and argumentative in nature. However, the pith of their complaints is that the two courts below erred in law and fact in:-

(a) Predicating the convictions on very weak and therefore unreliable visual identification evidence;
(b) Relying on the contents of the victims' PF3s which were irregularly admitted in evidence;
(c) Relying on the evidence of PW3 Hamida whose competence to testify was not established; and
(d) Holding that the offences of Gang Rape had been proved satisfactorily, when no evidence of penetration was given.

The four appellants appeared in person before us to prosecute the appeal. When reminded the contents of each one's memorandum of appeal, each one opted to adopt them and had neither anything to say in elaboration nor any additional ground of appeal.

The respondent Republic, which was represented by Ms Maria Mdulugu, learned State Attorney, did not support the appellants' convictions and the sentences imposed on them. In her focused submission, she urged us to expunge from the record, the evidence of PW3 Hamida and the PF3 (exhibits PE1 and PE2). For the former, she argued that her (PW3) evidence was received and acted upon without any ***voire dire*** examination being carried out to test her competence to testify. For the latter, it was her contention that the provisions of S. 240(3) of the Criminal Procedure Act, Cap 20 (the Act), were deliberately flouted by the trial court in spite of the appellants' request to have the doctor called to testify. In support of her submissions she invited us to refer to our decision in **Hassan Hussein Tinna V Republic,** Criminal Appeal No. 33 of 2011 (unreported).

We shall first dispose of these two issues. There is no gainsaying that the trial of the appellants was flawed by the stated glaring incurable irregularities which, we respectfully think, cast doubt on the impartiality of the learned trial Resident Magistrate. We shall demonstrate why we are saying so.

Section 240 of the Act caters for the admission of medical reports in evidence. It is a mandatory requirement under s.240(3) that where any medical report is received in evidence in any trial in a subordinate court, the court must inform the accused of his right to have the author of the report called for cross-examination. This becomes necessary only when the prosecution decides not to call him/her as its witness. The law is now legendary that if such a report, as a PF3, is received in evidence without complying with the provisions of section 240(3), such a report must be expunged or discounted and the trial could be **vitiated**: See, for instance, **Sultan Mohamed v.R,** Criminal Appeal No. 176 of 2006; **Alfeo Valentino v. R,** Criminal Appeal No. 90 of 2006; **Hangwa William v.R.,** Criminal Appeal No. 17 of 2009 (all unreported),etc.

In this particular case two medical reports, being the PF3[S] of PW1 Amina and PW2 Hawa, were tendered in evidence as exhibits PE1 and PE2 respectively. They were tendered not by the doctor who prepared them but by the concerned victims themselves. When PW1 Amina wanted to tender her PF3 in evidence, there was objection from some of the accused persons. Responding to the objections, the Public Prosecutor (P.P.) said:

> *"**P.P.** The accused persons did not give reasons why so they refused (sic) PF3 to be tendered."*

Ruling on the objection, the trial magistrate held:-

> *" Since the second, third and fifth accused did not give reasons for their refusal and since the three accuseds that is first, fourth and sixth accuseds has (sic) accepted, the court is hereby accept (sic) PF 3 to be tendered herein court and it is marked as* **"PE1"**.

The same objection was raised in respect of exh. PE2. The P.P.'s response was:

> *"Fifth Accused has objection but he has no reason for doing that and as always (sic) he who allege must prove. For the reason I pray for this*

honourable court to accept it as the prosecution Exhibit".

Ruling on this objection, the learned Resident Magistrate held:

"As the fifth accused is objecting for the PF3 to be tendered herein court without any reason and taking into consideration that other accused has accepted it. The court is hereby admitting the PF3 of Hawa Shabani and it is hereby marked as PE2."

It is our holding that the trial Resident Magistrate erred in law in overruling the objections. She had a statutory obligation to inform the appellants of their right to have the doctor called for purposes of cross-examination. This is what the concept of " a fair hearing" enshrined in Article 13(6)(a) of our 1977 Constitution entails. Before us, the appellants' have complained that this error occasioned a failure of justice. We have found a lot of merit in this complaint because, the learned first appellate judge relied on these reports to establish the ingredients of penetration for the rape charges.

We have further noted with grave concern, that the procedural and substantive flaws did not end up with the tendering and admission in

evidence of the PF3s. After the prosecution had closed its case, the learned trial Resident Magistrate held that all the accused persons had a case to answer. The appellant Kasenya Ramadhani informed the trial court that he wanted the doctor who examined PW1 Amina and PW2 Hawa and authored exhibits PE1 and PE2 called to testify. He encountered the same earlier hurdle.

