

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 198 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

MAGAI MANYAMA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision/Judgment of the High Court of Tanzania
at Mwanza)**

(Mwangesi, J.)

dated the 24th day of March, 2014

in

HC. Criminal Sessions No. 193 of 2002

JUDGMENT OF THE COURT

25th November & 3rd December, 2015

MJASIRI, J.A.:

In the District Court of Musoma at Musoma, the appellant Magai Manyama was charged and convicted of rape contrary to sections 130 (1) and (2) (a) and 131 (1) of the Penal Code, Cap. 16, R.E. 2002 (the Penal Code) and was sentenced to thirty (30) years imprisonment and twelve (12) strokes of the cane. He was also ordered to pay Shillings Two Hundred Thousand (200,000/=) as compensation to the victim.

Aggrieved by the conviction and sentence, he appealed to the High Court. His appeal was unsuccessful. Still aggrieved, he has filed his second appeal to this Court.

The background to this case is that PW1, Paskazia Msafiri who was the victim had gone to a bar in Mwisenge in Musoma township where her sister Noela Msafiri PW2, worked as a waitress. The joint was owned by PW3, No. E.928 PC King'aru a policeman. The appellant was also drinking in the same bar. The appellant was well known to PW2. At about 21.00 hours when PW1 left the bar with PW2, the appellant followed them. When they reached the grave yard, PW2 stopped to ease herself, while doing so the appellant abruptly started to assault PW1, fell her down and raped her.

PW2 on seeing that her sister was being attacked by the appellant went back to the bar to seek for help from PW3. Before leaving, PW2 asked the appellant, calling out his name, why he had hit her sister. When PW3 arrived at the scene, the appellant ran away. PW3 chased him. According to PW1 the appellant was arrested on the same night.

PW1 in her testimony, gave a detailed account as to what had transpired and clearly stated that she was raped by the appellant. She also

testified that she was also assaulted by the appellant. The appellant was identified by both PW2 and PW3. PW2 called out his name as he was assaulting his sister. The appellant denied the charge.

The appellant lodged a seven (7) point memorandum of appeal. The crucial grounds of appeal are as follows:-

- 1. The prosecution witnesses were not credible.*
- 2. The appellant was not properly identified.*
- 3. The case against the appellant was not proved.*

At the hearing of the appeal, the appellant appeared in person and defended for himself while the respondent Republic had the services of Mr. Mamti Sehewa, learned Senior State Attorney.

The appellant being unrepresented did not elaborate on his grounds of appeal. He opted for the learned Senior State Attorney to present his submissions first.

Mr. Sehewa strongly supported the conviction of the appellant and the sentence metted out by the trial court which was upheld by the High Court.

On ground No. 1, on the failure to assess the credibility of prosecution evidence the learned Senior State Attorney submitted that the evidence of PW1 was sufficient to establish the charge. He relied on section 127 (7) of the Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act). The trial court found PW1 to be a credible witness. The appellant in his defence agreed to have accompanied PW1 and PW2 when they left the bar on the fateful night. He submitted that the charge against the appellant was proved beyond reasonable doubt. He stated that the best evidence of rape is that of the victim.

With regards to ground No. 2, that the trial and first appellate court relied on unfavourable visual identification, he submitted that the appellant was properly identified. The appellant was known to PW2 who called him by name. He had also been drinking at the bar in the presence of PW1, PW2, and PW3. PW3 clearly stated in his testimony that it was the appellant who ran away, when he arrived at the scene. There was moonlight and the appellant was clearly seen by PW3.

The crucial issues for consideration and determination are as follows:-

- 1. Whether or not PW1 was raped.*

2. *Whether or not it was the appellant who committed the rape.*

We on our part after carefully reviewing the record are inclined to agree with Mr. Sehewa. The concurrent findings of the two courts below cannot be faulted. PW1 was found to be a credible witness. Given her testimony, it is evident that PW1 was raped. There was cogent evidence which was not contradicted by the appellant.

Section 127 (7) of the Evidence Act, provides as under:-

*"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence **the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.**"*

It is settled law that the best evidence of rape has to come from the victim. See for instance **John Martin @ Marwa v. Republic**, Criminal Appeal No. 22 of 2008 CAT and **Selemani Makumba v. Republic**, Criminal Appeal No. 94 of 1999 CAT (both unreported).

On the issue of identification, the evidence of PW2 and PW3 clearly indicated that it was the appellant who was the culprit. He was mentioned by name by PW2 and was also recognized by PW3 as he had just left the bar where he was drinking. When PW1 was being cross examined by the appellant (page 8 of the record) she stated as follows:-

"I identified the accused when beating me and being named by my sister. I looked at him and recalled that I am used to seeing him"

We are of the firm view that once PW1, PW2 and PW3, were believed, the issue of mistaken identity does not arise. The appellant was arrested on the same night.

In **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003 it was stated thus:-

"Every witness is entitled to credence and must be believed and his testimony accepted unless they are

good and cogent reasons for not believing a witness.”

According to the case of **Patrick Sanga v. Republic**, Criminal Appeal No. 213 of 2008 CAT (unreported), it was pointed out that a *witness* also includes an accused person who testifies in his defence and his evidence and his witnesses also. The appellant admitted being present at the bar on the night of the incident. He also stated that he accompanied PW1 and PW2 when they left the bar.

Both the High Court and the District Court found PW1 and PW2 to be credible witnesses and relied on their testimony. This Court has stated time and again that except on points of law, would not readily interfere with concurrent findings of fact by courts below unless there are serious misdirections, non directions, or misapprehensions or a miscarriage of justice. See **Salum Mhando v. Republic** 1993 TLR 170, **Jaffari Mfaume Kawawa v. Republic** 1981 TLR 149, **Musa Mwaikunda v. Republic**, Criminal Appeal No. 174 of 2006 CAT, and **Michael Elias v. Republic**, Criminal Appeal No. 243 of 2009 (both unreported).

In **Omari Ahmed v. Republic** 1983 TLR 52 it was held that the trial Court's finding as to credibility of witnesses is usually binding on an appeal

court unless there are circumstances which call for re-assessment of their credibility. See also **Dickson Elia Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 CAT (unreported).

In this appeal we see no basis or cause to fault the two courts below. We have failed to detect any defect to impinge the credibility of the prosecution witnesses. We have also failed to discern where the two courts below misapprehended the evidence or violated any principle of law.

In the result, we find the appeal devoid of merit and we hereby dismiss it. Order accordingly.

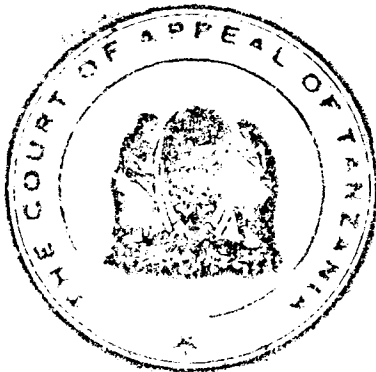
DATED at MWANZA this 1st day of December, 2015.


E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL