IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CORAM: MSOFFE, J.A., ORIYO, J.A., And MMILLA, J.A.

CRIMINAL APPEAL NO. 306 OF 2013

KANISIUS MWITA MARWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mwanza.)

(Sumari, J.)

dated 24th May, 2013
in
DC Criminal Appeal No. 76 of 2012.

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JUDGMENT OF THE COURT

15th & 20th October, 2014

MMILLA, J. A.:

The appellant one Kanisius Mwita Marwa was charged before the District Court of Tarime in Mara Region with two offences; armed robbery contrary to section 287A of the Penal Code Cap 16 as amended by Act No. 4 of 2004, and rape contrary to sections 130(1),(2)(e) and 131(1) of the same Act. While that court acquitted him of the offence of armed robbery it substituted and convicted him of the offence of theft c/s 265 of the Penal Code for which it sentenced him to 5 years imprisonment, it nevertheless convicted him as

charged on the second count of rape and sentenced him to life imprisonment. He was also ordered to compensate the complainant a total of T. shs 2,000,000/=. On appeal to the High Court at Mwanza, he was successful on the first count, but that court upheld conviction and sentence on the second count of rape, hence this second appeal to this Court.

The background facts of this case are not complicated. The complainant was Helena Kisagero, then aged 15 years. She was in form one at Nkende Secondary School in Tarime District. On 22.9.2011 at about 11.00 hours, while in her school uniform, she left home on foot for school. On reaching the road at Seng'ensa area, she saw a motor vehicle that was heading the direction of her school and stopped it. That motor vehicle was being driven by the appellant. She asked for a lift up to Nkende Secondary School. The request was accepted and she boarded. On approaching Nkende Secondary School sign board, the complainant reminded the appellant to drop her there, but to her surprise the appellant defied her request and increased the speed. Upon that, the complainant raised an alarm soliciting help. The appellant reacted by producing a knife and threatened to stab her if she continued to yell. He continued to drive speedly.

On reaching Gamasara area the appellant swerved into the weather road. After covering a short distance, he stopped the motor vehicle and ordered her to take off her clothes, but she refused to obey. Upon that, the appellant held her firmly and tore her clothes, undressed her underpants and began raping her. In the process, he injured her vagina resulting into profuse bleeding. Meanwhile however, the curious children went to where the motor vehicle was parked and peeped inside. On seeing what was happening, they raised noises which attracted PW2 and PW3 to rush to where that motor vehicle was parked. On arrival at the scene, PW2 and P3 found the appellant having sexual intercourse with the young girl who was crying. On asking what was happening, the appellant told them to mind their own business and continued with his evil act. PW2 and PW3 broke the glass of the door of that motor vehicle, and that albeit threats to stab them with the knife he was armed with, they rescued the complainant who was then naked after which the appellant drove away leaving them and the girl at the scene of crime. However, they had then marked the registration numbers of that motor vehicle to be T.491 BRT.

After the appellant had left, PW2 took the victim girl to his home where his sister in law one Jenifer Saba (PW7) gave her clothes to cover herself

before she took her to Tarime Police Station and subsequently to Tarime District Hospital for medical examination and treatment.

On their part, the police commenced investigation. They gathered evidence which culminated into the arrest of the appellant who was subsequently charged with those two offences.

In his defence before the trial court, the appellant denied the allegations leveled against him. He was eloquent that PW1, PW2 and PW3 were not truthful witnesses in purporting that they identified him at the scene of crime, and also that PW1 did not identify him at the identification parade which was organized by PW6 Insp. George Lutonja. He also alleged that the evidence of PW1, PW2 and PW3 ought not to have been believed and relied upon on account that it was loaded with contradictions. He similarly asserted that because his mother who testified as PW8 said she had stopped him from driving her motor vehicle, and that on 22.9.2011 that motor vehicle was parked at home, PW1, PW2 and PW3 lied when they said he was the one driving the said motor vehicle in which the incident of rape took place.

Before us, the appellant appeared in person and was not represented, while Mr. Lameck Merumba, learned State Attorney represented the

respondent Republic. He hurried to inform the Court that he was supporting conviction, but that he had reservations on the sentence.

The memorandum of appeal filed by the appellant raised six (6) grounds; **one** that the memorandum of the matters agreed during preliminary hearing was not signed as envisaged by section 192(3) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA); **two** that the identification parade was conducted without strictly complying with the Police Standing Order **(the PGO)** No. 232; **three** that the lower courts believed and relied on concocted evidence; **four** that the complainant's age was not proven; **five** that the evidence of visual identification was unsatisfactory, and **six** that there was no sufficient evidence to connect him with the purported motor vehicle in which it was alleged the charged rape took place.

When he appeared before us, the appellant successfully prayed to be allowed to present and adopt the written submissions he had prepared. We have perused it and have found that it merely emphasizes the grounds he raised. He did not give oral submissions.

On his part, Mr. Merumba discussed the six grounds raised seriatim. To begin with, he conceded that section 192 (3) of the CPA was not strictly complied with on account that the memorandum of undisputed matters was not signed by the persons required to sign it. However, while he invited the Court to vitiate those proceedings, he was quick to add that such omission affected the preliminary hearing only and not the rest of the proceedings.

Admittedly, in conducting the preliminary hearing the trial court is directed by section 192(3) of the CPA at one stage to prepare a memorandum of the matters agreed, to read over and explain it to the accused in a language that he understands, and subsequently require him and his advocate (if any) as well as the public prosecutor to sign it. The provision is coached in mandatory terms. Since it is clear that it was not signed as required, it is certain that the appellant's complaint in this regard is well founded as we accordingly hold. However, we agree with Mr. Merumba that such omission affected the preliminary hearing proceedings only and not the rest.

A situation similar to this facing us here occurred in the case of **Brayson s/o Katawa v. Republic,** Criminal Appeal No. 259 of 2011, CAT (unreported). In that case, it was established that section 192(3) of the Act was not complied with during the Preliminary Hearing. Firstly because the

memorandum of agreed matters was not read over and explained to the appellant in a language he understood as required; secondly because his signature was not appended at the end of the memorandum, and thirdly because his defence counsel stepped into his shoes and told the court what matters were admitted and what matters were not admitted. While holding that such omission constituted a fundamental defect, the Court nevertheless went on to hold, relying on the cases of **M.T. 7479 Sgt. Benjamin Holela v. Republic**, [1992] TLR 121, **Christopher Ryoba v. Republic**, Criminal Appeal No. 26 of 2002; **Kalist Clemence @ Kanyaga v. Republic**; Criminal Appeal No. 19 of 2003, **Athumani Ndagala @ Mikingamo v. Republic**, Criminal Appeal No. 63 of 2007 (all unreported), that the procedural irregularities in a trial as in this case, vitiates the preliminary hearing proceedings only resulting in the nullification of same and not the rest.

The basic issue becomes; what is the attending consequence for nullifying such proceedings? The answer is found in that same case of **Brayson s/o Katawa v. Republic (supra).** On this aspect, the Court stressed that the effect of nullifying proceedings of a preliminary hearing meant that all the evidence that the parties thought was deemed proved in terms of section 192 (4) of the Act, would be proved in the ordinary way.

That is the correct position of the law and we associate ourselves with that conclusion. We desire to be so guided.

Also conceded by Mr. Merumba is the second ground of appeal in which the complaint is that the identification parade was not conducted in accordance with the PGO and the relevant rules. Mr. Merumba was clear that PW6 abrogated the procedure by his failure to inform the appellant, among other things, the right of seeking the presence of his advocate, if any, when the parade took place, and at the termination of the parade or during the parade to ask the accused (appellant) if he was satisfied that the parade was conducted in a fair manner and made a note of his reply. He referred us to the case of **Francis Majaliwa Deus and Another v. Republic**, Criminal Appeal No. 39 of 2005, CAT (unreported) and prayed the Court to discard that piece of evidence. Once again, we agree with him.

As correctly asserted by the appellant and supported by Mr. Merumba, identification parades are conducted according to PGO No. 232 issued by the Inspector General of Police. This is by virtue of the powers bestowed on him under section 7(2) of the Police Force and Auxiliary Services Act Cap 322 of the Revised Edition, 2002. The Order stipulates mainly the procedure of conducting the parade, the rank of police officers who can conduct the same

(in terms of Rule 2 (b) thereof, an Assistant Inspector and above), the rights of the suspect, and the making and maintenance of the records of that exercise at the end of it all. The need to comply with the procedure in this regard has been emphasized in many cases, including those of **Francis Majaliwa Deus and 2 others v. Republic** (supra), **Raymond Francis v. Republic** [1994] T.L.R. 100, and **Maisa Lucas Mwita @ Kipara v. Republic**, Criminal Appeal No. 119 of 2011 (unreported). Where such procedure may not have been followed, the evidence becomes worthless.

As already pointed out, the identification parade in our present case was organized and conducted by PW4. Going by the evidence on record, it is apparent that he did not inform the appellant the right of seeking the presence of his advocate, if any, when the parade took place. Also, at the termination of the parade or during the parade, he did not ask the appellant if he was satisfied that the parade was conducted in a fair manner and did not make a note of his reply. It is clear therefore, that the exercise was unsatisfactorily done. In view of that, we cannot avoid to find and hold that that piece of evidence was worthless entitling us to expunge it from the record as we accordingly do.

Next for consideration are the third and fifth grounds of appeal which we think can conveniently be discussed together. While the complaint in the third ground was that the evidence which was relied on in founding his conviction was concocted, the fifth ground alleges that the evidence of visual identification was unsatisfactory.

Submitting in respect of the third ground, Mr. Merumba contended that the lower courts properly found that the evidence advanced by the prosecution was credible. Concerning the fifth ground, Mr. Merumba submitted that fortunately, the charged incidents occurred in broad day light, thus ruling out possibilities of mistaken identity by PW1, PW2 and PW3. He also said that there was cogent circumstantial evidence that came from PW5, PW7 and PW8 touching on the identity of the motor vehicle in which the charged rape allegedly took place. Also, Mr. Merumba contended that the sixth ground was baseless when the evidence of PW2, PW3, PW5 and PW8 is considered in its broad perspective. He prayed the Court to dismiss these grounds too. Once again, we agree with him.

To begin with, the evidence on record does not provide clues on why any of the prosecution witnesses, particularly PW1, PW2 and PW3 could have

cooked their evidence against the appellant; in fact, he himself did not suggest any.

Apart from what we have just said above, it is plain and certain that the charged incidences occurred in broad day light, to be precise, at around 12.15 hours, therefore ruling out possibilities of mistaken identity by PW1, PW2 and PW3 as was correctly submitted by Mr. Merumba. The evidence of those three witnesses was more than clear.

To begin with, PW1 said she stopped the appellant's motor vehicle at around 11.00 hours. Since PW2 and PW3 were positive that they arrived at the scene of crime at around 12.15 hours, it means that she had been with her assailant for not less than an hour, therefore that she had ample time in which to identify him. Also, PW2 and PW3 testified in common that they clearly identified the appellant at the scene of crime, and were unequivocal that the incident took place in a motor vehicle with Reg. No. T491 BRT make Toyota Corolla. In our view, that was clear evidence of unmistaken identity of the appellant.

There was also cogent circumstantial evidence which came from PW5 DC Feruzi, the constable who had arrested the appellant on 7.9.2011 while

driving motor vehicle with Reg. Nos. T491 BRT make Toyota Corolla for defying police orders, so also the evidence from Mary Cyprian (PW8), the appellant's mother and owner of that very motor vehicle who said that it was the appellant who was ordinarily driving that motor vehicle. The fact that PW1 said she was raped in the motor vehicle that was being driven by the appellant, and because PW2 and PW3 said that they found the appellant raping the complainant in motor vehicle with Reg. Nos. T491 BRT make Toyota Corolla, and since PW5 and PW8 concretely connected the appellant to that motor vehicle, it goes without saying that the prosecution had proved beyond reasonable doubt that the appellant was the person who raped the complainant. Thus, the third, fifth and sixth grounds are baseless; we dismiss them too.

Yet to be considered is the fourth ground of appeal in which the appellant is complaining that the complainant's age was not proven. Mr. Merumba submitted that this complaint is devoid of merit, save to the extent on how the proven age could have influenced the sentence which was meted by the trial court and upheld by the first appellate court. We hasten to say that we agree with him.