Objecting to Kasenya's prayer, the P.P. said:

> "***P.P.*** *The Doctor was not called as a witness because the PF3 was tendered and was admitted to court."*

The ruling of the learned trial Resident Magistrate which led us to the conviction that she might have jettisoned her impartiality to the winds in order to accommodate the P.P.'s interests, was as short as it was unreasoned . She ruled thus:-

> " *Let the matter continue without the Doctor's evidence since the PF3 was admitted go to the court (sic) as prosecution exhibit."*

The nagging and pertinent question as to why both the P.P. and the learned trial Resident Magistrate were adamant in their resolve to protect the author of Exhibits PE1 and PE2 from going into the witness box, remain unswered to date. It is gratifying that Ms. Mdulugu saw through them and

pressed us to expunge this evidence. We accede to her prayer and expunge both exthibits from the evidence. This particular ground of appeal, therefore, succeeds.

The second legal issue raised by the appellant and Ms. Mdulugu, should not detain us at all. PW3 Hamida was unarguably a child of tender age. Before her evidence was received, the mandatory provisions of s.127(2) of the Evidence Act, Cap 6 had to be strictly complied with. We are in full agreement with the contentions of the parties to this appeal that this was not done. The proceedings in the trial court will vindicate us. This is what happened in court. We shall faithfully reproduce the proceedings as obtained from the original trial court's record.

"Date: - 04/02/2003
Coram:- S.S. Sarwat, R.M,
P.P. : ASP Peter
Accused – Present

P.P.:- I have one witness:

PROSECUTION CASE CONTINUES:-

COURT: Witness is a minor and the court I hereby testing if she is capable of giving evidence as per Section 127 of Evidence Act.

Hamida Ismail of Naida I am not starting yet school. Muslim, she understand the nature of oath.

PW3 NAME- HAMIDA ISMAIL, AGE 12 YEARS, TRIBE-NYATURU, RELIGION-ISLAM, AFFIRM AND STATE AS FOLLOWS:-

COURT: - After the testified of the witness the court is of the opinion that the witness is understanding the nature of the oath and she is possessing of sufficient intelligence as per section 127 (2) of the Evidence Act.

EXAMINATION IN CHIEF BY P.P:-"

Thereafter PW3 Hamida gave her evidence.

With due respect to the learned trial Resident Magistrate, all we can say here is that that was not a ***vore dire*** examination contemplated under S.127(2) of the Evidence Act and as lucidly expounded by this Court and the High Court in numerous decided cases and decisions from other jurisdictions. For the benefit of all magistrates whether exercising original, appellate and/or revisional jurisdictions, we advise them to seriously read these decisions in order to acquaint themselves with this unavoidable procedure. We recommend a few of them, because they are many; eg:-

(i) **Augustino Lyanga v.R.,** (CAT) Criminal Appeal No. 105 of 1995,

(ii) **Justine Sawaki v.R,** (CAT) Criminal Appeal No. 103 of 2004,

(iii) **Godi Kasenegala V. R.,** (CAT) Criminal Appeal No. 10 of 2008,

(iv) **Hangwa William** (supra),

(v) **Hassan J. Tinna** (supra), (all unreported), and

(vi) **Kinyua V.R.** (KCA) (2002) IKLR 156,etc.

As no ***voire dire*** was conducted at all under S. 127(2) of the Evidence Act, to determine the competence of PW3 Hamida in a criminal trial in terms of s 198(1) of the Act, we hereby totally discount her evidence as correctly urged by the appellant and Ms. Mdulugu. This leaves us with the evidence of PW1 Amina and PW2 Hawa.

We showed above that one of the appellants' grievances in this appeal is that they were wrongly convicted for the offences of gang rape as no evidence was led by the prosecution to prove the essential ingredient of rape. The respondent Republic has conceded this. We, too, share their conviction. This is simply because, both PW1 Amina and PW2 Hawa made bare assertions that they were raped. According to settled law this was insufficient. See, for instance, **Selemani Makumba v R,.** (CAT) Criminal Appeal No. 94 of 1999, **Mathayo Ngalya @ Shaban v.R**, (CAT) Criminal Appeal No. 170 of 2006, **Hazikimana Syrivester v R.,** (CAT) Criminal

Appeal No. 181 of 2007, **Sindayigaya Francis v. R.,** (CAT) Criminal Appeal No. 128 of 2009 (all unreported), etc.