In the first place, the complainant's age was reflected in the charge sheet, and also she pronounced it in her evidence before the trial court. She was express that she was 15 years of age. The appellant had the opportunity of cross - examining PW1 as shown on page 4 of the court record. He did not raise any questions touching on the complainant's age. Also, the appellant did not cast doubt of PW1's age in his defence. That means his complaint now that her age was not proven is an afterthought. In the circumstances, this ground as well lacks merit.

Notwithstanding what we have just said above however, we are sensitive that since the complainant was then 15 years old, the sentence of life imprisonment which was imposed on the appellant by the trial court and upheld by the first appellate court was excessive. The punishment for the offence of rape is provided under section 131 (2) and (3) of the Penal Code. That section stipulates that:-

> "(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by

the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) **Not relevant**

(3) Notwithstanding the preceding provisions of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment."

Since the complainant in this case was above the age of 10 years as aforesaid, the appropriate sentence ought to have been 30 years imprisonment. However, in view of the fact that the severity of the sentence was not complained of by the appellant, because it is a point of law we take the liberty to invoke the powers obtaining under section 4(2) of the Appellate Jurisdiction Act Cap 141 of the Revised Edition, 2002 (the AJA), in consequence of which we quash and set aside the sentence of life imprisonment and impose in its stead the sentence of 30 years imprisonment.

We also feel compelled to say something about the compensation. After pronouncing the custodial sentence, the trial court ordered the appellant to compensate the complainant T. shs 2,000,000/= without more directions. Later on however, after upholding the sentence and order for compensation,

the first appellate court held the opinion that because the appellant was put behind bars for life, the trial magistrate ought to have ordered for distress to enable the complainant to realize the awarded compensation, and it proceeded to order distress. With respect, that was incorrect.

It is apparent that the trial magistrate's order for compensation was based on the provisions of section 131(1) of the Penal Code already quoted above which directs in part that the appellant shall in addition be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to such person. That section does not go to the extent of prescribing the means of recovery of the compensation, therefore that it was improper for that court to have gone that far. Once again, we invoke the powers this Court has under section 4(2) of the AJA for which we nullify the order for distress given by the first appellate court and restore the position which was pronounced by the trial court.

As earlier on pointed out, the trial court believed that the appellant did not commit the offence of armed robbery. It believed however that the appellant committed the offence of theft contrary to section 265 of the Penal Code and sentenced him to 5 years imprisonment.

On the other hand, the first appellate court was convinced that the appellant committed neither the offence of armed robbery, nor that of theft. It quashed conviction and acquitted the appellant on that count.

After carefully considering the evidence in that regard and the circumstances under which the complainant lost her properties, we are convinced that the findings of both courts below on the point were faulty. We are saying so because evidence was in abundance that PW1 was pulled out of that motor vehicle by PW2 and PW3 naked and left behind everything she had which the appellant took away at the time he sped away. We also note that PW2 and PW3 did not make attempts to apprehend him because he was armed and dangerous. Both PW2 and PW3 testified that he told them to mind their own business and threatened to stab them with the said knife.

We think that like in a situation where a person may have killed a person in the course of committing a robbery, such person cannot escape the wrath of the law merely because he did not intend to kill. We equate that to a situation obtaining in the instant case in which the appellant deprived the complainant of her properties in the course of committing the offence of rape. In our firm view, the courts below ought to have had found, as we do, that the appellant was guilty of the offence of armed robbery as was charged in

the first count. Therefore, we quash the findings of those courts in respect of that count. We accordingly sentence him to 30 years imprisonment. We however order the sentences to run concurrently.

Except to the extent shown above, the appeal is otherwise dismissed.

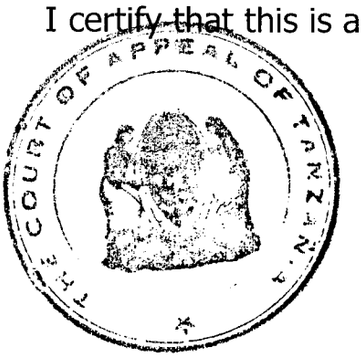
DATED at MWANZA this 18th day of October, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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



I. P. Kitusi
CHIEF REGISTRAR
COURT OF APPEAL