In **Selemani Makumba** (supra) we held thus:

> *" True evidence of rape has to come from the victim if an adult, that there was penetration and no consent..."*

Subsequently, the courts have consistently held that evidence has to be led specifically to prove the ingredient of penetration. "Short of that evidence, the offence of rape cannot be said to have been proved", the Court unequivocally held in **Sindayigaya Francis** (supra). No scintilla of evidence was given by the prosecution witnesses to prove this essential ingredient, hence reliance by the learned first appellate judge on the now discounted PF3[S]. We accordingly hold that the two offences of gang rape were not proved at all, and allow the appeal against the convictions for gang rape. The sentences of thirty years imprisonment, which were otherwise illegal, are also quashed and set aside.

It was the appellants' and Ms. Mdulugu's strong submissions that the offence of robbery was not proved beyond reasonable doubt contrary to the concurrent findings of the two courts below. Agreeing with the

contention of the appellants, Ms. Mdulugu convincingly argued that the visual identification evidence of PW1 Amina and PW2 Hawa lacked cogency because the conditions at the scene of the crime were not conducive to an unmistaken identification of the appellants among the ten plus armed bandits. She argued that the two witnesses could not have easily recognized the appellants by the aid of light from torches which were being flashed on them. We have found this reasoning convincing.

There is no dispute that the robbery took place at night and as already shown the two witnesses were awakened from sleep. Upon rising from bed, they confronted about ten bandits who were armed with machetes and who instantly assaulted them. There was no light on in the house and the only source of light available was the light from the bandits' torches. Before proceeding further we want to make it clear that, we do not wish to be taken here as saying that it is not always possible to identify assailants at night where victims are terrorized and terrified. Each case must be judged on the basis of its own peculiar facts.

In this case, the evidence on the source of light was not convincing. In her entire evidence in chief, PW1 Amina did not tell what enabled her to

identify the appellants among the bandits. It was while under cross-examination when she claimed that "there was bright light of your torch". She immediately believed herself, this time claiming that there was electricity light. Later she said:-

> *" I have no electricity but recognize you through your torch".*

PW2 Hawa was equally vague. She said:-

> *" After that the urban group left us to outside then there village group remained. Kasenya and Masumbuko was (sic) lighted us in the face".*

The argument of the appellants which found purchase with Ms. Mdulugu, is that since the bandits flashed their torches into the faces of the witnesses, and the light was very bright, it could have been impossible for PW1 and PW2 to identify the bandits. We have found a lot of sense in this argument and there is authority to support it.

This Court has held in numerous decisions that torchlight flashed on a witness is not an effective means or mode of identification. See, for instance, **Juma Marwa v.R.,** Criminal appeal No. 71 of 2001, **Michael Godwin and Another v. R.,** Criminal Appeal No. 66 of 2002, **Mathayo**

Igokelo @ Kapela and Another v. R., Criminal appeal No. 446 of 2007 (all unreported). In **Godwin v R.** (supra), the Court held:-

> *" It is common knowledge that it is easier for one holding or flushing the torch to identify the person against whom the torch is flushed. In this case, it seems to us that with the torch light flushed at them (PW1 and PW2), they were more likely to have been dazzled by the light. They could therefore not identify the bandits properly..."*

The above reasoning applies with great force to the facts of this case. Given the fact that the identifying witnesses had been rudely awakened from their sleep and the ensuing panick when they confronted over ten bandits each armed with a machete and bright torch light being flashed at them, it could not be held with any degree of certitude that they properly identified the appellants among the bandits notwithstanding that they were all villagemates. This might go to explain the failure to testify by their neighbours who rushed to their aid in response to the alarms raised and indeed escorted them to the Police Station. Had the appellants been recognized and immediately named, one of these neighbours would have testified in support of PW1 and PW2.

In fine, we have found the identification evidence of PW1 Amina and PW2 Hawa not convincing at all to sustain the convictions of the appellants. We therefore allow the appellants' appeal against conviction for robbery. The conviction is hereby quashed and set aside. The prison sentence of fifteen years, which was also illegal and the compensation order, are also quashed and set aside. The appellants are to be released forthwith from prison unless they are otherwise lawfully held.

DATED at **DODOMA** this 16th day of March, 2013.

E.M.K.RUTAKANGWA
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

B.K.M. MMILLA
JUSTICE OF APPEAL

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

(Malewo M.A)
DEPUTY REGISTRAR
COURT OF APPEAL